DUPLICATIVE FOREIGN LITIGATION

by

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Duplicative Foreign Litigation

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

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

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jurisdiction. The academic community in turn has yet to give the issue sustained attention, and a dearth of scholarship addresses the problem.

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

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INTRODUCTION

In recent years, the idea of transnational law as a solution to international challenges has captivated legal academia. Whether because of globalization, changes in law and theory, or other reasons, transnational cases have taken on greater significance. Transnational law is now taught as a first-year course in law schools, and national courts, applying domestic law, have


3 See infra section II.B.

4 ANDREW BELL, FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION 3 (2005) (describing how transnational litigation has emerged, in part, with the advent of “great technological advances, particularly in the field of transportation and telecommunications and, more generally, through the internet’s facilitation of international commerce . . .”); cf. Ronan E. Degnan & Mary Kay Kane, The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants, 39 HASTINGS L.J. 799, 799 (1988) (“It is trite but true to observe that disputes between the United States nationals and people from other lands have been increasingly steadily and doubtless will continue to do so.”).


emerged to play an important, if not the primary, role in responding to cross-border challenges. As transnational actions have increased, however, new difficulties present themselves.

One of the more intractable difficulties is the problem of parallel proceedings. What should a court do when a lawsuit involving the same parties and the same issues is already pending in the court of another country? Finding a coherent answer to this question has not been easy. Yet a pressing need to find one exists. The number of foreign parallel proceedings, like the number of transnational cases, is on the rise. And with the loosening of jurisdictional doctrines, as well as the spread of American-style liti-

Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum, 56 J. LEGAL EDUC. 479, 479 (2006) (noting the “move to globalize the curriculum at other law schools has gathered steam, fueled by conferences, symposia, and workshops. . . with current efforts aimed at ensuring “that the vast majority, if not all, of law school graduates have exposure to issues of international, transnational, and comparative law.”


gation, the future promises greater clashes between judicial systems as litigants are tempted to forum shop, vying to find courts and law more favorably inclined to them than their opponents.

Despite its salience, few commentators have addressed the issue of reactive, duplicative foreign proceedings. The treatment of these kinds of parallel proceedings “remains one of the most unsettled areas of the law,” and a dearth of scholarship explores how a court should proceed if the same case is already pending in a foreign forum. Lower court decisions are muddled, as judges apply at least three distinct approaches that are undertheorized.

The U.S. Supreme Court, for its part, has never spoken directly to the issue and has not rescued the lower courts from their confusion. The United States is not alone in its uncertainty. Other

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11 Reactive litigation refers to a countersuit that the first action’s defendant files against the first action’s plaintiff. In contrast, repetitive litigation is when a plaintiff files two or more parallel suits against the same defendant. This article focuses on reactive litigation only. Compare Allan D. Vestal, Reactive Litigation, 47 IOWA L. REV. 11 (1961) with Allan D. Vestal, Repetitive Litigation, 45 IOWA L. REV. 525 (1960).


13 As described in section I.B, the three approaches are often referred to as the Colorado River, Landis, and international abstention approaches. See infra notes x-y; see Goldhammer v. Dunkin’ Donuts, Inc., 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (noting disagreement among federal courts as to how to approach requests to dismiss or stay a proceeding pending the outcome of a parallel proceeding in a foreign court).

14 Calamita, supra note 12, at 603; Linda S. Mullenix, A Branch Too Far: Pruning the Abstention Doctrine, 75 GEO. L.J. 99, 103-04 (1986) (arguing that “[r]ather than providing the lower courts with meaningful criteria for principled restraint, the Supreme Court has supplied an empty conglomeration of talismanic phrases and incantations”); Martine Stückelberg, Lis Pendens and Forum Non Conveniens at the Hague Conference, 26 BROOK. J. INT’L L. 949, 960-61 (2001) (arguing that the lack of a Supreme Court decision has led to different approaches in different circuits).
countries struggle with these difficult issues too.\footnote{James J. Fawcett, Declining Jurisdiction in Private International Law (1995) (containing reports on the practice of declining jurisdiction in Argentina, Belgium, Canada, Quebec, Finland, France, Germany, Great Britain, Greece, Israel, Italy, Japan, The Netherlands, New Zealand, Sweden, Switzerland, and the United States).} A potentially seminal case on duplicative foreign litigation was recently before the Supreme Court of Canada,\footnote{Lloyd’s Underwriters v. Cominco Ltd., (2007) 279 D.L.R. (4th), 257, 2007 BCAA 429, leave to appeal to S.C.C. granted Nov. 29, 2007.} and the decision reveals the same doctrinal confusion found in U.S. decisions.\footnote{Lloyd’s Underwriters v. Cominco Ltd., 2009 S.C.C. 11 (Feb. 20, 2009). The Supreme Court of Canada’s decision summarily concluded that the issue of parallel proceedings can be addressed through the use of the forum non conveniens doctrine, without explaining the reasons for its application. The approach ultimately assumed that the waste of duplicative actions is inevitable. For commentary on the case prior to the Court’s decision, see Vaughan Black & John Swan, Concurrent Judicial Jurisdiction: A Race to the Courthouse or to Judgment, 46 CAN. BUS. L.J. 292 (2008); Joost Blom, Concurrent Judicial Jurisdiction and Forum Non Conveniens – What is to be Done?, 47 CAN. BUS. L.J. x (2009) (forthcoming); Austen L. Parrish, Comity and Parallel Foreign Proceedings, 47 CAN. BUS. L.J. x (2009) (forthcoming); Jane Walker, Teck Cominco and the Wisdom of Deferring to the Court First Seised, All Things Being Equal, 47 CAN. BUS. L.J. X (2009) (forthcoming).} In the United States, ingrained assumptions contribute to the difficulty in responding to duplicative litigation. For one, much of the existing analysis of foreign parallel proceedings is drawn from domestic theory, without any serious consideration as to whether the domestic can be so easily grafted onto the international, or whether the two situations are comparable at all.\footnote{Teitz, supra note 8, at 71 (arguing that “in the United States there is a continuing attempt to squeeze the parallel proceedings problem into the shoes of domestic doctrines, shoes that are both too small and too old to fit the larger needs of transnational dispute resolution”); Stephen B. Burbank, The United States’ Approach to International Civil Litigation: Recent Developments, 19 U. PA. J. INT’L ECON. L. 1, 14-17 (1998) (describing how through “cross-fertilization” domestic doctrines drive analysis of foreign parallel proceedings); see also Dubinsky, supra note x, at 341 (describing how courts are prone to use domestic doctrine when addressing transnational issues). For a general discussion of the incorrect reliance on domestic precedent in the transnational context, see Posner v. Essex Ins. Co., 178 F.3d 1209, 1222-24 (11 Cir. 1999); see also Louise Ellen Teitz, International Litigation: Parallel Proceedings and the Guiding Hand of Comity, 34 INT’L LAW. 545, 546-47 (2000).} Some issues are too important, or so it is believed, to be left to foreign
courts. Lastly, the question of what to do with parallel proceedings conventionally has had an awkward relationship with jurisdictional doctrines. The existence of jurisdiction – and the federal courts’ “virtually unflagging obligation” to exercise it\(^\text{20}\) – is touted as the primary reason why even duplicative actions must proceed unhindered.\(^\text{21}\)

This Article takes a different tack. After critiquing and describing the limitations of current doctrine, it argues that when courts address foreign duplicative litigation they must account for the breadth of their extraterritorial jurisdictional assertions. In recent decades, jurisdictional doctrines have expanded dramatically not through legislative enactment, but by virtue of judge-made rules that have untethered jurisdiction, choice of law, and related doctrines from their original territorial moorings.\(^\text{22}\) Since a dramatic re-envisioning of these doctrines seems unlikely, staying duplicative litigation becomes a key means for courts to accommodate and cabin the excesses of modern jurisdictional law and to avoid overburdening the judiciary. In short, to the extent that U.S. courts continue to exercise jurisdiction broadly (perhaps, in some contexts, exorbitantly) a greater willingness to stay reactive domestic litigation in the face of first-filed foreign proceedings is prudent.

Viewing abstention as a way to temper extraterritorial jurisdiction, this article concludes by offering a new approach to duplic-

\(^{20}\) Col. River Water Conservation Dist. v. United States, 424 U.S. 800, 805 (1976); see also Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution); Hyde v. Stone, 61 U.S. (18 How.) 170, 175 (1857) (explaining that when a court has jurisdiction “[t]he courts cannot abdicate their authority or duty in any case in favor of another forum”). This concept of the mandatory exercise of jurisdiction likely evolved from the common law rule judex tenetur impertiri iudicium suum (a court with jurisdiction over a case is bound to decide it). Sim v. Robinow, Fourth Ser., Vol. IXI, S.C. 665, 68 (1892).

\(^{21}\) For perhaps the most well known article arguing that federal courts violate separation of powers when they decline to exercise jurisdiction in the face of parallel state proceedings, see Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 YALE L.J. 71 (1984).

cative foreign proceedings. Courts should embrace a modified *lis alibi pendens* principle\(^\text{23}\) and reverse the prevailing presumption, which is heavily weighted in favor of allowing cases to continue even when duplicative foreign litigation is ongoing. Departing from current practice, courts should usually stay domestic proceedings when a first-filed foreign action exists, so long as the foreign court would have jurisdiction over the action under U.S. jurisdictional principles.\(^\text{24}\) Creating a rough symmetry between stay decisions and when a foreign court is considered a reasonable and appropriate forum under U.S. jurisdictional rules would create a fairer system for litigants, reduce the waste of unnecessary duplication, and, on balance, better serve long-term U.S. interests.

I. THE PROBLEM

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

A. Waste, Inefficiencies, and Gamesmanship

Parallel proceedings raise a host of problems. As one commentator explains: “there is almost nothing in principle to support the maintenance of concurrent, parallel proceedings in the courts of different countries.”\(^\text{25}\) Duplicative litigation is patently wasteful.\(^\text{26}\) It imposes a heavy financial burden on the parties by

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\(^{23}\) *Lis alibi pendens*, or simply *lis pendens*, is defined as a “suit pending elsewhere.” Black’s Law Dictionary 931 (6th ed. 1990).

\(^{24}\) The approach would be similar to what some have referred to as the “recognition prognosis” that has been adopted in many Western European countries. See J.J. Fawcett, *supra* note 15, at 36-37.

\(^{25}\) Calamita, *supra* note 12, at 609; see also Janet Walker, *Parallel Proceedings – Converging Views: The Westec Appeal*, 38 Can. Y.B. Int’l L. 155, 155 (2000) (“In the jungles of transnational litigation, there is probably nothing quite as savage as parallel litigation. It is savage because the commencement of a second proceeding on the same matters in a different forum almost inevitably represents some form of abuse.”); Vestal, *supra* note x, at 15 (“The policy of law generally seems to be that all facets of a controversy should be tried in a single action.”).

forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion.\textsuperscript{27} It also needlessly consumes scarce court resources, as two judges work on the same legal problem.\textsuperscript{28} The waste is magnified if the ultimate judgment in one action renders the other action meaningless.\textsuperscript{29} The concern for conserving scarce judicial resources should not be downplayed: the backlog of cases in U.S. courts\textsuperscript{30} threatens access to justice.\textsuperscript{31}

\begin{itemize}
  \item Calamita, supra note 12, at 609; see also Kathryn E. Vertigan, \textit{Note, Foreign Antisuit Injunctions: Taking a Lesson from the Act of State Doctrine}, 76 GEO. WASH. L. REV. 155, 158 (2007) (“Although fears of a race to judgment are one concern that parallel litigation raises, there are others. These other concerns include increased expense and inconvenience to litigants, a waste of scarce judicial resources, and the risk of inconsistent judgments arising from the two different fora.”).
  \item Note, \textit{Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation}, 59 YALE L.J. 978, 983 (1950) (“One tribunal's expenditure of time and effort will prove wasted since the first decision will be res judicata in the other suit.”); see also Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 856 (9th Cir. 1981) (explaining how permitting litigation to proceed concurrently in two fora “could result in inconsistent rulings or even a race to judgment”).
Issues of cost and efficiency are not the only concern. Parallel proceedings are also problematic because they “smack of indefensible gamesmanship, jeopardizing public faith in the judicial system.” A litigant may file parallel proceedings solely as a means to vex or harass the opposing party. At the very least, the ability to file a concurrent, parallel action invites tactics designed to delay the suit from proceeding in the forum not of the plaintiff’s choice. This is the race to judgment problem. Concurrent proceedings can also lead to inconsistent judgments and subject the parties to incompatible obligations. In some cases, a settlement

Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. Pitt. L. Rev. 809, 832 (1989) (arguing that “[c]ourts are a public resource, providing financed resolution of private disputes” and that “multiplicity is a harm to society’s legitimate interest in judicial efficiency.”).

For a recent overview exploring recent access to justice issues, see *Developments in the Law: Access to Courts*, 122 Harv. L. Rev. 1151 (2009). For a classic formulation, see Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142, 148 (1907) (”the right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . .”).

Rehnquist, *supra* note 26, at 1064 (describing the problems of duplicative litigation in the U.S. federal and state courts).


Vestal, *supra* note x, at 16 (describing the race-to-judgment problems created by parallel proceedings).

Takao Sawai, *Battle of Lawsuit-Lis Pendens in International Relations*, 23 Japanese Ann. Int’l L. 17, 20 (1980) (exploring how duplicative actions can result in conflicting judgments); see also EFCO Corp. v. Aluma Sys. USA, Inc., 983 F. Supp. 816, 824-25 (S.D. Iowa 1997) (“Maintaining two concurrent and simultaneous proceedings would consume a great amount of judicial, administrative, and party resources for only speculative gain. Furthermore, simultaneous adjudications regarding identical facts and highly similar legal issues creates the risk of inconsistent judgments.”).
strategy motivates the filing of a reactive suit, as the costs of litigating on two fronts are prohibitive for many plaintiffs.\footnote{Furutu, \textit{supra} note x, at 5 (describing how the defendant may “intend[] to place the burden on the plaintiff in anticipation of a favorable settlement of the dispute”). For a classic example, see Bethell v. Peace, 441 F.2d 495 (5th Cir. 1971) (anti-suit injunction granted based on vexatious nature of foreign litigation).}

Further considerations exist beyond cost, efficiency, and gamesmanship. Continuing a case, when the same case between the same parties was already filed in a foreign forum, can implicate foreign relations and breed resentment. Not only are “foreign relations apt to be more fragile” than state-to-state and federal-to-state relations, “but they are also more apt to be disturbed — specifically by the apparent interference of one state’s courts in the judicial business of another’s.”\footnote{George A. Bermann, \textit{The Use of Anti-Suit Injunctions in International Litigation}, 28 COLUM. J. TRANSNAT’L L. 589, 606 (1990).} In high-profile suits, duplicative litigation can potentially interfere with the executive’s management of foreign affairs.\footnote{This can be particularly true if parties seek anti-suit injunctions in either court. \textit{See generally}, Trevor C. Hartley, \textit{Comity and the Use of Anti-Suit Injunctions in International Litigation}, 35 AM. J. COMP. L. 487 (1987).} And when duplicative litigation proceeds simultaneously in two countries, courts are aware of the key role they play. “One court may be asked to accelerate (or delay) its adjudication to thwart (or enhance) the potentially preclusive effect of a result in the other court, a strategy that squarely pits docket against docket, if not court against court.”\footnote{Rehnquist, \textit{supra} note 26, at 1065; cf. LaDuke v. Burlington N. R.R., 879 F.2d 1556, 1560 (7th Cir. 1989) (describing the danger when two suits are allowed to proceed simultaneously, that “a party may try to accelerate or stall proceedings in one of the forums in order to ensure that the court most likely to rule in its favor will decide a particular issue first”).} For these reasons, near universal agreement exists that duplicative litigation, in theory, should be avoided.

\section*{B. Three Doctrinal Approaches}

Presently, U.S. courts apply variations on three different approaches when concurrent, duplicative proceedings are pending in a foreign country.\footnote{Commentators have labeled the approaches differently. \textit{See, e.g.}, Calamita, \textit{supra} note 12, at x (describing Abstentionist, Landites, and Internationalists); GARY B. BORN & PETER B. RUTLEDGE, \textit{INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS} 569 (4th ed. 2007) (describing approaches based on \textit{Landis} and \textit{Colorado River}); Jocelyn H. Bush, Comment, To Abstain or not to Abstain?: A} In all three approaches, courts mostly con-
tinue to address parallel proceedings in the international context using the tools of domestic doctrine. And generally courts are reluctant to stay an action pending resolution of a first-filed foreign action – concerned that “deferring” to a foreign court constitutes an abdication of its responsibility to hear a case once jurisdiction vests. As detailed below, the overriding presumption is against declining jurisdiction.

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


For some recent examples where courts have not found “extraordinary circumstances” to outweigh the courts “unflagging obligation” to exercise jurisdiction, see Answers in Genesis of Kentucky, Inc. v. Creation Ministries Intern., Ltd., 2009 WL 348838 (6th Cir. 2009); In re CP Ships Ltd. Securities Litig., Slip Copy, 2008 WL 4663363 (M.D. Fla. 2008); Ekland Marketing Co. v. Lopez, 2007 WL 2288319 (E.D. Cal. 2007); Miller Brewing Co. v. Molson Coors Brewing Co., Slip Copy, 2006 WL 1543975 (E.D.Wis. 2006); Royal & Royal Sun Alliance Ins. Co. v. Century Intern. Arms, Inc., 466 F.3d 88, 93-94 (2d Cir. 2006); *cf.* Bigio v. Coca-Cola Co., 239 F.3d 440, 454 (2d Cir.2000) (as amended) (“When a court dismisses a complaint in favor of a foreign forum pursuant to the doctrine of international comity, it declines to exercise jurisdiction it admittedly has.”).


Id. at 818; see also id. at 817 (describing the “duty of the District Court to adjudicate a controversy properly before it” and emphasizing that “only the clearest of justifications will warrant dismissal”).

Id. at 817.

*Id.* (describing general principles to guide the decision as to whether exceptional circumstances are present). The Court later emphasized that six factors
After *Colorado River*, a number of cases reaffirmed its core holding\(^{48}\) and later courts applied the case and its progeny in the international context.\(^{49}\) Because a “heavy obligation to exercise jurisdiction” exists,\(^{50}\) under this approach courts rarely stay litigation when faced with duplicative foreign proceedings.\(^{51}\) Rather, “parallel proceedings in the same in personam claim [is] ordinarily [] allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.” \(^{52}\)

A second, related approach recognizes the general “unflagging obligation” of federal courts to exercise jurisdiction conferred upon them, but then focuses on the unique considerations that private international disputes raise.\(^{53}\) Characterized as international abstention, this second approach infuses comity and broader fairness considerations into the analysis, as well as con-


\(^{49}\) BORN & RUTLEDGE, supra note 41, at 524 (citing cases); see, e.g., AAR Intern., Inc. v. Nimelias Enterprises SA, 250 F.3d 510, 516-18 (7th Cir. 2001); Neuchatel Swiss General Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193 (9th Cir. 1991).

\(^{50}\) *Colo. River*, 424 U.S. at 820.


\(^{52}\) China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir.1987) (quoting Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 926-27 (D.C.Cir.1984) (citing *Colorado River*, 424 U.S. at 817)); see also Royal and Sun Alliance Ins. Co. of Canada v. Century Intern. Arms, Inc., 466 F.3d 88, 93-94 (2d Cir. 2006) (noting that “while the relevant factors to be considered differ depending on the posture of the case, the starting point for the inquiry remains unchanged: a district court's 'virtually unflagging obligation' to exercise its jurisdiction”).

\(^{53}\) For a recent example, see Belize Telecom, Ltd. v. Government of Belize, 528 F.3d 1288 (11th Cir. 2008) (noting the general obligation to exercise jurisdiction, but noting a narrow exception for some private international law cases); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134 (C.D. Cal. 2005) (discussing international abstention but explaining how abstention must be rare as courts have an unflagging obligation to except jurisdiction).
cern over the efficient use of judicial resources. Under the international abstention approach, courts tend to more readily stay an action pending resolution of an identical, first-filed, foreign proceeding. Several courts, however, have limited the application of international abstention — and, in turn, the use of comity — to when a foreign decision has been reached (finding it inapplicable to pending foreign actions). Notably, unlike stays entered under the *Colorado River* doctrine, stays granted employing the international abstention doctrine are generally not considered “final rulings” and therefore are not immediately appealable.

The third approach — and the least followed for transnational litigation — is drawn from cases dealing with parallel litigation pending in more than one federal court. In that context, some-
thing close to a system of lis pendens operates, with a strong presumption in favor of the first-filed case.\textsuperscript{59} This approach can be traced to the case \textit{Landis v. North American Co.}, where Justice Cardozo, writing for the court, rested the decision to stay on the inherent equitable powers of the court: “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”\textsuperscript{60} Under \textit{Landis}, courts employ a balancing test\textsuperscript{61} that requires the movant to “make out a clear case of hardship or inequity in being required to go forward [in the other forum] . . . .” The burden is on the party seeking the stay to establish grounds for it; while the court’s decision to grant the stay is discretionary.\textsuperscript{62}

Another wrinkle adds to the confusion. Although these three approaches to reactive, duplicative litigation are different, with distinct emphases and historical roots, courts have blurred the


\textsuperscript{60} \textit{Landis}, 299 U.S. at x. For a recent discussion of the court’s inherent authority to control procedure, see Amy Coney Barrett, \textit{Procedural Common Law}, 94 VA. L. REV. 813 (2008).

\textsuperscript{61} In determining whether to grant a motion to stay, courts consider such factors as: (1) the length of the requested stay; (2) the “hardship or inequity” that the movant would face in going forward with the litigation; (3) the injury that a stay would inflict upon the non-movant; and (4) whether a stay will simplify issues and promote judicial economy. St. Clair Intell. Prop. Consultants v. Fuji-film Holding Corp., Slip Copy, 2009 WL 192457 (D. Del. 2009) (citing \textit{Landis}, 299 U.S. at 254-55). Other courts have said the \textit{Landis} test balances seven factors: (1) comity; (2) the adequacy of relief available in the other forum; (3) judicial efficiency; (4) the degree of identity of the parties and issues in the two cases; (5) the likelihood of prompt disposition in the other forum; (6) convenience to the parties, counsel, and witnesses; and (7) the possibility of prejudice if the stay or dismissal is granted. Nigro v. Blumberg, 373 F. Supp. 1206, 1213 (C.D. Pa. 1974); see also Battle v. Anderson, 564 F.2d 388, 397 (10th Cir.1977).

\textsuperscript{62} Ohio Envtl. Council v. United States Dist. Ct. S.D. Ohio, 565 F.2d 393, 396 (6th Cir.1977) (quoting \textit{Landis}, 299 U.S. at 254-255) (explaining that whether to enter a stay is within the sound discretion of the district court and that the party seeking the stay bears the burden of showing “that there is pressing need for delay, and that neither the other party nor the public will suffer harm from entry of the order.”); see also Dellinger v. Mitchell, 442 F.2d 782 (C.A.D.C.1971); Castanho v. Jackson Marine, Inc., 484 F. Supp. 201, 209 (E.D. Tex.1980); Kahan v. Rosenstiel, 285 F. Supp. 61 (D. Del. 1968).
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lines between them. Judges commonly now cite all three approaches – relying on Colorado River, Landis or international abstention cases simultaneously – neglecting to acknowledge the tension (or, perhaps, even inconsistency) in doing so.

II. THE CRITIQUE

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

A. The Limits of Current Doctrine

The present approaches to first-filed, foreign, duplicative litigation can be critiqued on a number of fronts. As an initial matter, Landis abstention – used to address duplicative federal court proceedings – conceptually is ill-suited for the international context. Landis is concerned with intra-jurisdictional stays, when the reactive litigation is filed in the same court system. Distinguishing between intra- and inter-jurisdictional stay requests is sound: although the differences are sometimes overplayed, foreign courts can have starkly different judicial systems and con-

63 BORN & RUTLEDGE, supra note 41, at 526, n.31 (noting that “several recent courts are beginning to blur the traditional fine distinctions between the ‘Colorado River’ approach and the ‘Landis’ approach. Instead, they cite principles from both decisions and announce a set of factors drawing on both lines of authority”).

64 Id. (citing National Union Fire Ins. Co. v. Kozeny, 115 F. Supp. 2d 1243, 1246-47 (D. Colo. 2000) and Goldhammer v. Dunkin Donuts, Inc., 59 F. Supp. 2d 248, 251-53 (D. Mass. 1990)); see also George, supra note x, at 907 (Baylor) (explaining how courts have integrated both the Landis and Colorado River approaches, and how the tests are similar in application).

65 See Compagnie des Bauxites de Guinea v. Insurance Co. of N. Am., 651 F.2d 877, 887 n.10 (3d. Cir. 1981), aff’d, 456 U.S. 694 (1982) (asserting that the first-to-file rule was never meant to apply in cases where two courts were not of the same sovereign).

66 An example exists in the debate over the use of foreign law in U.S. decision. For an overview of the debate, see Austen L. Parrish, Storm in a Teacup: the U.S. Supreme Court's of Foreign Law, 2007 ILL. L. REV. 637.
ceptions of justice. Bright-line, automatic, first-to-file rules (without other adjustments) work best when similar jurisdictional and judgment enforcement rules are used and the existence of concurrent jurisdiction is rare. Moreover, in practice, courts that utilize Landis as the starting point for the analysis, commonly end up considering factors similar to those considered under the Colorado River or international abstention approaches.

On the other hand, the other two approaches — Colorado River and international abstention — have their own limitations. Both approaches have led to paradoxical result. Under current law, U.S. courts are more respectful of comity when no foreign action exists and the offense to foreign sovereigns is at best speculative, than when a foreign court has already asserted jurisdiction and the likelihood of offense is real. This is because courts may dismiss a case by virtue of forum non conveniens without considering its “unflagging” obligation to exercise jurisdiction. Under forum non conveniens, a U.S. court will dismiss if it finds itself to be a significantly inconvenient forum and that the interests of the public and the parties would be better served by requiring that the action be litigated elsewhere. The paradox is therefore two-fold. First, courts are more willing to dismiss than stay an action.

67 The approaches to forum non conveniens itself varies dramatically. J.J. Fawcett, supra note 15 (describing the different approaches throughout the world); Karayanni, supra note x (describing approaches to forum non conveniens).


69 Born & Rutledge, supra note 41, at x.


Second, courts find comity to be a more potent concept when the possibility of offending a foreign sovereign and the threat of duplicative costs is at most speculative.

This inconsistent treatment – difficult to justify in any principled way – is likely one of historical oddity. Courts developed one line of cases under forum non conveniens, while simultaneously crafting international abstention in an entirely separate line of cases, without recognizing the substantial overlap. In the forum non conveniens context, unlike with abstention, the notion of an unflagging obligation to exercise jurisdiction long ago gave way to the concept of international comity.

Another problem exists in relying on *Colorado River* in international cases. The unflagging obligation of federal courts to exercise jurisdiction is a principle peculiar to the domestic context. The “unflagging” obligation language developed in the context of the civil rights movement and despite some protests in particular cases, the language has been retained.

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72 Some dispute exists as to whether a stay is meaningfully different than a dismissal. Goldhammer v. Dunkin' Donuts, Inc., 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (stating that “as a practical matter, a stay is tantamount to dismissal”); Sonenshein, supra note 19, at 671 (arguing that no meaningful difference exists between a stay and a dismissal); *but see Quackenbush*, 517 U.S. 706, 731 (1996); Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp., 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (holding that *Quackenbush* precludes an outright dismissal, but not a stay, in favor of parallel foreign litigation).

73 See David G. Morgan, *Discretion to Stay Jurisdiction*, 31 Int'l & Comp. L.Q. 582, 582 (1982) (explaining that “[t]he English High Court has always enjoyed an inherent discretion to stay an action in order to prevent injustice, even though proper jurisdiction has been founded and even though there is no foreign jurisdiction clause.”).


75 See James E. Pfander, *Brown II: Ordinary Remedies for Extraordinary Wrongs*, 24 Law & Ineq. 47, 73 (2006) (“Pullman abstention represented a major obstacle to the ability of civil rights plaintiffs to challenge the many new laws (i.e., are more willing to impose a harsher result).”)
the case to the contrary,76 is generally understood to reflect long-ensuing debates over federalism.77 The “unflagging obligation” was formulated with concerns that state courts were not as prone as federal courts to promptly and effectively vindicate federal constitutional rights, or, at least, that Southern state courts judges could not be trusted as guardians of constitutional rights.78 Skeptics of federal and state court parity “posit an overt hostility on the part of state courts to the vindication of federal constitutional rights.”79 Underlying the debate then over whether the federal

76 Colo. River, 424 U.S. at 817 (suggesting federalism concerns were absent from the decision).
77 For a general overview of these debates, see Philip B. Kurland, Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481, 487 (1960) (arguing that one problem of “cooperative judicial federalism” is “how to utilize the special expertise of each of two judicial systems, State and federal”); Michael Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts, 71 B.U. L. Rev. 609, 625 (1991) (arguing that “the challenge lies in finding a principled means of identifying those cases that belong in federal court”); cf. Felix Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 Cornell L.Q. 499, 506 (1928) (“T[he proper allocation of authority between United States and state courts is but part of the perennial concern over the wise distribution of power between the states and the nation.”). See generally Owen M. Fiss, Dombrowski, 86 Yale L.J. 1103 (1977) (describing the Warren Court’s determination to protect the civil rights movement and its subsequent dismantling by the Burger Court through cases like Younger v. Harris).
78 Barry Friedman, A Revisionist Theory of Abstention, 88 Mich. L. Rev. 530, 539 (1989) (noting the abstention doctrine “rested upon a fundamental distrust of state courts to protect federal rights.”); see also Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (describing as a “dangerous myth” the assumption “state courts will vindicate federally secured constitutional rights as forcefully as would the lower federal courts”); Redish, Separation of Powers, supra note x, at 91-92 (“If it is thought that state judges ... will be more sympathetic to state concerns, then it is difficult to see how state judges can also be equally enthusiastic enforcers of federal rights against state action.”)
79 Michael E. Solimine & James L. Walker, State Court Protection of Federal Constitutional Rights, 12 Harv. J.L. & Pub. Pol’y 127, 130 (1989); see also Friedman, supra note x, at 537-38 (“Implicit in every criticism of abstention is the assumption that, absent federal forum, federal a rights will not be vindi-
courts must exercise the jurisdiction Congress has granted them is the acknowledgement that the Constitution grants Congress the primary authority for defining the federal court’s jurisdiction. 80 Regardless of the merits of the parity debate, the considerations animating it are not present in the international context. 81 The nation’s system of federalism specifically embraces and encourages concurrent federal and state court jurisdiction, and achieving the correct balance between federal and state court authority is a key component of federalism. 83 In contrast, no higher civil court exists on the international plane, nor does any world constitution purport to distribute authority between different na-

80 Art. III, sec. 2.


83 For a nice description, see John B. Oakley, The Story of Owen Equipment v. Kroger: A Change in the Weather of Federal Jurisdiction, in Civil Procedure Stories 112 (2004) (“Federalism has become a code word for insisting that federal power is indeed limited, that the national government remains essentially a federal union of sovereign states, and that state authority should be zealously protected. Federalism celebrates states as organs of republican government constituted by locally accountable officials. By preserving the dignity and authority of state government, federalism guards against the processes of government becoming too remote from the people they govern, especially in matters of day-to-day life.”); see generally Ann Althouse, How to Build a Separate Sphere: Federal Courts and State Power, 100 Harv. L. Rev. 1485 (1987).

84 Both the International Court of Justice (ICJ) and the International Criminal Court (ICC) are, of course, international courts, but they possess limited jurisdiction, and relatively few international issues (let alone civil actions) are resolved in either forum. See Statute of the International Court of Justice art. 36, June 26, 1945, 59 Stat. 1065, 1066 (providing that the ICJ hears disputes only between states who have accepted the court’s jurisdiction); Rome Statute of the International Criminal Court arts. 12-13, July 17, 1998, 2187 U.N.T.S. 90, 99 (authorizing the ICC to exercise jurisdiction over nationals of a nonstate party if (1) a national of an accepting nonstate party commits a crime within the territory of a state party, or (2) a national of a nonparty commits a crime referred to the ICC by the Security Council).
Internationally, concurrent exercise of authority is often discouraged to avoid conflict, and each nation-state is under an obligation to exercise its sovereignty in a way that reduces interference with the sovereignty of others.

Nor do the separation of powers concerns, which have been thought to require courts to exercise jurisdiction once vested, exist in the international context. In domestic cases, declining jurisdiction in the absence of clear statutory authority may or may not be "a power grab – a usurpation of congressional power to define the jurisdiction of the federal courts – that is incompa-

85 See U.N. Charter, Art. 2(7) ("Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."); There are some who notably argue for the "constitutionalization" of international law. For a recent discussion of some of the literature, see Thomas Giegerich, The Is and the Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a "Well-Considered Constitutionalization of International Law"?, 10 GERMAN L.J. 31, 31, n.1 (2009); see also Towards World Constitutionalism: Issues in the Legal Ordering of the World Community (Ronald St. John MacDonald and Douglas M. Johnston eds., 2005); Transnational Constitutionalism: International and European Models (Nicholas Tsagourias ed., 2007).

86 Trail Smelter Arbitral Decision, 35 AM. J. INT'L. 684 (1945) (holding that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another"); see also Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (1957), reprinted in 53 AM. J. INT'L. L. 156 (1959) (holding that states have a duty to cooperate and account for the interests of other states); Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. Rep. 4 (1949) (holding that it is "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states"); Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928) (describing how states must respect the interest of other states); Rio Declaration on Environment and Development, June 14, 1992, Principle 2, 31 I.L.M. 874 at p. 876 (declaring that states have the obligation "to ensure that activities within their jurisdiction or control do not cause damage to the environment or damage to the environment of other states or of areas beyond the limits of national jurisdiction."); Declaration of the United Nations Conference on the Human Environment, June 16, 1972, prin. 21, 11 I.L.M. 1416 at p. 1420 (affirming state responsibility to "ensure that their activities within their jurisdiction and control do not cause damage to the environment or other states or to areas beyond the limits of national jurisdiction.").

ble with basic premises of constitutional democracy. But in the international context, the existence of parallel proceedings is largely not one of Congressional choice, but a result of judge-made jurisdictional rules. Presumably what the courts give, they can take away.

Another point is worth making, although not peculiar to foreign parallel proceedings. The universally quoted language that courts have a “virtually unflagging obligation” to hear cases is, as a descriptive matter, simply wrong. Courts flag in their obligation to hear cases all the time. From the justiciability doctrines, to forum non conveniens, to abstention, to exhaustion of state

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89 As described below in Section II, the expansion of jurisdictional rules – leading to concurrent exercises of jurisdiction – have mostly been court driven.


91 See generally FALLO


remedies,\textsuperscript{94} to supplemental jurisdiction,\textsuperscript{95} courts now commonly decline to hear cases even though jurisdiction has attached.\textsuperscript{96} The appropriate question to ask then is not whether courts may decline jurisdiction – that happens routinely as the so-called “absolute right” doctrine has come into disfavor.\textsuperscript{97} The question is whether declining jurisdiction in a particular context is wise. At the very least, staying a case in the face of parallel litigation is substantially more similar to forum non conveniens than domestic abstention doctrines – in fact, several countries address parallel litigation through their forum non conveniens doctrines.\textsuperscript{98} And in any case, when a court stays a case, rather than dismissing it, a court technically has not abdicated its duty or refused to exercise the jurisdiction granted it.\textsuperscript{99} So reliance on the “unflagging obligation” is particularly misplaced.\textsuperscript{100}

The three approaches contain other oddities that make them poorly suited for handling duplicative foreign litigation. One puzzling one is the continued distinction between in rem, quasi-in-

\textsuperscript{94} David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543, 558-59 (1985).
\textsuperscript{95} 28 U.S.C. § 1367(c) (providing courts discretion to decline supplemental jurisdiction).
\textsuperscript{96} David Shapiro wrote the pathbreaking article arguing that courts have discretion to decline to exercise jurisdiction, see Shapiro, supra note x, at 547 (explaining how courts have significant discretion to decline jurisdiction in a range of contexts); see also Daniel J. Meltzer, Jurisdiction and Discretion Revisited, 79 Notre Dame L. Rev. 1891 (2004) (honoring David Shapiro and explaining the continuing influence of his article). For earlier discussions of judicial discretion, see Henry J. Friendly, Indiscretion about Discretion, 31 Emory L.J. 747 (1982) and Nathan Isaacs, The Limits of Judicial Discretion, 32 Yale L.J. 339 (1923).
\textsuperscript{97} For discussion of the absolute right doctrine, see Michael M. Wilson, Federal Court Stays and Dismissals In Deference to Parallel State Court Proceedings: The Impact of Colorado River, 44 U. Chi. L. Rev. 641, 646-53 (1977).
\textsuperscript{99} Quackenbush v. Allstate Insurance, 517 U.S. 706, 721, 116 S. Ct. 1712, 1723 (1996) (“Unlike the outright dismissal or remand of a federal suit, we held, an order merely staying the action ‘does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.’”) (quoting Thibodaux, 360 U.S., at 29).
\textsuperscript{100} For early cases where the Court rejected the Cohens v. Virginia formulation and declined to exercise jurisdiction over foreign matters, see Canada Malting Co. v. Patterson S.S. Ltd., 285 U.S. 413, 422-23 (1932) (jurisdiction properly declined where all parties were Canadian citizens and litigation would be more appropriately conducted in foreign court); The Belgenland, 114 U.S. 355, 364-65 (1885) (courts to use discretion in accepting jurisdiction over controversies when all parties are foreigners).
rem, and in personam actions. 101 If the first-filed case is an in rem action then courts will routinely stay litigation 102 on the fiction that only one sovereign may effectively exercise jurisdiction over a res. 103 The focus though on whether a court has assumed jurisdiction over a res is strange. Shaffer v. Heitner 104 purportedly precluded such a basis for differentiating between cases; the Supreme Court having long interred the hoary distinction between in rem and in personam labels, at least for jurisdictional purposes. 105 Although in rem cases may well provide a stronger case

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102 See Jennifer M. Anglim, Crossroads in the Great Race: Moving Beyond the International Race to Judgment in Disputes over Artwork and other Chattels, 45 Harv. J. Int’l L. 239, 262-66 (2004) (describing distinction in how courts treat in rem and in personam cases in deciding whether to issue a stay in the context of international litigation); George, supra note x, at 782,788, 864 (describing different treatment of in rem cases); see also Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 466 (1939) (distinguishing in personam and in rem cases and the explaining that the first court to acquire jurisdiction of the res has priority to the exclusion of other courts); Donovan v. City of Dallas, 377 U.S. 408 (1964); United States v. $270,000 in United States Currency, Plus Interest, 1 F.3d 1146, 1147-48 (11th Cir. 1993); Cassity v. Pitts, 995 F.2d 1009, 1012 (10th Cir. 1993). But cf. Markham v. Allen, 326 U.S. 490 (1946) (finding that federal court had jurisdiction over claims even though state assumed jurisdiction over decedent’s property); United States v. Klein, 303 U.S. 276 (1938) (holding that other courts do not lose power to adjudicate rights merely because federal courts controlled the property).

103 Kline v. Burke Construction Co., 260 U.S. 226, 229-30 (1922) (quoting Covell v. Heyman, 111 U.S. 176, 182 (1884)) (“When one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void.”); see also Note, Stays of Federal Proceedings in Deference to Concurrently Pending State Court Suits, 60 Colum. L. Rev. 684, 684 (1960); Note, Power To Stay Federal Proceedings Pending Termination of Concurrent State Litigation, 59 Yale L.J. 978 (1950).

104 433 U.S. 186, 211-12 (1977) (characterizing any distinction between in rem and in personam jurisdiction as a “fiction” and stating that all exercises of personal jurisdiction, whether in rem, quasi in rem or in personam, must satisfy the minimum contacts standard of International Shoe and its progeny); see also Mul-lane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950) (“Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the substantive law of property under a system quite unlike our own...”).

105 Martin H. Redish, Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem, 75 Notre Dame L. Rev. 1347, 1359 (2000) (describing any distinction between in rem and in personam cases as “little more than a metaphysical relic of a very
for abstaining, the same general concerns (conflicting judgments, unnecessary waste, tension between different sovereigns, etc.) is present in in personam cases as well.

Lastly, a more fundamental weakness can be levied against all three approaches. The approaches are easily manipulated—riddled with a long litany of ill-defined policy and other vague considerations.\textsuperscript{106} Some courts balance as many as three factors, and ten sub-factors.\textsuperscript{107} But no guidance is given to how much relevance or weight a court should afford each factor. And often the factors are apples and oranges to one another. For example, although courts routinely pay lip-service to adjudicatory comity, courts appear to have little understanding of what exactly “comity” consists of, or what weight to afford it in the final analysis.\textsuperscript{108} When should reciprocity considerations trump efficiency and access-to-justice concerns? Courts are at a loss. And how the factors indicate an outcome in a given case is almost anyone’s guess. The


\textsuperscript{107} See, e.g., Belize Telecom, Inc. v. Gov't of Belize, 528 F.3d 1298 (11th Cir. 2008) (considering: (1) international comity; (2) fairness to litigants; and (3) efficiency, as well as sub-factors, including: (1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; (3) whether the foreign judgment is prejudicial, in the sense of violating American public policy because it is repugnant to fundamental principles of what is decent and just; (4) the order in which the suits were filed; (5) the more convenient forum; (6) the possibility of prejudice to parties resulting from abstention; (7) the inconvenience of the federal forum; (9) avoidance of piecemeal litigation; (9) whether the actions have common parties and issues; and (10) whether the alternative forum will issue a prompt decision); see also Grammar, Inc. v. Custom Foam Systems Ltd., 482 F. Supp. 2d 853, 857 (E.D. Mich. 2007) (balancing eight factors), PaineWebber, Inc. v. Cohen, 276 F.3d 197, 206-07 (6th Cir. 2001) (balancing eight or more factors); Boushel v. Toro Co., 985 F.2d 406, 409 n. 2 (8th Cir.1993) (considering five factors).

result of such a vague and open-ended balancing is a hodge-podge of ad hoc, results-oriented decisions, and the absence of any sort of predictability.\textsuperscript{109} One respected commentator has harshly observed that decisions relying on \textit{Colorado River} are inevitably conclusory and filled with “legal gibberish.”\textsuperscript{110}

\textbf{B. Jurisdictional Expansion}

Another way of looking at foreign parallel proceedings exists; one that appreciates the interconnectedness between the growth of concurrent actions and the expanding reach of a court’s jurisdiction. As a general matter, U.S. Courts have systematically broadened their jurisdictional reaches as territorial theories of jurisdiction have been discarded.\textsuperscript{111} More recently, pressure to use domestic laws (rather than international law) to solve global problems and extend American power abroad has contributed to these jurisdictional expansions. As these expansions have occurred, the number of concurrent and overlapping actions have in turn exploded.

\textbf{1. Legal Realism and the End of Territoriality}

Before the Second World War, territoriality was a defining feature of American law.\textsuperscript{112} Conflicts-of-law doctrine,\textsuperscript{113} as well as prescriptive\textsuperscript{114} and adjudicatory jurisdiction\textsuperscript{115} were founded on

\begin{itemize}
\item \textsuperscript{109} \textit{Cf.} Stein, \textit{supra} note x, at 785 (explaining how forum nonconveniens decisions, with similar balancing tests, “tend to be a mechanical litany of the seminal Supreme Court language followed by a summary conclusion.”).
\item \textsuperscript{110} Mullenix, \textit{supra} note 14, at 104.
\item \textsuperscript{111} Stephens, \textit{supra} note x, at 634 (“Since World War II, U.S. courts have generally broadened their subject matter and personal jurisdiction); \textit{see also} George A. Rutherglen, \textit{International Shoe and the Legacy of Legal Realism}, 2001 \textit{SUP. CT. REV.} 347.
\item \textsuperscript{112} For a description of some of the history of territoriality in American law, \textit{see} Kal Raustiala, \textit{Does the Constitution Follow the Flag? Territoriality and Extraterritoriality in American Law} (forthcoming 2009).
\item \textsuperscript{113} \textit{See} 1 Joseph Beale, \textit{A Treatise on the Conflict of Laws} 311-12 (1935) (“Since the power of a state is supreme within its own territory, no other state can exercise power there . . . It follows generally that no statute has force to affect any person, thing, or act outside the territory of the state that passed it.”); \textit{see also} Leah Brilmayer, \textit{Conflicts of Laws} (2d ed. 1995) (describing territorial theories of conflict of laws).
\item \textsuperscript{114} Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (“The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”);
\end{itemize}
territorial theories that geographically constrained judicial power. Jurisdiction was explicitly based on territoriality: a theory derived from Dutch scholars which found “each sovereign had jurisdiction, exclusive of all other sovereigns, to bind persons and things within its territorial boundaries.” Or, in Justice Story’s words, “every nation possess[es] exclusive sovereignty and jurisdiction within its own territory,” and “it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its territory.” With the world carved up into separate, territorial regions and court power based on territorial principles, jurisdictional overlap and the problem of parallel proceedings were rare.

Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (explaining that the jurisdiction of a nation within its own territory is “necessarily exclusive and absolute” and, accordingly, that territory demarcated the limits of nation’s law); The Antelope, 23 U.S. (10 Wheat) 66, 122 (1825) (explaining that “no nation can prescribe a rule for others”); The Appollon, 22 U.S. 363, 370 (1824) (“The laws of no nation can justly extend beyond its own territory, except so far as regards its own citizens.”).


T. Alexander Aleinikoff, Semblances of Sovereignty: The Constitution, the State and American Citizenship 12-18 (2002) (describing how territorial or sovereignty-based approaches were followed in various areas of the law, such as the presumption against extraterritorial application of law and in the enforcement of judgments law).


Joseph Story, Commentaries on the Conflicts of Laws 19, 21 (Hilliard, Gray & Co. 1834); see also

Larry Kramer, Vestiges of Beale: Extraterritorial Application of American Law, 1991 SUP. CT. REV. 179 (1991); see also David J. Gerber, Beyond Balancing:
At the end of the Second World War, however, pragmatism, legal realism, and other related theories began to discredit territorial theories of jurisdiction and the problem of concurrent jurisdictional assertions became more prevalent. Legal realists attacked the formalist assumptions that underpinned territorial approaches to law. The power to regulate did not flow “naturally and inevitably from some self-evident theory” as territoriality, realists argued. Instead, realists pushed for “reasonableness” to be the touchstone of any jurisdictional analysis.

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

In the personal jurisdiction context — with *International Shoe* and later with cases like *Shaffer v. Heitner* — the Court discarded a core premise of early jurisdictional doctrines that states could not assert jurisdiction over people outside their borders. Together the decisions interred the premise that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory” and that “no State can exercise direct jurisdiction and authority over persons or property without its territory.” Judicial inquiry “shifted from territorial

125 Rutherglen, supra note x, at 347; see also Weber Waller, supra note x (describing the lack of clear rules in transnational cases).

126 326 U.S. 310 (1945).

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


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

considerations to a qualitative evaluation of the relationships among the plaintiff, the defendant, the forum state, and the events occasioning the litigation.\textsuperscript{132} The idea that fairness and not territorial borders provided the only limitation on jurisdictional power was then carried to the international context.\textsuperscript{133} Courts finally expanded personal jurisdiction by re-embracing a form of territoriality through transient jurisdiction.\textsuperscript{134} U.S. courts now exercise “general jurisdiction based solely on transient physical presence, attachment of property, or extensive business activities unrelated to the cause of action.”\textsuperscript{135}

The same drift occurred in the context of legislative jurisdiction: courts moved from a doctrine based on territorial limits to one founded on concepts of fairness. Initially, legislatures were barred from creating laws that regulated foreigners abroad.\textsuperscript{136} Over time that prohibition changed to a presumption, where Con-

\begin{itemize}
\item \textsuperscript{132} Silberman, supra note x, at 53, n. 88 [NYULR] (citing Developments in the Law: State-Court Jurisdiction, 73 Harv. L. Rev. 909 909, 955-66 (1960)).
\item \textsuperscript{133} See generally Parrish, supra note x, at x (Sovereignty); Edward B. Adams, Jr., Personal Jurisdiction Over Foreign Parties, in INTERNATIONAL LITIGATION: DEFENDING AND SUITING FOREIGN PARTIES IN U.S. FEDERAL COURTS 113, 114 (David J. Levy ed., 2003) (noting that the same standards apply for “personal jurisdiction over a non-resident or foreign defendant”); Gary A. Haugen, Personal Jurisdiction and Due Process Rights for Alien Defendants, 11 B.U. INT’L L.J 109, 110 (1993) (describing how the courts treat the Due Process Clause’s jurisdictional protections as “apply[ing] to alien defendants in the same way they apply to domestic defendants”).
\item \textsuperscript{135} Burnham v. Superior Court, 495 U.S. 604 (1990).
\item \textsuperscript{136} See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (Hilliard, Gray & Co. 1834) (explaining “it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory”); see also Schooner Exchange v. M’Faddon, 11 U.S. (7 Cranch) 116, 136 (1812) (explaining that territory demarcated the limits of a nation’s law); The Apollon, 22 U.S. 362, 370 (1824) (“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens”); The Antelope, 23 U.S. (10 Wheat) 66, 122 (1825) (explaining that “no nation can prescribe a rule for others” and finding the United States does not have the authority to nullify foreign laws); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57(1909) (setting out the territorial limits to laws); cf. Buxbaum, supra note x, at 268 (explaining how extraterritorial regulation was initially viewed as illegitimate).
\end{itemize}
gress was permitted to regulate abroad, but was presumed not to. More recently, the presumption was turned upside-down, and with the development of the so-called “effects test,” which has given courts near universal jurisdiction.

As legal rules of jurisdiction became more indeterminate, the jurisdictional reach of American courts grew exponentially. In fact, the growth was so dramatic the development of the forum non conveniens doctrine was arguably the result of the expanding jurisdictional reaches of courts and the need, for the first time, “to decline jurisdictional power, notwithstanding its existence.”

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138 United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 443-44 (2d Cir. 1945). For later articulations of the effects test, see RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § (1965) (stating that federal statutes apply to “conduct occurring within, or having an effect within, the territory of the United States.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) (“[A] state has jurisdiction to prescribe law with respect to . . . conduct outside its territory that has or is intended to have substantial effect within its territory . . . .”). For cases that find the presumption against extraterritoriality inapplicable when an effect is felt in the United States, see In re Simon, 153 F.3d 991, 995 (9th Cir. 1998); Envtl Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993); Laker Airways, Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 925 (D.C. Cir. 1984); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968).

139 BORN & RUTLEDGE, supra note 41, at 573 (questioning whether in today’s global economy the effects test permits almost limitless legislative jurisdiction); Paul Schiff Berman, Global Legal Pluralism, 80 S. CAL. L. REV. 1155, 1182 (2006) (“[I]n an electronically connected world the effects of any given action may immediately be felt elsewhere with no relationship to physical geography at all.”); R.Y. Jennings, Extraterritorial Jurisdiction and the United States Antitrust Laws, 33 BRIT. Y.B. INT’L L. 146, 159 (1957) (explaining how the effects test means there exists “virtually no limit to a State’s territorial jurisdiction”).


141 KARAYANNI, supra note x, at 109; see also William L. Reynolds, The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit In-
2. Globalization and the World in U.S Courts

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

Early in the century, the international cartel movement created complex business relationships that crossed national borders. In the later part of the century, globalization – and a number of great technological advances in communication and transportation – led to tremendous interdependence between countries, as trade and labor mobility increased. As economies became more interdependent, the pressure to regulate cross-border activities increased. And as communication and trans-

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143 See supra notes 2 and 4.


145 Numerous commentators have described the changes. For a sampling, see Kal Raustiala, The Evolution of Territoriality: International Relations and American Law, in Territoriality and Conflict in an Era of Globalization 219, 220, 234-48 (Miles Kahler & Barbara F. Walter eds., 2006) (arguing territoriality is “decreasingly important as a jurisdictional principle” in a globalizing world); John Gerrard Ruggie, Territoriality and Beyond: Problematizing Modernity in International Relations, 47 Int’l Org. 139, 148-63 (1993) (discussing the evolution of modern territoriality); Saskia Sassen, Territory and Territoriality in
portation became easier, jurisdiction doctrines based on reason-
ableness meant broader jurisdictional assertions were permis-
sible.\footnote{146}{The advent of the internet led to further pressure to ignore
any remaining territorial limits to the exercise of judicial power,
and increased the number of overlapping laws.\footnote{147}{Paul Berman has argued in a series of articles
that in an age of globalization, territorial borders should have little significance
in jurisdictional questions. Paul Schiff Berman, \textit{Dialectical Regulation, Territor-
accommodate non-territorial based norms through legal pluralism and arguing
that territoriality is eroding); Paul Schiff Berman, \textit{Global Legal Pluralism}, 80 S.
CAL. L. REV. 1155, 1168 (2007) (arguing for a conflict approach different from
“territorially-based sovereigntism” and universalism); Paul Schiff Berman, \textit{The
critiques against territorial based rules for jurisdiction).}
\footnote{146}{See, e.g., Anderson v. Dassault Aviation, 361 F.3d 449, 455 (8th Cir. 2004)
(finding exercise of jurisdiction over foreign manufacturer reasonable in part
because foreign manufacturer had “ready access to air transportation for conven-
iently making the trip); Mutual Serv. Ins. Co. v. Frit Indus., Inc., 358 F.3d 1312,
1320 (11 Cir. 2004) (finding exercise of jurisdiction because, among other things,
“modern methods of transportation and communication” have lessened the bur-
den of defending suit in a foreign jurisdiction” (internal citation omitted); Harris
Rutsky Co. Ins. Serv. v. Bell & Clements Ltd., 328 F.3d 1122, 1132-33 (9th Cir.
2003) (finding personal jurisdiction over U.K. insurance broker, noting that
modern advances in transportation and communication have reduced the burden
of foreign litigation); Deprenyl Animal Health, Inc. v. Univ. of Toronto Innovations
Found., 297 F.3d 1343, 1356 (Fed. Cir. 2002) (finding burden on foreign
corporation minimal “in light of modern transportation and communication
methods”); Panavision Int’l v. Toeppen, 141 F.3d 1316, 1323 (9th Cir. 1998) (stating
that the location of witness and documents “no longer weighed heavily given
the modern advances in communication and transportation”); Sher v. Johnson,
911 F.2d 1357, 1365 (9th Cir. 1990) (noting as a rule that requiring a nonresident
to defend locally is not constitutionally unreasonable “[i]n the era of fax ma-
chines and discount air travel”); see generally CLERMONT, supra note x, at 12 (“Of
course, the revolution of transportation and communication has increased the
occurrence of long-distance disputes, but it has also decreased the burden
of long-distance litigating.”).}
\footnote{147}{Thomas Schultz, \textit{Carving up the Internet: Jurisdiction, Legal Orders, and
the Private/Public International Law Interface}, 19 EUR. J. INT’L L. 799, 799-804
(2008) (responding to the “general understanding of the Internet forms one of
the paradigms which underlie the general view of deterterritorialization, transna-
tionalism, state decline, and the replacement of national pyramids of normativ-
ity by global networks of spread-out normativity.”); JACK GOLDSMITH & TIMOTHY
WU, \textit{WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD} 179, 181-
83 (2006) (describing and responding to the perception that we are in a border-
less world where state sovereignty has little importance). One of the most well-
known cases involving jurisdiction based on internet contacts occurred when a
French court ordered Yahoo.com to block access to websites selling Nazi mem-
orabilia or otherwise assisting in the denial of the holocaust. Tribunal de grande
instance [T.G.I.] [ordinary court of original jurisdiction] Paris, May 22, 2000,
The second driving force was both the move away from international law as a palatable way to address global challenges. During the late 1990s, conservative, neo-realist scholars\textsuperscript{148} attacked international law believing it to threaten American independence.\textsuperscript{149} Modern internationalist scholars also turned away from international law, promoting non-state and sub-state actors, who sought to have a greater voice and role in international law and relations.\textsuperscript{150} Both positions were ideologically driven, and intimately tied to the domestic culture wars.\textsuperscript{151} The neo-realists were largely allied with conservative domestic movements, who for decades had sought to roll back a progressive civil rights agenda.\textsuperscript{152} The modern internationalists in turn sought to give
greater power to environmental, human rights, and indigenous rights group as a way of advancing a progressive values.\textsuperscript{153}

Both groups were successful in their own way. The United States has increasingly withdrawn from international law and its institutions, preferring to use domestic law (applied extraterritoriality) to solve global challenges.\textsuperscript{154} Many see U.S. courts as “both a means for addressing many of the world’s evils and a model for others to emulate.”\textsuperscript{155} Currently, few disputes escape the long jurisdictional arms of U.S. courts.

\textbf{III. THE PROPOSAL}

What is needed is an integrated approach to parallel litigation that recognizes how parallel litigation is connected to jurisdiction, avoids the costs of unnecessary duplication, and protects American interests from foreign overreaching. A two-step inquiry commends itself to achieving these goals.\textsuperscript{156}

\textit{A. Reversing the Presumption}

As a starting point, courts should reverse the existing presumption and do away with references – in the international context – to a court’s unflagging obligation to exercise jurisdiction.\textsuperscript{157}

\textsuperscript{153} Robert Howse, \textit{Human Rights, International Economic Law and Constitutional Justice: A Reply}, 19 EUR. J. INT’L L. 945, 945 (2008) (“New actors have been empowered in the international legal system (not only individuals but various kinds of non-state collectivities as well); conceptions of responsibility have been altered; classic notions, such as territorial sovereignty and recognition of statehood, have sometimes subtly and sometimes radically been reshaped or adapted.”).

\textsuperscript{154} For an expanded discussion of this phenomenon, see Parrish, \textit{supra} note x (Minn. LR).

\textsuperscript{155} Stephan, \textit{supra} note x, at 627.

\textsuperscript{156} The proposal has similar elements to that recently suggested by N. Jansen Calamita. The proposals differ, however, in that this one does not promote adjudicatory comity as the basis for the proposal, but instead is more pragmatic in its approach as a way to promote U.S. interests while avoiding unnecessary waste. See Calamita, \textit{supra} note 12.

\textsuperscript{157} The reversal of the presumption is not an academic change. Presumptions are significant. William N. Eskridge, Jr. & Philip P. Frickey, \textit{Quasi-}
A court should presumptively find a stay warranted if the moving party can establish: (1) that parallel foreign action was filed first; and (2) that the foreign court would have jurisdiction over the action consistent with U.S. jurisdictional principles.

Tethering the initial presumption to U.S. jurisdictional standards has benefits. First, for the foreign court to have jurisdiction (under U.S. principles), by definition the foreign court would be considered an acceptable forum under U.S. Due Process standards. The minimum contacts test for personal jurisdiction ensures that the defendant have sufficient contacts with the foreign forum so that the exercise of jurisdiction is reasonable. The effects test for prescriptive (legislative) jurisdiction similarly ensures that the foreign forum has some connection to the underlying transaction upon which the lawsuit is based (i.e., a substantial effect is felt in the foreign forum).

Second, the presumption is easy to apply and would lead to greater predictability. The presumption does not require the court...
to balance multiple factors, assess the unquantifiable (and often unknowable) interests of a foreign forum, or otherwise evaluate foreign law.\textsuperscript{161} Instead, the test would require merely that the court assess what it does routinely (i.e., whether it has jurisdiction to proceed). Lastly, creating symmetry between jurisdiction and international abstention ensures that U.S. interests are accounted for. If Congress believes that too many parallel actions are being decided abroad, it need only curtail the breadth of the court's jurisdictional assertions. On the other hand, the U.S. interest in having a case heard locally is at its lowest, if the foreign court is a reasonable and appropriate forum (under U.S. standards). If, in contrast, the foreign court has asserted jurisdiction on an exorbitant basis\textsuperscript{162} then the U.S. court should not defer (indeed, the foreign court's judgment will not be recognized or enforced) and the stay should be denied.

The benefits to staying an action, when the first-filed case is before a court of appropriate jurisdiction are manifest. First, the U.S. will avoid the costs that unnecessarily duplicative actions engender. Following the first-to-file rule reduces the number of transnational lawsuits proceeding concurrently, thereby eliminating the potential for conflicting decisions and discouraging an invidious race to judgment. Second, respecting a presumptive lis pendens rule would provide greater structure and guidance to the lower courts on what comity entails, while curbing the potential for unprincipled, ad hoc decisions and the attendant costs created by uncertainty. Instead of the current “hydra-headed” approach,\textsuperscript{163} where courts have to balance multiple factors, the court would engage in one inquiry: can the plaintiff's claims be litigated in an already pending foreign forum with jurisdiction. Finally, it would discourage the filing of unnecessary reactive litigation in the future, and the corresponding increase in expense and inconvenience to the parties and courts.

\textsuperscript{161} See Washington v. Glucksberg, 521 U.S. 702, 787 (1997) (Souter, J., concurring in judgment) (“The principle enquiry at the moment is into the Dutch experience, and I question whether an independent front-line investigation into the facts of a foreign country’s legal administration can be soundly undertaken through American courtroom litigation.”). In a different context, see Ernesto J. Sanchez, A Case Against Judicial Internationalism, 38 CONN. L. REV. 185 (2005) (arguing that judges with expertise in U.S. lack access to adequate resources to research foreign law).

\textsuperscript{162} A classic example is the French courts assertion of jurisdiction based on nationality alone. Civil Code Art. 14.

\textsuperscript{163} Rehnquist, supra note 26, at 1111.
B. Shifting Burdens

If the moving party makes the preliminary showing to establish a presumptive stay, the burden should then shift to the party opposing the stay. The initial presumption could be overcome through demonstrating that a manifest injustice would occur if the U.S. litigation does not proceed. A defendant meets this burden through establishing some fundamental unfairness in waiting until the foreign forum has concluded or by establishing that the foreign forum is a forum non conveniens. Courts should be particularly sensitive to whether the natural plaintiff filed the foreign action, and whether the U.S. case involves parties and activities occurring abroad (even if the U.S. forum itself is not forum non conveniens).

A hypothetical drives home the approach. Assume that a New York citizen is in a car accident in New York with a French citizen, and both suffer injuries. Also assume the French citizen brings an action in France, asserting jurisdiction based on the plaintiff’s nationality, and then the New York citizen brings an action in New York federal district court. The French citizen moves to stay the second-filed U.S. action. Under these circumstances, the U.S. federal court would deny any request to stay the second-file New York action. Jurisdiction based on a plaintiff’s nationality is not a permissible basis for jurisdiction under U.S. law and therefore the French citizen could not meet its initial burden.

On the other hand, if the New York citizen had substantial contacts with France, sufficient to establish general jurisdiction under U.S. jurisdictional principles then potentially the French citizen could meet its initial burden. But the action would still be unlikely stayed. Under the forum non conveniens, a French court could well be viewed as an inappropriate forum given that the accident, witnesses, and events all occurred in New York. [Articles editor: please note that this section is being revised, but I felt

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164 Code Civil (C. Civ.) arts. 14-15 (authorizing jurisdiction over virtually any action brought by a plaintiff of French nationality); see generally Kevin M. Clermont & John R.B. Palmer, Article 14 Jurisdiction, Viewed from the United States, in DE TOUS HORIZONS: MELANGES XAVIER BLANC-JOUVAN 473 (2005); Clermont, supra note x, at 482-84.

165 The Due Process clause focuses on the defendant’s connections with the forum state, not the plaintiffs. See generally Graham C. Lilly, Jurisdiction over Domestic and Alien Defendants, 69 VA. L. REV. 85 (1983).
it was far enough along for your review].

C. Responding to Critics

In essence, the proposed approach would create a presumption against duplicative litigation, so long as the foreign forum meets U.S. standards for fundamental fairness. The most common objection to this sort of approach is the perception that it would promote a race to the courthouse. But that concern seems misplaced. First, under any of the current approaches a race to the courthouse already exists. Current approaches consider who filed first as one of the many factors balanced in the analysis.\textsuperscript{166} Similarly, we tolerate races already under \textit{Landis} in federal-to-federal cases, as well as intrastate cases.\textsuperscript{167} Second, the race to the courthouse seems less problematic than the alternative race to judgment. At least the race to the courthouse involves only the litigants, not the courts.\textsuperscript{168}

Another common objection suggests that staying a proceeding undermines a plaintiff's choice of forum. But this untrue. On the contrary, creating a presumption in favor of a stay better protects the plaintiff's choice of forum – a prerogative the U.S. system has long promoted.\textsuperscript{169} Reactive litigation, by definition, attempts to displace the plaintiff's first-filed choice of forum, by permitting the defendant in the first action to second-guess the plaintiff's choice and litigate on two fronts.\textsuperscript{170} By allowing actions first-filed in appropriate foreign courts to proceed, the plaintiff's choice is protected. Certainly this has to be better than the current state of affairs. The myriad of current approaches leave litigants with so little certainty about what the court will likely do, that it induces many litigants to strategically file a reactive suit – knowing that doing so will significantly increase an opponent's costs, while creating more confusion at the judgment enforcement stage.\textsuperscript{171}

Nor does the approach elevate efficiency and administration considerations over issues of substance. As an initial matter,

\textsuperscript{166} See supra notes x-y, and accompanying text.
\textsuperscript{167} Rehnquist, supra note 26, at 1068, 1112 (“If there must be a race, let it exhaust only the litigants, not the courts as well.”).
\textsuperscript{168} Vestal, supra note x, at x.
\textsuperscript{169} See Teitz, supra note x, at 229 (Treading carefully).
\textsuperscript{170} See supra notes x-y, and accompanying text.
much of modern U.S. federal civil procedure is animated by efficiency concerns and attempts to reduce the costs of litigation. From pleading requirements, to rules of joinder, to summary judgment, federal procedural rules seek to avoid piece-meal litigation and promote efficiency. It seems strange then that such efficiency concerns would be ignored in the parallel litigation context.

But the approach is not simply driven by issues of cost: a more important interest is at stake. The United States has an interest in promoting an international system that reduces conflict and values democratic self-governance. Those ideals are undermined if our national courts (and others) exert their power extraterritorially. As one circuit court explained the problems with such legal imperialism:

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


Harrison v. Wyeth Lab., 510 F. Supp. 1, 4-5 (E.D. Pa. 1980), aff’d, 676 F.2d 685 (3d Cir. 1982); see also William L. Reynolds, The Proper Forum for Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Fed-
Although we may “cherish the image of our courts as the refuge of all seeking succor,” it is past time for us to get it through our heads that it is not everyone but us who is out of step. Extensive use of extraterritorial jurisdiction and the judicial unilateralism which it entails may also be symptomatic of a decline of hegemonic power; a decline we presumably do not wish to hasten.

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

A final point is worth emphasizing. While a version of comity underlies the proposed approach, comity does not mean mindless deference to a foreign court. Countries embrace comity for...
self-interested reasons, not out of some abstract respect of foreign sovereigns. Comity embodies the concepts of mutuality and reciprocity, similar to how those concepts are embodied in other international principles,\textsuperscript{185} such as good neighborliness,\textsuperscript{186} the no-harm principle,\textsuperscript{187} the duty to warn,\textsuperscript{188} and the duty to cooperate.\textsuperscript{189} States agree to impose restraints on unilateral sovereign action because by so agreeing other states will do the same, thus better preserving overall sovereignty. Said differently, comity is a way that nation-states surrender a small degree of sovereignty in the short term to restore control lost to external forces over the long term. One can criticize comity and reciprocity,\textsuperscript{190} but they are cornerstones of the international system: ones that the United States has long benefited from.

\textsuperscript{185}U.S. ex rel. Saroop v. Garcia, 109 F.3d 165, 169 (3d Cir. 1997) (deference to foreign judicial proceedings “fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations”).

\textsuperscript{186}Günther Handl, 

\textsuperscript{187}Trail Smelter Arbitral Decision, 35 Am. J. Int’l L. 684 (1945) (holding that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another”); see also Island of Palmas Case (U.S. v. Neth.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928) (describing how states must respect the interest of other states); Rio Declaration on Environment and Development, June 14, 1992, Principle 2, 31 I.L.M. 874, 876 (1992) (declaring that states have the obligation “to ensure that activities within their jurisdiction or control do not cause damage to the environment or damage to the environment of other states or of areas beyond the limits of national jurisdiction.”); Declaration of the United Nations Conference on the Human Environment, June 16, 1972, prin. 21, 11 I.L.M. 1416, 1420 (1972) (affirming state responsibility to “ensure that their activities within their jurisdiction and control do not cause damage to the environment or other states or to areas beyond the limits of national jurisdiction”).

\textsuperscript{188}Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. Rep. 4 (1949) (holding that it is “every state’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states”).

\textsuperscript{189}Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (1957), reprinted in 53 Am. J. Int’l L. 156 (1959) (holding that states have a duty to cooperate and account for the interests of other states).

CONCLUSION

Transnational litigation is here to stay. Cross-border and transboundary cases are simply a feature of a globalized, interconnected world. As a result, duplicative foreign proceedings will increase in frequency, becoming a more common phenomenon. In short, litigants increasingly have a choice of where to battle: here, abroad, or in both places. Despite this reality, U.S. federal courts have been slow to adjust to the realities of modern, transnational cases, preferring instead to apply domestic doctrine, despite the obvious inconsistencies in doing so.

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