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ARTICLES

INTERNATIONAL COMITY IN AMERICAN LAW

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International comity is one of the principal foundations of U.S. foreign relations law. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity—from the conflict of laws to the presumption against extraterritoriality; from the recognition of foreign judgments to the doctrines limiting adjudicative jurisdiction in international cases; and from a foreign government's privilege of bringing suit in the U.S. courts to the doctrines of foreign sovereign immunity. Yet international comity remains poorly understood. This Article provides the first comprehensive account of international comity in American law. It has three goals: (1) to offer a better definition of international comity and a framework for analyzing its manifestations in American law; (2) to explain the relationship between international comity and international law; and (3) to challenge the myths that international comity doctrines must take the form of standards rather than rules and that international comity determinations should be left to the executive branch.

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INTRODUCTION

For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity. Comity has long served as the basis for the conflict of laws[1] and the enforcement of foreign judgments in the United States.[2] Today, American courts also use international comity to restrain the reach of domestic law.[3] The Supreme Court has repeatedly characterized foreign sovereign immunity as a "gesture of comity"[4] and, conversely, has used comity to explain why foreign governments should be allowed to bring suit as plaintiffs in American courts.[5] The act of state doctrine was once said to rest on "the highest considerations of international comity and expediency."[6] The Supreme Court has looked to international comity to reinforce constitutional due process limitations on per-

1. See Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 589 (1839) ("[T]he laws of the one [country], will, by the comity of nations, be recognised and executed in another . . . .").

2. See Hilton v. Guyot, 159 U.S. 113, 163 (1895) (noting enforcement of "judicial decree . . . depends upon what our greatest jurists have been content to call 'the comity of nations'").

3. See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004) (concluding "principles of prescriptive comity" limit U.S. antitrust law).

4. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 696 (2004) (citing Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003)).

5. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964) ("Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States.").

6. Oetjen v. Cent. Leather Co., 246 U.S. 297, 303–04 (1918).

sonal jurisdiction.[7] The Court has also told district courts to engage in a comity analysis when considering the discovery of evidence abroad for use in U.S. courts[8] and the discovery of evidence in the United States for use in foreign courts.[9] Lower federal courts have used "international comity" as an abstention doctrine to defer to parallel proceedings in foreign courts,[10] and alternatively to decide whether to enjoin the parties from continuing such proceedings.[11] American law is full of international comity doctrines.[12]

Yet courts and commentators repeatedly confess that they do not really understand what international comity means. Courts complain that comity "has never been well-defined."[13] They frequently refer to it as "vague"[14] or "elusive."[15] One court recently observed that "[a]lthough comity eludes a precise definition, its importance in our globalized economy cannot be overstated."[16] Scholars echo these complaints.[17] They also point out that "courts appear to have little understanding of what exactly comity consists,"[18] or at a minimum that courts are "not always clear or consistent."[19] As Trey Childress has noted, because there is "no clear ana-

7. See Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (noting "risks to international comity" posed by expansive view of general jurisdiction).

8. See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543–44 (1987) (noting "concept of international comity" requires "particularized analysis" of discovery requests).

9. See Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261 (2004) ("[C]omity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases . . . .").

10. See, e.g., Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (applying "doctrine of international comity abstention").

11. See, e.g., China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 37 (2d Cir. 1987) (concluding factors favoring antisuit injunction "are not sufficient to overcome the restraint and caution required by international comity").

12. For a recent discussion of domestic comity doctrines, see Gil Seinfeld, Reflections on Comity in the Law of American Federalism, 90 Notre Dame L. Rev. 1309, 1314–35 (2015) (surveying comity in law of American federalism).

13. JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005).

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

15. Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 886 (9th Cir. 2012); Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 18 (1st Cir. 2004); Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994); Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984).

16. Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 360 (8th Cir. 2007).

17. See Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1, 4 (1991) [hereinafter Paul, Comity in International Law] ("[D]espite ubiquitous invocation of the doctrine of comity, its meaning is surprisingly elusive."); Anne-Marie Slaughter, Court to Court, 92 Am. J. Int'l L. 708, 708 (1998) ("Comity . . . is a concept with almost as many meanings as sovereignty.").

18. Austen L. Parrish, Duplicative Foreign Litigation, 78 Geo. Wash. L. Rev. 237, 260 (2010).

19. Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081, 1103 (2015); see also Michael D. Ramsey, Escaping "International Comity," 83 Iowa L. Rev. 893, 893

lytical framework" for exercising international comity, "courts have been left to cobble together their own approach."[20]

Confusion also surrounds the relationship between international comity and international law. Although doctrines of international comity sometimes overlap with rules of international law, the comity doctrines are domestic law and are generally not required by international law.[21] For example, no rule of customary international law requires the United States to recognize the judgment of a foreign court,[22] to treat a foreign act of state as valid,[23] or to allow foreign governments to bring suit as plaintiffs in U.S. courts.[24] And yet the Supreme Court often seems to treat international comity and international law as interchangeable.[25]

Part of the problem is the Supreme Court's 1895 definition of comity in *Hilton v. Guyot*, which courts often take as their point of departure:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[26]

(1998) ("'International comity' is frequently invoked by courts but rarely defined with precision.").

20. Donald Earl Childress III, Comity as Conflict: Resituating International Comity as Conflict of Laws, 44 U.C. Davis L. Rev. 11, 51 (2010); see also Lawrence Collins, Comity in Modern Private International Law, *in* Reform and Development of Private International Law 89, 110 (James Fawcett ed., 2002) ("The vast amount of material [on comity] cries out for some synthesis . . . .").

21. See infra Part III (explaining differences between international comity and international law).

22. See Restatement (Third) of the Foreign Relations Law of the United States ch. 8, intro. note at 591 (Am. Law Inst. 1987) ("[T]here are no agreed principles governing recognition and enforcement of foreign judgments, except that no state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment debtor.").

23. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964) ("That international law does not require application of the [act of state] doctrine is evidenced by the practice of nations.").

24. See James Crawford, Brownlie's Principles of Public International Law 157 (8th ed. 2012) (noting while some countries allow recognized governments to sue in local courts, "great caution is needed in using municipal cases to establish propositions about recognition in general international law").

25. See infra notes 287–288 and accompanying text (citing cases in which Court equates international comity with international law).

26. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). Westlaw shows more than 470 quotations of this passage, or parts of it, by state and federal courts since *Hilton*. See WestlawNext, http://westlawnext.com (last visited Sept. 25, 2015) (in All State & Federal, search: (comity /s "absolute obligation") (recognition /s "within its territory" /s "acts of another nation") ("due regard" /s "international duty" /s "rights of its own citizens") and *Hilton*).

This definition of comity is both incomplete and ambiguous. Speaking only of "recognition," *Hilton* fails to capture doctrines that restrain the application of U.S. law and the jurisdiction of U.S. courts. Speaking only of "acts," this definition leaves out foreign sovereign immunity and a foreign state's privilege of bringing suit in U.S. courts, both of which the Supreme Court had recognized as manifestations of international comity well before *Hilton* was decided.[27] *Hilton* is also fundamentally ambiguous about whether comity binds U.S. courts and, if so, whether it binds them as a matter of international or domestic law. If comity is "neither a matter of absolute obligation . . . nor of mere courtesy and good will,"[28] what is it? Is there an "international duty"[29] to extend comity, or is it simply a question of "convenience"?[30] As a recent commentator has observed, *Hilton*'s definition of comity is "woefully inadequate."[31]

The supposedly indeterminate nature of comity has long made it an object of criticism. Judge Cardozo called comity a "misleading word" that "has been fertile in suggesting a discretion unregulated by general principles."[32] Comity's connection to foreign relations has led some to conclude that international comity determinations would be better made by the executive branch than by courts.[33] Yet this suggestion raises problems of its own. Many judges resist the notion that the Executive should be able to dictate results in particular cases.[34] And even the executive branch

27. See The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870) (recognizing privilege of bringing suit on basis of comity); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822) (characterizing foreign sovereign immunity as resting on "principles of public comity and convenience").

28. *Hilton*, 159 U.S. at 163–64.

29. Id. at 164.

30. Id.

31. Childress, supra note 20, at 34.

32. Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201–02 (N.Y. 1918) (Cardozo, J.) (internal citation omitted). For further examples of criticism of comity, see infra notes 317–321 and accompanying text.

33. See Eric A. Posner & Cass R. Sunstein, *Chevroni*zing Foreign Relations Law, 116 Yale L.J. 1170, 1177 (2007) ("[T]here are strong reasons, rooted in constitutional understandings and institutional competence, to allow the executive branch to resolve issues of international comity . . . .").

34. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677, 735 (2004) (Kennedy, J., dissenting) (observing "judicial independence . . . is compromised by case-by-case, selective determinations of jurisdiction by the Executive"). Recent scholarship suggests that the Supreme Court as a whole has become more skeptical of deference to the executive branch in foreign relations cases. See Harlan Grant Cohen, Formalism and Distrust: Foreign Affairs Law in the Roberts Court, 83 Geo. Wash. L. Rev. 380, 437 (2015) ("The Court is skeptical of the executive branch's claims that it knows better, that it should not be second-guessed, and that it needs room to maneuver in a dangerous world."); Ganesh Sitaraman & Ingrid Wuerth, The Normalization of Foreign Relations Law, 128 Harv. L. Rev. 1897, 1930 (2015) ("In recent years, however, the Court has delivered a series of defeats to the executive branch in cases on executive power and statutory interpretation.").

has concluded, in the context of foreign state immunity, that case-by-case discretion does not help U.S. foreign relations.[35]

It is something of an embarrassment for U.S. foreign relations law that so many of its doctrines depend on a principle that is poorly defined and arguably leads to unbounded discretion either by the courts or by the executive branch. Michael Ramsey has argued that because "the phrase 'international comity' adds nothing—and obscures much—in judicial discourse," it "should be abandoned."[36] This Article takes a different approach. It aims to rescue international comity from disrepute and support its critical role in U.S. foreign relations law by providing a clearer view of both the underlying principle and its manifestations in American law.

More specifically, this Article makes three contributions to understanding international comity in American law. First, it offers a clearer and more comprehensive definition of comity than *Hilton v. Guyot*, as well as a framework for analyzing international comity doctrines. It catalogues and categorizes the uses of international comity in American law, based on a reading of all the U.S. Supreme Court opinions mentioning "comity," as well as a number of lower court decisions. This categorization shows that courts have used international comity to defer to foreign lawmakers, to foreign courts, and to foreign governments as litigants, and that international comity has operated in each category both as a principle of recognition and as a principle of restraint. The result is the first comprehensive account of international comity applied by U.S. courts.[37]

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35. See infra notes 404–410 and accompanying text (discussing passage of Foreign Sovereign Immunities Act).

36. Ramsey, supra note 19, at 951–52.

37. A number of prior articles have discussed international comity in American law, but each has been restricted in some way. Eric Posner and Cass Sunstein consider only the presumption against extraterritoriality, the act of state doctrine, foreign sovereign immunity, and the *Charming Betsy* canon (which is not really a comity doctrine, see infra notes 46–48 and accompanying text), though they briefly allude to other doctrines without explaining them. See Posner & Sunstein, supra note 33, at 1179–80 (listing *Charming Betsy* canon, presumption against extraterritoriality, act of state doctrine, foreign sovereign immunity, and "comity in general" as "comity doctrines"). Jansen Calamita, Trey Childress, and Anne-Marie Slaughter are concerned only with adjudicative comity. See N. Jansen Calamita, Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings, 27 U. Pa. J. Int'l Econ. L. 601, 624–78 (2006) (discussing principles of "adjudicatory" comity); Childress, supra note 20, at 63 (limiting analysis "to one species of comity, adjudicatory comity"); Anne-Marie Slaughter, A Global Community of Courts, 44 Harv. Int'l L.J. 191, 205–10 (2003) [hereinafter Slaughter, A Global Community of Courts] (discussing emergence of "judicial comity"). Michael Ramsey expressly limits his consideration of comity to the recognition of foreign acts. See Ramsey, supra note 19, at 896 n.16 ("I speak here and throughout this Article only of 'international comity' used in connection with the 'effect-of-foreign-acts' inquiry."). Neither Joel Paul nor Spencer Waller attempt to distinguish different uses of comity, Paul because his focus is on the comparative use of comity in different legal systems, and Waller because he thinks courts should engage in a single, omnibus comity inquiry. See Paul, Comity in International Law, supra note 17, at 27 (examining "how courts in other legal systems use either the classical doctrine or the broader notion

Second, this Article explains the critical distinction between international law and international comity. International law binds the United States on the international plane, while international comity allows the United States to decide for itself how much recognition or restraint to give in deference to foreign government actors. In some areas of foreign relations law, like sovereign immunity and prescriptive jurisdiction, doctrines of international comity are layered on top of rules of international law. In other areas, international comity does all of the work. International comity thus describes an internationally oriented body of domestic law that is distinct from international law and yet critical to legal relations with other countries.

Third, this Article uses its categorization of international comity doctrines to challenge two enduring myths about comity: (1) that comity must be governed by standards rather than rules; and (2) that comity determinations are best left to the executive branch. The Article shows that courts frequently express doctrines of international comity as rules rather than standards, and that allowing courts to apply these doctrines without interference by the executive branch promotes not just the rule of law but also U.S. foreign relations.

This Article's definition of international comity is based on a reading of all the U.S. Supreme Court cases that use the word "comity"[38] as well as a large number of lower court cases. This approach reflects the supposition that courts using the term have the sense, however inchoate, that a common principle lies behind certain doctrines. Once the doctrines that seem to rest at least in part on international comity were identified, it became clear that each involved deference to foreign lawmakers, to foreign courts, or to foreign governments as litigants. It also became clear that some doctrines worked to recognize foreign acts or actors and that

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of comity to manage conflicting public policies between sovereign states"); Spencer Weber Waller, A Unified Theory of Transnational Procedure, 26 Cornell Int'l L.J. 101, 102 (1993) (proposing "single omnibus comity inquiry conducted as early as possible in the litigation process"). Moreover, with the exception of Posner and Sunstein, none of these Articles consider "sovereign party comity"—that is, foreign sovereign immunity and the recognition of foreign sovereigns as plaintiffs.

For discussions of international comity in English law, see generally Adrian Briggs, The Principle of Comity in Private International Law, 354 Recueil des Cours 65 (2011) (surveying international comity's application in English caselaw); Collins, supra note 20, at 95–110 (discussing manifestations of international comity in English law). For consideration of international comity in other countries in the specific context of competition law, see generally Cooperation, Comity, and Competition Policy (Andrew T. Guzman ed., 2011) (discussing comity and antitrust in laws of the European Union, Brazil, Japan, and Israel, among others).

38. As of September 25, 2015, there were 637 such cases. See WestlawNext, http://next.westlaw.com (last visited Sept. 25, 2015) (in U.S. Supreme Court, search: "comity"). The author read all 637 cases and eliminated those that discussed comity only in a domestic context, leaving more than 100 Supreme Court cases relevant to "international comity." Id.

some worked to restrain U.S. acts or actors.[39] Based on this survey, this Article adopts a functional definition of international comity that captures its uses in American law today: *International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.*

This Article's definition of international comity differs from *Hilton*'s in several respects. First, international comity is not just recognition but *deference*—a word that captures comity's use both as a principle of recognition and as a principle of restraint. Second, international comity is not just deference to foreign acts; it is deference to foreign government *actors*, a phrase that captures the use of international comity with respect to a foreign court prior to judgment, as well as the use of international comity in relation to foreign governments as plaintiffs or defendants in U.S. courts. Third, international comity is *not international law*, though the uses of international comity have changed in relation to changes in international law. And fourth, international comity *is domestic law*—that is to say, the principle of international comity is manifested in a number of different domestic doctrines that U.S. courts are bound to follow.[40]

Beyond offering a definition of international comity, this Article catalogues and categorizes the uses of international comity in American law along two dimensions. Along one axis, it distinguishes the uses of international comity based on the foreign government actor to whom deference is given. Deference to foreign lawmakers constitutes "prescriptive comity,"[41] deference to foreign tribunals is termed "adjudicative comity,"[42] and deference to foreign governments as litigants is "sovereign party comity."[43] Along the second axis, the Article distinguishes between the operation of comity as a "principle of recognition"—that is, as a means of recognizing foreign law, foreign judgments, and foreign sovereigns as litigants—and the operation of comity as a "principle of restraint"—that is, as a means of restraining the reach of American law, the jurisdiction of

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39. Recognition and restraint are often related. Recognizing foreign law as applicable to a particular case, for example, often means restraining the application of domestic law to that case. For further discussion of the interplay between recognition and restraint, see infra note 286 and accompanying text.

40. This Article is limited to doctrines of international comity applied by U.S. courts. It therefore excludes international comity by the executive branch in the exercise of its own authority. See, e.g., U.S. Dep't of Justice & FTC, Antitrust Enforcement Guidelines for International Operations § 3.2 (1995), reprinted in 34 I.L.M. 1080, 1102 (1995) ("In enforcing the antitrust laws, the Agencies consider international comity."); see also The Paquete Habana, 175 U.S. 677, 693–94 (1900) (characterizing Executive's decision not to seize coastal fishing vessels as prizes of war, prior to its evolution into rule of customary international law, as exercise of comity); United States v. Rauscher, 119 U.S. 407, 411–12 (1886) (noting decision to deliver fugitive to foreign government in absence of extradition treaty was act of comity).

41. See infra section II.A (describing prescriptive comity).

42. See infra section II.B (describing adjudicative comity).

43. See infra section II.C (describing sovereign parity comity).

American courts, and, more specifically, the jurisdiction of American courts over foreign sovereign defendants. Each of the international comity doctrines may be placed in one of the resulting boxes.

TABLE 1

	Principle of Recognition	**Principle of Restraint**
Prescriptive Comity	Conflict of Laws Act of State Doctrine	Presumption Against Extraterritoriality Presumption Against Unreasonable Interference Interest Balancing Under Restatement (Third) Section 403 Foreign State Compulsion
Adjudicative Comity	Recognition of Foreign Judgments Judicial Assistance Under 28 U.S.C. § 1782	Forum Non Conveniens International Comity Abstention Prudential Exhaustion Antisuit Injunctions Due Process Limits on Personal Jurisdiction Foreign Discovery Under *Aérospatiale*
Sovereign Party Comity	Privilege of Bringing Suit	Foreign State Immunity Foreign Official Immunity

Some of the doctrines included in the matrix above may not be recognized immediately as manifestations of international comity. But each fits this Article's definition—deference to foreign government actors that is not required by international law but is incorporated in domestic law—and Part II defends the inclusion of each. It is also important to note that some of the international comity doctrines rest partly on comity and partly on other bases. The modern presumption against extraterritoriality, for

example, has two rationales: (1) "[i]t serves to protect against unintended clashes between our laws and those of other nations which could result in international discord;"[44] and (2) it reflects the assumption that Congress is "'primarily concerned with domestic conditions.'"[45] Only the first of these justifications reflects international comity. The discussion below will note when a doctrine rests on more than one rationale.

Finally, this categorization does not include the *Charming Betsy* canon of avoiding violations of international law,[46] which others have classified among the comity doctrines.[47] As Part III explains, international comity is not just distinct from international law—it is deference to foreign government actors that is *not* required by international law. When a court construes a federal statute to avoid conflict with international law under the *Charming Betsy* canon, it does not defer to a foreign government actor but rather to another body of law with a complex relationship to U.S. domestic law.[48]

Categorizing the international comity doctrines in this way reveals how each of them fits into a larger picture. For example, many of the doctrines of adjudicative comity address the same basic question: When should a U.S. court defer to a foreign court's resolution of a legal dispute? What changes is the time at which that question is asked—before a suit is filed in foreign court, while it is pending, or after the foreign court has rendered judgment. Categorizing the doctrines also facilitates comparisons within and across categories and raises new questions. Why, for example, has reciprocity been urged as a requirement for some of the comity doc-

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44. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

45. Id. (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

46. See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ."); Restatement (Third) of the Foreign Relations Law of the United States § 114 (Am. Law Inst. 1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States."). This Article also omits enforcement of arbitration clauses, which *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* said rested in part on "concerns of international comity." 473 U.S. 614, 629 (1985). Because enforcement of arbitration clauses does not involve deference to foreign government actors, it is not a doctrine of international comity but rather reflects deference to private autonomy.

47. See Posner & Sunstein, supra note 33, at 1179 (listing *Charming Betsy* canon as comity doctrine).

48. The *Charming Betsy* canon is more akin to the constitutional avoidance canon, with which it is sometimes linked, than to doctrines of international comity. See DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (stating constitutional avoidance canon "has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*"); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 500 (1979) (misciting *The Charming Betsy* for proposition "that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

trines but not for others?[49] Why are some comity doctrines state law,[50] others both state and nonpreemptive federal law,[51] and still others preemptive federal law?[52]

This Article uses its categorization of international comity doctrines to challenge two enduring myths about comity: (1) that comity must be governed by standards rather than rules; and (2) that comity determina-

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49. *Hilton* imposed a reciprocity requirement for the enforcement of foreign judgments under general common law. See Hilton v. Guyot, 159 U.S. 113, 228 (1895) (holding foreign judgment, "for want of reciprocity, not to be conclusive evidence of the merits of the claim"). Today, recognition of foreign judgments in the United States is governed by state law, and most states do not impose a reciprocity requirement. See Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 404 reporters' note 11 (Am. Law Inst., Tentative Draft No. 1, 2014) (noting no Uniform Act requires reciprocity for recognition of foreign judgment, although six states have added reciprocity as condition for recognition). The American Law Institute's proposed federal judgments statute, on the other hand, would require reciprocity. See Am. Law Inst., Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 7(a) (2006) ("A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of the courts in the United States would not be recognized or enforced in the courts of the state of origin."); see also John F. Coyle, Rethinking Judgments Reciprocity, 92 N.C. L. Rev. 1109, 1169 (2014) ("If a policy of judgments reciprocity is unlikely to persuade the nations that currently refuse to enforce U.S. judgments to change their practice—as seems to be the case—then the answer to the question of whether to adopt such a policy is easy."). Other doctrines of international comity expressly reject a reciprocity requirement. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411–12 (1964) (rejecting reciprocity requirement for foreign government's privilege of bringing suit in U.S. courts); Restatement (Second) of Conflicts of Laws § 6 cmt. k (Am. Law Inst. 1971) (rejecting reciprocity requirement for conflict of laws).

50. The conflict of laws and the enforcement of foreign judgments are governed by state law in the United States. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding conflict of law rules applied by federal court must conform to conflict of law rules in state where federal court is located); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (applying state law to enforcement of foreign judgment).

51. Doctrines of adjudicative comity as principles of restraint are generally governed by federal law in federal court and state law in state court. See, e.g., Am. Dredging Co. v. Miller, 510 U.S. 443, 457 (1994) (holding federal law of forum non conveniens does not preempt state law). Doctrines of prescriptive comity that federal courts use as principles of restraint apply only to federal statutes. See, e.g., Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877 (2010) (applying presumption against extraterritoriality to "legislation of Congress"). By contrast, the geographic scope of state statutes (subject to any constitutional or international law limits) is a question of state law. See Skiriotes v. Florida, 313 U.S. 69, 79 (1941) (deferring to state interpretation of geographic scope of state statute despite statutory language apparently inconsistent with that interpretation).

52. Only a few international comity doctrines clearly constitute federal law binding on state courts, including foreign sovereign immunity, due process limitations on personal jurisdiction, and the act of state doctrine. See 28 U.S.C. § 1604 (2012) (stating "foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" subject to exceptions); Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) (discussing due process limits on personal jurisdiction); *Sabbatino*, 376 U.S. at 427 (holding scope of act of state doctrine "must be determined according to federal law").

tions are best left to the executive branch.[53] The first myth goes back at least to the early nineteenth century. In his 1834 treatise on conflicts, Justice Joseph Story endorsed the view that "comity is, and ever must be uncertain" and "must necessarily depend on a variety of circumstances, which cannot be reduced to [sic] any certain rule."[54] This discretionary aspect of international comity has been responsible for much of the criticism that the doctrine has attracted over the years.[55] But examining the full range of comity doctrines reveals that international comity can be—and often is—expressed in the form of rules rather than standards.[56] In the area of sovereign party comity, the Supreme Court has adopted a rule that any government recognized by the United States, and not at war with it, may bring suit in U.S. courts,[57] while the Foreign Sovereign Immunities Act (FSIA) sets forth rules to determine when foreign states may be sued in federal and state courts.[58] In the areas of prescriptive and adjudicative comity, one finds a mix of rules and standards. The act of state doctrine operates as a rule rather than a standard,[59] and the Supreme Court has rejected a case-by-case approach for restraining the extraterritorial reach of federal statutes.[60] The Restatement (Second) of Conflict of Laws adopts a "most significant relationship" standard,[61] subject to a number of pre-

53. So much has been written about international comity that it would be impossible to respond to every argument in a single article. See, e.g., supra note 37 (surveying international comity scholarship). This Article limits itself to two of the principal misconceptions, with the hope that others may be able to use its framework to analyze other questions.

54. Joseph Story, Commentaries on the Conflict of Laws § 28, at 34 (2d ed. 1841) (1834) (quoting Saul v. His Creditors, 5 Mart. (n.s.) 665, 678 (La. 1827) (Porter, J.)) (misquotation).

55. See infra notes 316–321 and accompanying text (discussing criticism of comity as discretionary).

56. To be clear, this distinction relates to the range of facts a court may consider in applying a doctrine and to the corresponding degree of discretion the court enjoys. See infra notes 322–323 and accompanying text (explaining difference between rules and standards). Whether a doctrine takes the form of a rule or a standard is a separate question from whether that doctrine binds the court as a rule of law. The doctrine of forum non conveniens, for example, takes the form of a standard rather than a rule, but it is also binding on district courts.

57. *Sabbatino*, 376 U.S. at 409 ("[T]he privilege of suit has been denied only to governments at war with the United States or to those not recognized by this country." (citations omitted)).

58. See 28 U.S.C. §§ 1604–1607 (2012) (providing foreign state immunity from suit subject to specific exceptions).

59. See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."); infra note 338 and accompanying text (discussing act of state doctrine).

60. See F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 168 (2004) (rejecting case-by-case approach to prescriptive comity as "too complex to prove workable").

61. See, e.g., Restatement (Second) of Conflict of Laws § 188(1) (Am. Law Inst. 1971) (noting contract issues "are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties").

sumptive rules for recognizing foreign law.[62] Adjudicative comity as a principle of recognition operates largely through nondiscretionary rules governing the enforcement of foreign judgments,[63] as well as a discretionary statute authorizing judicial assistance to foreign tribunals.[64] It is only when adjudicative comity operates as a principle of restraint through doctrines like forum non conveniens that international comity operates predominantly through standards rather than rules.[65]

The second myth challenged here is that the executive branch has greater institutional competence to apply the comity doctrines. Eric Posner and Cass Sunstein have argued that courts should defer to the Executive in applying international comity doctrines because "the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary."[66] Posner and Sunstein consider only a limited number of comity doctrines.[67] When one considers the full range, one sees a number of doctrines under which deference to the Executive would seem utterly inappropriate: the conflict of laws, the enforcement of foreign judgments, forum non conveniens, antisuit injunctions, and questions of foreign discovery, to name a few.[68] To be sure, the executive branch has authority to determine certain facts on which some of the comity doctrines turn. The President has unreviewable authority to recognize foreign governments, and recognition in turn en-

62. See, e.g., id. § 188(3) ("If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied . . . .").

63. See Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 404 cmt. b (Am. Law Inst., Tentative Draft No. 1, 2014) (noting even "discretionary" grounds for nonrecognition of foreign judgments are mostly mandatory in practice).

64. See 28 U.S.C. § 1782(a) (2012) (providing district court "may" order a person to provide evidence to foreign or international tribunals).

65. See infra notes 352–353 and accompanying text (discussing doctrines of adjudicative comity that operate as principles of restraint). Even in this area, one encounters the occasional rule, such as the presumptive limitation of general jurisdiction over corporations to "the place of incorporation and principal place of business." Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014).

66. Posner & Sunstein, supra note 33, at 1205. For another excellent discussion of deference to the Executive in foreign affairs, see Curtis A. Bradley, *Chevron* Deference and Foreign Affairs, 86 Va. L. Rev. 649, 679–725 (2000) (discussing range of foreign affairs doctrines).

67. See Posner & Sunstein, supra note 33, at 1179–80 (considering only presumption against extraterritoriality, act of state doctrine, foreign sovereign immunity, and (mistakenly) *Charming Betsy* canon); supra notes 46–48 and accompanying text (explaining why *Charming Betsy* is not truly an international comity doctrine).

68. Courts have declined to defer to the Executive even with respect to doctrines like forum non conveniens that expressly incorporate "public interest" factors. See, e.g., Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 950–53 (1st Cir. 1991) (Breyer, C.J.) (rejecting Securities and Exchange Commission's (SEC) argument that district court misapplied doctrine).

titles foreign governments to bring suit in U.S. courts.[69] Executive branch agencies may also have authority to determine the geographic scope of statutes they administer.[70] But as a general matter, the President does not have—and should not be given—authority to dispose of particular cases on foreign relations grounds. Such authority not only compromises judicial independence but also harms U.S. foreign relations by putting the Executive in the uncomfortable position of having to make decisions that may displease foreign governments.

This Article proceeds in four parts. Part I begins with a brief history of international comity, from its origins in the Netherlands, through its adoption by English common law, to its transmission to the United States. It also shows how the rationale for comity shifted from private interests in convenience to public interests in respecting the sovereignty of other nations, a shift that has obscured the comity basis of some doctrines. Part II discusses and categorizes the manifestations of international comity in American law, defending the inclusion of each doctrine and explaining why each of the categories represents a coherent group. Part III considers the relationship between international comity and international law. The border between the two has shifted over time. Changes in international law have sometimes created new roles for international comity, and rules of international comity have sometimes evolved into rules of international law. In some areas of foreign relations law today—like foreign sovereign immunity and prescriptive jurisdiction—one may think of an international law "core" and a comity "penumbra," while in other areas all of the rules are rules of comity alone. Finally, Part IV challenges two of the leading comity myths: (1) that comity must be governed by standards rather than rules; and (2) that comity determinations are best left to the executive branch. Part IV shows that international comity doctrines are frequently expressed as rules rather than standards, and that allowing courts to apply these doctrines without inference by the executive branch promotes not just the rule of law but also U.S. foreign relations.

I. A BRIEF HISTORY OF INTERNATIONAL COMITY

To understand the role of international comity in American law today, one must have some idea of where it came from and how it developed. American notions of comity find their origin in the writings of the

69. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (noting recognized foreign governments not at war with United States may bring suit in U.S. courts). Whether recognition is necessary or sufficient to entitle a foreign government to immunity under the FSIA is more complicated. See infra notes 372–374 and accompanying text (discussing executive recognition and immunity under FSIA).

70. See Bradley, supra note 66, at 691–94 (arguing for deference to extraterritorial interpretations by executive branch); Posner & Sunstein, supra note 33, at 1204 ("[I]n cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference under standard principles of administrative law, the executive's interpretations should prevail over the comity doctrines.").

seventeenth-century Dutch jurist Ulrich Huber, whose approach was adopted in turn by the influential English judge Lord Mansfield. In the United States, Joseph Story's treatise on the conflict of laws made comity the foundation for recognizing foreign laws and judgments, but U.S. courts also looked to international comity as the basis for foreign sovereign immunity, the act of state doctrine, and the privilege of foreign governments to bring suit in the United States. During the first half of the twentieth century, as international law moved away from a strictly territorial view of jurisdiction, comity began to play new roles, restraining the reach of U.S. laws and the jurisdiction of U.S. courts. With these new roles came new justifications for comity, specifically public interests in sovereignty and fostering friendly relations with other nations, which ultimately eclipsed comity's original rationale of commercial convenience serving private interests.

A. *From Huber to Mansfield*

The history of international comity begins with the seventeenth-century Dutch jurist Ulrich Huber.[71] After the Peace of Westphalia in 1648, the world was understood to be divided into separate and independent states whose territorial sovereignty was deemed to be exclusive and absolute.[72] In this era of territorial states, comity was a way to explain how rights acquired under the laws of one nation could have effect within the territory of another. Both territorial sovereignty and respect for foreign rights were of particular concern in the Netherlands, which had recently won independence from Spain but whose status as a trading nation created a pressing need to treat foreigners fairly.[73] Huber's *De Conflictu Legum* set forth three maxims to address the problem of foreign rights in a world of exclusive territorial sovereignty:

> (1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.
>
> (2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
>
> (3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force eve-

71. For more on Huber, see Ernest G. Lorenzen, Huber's *De Conflictu Legum*, 13 Ill. L. Rev. 375 (1919), reprinted in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws 136–62 (1947) (discussing Huber's views on the conflict of laws and their influence); Hessel E. Yntema, The Comity Doctrine, 65 Mich. L. Rev. 9, 24–32 (1966) (discussing Huber's conception of comity and comparing it to others').

72. See Leo Gross, The Peace of Westphalia, 1648–1948, 42 Am. J. Int'l L. 20, 28–29 (1948) (noting Peace of Westphalia established "new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority").

73. See Yntema, supra note 71, at 16–19 (discussing historical concerns of Netherlands following independence).

> rywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.[74]

Huber saw these maxims as part of the law of nations,[75] but there were important differences between Huber's first two maxims and his third. The first two stated the territorial view of sovereignty in the strongest terms and permitted no discretion on the part of the sovereign, which could not regulate extraterritorially even to promote its most compelling interests. Huber's third maxim was different in two ways. First, it did not state the strictly territorial view of sovereignty but rather tried to solve a problem that territoriality created. Huber wrote that "nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law."[76] Comity avoided that inconvenience. Second, Huber's final maxim expressly permitted discretion by the sovereign, which could deny the effect of foreign law to the extent necessary to protect itself and its subjects. The discretion not to recognize foreign rights was captured in the word "comity."[77]

Scottish lawyers brought Huber's ideas to Britain, where Lord Mansfield adopted them in his conflicts decisions.[78] In *Robinson v. Bland*, Mansfield wrote that "the general rule established ex comitate et jure gentium is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract."[79] In *Holman v. Johnson*, he added: "The doctrine Huberus lays down, is founded in good sense, and upon general principles of justice. I entirely agree with him."[80]

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74. Ulrich Huber, De Conflictu Legum Diversarum in Diversis Imperiis (Ernest G. Lorenzen trans. 1919) (1689), reprinted in Lorenzen, supra note 71, at 164 (citations omitted).

75. Id. ("[I]t is manifest that what the different nations observe among themselves belongs to the law of nations.").

76. Id. at 165.

77. Posner and Sunstein characterize the public policy exception to the recognition of foreign laws and judgments as an "anti-comity" doctrine because it "assert[s] American interests . . . at the expense of the interests of other countries." Posner & Sunstein, supra note 33, at 1182. In fact, the discretion not to defer to foreign government actors has been an inherent part of comity itself since the very beginning. See Huber, supra note 74, at 164 ("Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere *so far as they do not cause prejudice to the power or rights of such government or of its subjects*." (emphasis added)).

78. See D.J. Llewelyn Davies, The Influence of Huber's *De Conflictu Legum* on English Private International Law, 18 Brit. Y.B. Int'l L. 49, 52–55 (1937) (discussing reception of Huber's ideas in English law).

79. Robinson v. Bland (1760) 96 Eng. Rep. 141, 141; 1 Black W. 257, 258 (K.B.) (citing Huber).

80. Holman v. Johnson (1775) 98 Eng. Rep. 1120, 1121; 1 Cowp. 342, 344 (K.B.). Today, comity appears to play a smaller role in England than in America. As a leading English writer explained, "Dicey . . . was scornful of comity being used as a basis for taking decisions, and English private international law has never really gotten over it." Briggs,

B. *American Beginnings*

Comity came to America with the rest of English common law. Counsel cited Huber and courts relied on him. In 1797, Alexander Dallas even published a translation of Huber in the U.S. Reports.[81] Riding circuit two years later, Justice Washington invoked Huber for the proposition that "by the courtesy of nations, to be inferred from their tacit consent, the laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to the rights of such other government or its citizens."[82] Justice Story, also on circuit, wrote that Huber's doctrine "has become incorporated into the code of national law in all civilized countries."[83]

Story's 1834 treatise *Commentaries on the Conflict of Laws* cemented comity into the foundations of American conflicts law. Echoing Huber, Story began with three maxims: (1) "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory;"[84] (2) "that no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein;"[85] and (3) "that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."[86] After paraphrasing and defending Huber, Story endorsed comity as the basis for enforcing foreign law. The "'comity of nations,'" he wrote, "is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."[87] Like Huber, Story justified comity on the basis of "mutual convenience and utility."[88] Yet Story also thought that the territorial sovereign could trump other considerations and refuse to enforce foreign law: "No nation can . . . be required to sacrifice its own interests in favour of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscien-

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supra note 37, at 149; see also Collins, supra note 20, at 91–94 (recounting criticism of comity in England).

81. See Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 n.* (1797) (providing translation of Huber). The case, in which Dallas served as counsel, was dismissed on jurisdictional grounds, but Dallas apparently felt that his translation should not go to waste. Id.

82. Banks v. Greenleaf, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) (Washington, J.).

83. Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1063 (C.C.D.R.I. 1812) (No. 16,871) (Story, J.).

84. Story, supra note 54, § 18, at 25.

85. Id. § 20, at 26.

86. Id. § 23, at 30. Story's first maxim combines Huber's first two, Story's second maxim restates a part of Huber's first, and Story's third maxim tracks Huber's third. See supra note 74 and accompanying text (quoting Huber's maxims).

87. Story, supra note 54, § 38, at 41.

88. Id. § 30, at 36.

tious regard to justice and duty."[89] In England and America, this discretion was exercised in the first instance by courts but subject always to legislative control.[90] This comity, Story emphasized, was "not the comity of the courts, but the comity of the nation."[91]

During the nineteenth century, American courts invoked comity repeatedly as the basis for enforcing foreign laws—from those governing contracts,[92] to those respecting the ownership of personal property,[93] to those organizing corporations.[94] "It is needless to enumerate here," Chief Justice Taney wrote in *Bank of Augusta v. Earle*, "the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognised and executed in another, where the right of individuals are concerned."[95] Comity also gave the states of the Union some room—though in the end not enough—to manage the issue of slavery.[96] "By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions," Justice Story

89. Id. § 25, at 31. In a provocative book, Alan Watson argues that Story (and James Kent for that matter) misread Huber, who did not in fact intend to allow sovereigns unfettered discretion not to enforce foreign law. See Alan Watson, Joseph Story and the Comity of Errors 18–44 (1992). Watson goes on to argue that Huber's view would have required a different outcome in Somerset v. Stewart (1772) 98 Eng. Rep. 499; Lofft. 1 (K.B.), a famous decision in which Lord Mansfield refused to recognize foreign laws making someone a slave. Watson speculates that Mansfield "was deliberately ignoring Huber in order to reach his decision," Watson, supra, at 68, and that the attorneys for Somerset's owners must not have raised Huber since that would have forced Mansfield's hand, id. at 70. It seems more likely that Mansfield, Kent, and Story correctly read Huber to allow discretion not to enforce foreign law. In any event, that is certainly how the doctrine of comity developed in England and the United States.

90. See Story, supra note 54, § 23, at 30 ("When its own code speaks positively on the subject, it must be obeyed . . . .").

91. Id. § 38, at 42. For discussion of what Story meant by this distinction, see infra notes 213–214 and accompanying text.

92. See, e.g., Van Reimsdyk v. Kane, 28 F. Cas. 1062, 1064 (C.C.D.R.I. 1812) (No. 16,871) (Story, J.) ("The general rule is, that a discharge of a contract according to the lex loci contractus is good every where. The rule is founded upon public convenience, and the comity of nations.").

93. See, e.g., Holmes v. Remsen, 4 Johns. Ch. 460, 487 (N.Y. 1820) (Kent, J.) ("We are bound to give effect to the assignment [of personal property] . . . by the comity of nations.").

94. See, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 590 (1839) (recognizing foreign corporation "is but the usual comity of recognising the law of another state").

95. Id. at 589.

96. For an excellent discussion of comity and slavery, see Paul Finkelman, An Imperfect Union: Slavery, Federalism, and Comity 4 (1981) ("Such comity . . . was indispensable in a union of states, for if states refused to recognize and enforce each other's laws, interstate relations would collapse and the Union would founder.").

wrote in *Prigg v. Pennsylvania*.[97] "If it does it, it is as a matter of comity, and not as a matter of international right."[98]

Comity served not just as the basis for enforcing foreign laws in American courts, but also as the basis for recognizing foreign judgments,[99] most famously in *Hilton v. Guyot*.[100] Justice Gray began by restating the traditional rule of strictly territorial sovereignty: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."[101] Thus, the effect not just of an executive order or legislative act but also of a judicial decree "depends upon what our greatest jurists have been content to call 'the comity of nations.'"[102] Like Huber and Story, Gray noted the territorial sovereign's discretion not to enforce foreign law against its own interests. Comity was "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[103] Despite its slippery definition of comity,[104] *Hilton* articulated clear rules for the enforcement of foreign judgments in the United States:

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case

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97. 41 U.S. (16 Pet.) 539, 611 (1842).

98. Id. Scholars have differed over the importance of slavery in shaping Story's views of comity. Compare Paul, Comity in International Law, supra note 17, at 20 ("Story's intention in formalizing the doctrine was to enshrine comity as a mediating principle between free and slave states and thereby save the republic."), with Watson, supra note 89, at 40 (finding no evidence "slavery was in the forefront of Story's mind on this matter").

99. See Huber, supra note 74, at 168 (stating comity "applies equally to the subject of res judicata"); see also id. at 165 ("[A]ll transactions and acts, in court as well as out, . . . rightly done according to the law of any particular place, are valid even where a different law prevails."). While Story found "much diversity of practice as well as of opinion among jurists and nations," Story, supra note 54, § 584, at 847, he also cited comity as the basis for enforcing foreign judgments. See id. § 598, at 857 ("[A sovereign] acts in executing [a foreign judgment] upon the principles of comity.").

100. See 159 U.S. 113, 163 (1895) (noting enforcement of "judicial decree . . . depends upon what our greatest jurists have been content to call 'the comity of nations'"); see also Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 437 (1808) (noting "spirit of comity" lies behind enforcement of foreign judgments).

101. *Hilton*, 159 U.S. at 163.

102. Id.

103. Id. at 163–64.

104. See supra notes 26–31 and accompanying text (discussing *Hilton*'s definition of comity).

> should not, in an action brought in this country upon the judgment, be tried afresh . . . .[105]

These rules were generally followed by state courts, and have been codified in two uniform state acts that govern the enforcement of most foreign judgments in the United States today.[106]

While comity was the basis for enforcing foreign laws and judgments in American courts during the nineteenth century, it also served to restrain the exercise of jurisdiction over foreign sovereigns. In *The Schooner Exchange v. McFaddon*, Chief Justice Marshall held that a French warship was immune from suit by its former owners to recover it.[107] *The Schooner Exchange* is sometimes read as applying international law, but Marshall treated the international rules governing immunity as defeasible by the United States.[108] "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute," Marshall wrote.[109] Thus, any immunity of a foreign sovereign in the courts of the United States "must be traced up to the consent of the nation itself."[110] For "mutual benefit,"[111] all nations had consented to treat the foreign sovereign himself, his foreign min-

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105. *Hilton*, 159 U.S. at 202–03. The Court refused to enforce the judgment in *Hilton* on reciprocity grounds, because France would not enforce U.S. judgments. Id. at 227 ("[J]udgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country . . . ."). On the same day, the Court held that a Canadian judgment was entitled to enforcement because Canada gave full effect to U.S. judgments. See Ritchie v. McMullen, 159 U.S. 235, 242 (1895) ("By the law of England, prevailing in Canada, a judgment rendered by an American court under like circumstances would be allowed full and conclusive effect.").

106. Unif. Foreign-Country Money Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 2005) [hereinafter 2005 Uniform Act]; Unif. Foreign Money-Judgments Recognition Act (Nat'l Conference of Comm'rs on Unif. State Laws 1962) [hereinafter 1962 Uniform Act].

107. See 11 U.S. (7 Cranch) 116, 147 (1812) (Marshall, C.J.) ("[T]he Exchange, being a public armed ship, in the service of a foreign sovereign, . . . should be exempt from the jurisdiction of the country.").

108. The law of nations at the time was said to consist of four categories: (1) the necessary; (2) the voluntary; (3) the customary; and (4) the conventional. See Sarah H. Cleveland & William S. Dodge, Defining and Punishing Offenses Under Treaties, 124 Yale L.J. 2202, 2212 (2015) (discussing early American understanding of law of nations). Nations were bound by the voluntary law of nations but were free to withdraw from the customary law of nations by giving proper notice. See Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, 120 Yale L.J. 202, 215–23 (2010) (discussing distinction between voluntary and customary law of nations). Whether or not rules of foreign sovereign immunity properly fell into the defeasible category, Marshall's opinion in *The Schooner Exchange* certainly treated them that way. See William S. Dodge, Withdrawing from Customary International Law: Some Lessons from History, 120 Yale L.J. Online 169, 188 (2010), http://www.yalelawjournal.org/forum/withdrawing-from-customary-international-law-some-lessons-from-history (on file with the *Columbia Law Review*) ("*The Schooner Exchange v. McFaddon* treated foreign sovereign immunity as part of the customary law.").

109. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136.

110. Id.

111. Id.

ister, and his military forces as immune from arrest or detention within their territories.[112] But Marshall emphasized that the territorial sovereign was "capable of destroying this implication" and of "subjecting such vessels to the ordinary tribunals."[113]

Marshall's treatment of foreign sovereign immunity bears a striking resemblance to Huber and Story's descriptions of comity. Each began with the assumption that sovereignty was strictly territorial, each made exceptions based on "mutual benefit," and each maintained the discretion of the territorial sovereign to deny such exceptions if it so chose. Although Chief Justice Marshall did not use the word "comity," Justice Story, who joined the opinion in *The Schooner Exchange*, would write just a decade later that the doctrine expounded in that case "stands upon principles of public comity and convenience."[114] In more recent times, the Supreme Court has consistently characterized foreign sovereign immunity as "a matter of grace and comity on the part of the United States."[115]

Beginning in the nineteenth century, comity was also invoked to allow a foreign sovereign to bring suit in U.S. courts. "To deny him this privilege," the Supreme Court said in *The Sapphire*, "would manifest a want of comity and friendly feeling."[116] An earlier case allowing the Spanish King to bring suit had rested not on comity but on the reference in Article III of the Constitution to controversies involving foreign states.[117] But by grounding the privilege in comity, the Court preserved the discretion of the United States to deny it, at least to foreign states that are at war with the United States or not recognized by it.[118]

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112. See id. at 137–46 (discussing immunity of the sovereign, foreign ministers, and foreign troops).

113. Id. at 146.

114. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822).

115. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983); see also infra note 275 (collecting cases treating sovereign immunity as comity). Modern customary international law requires sovereign immunity in some cases, although the exact contours of the customary international law rules are uncertain. See Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 77 (Feb. 3) (finding international law required immunity for *acta jure imperii* committed by armed forces during armed conflict). For a discussion of the relationship between customary international law and comity with respect to immunity today, see infra notes 300–301 and accompanying text.

116. 78 U.S. (11 Wall.) 164, 167 (1870).

117. See King of Spain v. Oliver, 14 F. Cas. 577, 579 (C.C.D. Pa. 1810) (No. 7814) (Washington, J.) ("[I]t is sufficient to observe, that the constitution of the United States gives jurisdiction to the courts of the United States, in cases where foreign states are parties . . . .").

118. See Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 319–20 (1978) ("It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 409 (1964) (noting privilege of bringing suit had been denied "only to governments at war with the United States . . . or to those not recognized by this country").

The act of state doctrine is another manifestation of international comity in American law.[119] In *Oetjen v. Central Leather Co.*, the Supreme Court said that the doctrine "rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"[120] Later cases have emphasized separation of powers as the basis for the act of state doctrine.[121] But this separation of powers rationale ultimately rests on comity, for it reflects "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[122]

C. *New Roles*

In most of the preceding examples, American courts used comity to address problems created by a strictly territorial view of sovereignty—how to explain the enforcement of a foreign law or judgment outside the foreign state's territory, or the decision not to exercise jurisdiction over a foreign sovereign inside the United States' territory. As this territorial view of sovereignty weakened, however, comity came to play new roles in American law. In *American Banana Co. v. United Fruit Co.*, the Supreme Court had to decide whether the Sherman Act reached anticompetitive conduct in another country.[123] In the past, it would have answered that question by relying on rules of international law.[124] But international

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119. The doctrine provides that American courts will not question the validity of a foreign act of state fully performed within the state's own territory. See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990) (noting act of state doctrine bars U.S. courts from "declar[ing] invalid the official act of a foreign sovereign performed within its own territory").

120. 246 U.S. 297, 303–04 (1918).

121. See *Sabbatino*, 376 U.S. at 423 ("The act of state doctrine . . . arises out of the basic relationships between branches of government in a system of separation of powers."); see also *Kirkpatrick*, 493 U.S. at 404 (noting evolution in "jurisprudential foundation for the act of state doctrine" from comity to separation of powers). But see First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (plurality opinion) (Rehnquist, J.) ("The act of state doctrine, like the doctrine of immunity for foreign sovereigns, has its roots, not in the Constitution, but in the notion of comity between independent sovereigns.").

122. *Sabbatino*, 376 U.S. at 423. Lower courts have continued to rely on comity to enforce foreign acts of state not covered by the doctrine because they were not fully performed within the foreign state's own territory. See, e.g., Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 519 (2d Cir. 1985) (noting "principles of comity" would require recognition of extraterritorial acts of state if consistent with U.S. policy).

123. 213 U.S. 347, 355–58 (1909).

124. See, e.g., The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); see also John H. Knox, A Presumption Against Extrajurisdictionality, 104 Am. J.

law's strictly territorial view of jurisdiction had faded by 1909,[125] and so Justice Holmes adopted a territorial approach using comity instead:

> For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.[126]

Despite *American Banana*, U.S. courts soon began to apply U.S. antitrust law extraterritorially on the basis of effects.[127] Starting in the 1970s, some turned to comity—now expressed as a weighing of contacts and interests—as a way of limiting the Sherman Act's reach.[128] The question, the Ninth Circuit wrote in *Timberlane*, was "whether American authority *should* be asserted in a given case as a matter of international comity and fairness."[129] Section 403 of the Restatement (Third) of Foreign Relations Law adopted *Timberlane*'s interest balancing approach.[130] But when the

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Int'l L. 351, 352 (2010) ("For most of U.S. history, the Supreme Court determined the reach of federal statutes in the light of international law—specifically, the international law of legislative jurisdiction.").

125. See 1 L. Oppenheim, International Law: A Treatise § 147, at 196 (1905) ("Many States claim jurisdiction and threaten punishments for certain acts committed by a foreigner in foreign countries."); John B. Moore, Report on Extraterritorial Crime (1887), reprinted in 2 John Bassett Moore, A Digest of International Law § 202, at 244 (1906) ("The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries.").

126. *American Banana*, 213 U.S. at 356. The Supreme Court expressly invoked comity in later cases to limit the geographic scope of the Federal Employers' Liability Act and the Jones Act. See Lauritzen v. Larsen, 345 U.S. 571, 582 (1953) (citing "considerations of comity" in construing Jones Act); N.Y. Cent. R.R. v. Chisholm, 268 U.S. 29, 32 (1925) (referring to "'comity of nations'" while interpreting Federal Employers' Liability Act (quoting *American Banana*, 213 U.S. at 356)).

127. See, e.g., United States v. Sisal Sales Corp., 274 U.S. 268, 276 (1927) (applying U.S. antitrust law to "contract, combination and conspiracy intended to restrain trade in those articles and to increase the market price within the United States"); United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945) (Hand, J.) (holding agreements in restraint of trade "were unlawful, though made abroad, if they were intended to affect imports and did affect them").

128. See, e.g., Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979) (listing "factors" to determine extraterritorial jurisdiction); Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614 (9th Cir. 1976) (listing "elements to be weighed" to determine extraterritoriality).

129. 549 F.2d at 613.

130. Restatement (Third) of the Foreign Relations Law of the United States § 403 (Am. Law Inst. 1987) (listing factors to determine if exercise of prescriptive jurisdiction is unreasonable); see also id. § 403 reporters' note 2 (citing *Timberlane*). The Restatement departed from *Timberlane* by conceptualizing this balancing of interests not as "a requirement of comity" but "a rule of international law." Id. § 403 cmt. a. For a critique, see David B. Massey, Note, How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law, 22 Yale J. Int'l L. 419, 428–34 (1997) (arguing section 403 does not reflect customary international law).

geographic scope of the Sherman Act again reached the Supreme Court in *Hartford Fire Insurance Co. v. California*, the Court refused to consider dismissal on grounds of "international comity" unless the conduct prohibited by U.S. law was required by foreign law.[131] This provoked a strong dissent from Justice Scalia, who thought the case should have been dismissed on the basis of "'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws."[132] Although *Hartford* was considered "a near death blow" for comity,[133] just a decade later the Court looked to "principles of prescriptive comity" to limit the extraterritorial reach of American antitrust law in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*[134]

Developments in the area of adjudicative jurisdiction mirrored those in the area of prescriptive jurisdiction as America moved from the nineteenth century to the twentieth. The Supreme Court had applied a strictly territorial approach to personal jurisdiction in *Pennoyer v. Neff*.[135] But in the first half of the twentieth century, this territorial approach gave way to the more flexible framework of *International Shoe Co. v. Washington*, which required only "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[136] The expansion of personal jurisdiction created more opportunities for parallel proceedings, which American courts developed new tools to manage, like the doctrine of forum non conven-

131. See 509 U.S. 764, 799 (1993) (concluding if defendants could comply with both U.S. and foreign law, there was no need "to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity").

132. Id. at 817 (Scalia, J., dissenting).

133. Spencer Weber Waller, The Twilight of Comity, 38 Colum. J. Transnat'l L. 563, 564 (2000); see also Edward T. Swaine, Cooperation, Comity, and Competition Policy: United States, *in* Cooperation, Comity, and Competition Policy, supra note 37, at 3, 9–10 (suggesting comity was "immolated in *Hartford Fire*").

134. 542 U.S. 155, 165, 169 (2004). Although *Empagran* adopted Justice Scalia's notion of prescriptive comity, its approach was quite different from his *Hartford* dissent. *Empagran* rejected comity as a case-by-case balancing approach, which it said was "too complex to prove workable," and instead looked to comity as the basis for more categorical rules about when antitrust law applies abroad. Id. at 168. The following Term, a plurality of the Court again invoked "international comity" as the basis for limiting application of the Americans with Disabilities Act to matters affecting the internal affairs of foreign-flag ships. Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130 (2005) (plurality opinion) (Kennedy, J.). Although Justice Scalia argued for a balancing of interests in *Hartford*, 509 U.S. at 818–19 (Scalia, J., dissenting), he retreated in *Spector* to a more characteristic preference for categorical rules. See *Spector*, 545 U.S. at 158 (Scalia, J., dissenting) ("The fine tuning of legislation that the plurality requires would be better left to Congress. To attempt it through the process of case-by-case adjudication is a recipe for endless litigation and confusion.").

135. 95 U.S. 714, 722 (1877) (holding no state "can extend its process beyond that territory so as to subject either persons or property to its decisions").

136. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

iens[137] and (more questionably) the doctrines of prudential exhaustion[138] and international comity abstention,[139] each of which allows a district court to stay or dismiss a case over which it has personal jurisdiction.[140] U.S. courts have also looked to comity when considering whether to enjoin parallel proceedings in a foreign court.[141] Recently, the Supreme Court has relied on "international comity" to reinforce limits on personal jurisdiction under the Due Process Clause itself.[142] And finally, even when a U.S. court takes jurisdiction, comity has been deemed relevant to how that jurisdiction is exercised with respect to matters such as the discovery of evidence abroad under the Hague Evidence Convention.[143]

D. *New Justifications*

The changing role of international comity—attributable to international law's movement away from strict territoriality—led in turn to a shift in the justifications for comity. Until the turn of the twentieth century, a private rationale for comity predominated, most often expressed as commercial convenience. With the increased use of comity as a principle of restraint, however, more public rationales like respect for foreign sovereignty and the fostering of friendly relations took over.[144] The original

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137. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–12 (1947) (recognizing authority of district court to dismiss on grounds of forum non conveniens).

138. See Sarei v. Rio Tinto, PLC, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion) (McKeown, J.) ("[I]n ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion . . . .").

139. See, e.g., Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 92 (2d Cir. 2006) (applying "doctrine of international comity abstention").

140. For further discussion, see infra notes 228–258 and accompanying text (discussing adjudicative comity as principle of restraint).

141. See, e.g., China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 37 (2d Cir. 1987) (concluding factors favoring antisuit injunction "are not sufficient to overcome the restraint and caution required by international comity").

142. See Daimler AG v. Bauman, 134 S. Ct. 746, 763 (2014) ("[I]nternational comity . . . reinforce[s] our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands." (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945))).

143. See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543 (1987) (noting "concept of international comity" requires "particularized analysis" of discovery requests). Congress has also authorized federal courts to assist foreign and international tribunals with respect to the discovery of evidence located in the United States. See 28 U.S.C. § 1782(a) (2012) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . ."). The Supreme Court has noted that "comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases." Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 261 (2004).

144. But see Joel R. Paul, The Transformation of International Comity, Law & Contemp. Probs., Summer 2008, at 19, 20 ("Whereas once courts justified applying foreign law out of deference to foreign sovereigns, courts later justified their decisions out of deference to the autonomy of private parties or to the political branches.").

reason for international comity was commercial convenience. Huber wrote that "nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law."[145] Public interests found expression only as a justification for *not* extending comity to foreign laws, because under Huber's third maxim, one nation would enforce the laws of another only insofar "as they do not cause prejudice to the power or rights of such government or of its subjects."[146]

American courts in the nineteenth century tended to follow Huber in this regard. They consistently cited "mutual convenience" as the basis for extending comity to foreign laws, subject to the proviso that "they do not produce injury to the rights of [the] government or its citizens."[147] Justice Story wrote in his treatise that "this comity of nations" was "founded upon the notion of mutual convenience and utility."[148] The justification for extending comity to foreign judgments was the same.[149] Strikingly, the convenience rationale was adapted even to the seemly public doctrine of foreign sovereign immunity, which, the Court noted, "stands upon principles of public comity and convenience."[150] To be sure, the convenience rationale for comity was not exclusive in the nineteenth century. In *Bank of Augusta v. Earle*, Chief Justice Taney declared that comity helped not just "to promote justice between individuals" but also "to produce a friendly intercourse between the sovereignties to which they belong."[151] But such references to the public interest in fostering friendly relations were rare during the nineteenth century, when the dominant rationale for comity was convenience, mostly conceived in terms of private interests.

Public interests began to play a larger role around the turn of the twentieth century. It was easy to justify comity as a principle of recognition on grounds of convenience because both parties to a contract had an interest in having it be enforceable and, by extension, in the enforce-

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145. Huber, supra note 74, at 165.

146. Id. at 164.

147. Banks v. Greenleaf, 2 F. Cas. 756, 757 (C.C.D. Va. 1799) (No. 959) (Washington, J.); see also Holmes v. Remsen, 4 Johns. Ch. 460, 472 (N.Y. 1820) (Kent, J.) (noting recognition of foreign law "is founded on the mutual respect, comity and convenience of commercial nations"); Blanchard v. Russell, 13 Mass. (13 Tyng) 1, 4 (1816) (Parker, C.J.) (noting "courtesy, comity, or mutual convenience of nations, amongst which commerce has introduced so great an intercourse, has sanctioned the admission and operation of foreign laws relative to contracts").

148. Story, supra note 54, § 30, at 36.

149. Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 437 (1808) ("[P]ublic convenience seems to require that a question, which has once been fairly decided, should not be again litigated between the same parties . . . .").

150. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822).

151. 38 U.S. (13 Pet.) 519, 589 (1839); see also The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870) (allowing foreign sovereign to bring suit in U.S. courts because "[t]o deny him this privilege would manifest a want of comity and friendly feeling").

ability of judgments based on the contract. But comity as a principle of restraint was more difficult to explain in convenience terms. Exemption from extraterritorial legislation or adjudicative jurisdiction might be convenient for the defendant, but hardly so for the plaintiff. Respect for foreign sovereignty seemed a more natural fit. Thus, Justice Holmes in *American Banana* explained that to apply the Sherman Act extraterritorially "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[152] Since the start of the twentieth century, American courts have invoked the public interest rationale for comity in other areas of law too. In *Oetjen v. Central Leather Co.*, the Supreme Court said that the act of state doctrine rests "upon the highest considerations of international comity and expediency" and that to question the validity of a foreign act of state "would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'"[153] In sovereign party cases too, the interest in preserving relations with other nations and respecting foreign sovereignty came to the fore.[154] The exception to this trend has been adjudicative jurisdiction, where courts seem to have moved away from respect for sovereignty[155] towards greater consideration of private interests.[156]

The shift from private to public rationales for comity—from convenience to sovereignty—had a number of consequences. First, it bolstered the use of comity as a principle of restraint. Commercial convenience could explain why a foreign contract or judgment should be enforced, but it did not explain why a nation should restrict its prescriptive or adju-

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152. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909); see also F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (relying on prescriptive comity "to avoid unreasonable interference with the sovereign authority of other nations"); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (defining prescriptive comity as "respect sovereign nations afford each other by limiting the reach of their laws").

153. 246 U.S. 297, 303–04 (1918).

154. See Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) (noting foreign sovereign immunity "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964) ("Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States . . . .").

155. See, e.g., Pennoyer v. Neff, 95 U.S. 714, 722 (1877) (observing because "[t]he several States are of equal dignity and authority, . . . the laws of one State have no operation outside of its territory, except so far as is allowed by comity").

156. See, e.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947) (holding forum non conveniens requires consideration of "private interest of the litigant" as well as "[f]actors of public interest"); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (adopting due process standard of "fair play and substantial justice"). The author is grateful to Mary Kay Kane for this point.

dicative jurisdiction. As noted above,[157] the notion that another nation might have an interest in seeing a particular dispute resolved under its law or in its courts, which American courts should respect out of comity, seemed a better fit for judges seeking to justify restraint.

Second, the shift from private to public obscured the basis in comity of certain doctrines that protect private interests, like forum non conveniens. For example, *Quackenbush v. Allstate Insurance Co.* distinguished *Burford* abstention from forum non conveniens on the ground that abstention was concerned with "comity and federalism," principles involving "deference to the paramount interests of another sovereign," whereas the doctrine of forum non conveniens reflected a broader range of considerations, "most notably the convenience to the parties."[158] Historically, comity had a great deal to do with the convenience of the parties. But once comity came to be seen exclusively in terms of "deference to the paramount interests of another sovereign,"[159] doctrines that considered private interests were excluded almost by definition.

Finally, the increasing reliance on maintaining friendly relations with foreign governments as a justification opened the door to arguments for increased deference to the executive branch on questions of international comity. Posner and Sunstein have argued that, because comity doctrines are designed "to reduce tensions between the United States and other nations,"[160] the Executive is in the best position to determine how they should apply. This is one of the international comity myths that Part IV will challenge.

International comity has performed a variety of functions in American law. It has served as the basis for recognizing foreign laws, foreign judgments, and the privilege of foreign governments to bring suit in U.S. court. It has also served as the basis for restraining the application of American law, the jurisdiction of American courts, and, more specifically, the jurisdiction of American courts over foreign governments. International law's move away from strict territorial sovereignty in the early twentieth century strongly influenced the evolution of international comity in American courts. This not only led American courts to use comity in new ways but also shifted the dominant rationale for comity from private interests in convenience to public interests in sovereignty and fostering friendly relations. Having briefly surveyed the historical development of international comity, this Article now looks in greater detail at the uses of international comity in American law today.

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157. See supra note 152 and accompanying text (explaining restraint was difficult to justify on basis of convenience).

158. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996).

159. Id.

160. Posner & Sunstein, supra note 33, at 1173.

II. THE FACES OF COMITY

As noted in the introduction, many doctrines of American law manifest the principle of international comity. If international comity is deference to foreign government actors, then one may begin by dividing the comity doctrines into three categories based on the actors to whom deference is given: deference to foreign lawmakers is "prescriptive comity"; deference to foreign courts is "adjudicative comity"; and deference to foreign governments as litigants is "sovereign party comity." Within each of these categories, one must further distinguish based upon the function of the doctrine. Does it operate as a "principle of recognition" to recognize foreign law, foreign courts, and foreign sovereigns as litigants? Or does it operate as a "principle of restraint" to limit the reach of American law, the jurisdiction of American courts, and, more specifically, the jurisdiction of American courts over foreign sovereign defendants?

A. *Prescriptive Comity*

Justice Scalia coined the phrase "prescriptive comity" in his *Hartford* dissent, defining it as "the respect sovereign nations afford each other by limiting the reach of their laws."[161] The Supreme Court's decision in *Empagran* employed "prescriptive comity" in the same sense, as a means "to avoid unreasonable interference with the sovereign authority of other nations."[162] As noted above, the Court first used international comity this way in *American Banana Co. v. United Fruit Co.*[163] to limit the extraterritorial application of the Sherman Act. For a country to treat a defendant "according to its own notions rather than those of the place where he did the acts," Justice Holmes wrote, "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."[164]

The label "prescriptive comity" also fits Huber's and Story's conception of comity as the recognition of foreign law.[165] The word "prescriptive" refers to "jurisdiction to prescribe"—that is, "to make [a state's] law applicable to the activities, relations, or status of persons, or the interests

161. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting).

162. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004); see also Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130 (2005) (plurality opinion) (Kennedy, J.) (referring to "international comity" to limit interference with internal affairs of foreign-flag ship); Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004) (Breyer, J., concurring in part and concurring in the judgment) (referring to "notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement").

163. 213 U.S. 347 (1909).

164. Id. at 356.

165. See supra notes 74–91 and accompanying text (discussing Huber and Story).

of persons in things."[166] When one nation applies the laws of another in its courts, it recognizes that the other nation has jurisdiction to prescribe rules for the transaction or event. If that recognition occurs as a matter of comity, as has traditionally been the case with the conflict of laws in the United States, it may properly be deemed an exercise of "prescriptive comity."

Some writers have preferred "legislative comity,"[167] but that phrase could describe either comity *to* legislatures or comity *by* legislatures. Prescriptive comity is comity *to lawmakers*—often legislatures, but sometimes courts or executive branch officials.[168] Furthermore, prescriptive comity is exercised *by courts*. It is true that courts sometimes justify the extension of comity through assumptions about what the legislature would want.[169] It is also true that legislatures sometimes speak directly to the recognition of foreign law[170] or the extraterritorial reach of domestic law.[171] But it is ultimately courts that interpret and apply these rules, sometimes relying on background principles of "prescriptive comity" to do so.[172]

1. *As a Principle of Recognition.* — As a principle of recognition, prescriptive comity operates in American law today through state-law rules on the conflict of laws, the federal act of state doctrine, and the practice of some courts to recognize extraterritorial acts of state on the basis of comity. States in the United States have adopted a variety of methodologies for choosing the law to apply in a case that touches more than one

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166. Restatement (Third) of the Foreign Relations Law of the United States § 401(a) (Am. Law Inst. 1987). Jurisdiction to prescribe is distinct from jurisdiction to adjudicate. See id. § 401(b) (defining jurisdiction to adjudicate as jurisdiction "to subject persons or things to the process of its courts or administrative tribunals"). Jurisdiction to prescribe is also distinct from jurisdiction to enforce. See id. § 401(c) (defining jurisdiction to enforce as jurisdiction "to induce or compel compliance or to punish noncompliance with its laws or regulations").

167. See Ramsey, supra note 19, at 906–37 (referring to "legislative comity").

168. See Restatement (Third) of the Foreign Relations Law of the United States § 401(a) (noting prescriptive jurisdiction may be exercised "by legislation, by executive act or order, by administrative rule or regulation, or by determination of a court").

169. See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) ("'[P]rescriptive comity' . . . is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted."); Story, supra note 54, § 38, at 42 ("In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests.").

170. See, e.g., Or. Rev. Stat. §§ 15.300–.380 (2013) (codifying choice of law for contracts); id. §§ 15.400–.460 (codifying choice of law for torts and other noncontractual claims).

171. See, e.g., Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. §§ 6a, 45(a)(3) (2012) (limiting geographic scope of Sherman Act and Federal Trade Commission Act).

172. See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (relying on prescriptive comity to interpret geographic scope of Sherman Act in light of FTAIA).

jurisdiction.[173] In a few states, conflicts rules are codified by statute,[174] but in most they are judge-made common law. American courts generally apply the same choice-of-law rules in interstate and international cases.[175] In deciding conflicts cases today, U.S. courts rarely invoke comity directly. Instead, they simply apply the choice-of-law rules of the state in which they sit.[176] But the origin of these rules in comity is clearly seen in the widespread adoption of a public policy exception.[177] This exception is a direct descendant of Huber's third maxim that a government should enforce foreign laws "so far as they do not cause prejudice to the power or rights of such government or of its subjects."[178]

The act of state doctrine provides another example of prescriptive comity operating as a principle of recognition. The doctrine is a rule of federal common law under which both federal and state courts must not question the validity of a foreign sovereign's official act fully performed within its own territory.[179] In an early case, the Supreme Court characterized the doctrine as resting on "the highest considerations of international comity and expediency."[180] In contrast to state-law rules on the conflict of laws, the act of state doctrine has no public policy exception. A U.S. court must recognize as valid a foreign act to which the doctrine applies, "[h]owever offensive to the public policy of this country and its constituent States [the act] may be."[181] This aspect of the doctrine has perhaps obscured its foundation in comity. In modern cases, the Supreme

173. See Symeon C. Symeonides, Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey, 62 Am. J. Comp. L. 223, 282 (2014) (summarizing choice-of-law methodologies).

174. See, e.g., Or. Rev. Stat. §§ 15.300–.380 (codifying choice of law for contracts); id. §§ 15.400–.460 (codifying choice of law for torts and other noncontractual claims).

175. Restatement (Second) of Conflicts of Laws § 10 (Am. Law Inst. 1971) ("The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations.").

176. See, e.g., Pounders v. Enserch E & C, Inc., 306 P.3d 9, 11–17 (Ariz. 2013) (applying Arizona choice-of-law rules to determine New Mexico law governed tort action). Federal courts exercising diversity jurisdiction apply the conflicts rules of the state in which they sit. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.").

177. Restatement (Second) of Conflicts of Laws § 90 ("No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum.").

178. Huber, supra note 74, at 164; see also Story, supra note 54, § 25, at 31 ("No nation can . . . be required to sacrifice its own interests in favour of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety and happiness, or conscientious regard to justice and duty.").

179. See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("The act of state doctrine . . . requires that, in the process of deciding [cases], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

180. Oetjen v. Cent. Leather Co., 246 U.S. 297, 303–04 (1918).

181. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436–37 (1964).

Court has said that the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers."[182] One might characterize the act of state doctrine as one that rests in part on a basis other than comity.[183] But in fact, the separation-of-powers rationale for the act of state doctrine has international comity at its heart, for it rests on the perceived need for respect to foreign governments.[184] Both by function and by rationale, therefore, the act of state doctrine is properly considered a manifestation of international comity.[185]

In summary, prescriptive comity operates as a principle of recognition in American law through state conflicts rules and the federal act of state doctrine. Both doctrines defer to foreign lawmakers by recognizing their authority to prescribe rules to govern a case before a U.S. court.

2. *As a Principle of Restraint.* — Prescriptive comity operates as a principle of restraint in American law today mainly through the presumption against extraterritoriality. As noted above, the modern presumption against extraterritoriality rests on two rationales: (1) "[i]t serves to protect against unintended clashes between our laws and those of other nations which could result in international discord;"[186] and (2) it reflects the assumption that Congress is "'primarily concerned with domestic conditions.'"[187] Only the first rationale reflects international comity. As previously noted, Justice Holmes turned to international comity to support the presumption against extraterritoriality in *American Banana*, reasoning that application of U.S. law to foreign conduct "would be an interference with the authority of another sovereign, contrary to the com-

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182. Id. at 423; see also *Kirkpatrick*, 493 U.S. at 404 (noting evolution in "jurisprudential foundation for the act of state doctrine" from comity to separation of powers).

183. See supra note 45 and accompanying text (describing additional rationale for presumption against extraterritoriality).

184. See *Sabbatino*, 376 U.S. at 423 ("[The act of state doctrine] expresses the strong sense of the Judicial Branch that . . . passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals . . . in the international sphere.").

185. The Second Circuit has looked to "principles of comity" to determine whether to recognize foreign acts of state having extraterritorial effect. Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 519 (2d Cir. 1985). It has held that "[a]cts of foreign governments purporting to have extraterritorial effect—and consequently, by definition, falling outside the scope of the act of state doctrine—should be recognized by the courts only if they are consistent with the law and policy of the United States." Id. at 522; see also Banco Nacional de Cuba v. Chem. Bank N.Y. Tr. Co., 658 F.2d 903, 908 (2d Cir. 1981) ("[W]hen enforcement has promised to further, rather than violate, the policy aims of the United States, our courts have given extraterritorial effect to foreign expropriations."); Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 51 (2d Cir. 1965) ("[W]hen property confiscated is within the United States at the time of the attempted confiscation, our courts will give effect to acts of state 'only if they are consistent with the policy and law of the United States.'" (quoting Restatement of the Foreign Relations Law of the United States § 46 (Am. Law Inst. Proposed Official Draft 1962))).

186. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20–22 (1963)).

187. Id. (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

ity of nations, which the other state concerned justly might resent."[188] The second rationale—that Congress is primarily concerned with domestic conditions—first appeared in the Supreme Court's 1949 decision in *Foley Brothers* as a reasonable assumption about the focus of congressional concern in most cases.[189] In recent cases, the "domestic conditions" rationale has predominated,[190] but the Court leaned heavily on comity in *Kiobel v. Royal Dutch Petroleum Co.* to limit the federal-common-law cause of action for human rights violations under the Alien Tort Statute (ATS), emphasizing that the "presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'"[191]

U.S. courts have sometimes used other tools to restrain the reach of U.S. statutes. In *Empagran*, the Supreme Court invoked not the presumption against extraterritoriality but a principle of "construi[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,"[192] which Justice Breyer characterized as a "principle of prescriptive comity."[193] Lower courts have sometimes engaged in a case-by-case balancing of interests under section 403 of the Restatement (Third) of Foreign Relations Law. Although the Third Restatement took the position that such interest balancing was required by customary international law,[194] lower courts adopting section 403 have generally characterized it as an exercise of comity.[195] But the Supreme Court has spe-

188. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909). Prior to *American Banana*, the presumption against extraterritoriality was thought to rest on international law, and was simply an application of the *Charming Betsy* canon. See Knox, supra note 124, at 362–66 (describing origins of presumption against extraterritoriality).

189. See 336 U.S. at 285 ("[The presumption] is a valid approach whereby unexpressed congressional intent may be ascertained. It is based on the assumption that Congress is primarily concerned with domestic conditions."); see also William S. Dodge, Understanding the Presumption Against Extraterritoriality, 16 Berkeley J. Int'l L. 85, 117–19 (1998) (discussing "domestic conditions" rationale).

190. In particular, the Court has made clear that the "presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law." Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2877–78 (2010); see also Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 174 (1993) (noting "presumption has a foundation broader than the desire to avoid conflict with the laws of other nations"); Smith v. United States, 507 U.S. 197, 204 n.5 (1993) (rejecting argument presumption does not apply where there is no risk of conflict with foreign law).

191. 133 S. Ct. 1659, 1664 (2013) (quoting *Arabian Am. Oil Co.*, 499 U.S. at 248).

192. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

193. Id. at 164, 165, 169.

194. See Restatement (Third) of the Foreign Relations Law of the United States § 403 cmt. a (Am. Law Inst. 1987) ("This section states the principle of reasonableness as a rule of international law."). But see Massey, supra note 130, at 428–34 (arguing section 403 does not reflect customary international law).

195. See, e.g., In re French, 440 F.3d 145, 153 (4th Cir. 2006) ("Applying [section 403] factors, we can only conclude that the doctrine of international comity does not require that we forego application of the United States Bankruptcy Code in favor of Bahamian bankruptcy law."); United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997)

cifically rejected a case-by-case approach to extraterritoriality.[196] Going forward, it seems likely that prescriptive comity will continue to operate as a principle of restraint in American law, but primarily through the presumption against extraterritoriality, which the Supreme Court in *Morrison* instructed lower courts to apply "in all cases."[197]

Occasionally, conduct prohibited by U.S. law may be required by foreign law, in which case compliance with U.S. law may be excused under the doctrine of foreign state compulsion.[198] In *Hartford Fire Insurance Co. v. California*, the Supreme Court acknowledged the possibility of declining jurisdiction "under the principle of international comity" if the conduct prohibited by U.S. antitrust law were required by the law of another nation, although the Court found no such conflict in *Hartford*.[199] Lower courts applying the doctrine of foreign state compulsion in antitrust cases have noted its basis in comity.[200] Lower courts have also required a comity analysis before ordering compliance with an injunction that would require violating foreign law.[201] Sometimes, Congress itself writes a foreign state compulsion defense into the text of a statute. In 1991, for example, Congress created an exception to Title VII of the 1964 Civil Rights Act for "a workplace in a foreign country if compliance with [Title VII]

("[T]o the extent that comity is informed by general principles of reasonableness, *see* Restatement (Third) of the Foreign Relations Law of the United States § 403, the indictment lodged against NPI is well within the pale."); In re Maxwell Commc'n Corp., 93 F.3d 1036, 1046–53 (2d Cir. 1996) (applying section 403 factors under heading of "international comity").

196. See *Empagran*, 542 U.S. at 168 ("[T]his approach is too complex to prove workable."). Justice Scalia has also retreated from the balancing approach he advocated in *Hartford*. See supra note 134 (explaining Justice Scalia's approaches in *Empagran* and *Hartford*).

197. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2881 (2010). To say that the presumption applies in all cases is not to say that U.S. statutes apply only to conduct in the United States. *Morrison* rejected such a mechanical approach and instructed lower courts to determine the "focus" of the statute, which (as in *Morrison*) may be a place other than where the regulated conduct occurs. Id. at 2884.

198. See Restatement (Third) of the Foreign Relations Law of the United States § 441 (restating doctrine of foreign state compulsion); see also Anthony J. Colangelo, Absolute Conflicts of Law, 91 Ind. L.J. (forthcoming 2016) (manuscript at 7–48) (on file with the *Columbia Law Review*) (discussing doctrine of foreign state compulsion). The doctrine is also sometimes called "foreign sovereign compulsion." Id. (manuscript at 12).

199. See 509 U.S. 764, 797, 799 (1993) ("Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States . . . or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law.").

200. See, e.g., In re Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 544 (S.D.N.Y. 2011) (noting foreign state compulsion doctrine "acknowledges comity principles by accommodating the interests of equal sovereigns and giving due deference to the official acts of foreign governments"); Trugman-Nash, Inc. v. N.Z. Dairy Bd., 942 F. Supp. 905, 909 (S.D.N.Y. 1996) (observing "doctrines of act of state, foreign sovereign compulsion, and international comity . . . overlap to a large degree").

201. See, e.g., Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 138 (2d Cir. 2014) (holding "district court should undertake a comity analysis" in light of "apparent conflict between the obligations set forth in the Asset Freeze Injunction and applicable Chinese banking laws").

would cause such employer . . . to violate the law of the foreign country in which such workplace is located."[202] Properly understood, the foreign state compulsion defense rests on the expressed or presumed intent of the legislature, and its availability depends on the interpretation of the particular statute or rule at issue.[203] Although recognition of foreign law is a prerequisite for foreign state compulsion, the doctrine operates as a principle of restraint because its effect is to limit the application of U.S. law that would otherwise govern.

Thus, prescriptive comity operates as a principle of restraint in American law chiefly through the presumption against extraterritoriality and the doctrine of foreign state compulsion. These doctrines defer to foreign lawmakers by limiting the reach of U.S. laws and thus protecting against possible conflicts with foreign law.

B. *Adjudicative Comity*

Prescriptive comity has an adjudicative counterpart—here called "adjudicative comity"[204]—which may be defined as deference to foreign courts.[205] As a principle of recognition, adjudicative comity operates in American law through the rules for recognizing foreign judgments and through judicial assistance to foreign courts with the discovery of evidence under 28 U.S.C. § 1782.[206] As a principle of restraint, adjudicative comity operates through a multitude of doctrines that limit the exercise of U.S. courts' jurisdiction, often with the aim of avoiding multiple proceedings.

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202. 42 U.S.C. § 2000e-1(b) (2012); see also Age Discrimination in Employment Act, 29 U.S.C. § 623(f)(1) (2012) (incorporating defense similar to that in Title VII); Americans with Disabilities Act, 42 U.S.C. § 12112(c)(1) (incorporating defense similar to that in Title VII).

203. See Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 222 cmt. a (Am. Law Inst., Preliminary Draft No. 3, 2015) (noting "extent of discretion depends on the statute"). It may also depend on the good faith of the person raising the defense. See id. § 222 cmt. d ("U.S. courts have refused to permit persons who have acted in bad faith to rely on the defense.").

204. Some authors have used the phrase "adjudicatory comity." See Calamita, supra note 37, at 615 (distinguishing "adjudicatory comity" from "prescriptive comity"); Childress, supra note 20, at 16 (stating "adjudicatory comity is perhaps the most robust use of the comity doctrine in transnational litigation"). This Article uses "adjudicative" as counterpart to "prescriptive," but no difference in meaning is intended.

205. In this respect, international comity mirrors international law, which recognizes both "jurisdiction to prescribe" and "jurisdiction to adjudicate." Restatement (Third) of the Foreign Relations Law of the United States § 401(a)–(b) (Am. Law Inst. 1987). As Part III of this Article explains, however, international comity is distinct from international law. See infra Part III (explaining differences between international comity and international law).

206. See 28 U.S.C. § 1782(a) (2012) ("The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . .").

Although adjudicative comity arises in many different contexts, the basic question is often the same—whether to defer to a foreign tribunal's resolution of a dispute. What changes is the time at which the question is asked. In the judgments context, the foreign tribunal has already made its decision. When a U.S. court is asked to decline jurisdiction in favor of a pending foreign proceeding (or alternatively to enjoin the parties from continuing such a proceeding), the foreign tribunal has taken jurisdiction but not yet issued a judgment. And when the court is asked to decline jurisdiction for lack of personal jurisdiction or on grounds of forum non conveniens, a foreign proceeding may not even have begun. These different ways of exercising adjudicative comity can best be viewed as parts of a larger whole.[207]

Others have used the phrases "judicial comity"[208] or "the comity of courts."[209] The problem with these phrases—and particularly with the latter—is that they are liable to be misunderstood as referring to comity *by* courts rather than comity *to* courts. All the international comity doctrines discussed in this Article are exercised *by* courts. What distinguishes the doctrines in this section is that they manifest comity *to* foreign courts, whether by recognizing those courts' judgments or by restraining the jurisdiction of U.S. courts.

Some responsibility for the terminological confusion must be laid at Justice Scalia's door. In his *Hartford* dissent, Scalia referred to Justice Story's distinction between the "comity of courts" and the "comity of nations."[210] The "comity of courts," Scalia said, referred to doctrines "whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere."[211] By contrast, the "comity of nations" (which Scalia equated with prescriptive comity) was "exercised by legislatures when they enact laws."[212] In fact, Justice Story meant nothing of the kind. In Story's day, U.S. courts did not have authority to decline jurisdiction in

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207. See Am. Law Inst., Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 11 cmt. a, at 132 (2006) ("Declination of jurisdiction—whether via lis pendens or via forum non conveniens—is closely related to recognition and enforcement of foreign judgments."); see also Calamita, supra note 37, at 650 (placing doctrines along continuum). Paul Stephan similarly notes that "[e]ncounters between courts may be retrospective, prospective, or on-going." Paul B. Stephan, Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters, 100 Va. L. Rev. 17, 24 (2014). But he analyzes the doctrines from the perspective of contract theory rather than comity. See id. at 54–64 (providing contract theory analysis); see also id. at 23 ("Vague terms, such as 'comity,' promise much and deliver little in terms of usable instructions for judges facing a potential encounter with foreign courts.").

208. Ramsey, supra note 19, at 897–906; Slaughter, A Global Community of Courts, supra note 37, at 194.

209. Roger P. Alford, Ancillary Discovery to Prove Denial of Justice, 53 Va. J. Int'l L. 127, 147 (2012); Childress, supra note 20, at 16.

210. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (citing Story, supra note 54, § 38, at 42).

211. Id.

212. Id.

favor of another tribunal.[213] Story's reference to the "comity of courts" was simply a rhetorical flourish to emphasize that courts exercise comity not on behalf of themselves but on behalf of their sovereign.[214] For Story, there was no separate category called the "comity of courts." All comity was the "comity of nations," and all of it was exercised by courts.

1. *As a Principle of Recognition.* — U.S. courts exercise adjudicative comity as a principle of recognition when they give effect to foreign judgments. U.S. courts have long invoked a "spirit of comity" to recognize foreign judgments at common law.[215] Before *Erie*,[216] the rules for recognizing foreign judgments were considered rules of general common law.[217] After *Erie*, it was generally assumed that the recognition of foreign judgments was governed by state rather than federal law.[218] In a majority of states, these rules are codified for money judgments in two uniform acts.[219] These acts generally follow the rules set forth by the U.S. Supreme Court in *Hilton* (minus the reciprocity requirement). As with the recognition of foreign law,[220] Huber's influence appears most clearly in the public policy exception, which permits a U.S. court to refuse recognition if the foreign judgment "is repugnant to the public policy of this state or of the United States."[221] State courts consider the uniform

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213. See Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."); Wadleigh v. Veazie, 28 F. Cas. 1319, 1320 (C.C.D. Me. 1838) (No. 17,031) (Story, J.) (rejecting idea of "discretionary authority" to avoid parallel proceedings and stating no federal court "can escape from its duty, in any case, which congress has confided to its jurisdiction").

214. See Story, supra note 54, § 38, at 42 ("In the silence of any positive rule, . . . courts of justice presume the tacit adoption of [foreign laws] by their own government, unless they are repugnant to its policy, or prejudicial to its interests. It is not the comity of the courts, but the comity of the nation . . . .").

215. Croudson v. Leonard, 8 U.S. (4 Cranch) 434, 437 (1808).

216. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

217. A state court's recognition of a foreign judgment did not raise a federal question. See Aetna Life Ins. v. Tremblay, 223 U.S. 185, 190 (1912) (holding Supreme Court had no jurisdiction to review state court's decision on recognition of foreign judgment). Further, state courts were not obliged to follow the Supreme Court's decision in *Hilton* requiring reciprocity as a condition for recognizing foreign judgments. See Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (concluding state court "is not bound to follow the Hilton Case").

218. See, e.g., Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (applying Pennsylvania law to enforcement of foreign judgment); Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (Am. Law Inst. 1987) (stating "recognition and enforcement of foreign country judgments is a matter of State law").

219. 2005 Uniform Act, supra note 106; 1962 Uniform Act, supra note 106.

220. See supra notes 177–178 and accompanying text (explaining public policy exception in conflict of laws).

221. 2005 Uniform Act, supra note 106, § 4(c)(3); see also 1962 Uniform Act, supra note 106, § 4(b)(3) (noting foreign judgment need not be recognized if cause of action "on which the judgment is based is repugnant to the public policy of this state").

acts to be codifications of international comity,[222] and they continue to recognize foreign judgments not covered by the acts as a matter of comity.[223]

Federal courts also exercise adjudicative comity as a principle of recognition when they assist foreign courts with the discovery of evidence in the United States. In 28 U.S.C. § 1782, Congress authorized district courts to order discovery "for use in a proceeding in a foreign or international tribunal."[224] The Supreme Court refused in *Intel Corp. v. Advanced Micro Devices, Inc.* to impose a rule limiting assistance to evidence that would be discoverable under the foreign tribunal's rules, but the Court noted that "comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases."[225] Since *Intel*, lower courts have recognized international comity as the underlying basis of § 1782,[226] and have declined to order discovery when doing so would interfere with the foreign proceedings.[227] As a form of deference to a foreign tribunal, adjudicative comity under § 1782 operates as a principle of recognition, although quashing discovery when it would interfere with foreign proceedings also combines an element of restraint.

In short, adjudicative comity operates as a principle of recognition in American law through state law providing for the recognition of foreign judgments and a federal statute authorizing district courts to help foreign courts with the discovery of evidence in the United States. Under

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222. See, e.g., Sung Hwan Co. v. Rite Aid Corp., 850 N.E.2d 647, 650–51 (N.Y. 2006) (characterizing 1962 Uniform Act as adoption of "well-settled comity principles"); Kwongyuen Hangkee Co. v. Starr Fireworks, Inc., 634 N.W.2d 95, 97 (S.D. 2001) ("[1962 Uniform Act] is a codification of the common-law doctrine of comity applied to foreign nation money judgments.").

223. See 2005 Uniform Act, supra note 106, § 11 ("This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act]."); see also Manco Contracting Co. (W.W.L.) v. Bezdikian, 195 P.3d 604, 608 (Cal. 2008) ("Comity remains the basis for recognizing foreign judgments not covered by the act . . . ."); Roxas v. Marcos, 969 P.2d 1209, 1261 n.36 (Haw. 1998) ("The Act does not preclude recognition of other types of judgments through the doctrine of comity.").

224. 28 U.S.C. § 1782(a) (2012). The request for discovery may be made by the tribunal itself or by "any interested person." Id. Lower courts are divided on whether § 1782 may be used for discovery in international arbitrations. See Alford, supra note 209, at 133–39 (discussing different approaches to discovery for international arbitrations).

225. 542 U.S. 241, 261 (2004).

226. See, e.g., In re Berlamont, No. 14–mc–00190 (JSR), 2014 WL 3893953, at *1 (S.D.N.Y. Aug. 4, 2014) ("In the interests of international comity, 28 U.S.C. § 1782 permits federal courts to grant discovery within the United States for use in foreign proceedings.").

227. See, e.g., In re Microsoft Corp., No. 06-10061-MLW, 2006 WL 1344091, at *4 (D. Mass. Apr. 17, 2006) ("[C]onsiderations of comity strongly favor quashing the subpoena."); In re Microsoft Corp., No. C 06-80038 JF (PVT), 2006 WL 825250, at *3 (N.D. Cal. Mar. 29, 2006) ("[I]ssues of comity weigh against allowing the discovery in this case."). This possibility of interference arises when an "interested person," rather than the foreign court itself, seeks discovery. See supra note 224 (discussing 28 U.S.C. § 1782(a)).

these laws, U.S. courts defer to foreign courts by assisting in their resolution of cases or by recognizing their judgments.

2. *As a Principle of Restraint.* — As a principle of restraint, adjudicative comity finds expression in a number of doctrines. Many are designed to mitigate the possibility of parallel proceedings, which the Supreme Court's expansion of personal jurisdiction in *International Shoe* made more likely.[228]

Just two years after *International Shoe*, in *Gulf Oil Corp. v. Gilbert*,[229] the Supreme Court recognized the authority of a federal court to dismiss a suit over which it had jurisdiction on grounds of forum non conveniens. Under this doctrine, a court will first look to see if an adequate alternative forum exists.[230] If so, the court will weigh the private and public interests[231] to see if they are sufficient to overcome the "strong presumption in favor of the plaintiff's choice of forum."[232] Although an early Supreme Court case applying the doctrine in admiralty had referred to "motives of convenience or international comity,"[233] forum non conveniens generally has not been considered a comity doctrine.[234] In fact, the Court has distinguished forum non conveniens from comity in a domestic context on the ground that comity gives "deference to the paramount interests of another sovereign," while forum non conveniens reflects a broader range of considerations like "convenience to the parties."[235] Historically, however, comity had as much to do with private interests in convenience as with the public interests of other sovereigns.[236] Because the doctrine of forum non conveniens allows U.S. courts to restrain their exercise of ju-

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228. See Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (permitting exercise of personal jurisdiction based on "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); see also supra note 136 and accompanying text (discussing *International Shoe*).

229. 330 U.S. 501 (1947).

230. Id. at 506–07 ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process . . . ."); see also Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum.").

231. *Gilbert*, 330 U.S. at 508–09 (outlining private and public interest factors); see also *Piper*, 454 U.S. at 257–61 (discussing district court's application of private and public interest factors).

232. *Piper*, 454 U.S. at 255. The presumption in favor of a foreign plaintiff's choice of a U.S. forum is less strong. See id. at 256 (stating "foreign plaintiff's choice deserves less deference").

233. The Belgenland, 114 U.S. 355, 363 (1885).

234. But see Am. Dredging Co. v. Miller, 510 U.S. 443, 467 (1994) (Kennedy, J., dissenting) (noting "*forum non conveniens* defense promotes comity and trade").

235. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 723 (1996).

236. See supra notes 145–156 and accompanying text (discussing justifications for comity).

risdiction in deference to foreign courts, it is properly considered a doctrine of international comity.[237]

The Supreme Court has repeatedly emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[238] Forum non conveniens is an exception that applies "in certain narrow circumstances."[239] In the domestic context, a few other abstention doctrines exist. The Court has held that federal courts may stay their proceedings in deference to other federal courts.[240] The Court has also developed specific doctrines for abstaining in favor of state courts and has permitted abstention in cases falling outside these doctrines in "exceptional" circumstances.[241] Finally, the Court has recognized that federal courts may decline to hear a case "where the relief being sought is equitable in nature or otherwise discretionary," like a declaratory judgment.[242] With the possible exception of the last, however, none of these doctrines authorizes abstention in favor of *foreign* courts, and the Supreme Court has never done so except under the doctrine of forum non conveniens.

Nevertheless, lower courts have developed other comity doctrines to restrain adjudicative jurisdiction in international cases. The Seventh and Ninth Circuits have adopted a doctrine of "prudential exhaustion" for international law claims, requiring plaintiffs "to exhaust their local remedies in accordance with the principle of international comity."[243] The

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237. Other scholars have likewise identified the doctrine of forum non conveniens as a manifestation of comity. See, e.g., Calamita, supra note 37, at 637 (noting "adjudicatory comity serves as the founding principle for the court's acceptance of [forum non conveniens]"); Slaughter, A Global Community of Courts, supra note 37, at 205 ("As courts grapple with issues such as forum selection clauses, *forum non conveniens* motions, and parallel suits, they are developing a more nuanced conception of judicial comity.").

238. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976); see also Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1386 (2014) (quoting *Colorado River*); Sprint Commc'ns, Inc. v. Jacobs, 134 S. Ct. 584, 591 (2013) (quoting *Colorado River*).

239. *Quackenbush*, 517 U.S. at 721.

240. See Landis v. N. Am. Co., 299 U.S. 248, 254 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."); see also *Colorado River*, 424 U.S. at 817 (1976) (describing *Landis* as rule "between federal district courts").

241. *Colorado River*, 424 U.S. at 818.

242. *Quackenbush*, 517 U.S. at 721.

243. Sarei v. Rio Tinto PLC, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion) (McKeown, J.); see also Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 859 (7th Cir. 2015) (characterizing its holding as "prudential exhaustion requirement based on international comity concerns"). These opinions also assumed that international law required exhaustion. See id. at 857 ("[C]ustomary international law may impose an exhaustion requirement that limits plaintiffs' ability to bring [expropriation] claim outside the country against which they bring suit."); *Sarei*, 550 F.3d at 829–30 (en banc) (plurality opinion) (McKeown, J.) (discussing exhaustion of local remedies under international law). But customary international law requires the exhaustion of local remedies in domestic courts only before a claim is brought in *an international tribunal*. See Interhandel (Switz.

Ninth Circuit developed this doctrine in the context of human rights litigation under the Alien Tort Statute.[244] Inspired by a footnote in the Supreme Court's *Sosa* decision,[245] the Ninth Circuit held "that in ATS cases where the United States 'nexus' is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of 'universal concern.'"[246] A panel of the Ninth Circuit later applied the doctrine to an expropriation claim brought under the FSIA, though that decision was later vacated when the case was reheard en banc.[247] The Seventh Circuit took up the prudential exhaustion baton in another FSIA expropriation case, basing its exhaustion requirement on "the comity between sovereign nations that lies close to the heart of most international law."[248] On appeal from the district court's decision upon remand, the Seventh Circuit clarified that exhaustion was required not as a substantive requirement of the international law on expropriation but as a procedural limitation on where international law claims could be brought.[249]

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v. U.S.), Judgment, 1959 I.C.J. Rep. 6, 27 (Mar. 21) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law . . . ."); Crawford, supra note 24, at 710–11 ("A claim will not be admissible on the international plane unless the individual alien or corporation concerned has exhausted the legal remedies available in the state which is alleged to be the author of injury."). There is no international law rule requiring the exhaustion of local remedies before a claim is brought in another domestic court.

244. 28 U.S.C. § 1350 (2012).

245. See Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) (stating "we would certainly consider [an exhaustion] requirement in an appropriate case"). Section 2(b) of the Torture Victim Protection Act imposes an exhaustion requirement by statute for human rights claims brought under that act. See 28 U.S.C. § 1350 note (Torture Victim Protection) ("A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.").

246. *Sarei*, 550 F.3d at 831 (plurality opinion) (McKeown, J.). Other circuits have rejected an exhaustion requirement in ATS cases. See Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) (rejecting argument "that plaintiffs must exhaust their legal remedies in the nation in which the alleged violation of customary international law occurred"); Jean v. Dorélien, 431 F.3d 776, 781 (11th Cir. 2005) ("[T]he exhaustion requirement does not apply to the [ATS]."); see also Doe v. Exxon Mobil Corp., 654 F.3d 11, 27 (D.C. Cir. 2011) (declining to consider whether exhaustion is required under ATS), vacated on other grounds, 527 F. App'x 7 (D.C. Cir. 2013).

247. See Cassirer v. Kingdom of Spain, 580 F.3d 1048, 1062 (9th Cir. 2009) (holding "prudential exhaustion applies equally to cases brought against foreign states (and their instrumentalities) under the FSIA"), vacated, 616 F.3d 1019 (9th Cir. 2010) (en banc). The en banc court did not reach the question of prudential exhaustion. See 616 F.3d at 1037 ("[W]e do not consider whether exhaustion *may* apply to the claims asserted in this case.").

248. Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 684 (7th Cir. 2012).

249. See Fischer v. Magyar Államvasutak Zrt., 777 F.3d 847, 857 (7th Cir. 2015) ("Understood correctly, however, the prior opinion imposed an exhaustion requirement that limits where plaintiffs may assert their international law claims. We did not hold that plaintiffs failed to allege violations of international law in the first instance."). In the ATS context, an exhaustion requirement might be justified as an exercise of the federal courts'

A larger number of circuits have recognized a doctrine of abstention based on "international comity."[250] In most circuits, international comity abstention is simply an application to foreign proceedings of the federal–state abstention doctrine articulated in *Colorado River*,[251] which requires a showing of "exceptional" circumstances after consideration of several factors.[252] The circuits following *Colorado River* have held that international comity abstention is appropriate only where parallel foreign proceed-

authority to shape the federal common law cause of action. See, e.g., *Sosa*, 542 U.S. at 732 (limiting ATS cause of action to violations of international law norms that are generally accepted and specifically defined); id. at 733 n.21 (mentioning exhaustion as a further potential limitation). But there is no similar basis of authority for imposing an exhaustion requirement on international law claims more generally.

250. See Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014) ("International comity is a doctrine of prudential abstention . . . ."); Perforaciones Exploración y Producción v. Marítimas Mexicanas, S.A. de C.V., 356 F. App'x 675, 681 (5th Cir. 2009) ("Dismissal of a suit on international comity grounds may sometimes be appropriate . . . ."); Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd., 556 F.3d 459, 467 (6th Cir. 2009) (applying *Colorado River* abstention to foreign proceedings); Royal & Sun All. Ins. Co. of Can. v. Century Int'l Arms, Inc., 466 F.3d 88, 95 (2d Cir. 2006) (recognizing possibility of "international comity abstention"); Gross v. German Found. Indus. Initiative, 456 F.3d 363, 393 (3d Cir. 2006) (recognizing possibility of abstaining "on international comity grounds"); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1238 (11th Cir. 2004) (dismissing suit under "doctrine of international comity"); AAR Int'l, Inc. v. Nimelias Enters. S.A., 250 F.3d 510, 518 (7th Cir. 2001) ("[W]e apply the same general principles [of *Colorado River* abstention] with respect to parallel proceedings in a foreign court in the interests of international comity."); Al-Abood ex rel. Al-Abood v. El-Shamari, 217 F.3d 225, 232 (4th Cir. 2000) (applying *Colorado River* abstention to foreign proceedings).

251. See, e.g., Finova Cap. Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 898 (7th Cir. 1999) ("[I]n the interests of international comity, we apply the same general principles [of *Colorado River* abstention] with respect to parallel proceedings in a foreign court.").

252. See Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976) (identifying following factors: (1) which court first assumed jurisdiction over the property, if any; (2) "inconvenience of the federal forum"; (3) "desirability of avoiding piecemeal litigation"; and (4) "order in which jurisdiction was obtained by the concurrent forums"); see also Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23, 26 (1983) (advising district courts to consider additionally: (1) whether "federal law provides the rule of decision on the merits"; and (2) whether nonfederal proceeding would adequately protect federal plaintiff's rights).

ings are pending,[253] and then only upon a showing of "exceptional" circumstances.[254]

The Eleventh Circuit, however, has articulated a broader version of the doctrine, which—contrary to *Colorado River*—does not require a showing of exceptional circumstances but instead considers: "(1) a proper level of respect for the acts of our fellow sovereign nations—a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources."[255] In *Ungaro-Benages v. Dresdner Bank AG*, the Eleventh Circuit went further and upheld abstention on international comity grounds, despite the absence of parallel foreign proceedings, to support a foundation established by the United States and Germany to hear claims brought by victims of the Nazi regime.[256] Most recently, in *Mujica*

253. *Answers in Genesis*, 556 F.3d at 467 ("*Colorado River* instructed courts to consider several factors in determining whether to abstain in favor of a parallel proceeding in the courts of another sovereign."); *Royal & Sun All.*, 466 F.3d at 94 ("For two actions to be considered parallel, the parties in the actions need not be the same, but they must be substantially the same, litigating substantially the same issues in both actions."); *Gross*, 456 F.3d at 393–94 (rejecting international comity abstention absent pending foreign proceeding); *AAR Int'l*, 250 F.3d at 518 ("In evaluating the propriety of the district court's decision to abstain under *Colorado River*, we must first determine whether the federal and foreign proceedings are parallel."); *Al-Abood*, 217 F.3d at 232 ("The threshold question in deciding whether *Colorado River* abstention is appropriate is whether there are parallel suits.").

254. *Answers in Genesis*, 556 F.3d at 467 ("'Abstention from the exercise of federal jurisdiction is the exception, not the rule.'" (quoting *Colorado River*, 424 U.S. at 813)); *Royal & Sun All.*, 466 F.3d at 95 ("[C]ircumstances that routinely exist in connection with parallel litigation cannot reasonably be considered exceptional circumstances, and therefore the mere existence of an adequate parallel action, by itself, does not justify the dismissal of a case on grounds of international comity abstention."); *AAR Int'l*, 250 F.3d at 518 (stating district court "must consider the factors listed in *Colorado River* and its progeny and determine whether in light of those factors exceptional circumstances exist warranting abstention"). In the bankruptcy context, U.S. courts have been more willing to abstain in favor of foreign proceedings because of express congressional authorization. See 11 U.S.C. § 1517 (2012) (authorizing order recognizing foreign bankruptcy proceeding); see also In re Vitro S.A.B. de C.V., 701 F.3d 1031, 1053 (5th Cir. 2012) ("Chapter 15 provides courts with broad, flexible rules to fashion relief appropriate for effectuating its objectives in accordance with comity."); Cunard S.S. Co. v. Salen Reefer Servs. AB, 773 F.2d 452, 458 (2d Cir. 1985) ("American courts have consistently recognized the interest of foreign courts in liquidating or winding up the affairs of their own domestic business entities.").

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

256. See 379 F.3d 1227, 1240–41 (11th Cir. 2004) ("Although it may not be her forum of choice, the plaintiff should pursue her claim through the Foundation, which was established by the American and German governments to address exactly these types of claims from the Nazi era."). The court called dismissal in the absence of a pending proceeding "prospective[]" comity. Id. at 1238. *Ungaro-Benages* also adapted the factors relevant to abstention. See id. ("Applied prospectively, federal courts evaluate several factors, including the strength of the United States' interest in using a foreign forum, the strength of the foreign governments' interests, and the adequacy of the alternative forum."). On almost identical facts, however, the Third Circuit rejected abstention. See *Gross*, 456 F.3d at 394 ("We remain skeptical of this broad application of the international comity doctrine, noting our 'virtually unflagging obligation' to exercise the jurisdiction

v. AirScan Inc., a divided panel of the Ninth Circuit dismissed state-law claims in a human rights suit filed against two U.S. corporations on grounds of international comity despite the absence of parallel foreign proceedings.[257] The court applied the Eleventh Circuit's test from *Ungaro-Benages*, engrafting onto it the reasonableness factors for prescriptive comity articulated in section 403 of Restatement (Third) of the Foreign Relations Law and giving significant weight to the view of the U.S. executive branch that the case should be dismissed.[258]

Sometimes, U.S. courts are asked to address the possibility of parallel foreign proceedings not by dismissing the U.S. suit but by enjoining the foreign proceeding. Courts in the United States are quite reluctant to do this, and frequently cite international comity as a reason to exercise restraint. As the Second Circuit has observed, "principles of comity counsel that injunctions restraining foreign litigation be 'used sparingly' and 'granted only with care and great restraint.'"[259]

International comity has even influenced some of the Supreme Court's rulings on personal jurisdiction under the Due Process Clause. As a general matter, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant."[260] But the Court has recently relied expressly on "international comity" to support

granted to us . . . ." (quoting *Colorado River*, 424 U.S. at 817)). The Eleventh Circuit has recently characterized *Ungaro-Benages* as a one-time exception to the requirement of parallel foreign proceedings. See GDG Acquisitions, LLC v. Gov't of Belize, 749 F.3d 1024, 1034 (11th Cir. 2014) ("To date, we have reserved prospective international comity abstention for rare (indeed often calamitous) cases in which powerful diplomatic interests of the United States and foreign sovereigns aligned in supporting dismissal."); see also Perforaciones Exploración y Producción v. Marítimas Mexicanas, S.A. de C.V., 356 F. App'x 675, 681 (5th Cir. 2009) (noting possibility of abstention "when there is litigation pending in a foreign forum or, even absent such litigation," but finding abstention inappropriate in that case).

257. See 771 F.3d 580, 615 (9th Cir. 2014) ("[W]e conclude that all of the claims before us are nonjusticiable under the doctrine of international comity.").

258. Id. at 603–15. Judge Zilly dissented from this part of the opinion, finding the doctrine inapplicable in the absence of a pending foreign proceeding. See id. at 622 (Zilly, J., concurring in part and dissenting in part) ("I would join the Third Circuit in declining to follow the Eleventh Circuit down the 'prospective' comity path.").

259. Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 652 (2d Cir. 2004) (quoting China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 36 (2d Cir. 1987)); see also E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989 (9th Cir. 2006) ("'A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be used sparingly. The issue is not one of jurisdiction, but one of comity.'" (quoting Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981))); Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 17 (1st Cir. 2004) (noting decision whether to grant antisuit injunction "must take account of considerations of international comity"); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 366 (5th Cir. 2003) ("When a preliminary injunction takes the form of a foreign antisuit injunction, we are required to balance domestic judicial interests against concerns of international comity.").

260. Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014).

limits on general jurisdiction. In *Daimler AG v. Bauman*, the Supreme Court limited general jurisdiction to instances in which the defendant's contacts with the forum state are so continuous and systematic as to render it "'essentially at home'" there.[261] But the Court also faulted the Ninth Circuit for ignoring "the risks to international comity its expansive view of general jurisdiction posed."[262] Justice Ginsburg noted that general jurisdiction under the Brussels I Regulation is limited to the place where the defendant is "domiciled" and that expansive U.S. views of general jurisdiction had impeded the negotiation of international agreements on jurisdiction and judgments.[263] In light of all this, the Court concluded: "Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the 'fair play and substantial justice' due process demands."[264] The Supreme Court has also looked to international comity to limit the exercise of specific jurisdiction under the heading of "reasonableness." When determining whether an exercise of personal jurisdiction is "reasonable" under the Due Process Clause, the Supreme Court has expressly required lower courts "to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction."[265]

Finally, even when American courts have personal jurisdiction and decide to exercise it, they sometimes employ adjudicative comity as a principle of restraint to moderate that exercise. In the *Aérospatiale* case, for example, the Supreme Court had to decide whether to require first resort to the Hague Evidence Convention for the gathering of evidence abroad.[266] The majority held that "the concept of international comity re-

261. 134 S. Ct. 746, 761 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)).

262. Id. at 763.

263. Id.

264. Id. (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

265. Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 115 (1987). It is worth noting that three of the Supreme Court's most recent personal jurisdiction cases have involved non-U.S. defendants. See *Daimler*, 134 S. Ct. at 750 (considering personal jurisdiction over "claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States"); *Goodyear*, 131 S. Ct. at 2850 (considering personal jurisdiction in case involving "bus accident outside Paris"); J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2785 (2011) (plurality opinion) (Kennedy, J.) (considering personal jurisdiction over "a British manufacturer of scrap metal machines"). Looking to principles of international comity in such cases certainly makes more sense than looking to principles of federalism. See, e.g., id. at 2789–90 (plurality opinion) (Kennedy, J.) (invoking "unique genius of our Constitution" in establishing "two orders of government").

266. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 541–42 (1987).

quires . . . particularized analysis of the respective interests of the foreign nation and the requesting nation."[267]

In summary, adjudicative comity operates in American law through limits on personal jurisdiction as well as doctrines like forum non conveniens (and others of more doubtful status) that allow courts to dismiss cases over which they have jurisdiction. Adjudicative comity also limits district courts in granting antisuit injunctions and ordering the discovery of information located abroad. Each of these doctrines defers to foreign courts by restraining the exercise of U.S. courts' jurisdiction.

C. *Sovereign Party Comity*

Sovereign party comity is deference to foreign government actors as litigants in U.S. courts.[268] Although it is generally omitted from scholarly discussions of international comity,[269] the Supreme Court has articulated comity-based rules to determine when foreign governments may bring suit as plaintiffs in U.S. courts, and Congress has adopted comity-based rules to determine when sovereign immunity shields them from suit as defendants. As with prescriptive comity and adjudicative comity, sovereign party comity operates in American law both as a principle of recognition and as a principle of restraint.

1. *As a Principle of Recognition.* — The Supreme Court has held that "[u]nder principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States."[270] The Court has recognized exceptions for countries at war with the United States or not recognized by the United States.[271] But neither the existence of unfriendly relations nor even the severing of diplomatic relations will be sufficient to deny this privilege.[272] As the Court

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267. Id. at 543–44. The Court turned to comity after concluding that the treaty itself did not displace U.S. discovery rules. See id. at 529–32 (considering whether treaty provided exclusive means for obtaining evidence located in another treaty party). For a more detailed discussion of the relationship between international comity and international law, see infra Part III.

268. For a discussion of the Supreme Court's treatment of amicus briefs filed by foreign governments, see Kristen E. Eichensehr, Foreign Sovereigns as Friends of the Court, 102 Va. L. Rev. (forthcoming 2016) (manuscript at 33–64) (on file with the *Columbia Law Review*) (examining reasons for Court's deference to views of foreign sovereigns who file amicus briefs).

269. See supra note 37 (surveying international comity literature).

270. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964); see also The Sapphire, 78 U.S. (11 Wall.) 164, 167 (1870) ("To deny him this privilege would manifest a want of comity and friendly feeling.").

271. See *Sabbatino*, 376 U.S. at 409 ("[T]he privilege of suit has been denied only to governments at war with the United States . . . or to those not recognized by this country . . . .").

272. Id. at 410–11 (rejecting argument that "unfriendliness," including severance of diplomatic relations, should lead to denial of privilege). The Court has also expressly rejected reciprocity as a condition to a foreign government's privilege of bringing suit in

restated the rule most recently, "governments recognized by the United States and at peace with us are entitled to access to our courts."[273]

2. *As a Principle of Restraint.* — Sovereign party comity operates as a principle of restraint in American law through the doctrines of foreign state immunity and foreign official immunity, both of which fall under the more general heading of foreign sovereign immunity.[274] The Supreme Court has consistently characterized foreign sovereign immunity as a matter of comity.[275] The United States has codified the rules governing

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U.S. courts. See id. at 412 ("There are good reasons for declining to extend the principle [of reciprocity] to the question of standing of sovereign states to sue.").

273. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 319–20 (1978). The recognition of foreign governments is controlled by the executive branch. See Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government."). Congress has the constitutional power to declare war. See U.S. Const. art. I, § 8, cl. 11 ("The Congress shall have power . . . [t]o declare war . . . ."). For discussion of the extent to which the executive branch may control the access of foreign governments to U.S. courts, see infra note 371 and accompanying text.

274. See also infra Part III (discussing extent to which doctrines of foreign state immunity and foreign official immunity also reflect international law).

275. Some of these references may be intended simply to emphasize that foreign sovereign immunity is not required by the Constitution. See, e.g., Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983) ("As *The Schooner Exchange* made clear, however, foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (plurality opinion) (Rehnquist, J.) ("[T]he doctrine of immunity for foreign sovereigns[] has its roots, not in the Constitution, but in the notion of comity between independent sovereigns."); see also Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2255 (2014) ("Foreign sovereign immunity is and always has been, 'a matter of grace and comity . . . .'" (quoting *Verlinden*, 461 U.S. at 486)). But other references emphasize comity as the normative justification for sovereign immunity. See, e.g., Republic of the Philippines v. Pimentel, 553 U.S. 851, 866 (2008) ("Giving full effect to sovereign immunity promotes the comity interests that have contributed to the development of the immunity doctrine."); Dole Food Co. v. Patrickson, 538 U.S. 468, 479 (2003) ("Foreign sovereign immunity . . . is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns."); The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 353 (1822) ("[*Schooner Exchange*] stands upon principles of public comity and convenience."). Other opinions accurately describe comity as the historical basis for sovereign immunity. See, e.g., Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010) ("[*Schooner Exchange*] was interpreted as extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'" (quoting *Verlinden*, 461 U.S. at 486)); Republic of Austria v. Altmann, 541 U.S. 677, 688 (2004) ("[*Schooner Exchange* explained] that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign . . . ."); see also supra notes 107–115 (discussing original understanding of sovereign immunity as comity). The Court's characterization of sovereign immunity as comity does not preclude the possibility that some measure of immunity is required by international law. See infra Part III (explaining relationship between international comity and international law). But it does suggest that sov-

foreign state immunity in the FSIA, which provides that foreign states, as well as their agencies and instrumentalities, are immune from suit in both federal and state courts unless an exception to that immunity applies.[276] One might think of the FSIA as an exercise of international comity by Congress, but it is meant to be applied by the courts. Indeed, one of the principal reasons for the FSIA was to shift determinations of foreign state immunity from the executive branch to the courts.[277] In this sense, the FSIA is no different from state statutes governing the recognition of foreign judgments, which similarly codify rules of international comity for courts to apply.[278]

The FSIA did not codify the immunities of foreign officials.[279] Rules for the immunities of diplomatic agents and consuls are set forth in the Vienna Convention on Diplomatic Relations[280] and the Vienna Convention on Consular Relations.[281] But the immunities of other foreign government officials from suit in U.S. courts are otherwise governed by federal common law.[282] Some foreign officials are immune from suit based on their status. Sitting heads of state, heads of government, and foreign ministers are entitled to status-based immunity from suits based on any act—official or unofficial—but only while they hold those offices.[283] Other foreign officials, as well as former foreign officials, may be entitled to conduct-based immunity. Conduct-based immunity differs from status-based immunity in two respects: (1) it extends only to suits based on official acts; and (2) it lasts even after the foreign official leaves office.[284] Since

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ereign immunity in the United States cannot be understood exclusively in international law terms.

276. 28 U.S.C. §§ 1604–1607 (2012).

277. See infra notes 404–410 and accompanying text (noting purpose of FSIA to transfer foreign state immunity determinations to courts).

278. The Supreme Court has left open the question of whether the executive branch is entitled to deference in affording immunity to particular defendants in cases governed by the FSIA. See *Altmann*, 541 U.S. at 702 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."); infra notes 386–388 and accompanying text (discussing *Altmann*).

279. See *Samantar*, 130 S. Ct. at 2292 (concluding "FSIA does not govern petitioner's claim of [foreign official] immunity").

280. Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

281. Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

282. See *Samantar*, 130 S. Ct. at 2292 (noting immunity of foreign official was "properly governed by the common law"). The Supreme Court did not expressly hold that the common law governing immunity was federal common law, but that is how the opinion has been read. See, e.g., Curtis A. Bradley & Laurence R. Helfer, International Law and the U.S. Common Law of Foreign Official Immunity, 2010 Sup. Ct. Rev. 213, 254 (acknowledging "Court's holding in *Samantar* that federal common law now controls these issues").

283. Chimène I. Keitner, The Common Law of Foreign Official Immunity, 14 Green Bag 2d 61, 63–64 (2010) (discussing head of state immunity as status-based immunity).

284. See id. at 64–71 (discussing conduct-based immunity).

the Supreme Court's 2010 decision in *Samantar*, the executive branch has claimed authority to make determinations with respect to official immunity that are binding on the courts.[285]

Thus, sovereign party comity operates in American law both as a principle of recognition and as a principle of restraint. As a principle of recognition, it allows foreign governments recognized by the United States, and not at war with it, to bring suit in U.S. courts. As a principle of restraint, it shields foreign governments and foreign officials from certain kinds of suits in U.S. courts. In both of these aspects, sovereign party comity defers to foreign government actors as litigants in U.S. courts.

D. *Summary*

This Article defines international comity as deference to foreign government actors that is not required by international law but is incorporated in domestic law. Part II has surveyed the variety of ways in which international comity has been incorporated into doctrines of U.S. domestic law and has categorized those doctrines based on the actors to whom deference is given. Doctrines that defer to foreign lawmakers, like the conflict of laws, the act of state doctrine, and the presumption against extraterritoriality, are manifestations of prescriptive comity. Doctrines that defer to foreign courts, like the recognition of foreign judgments, the doctrine of forum non conveniens, and the limits on personal jurisdiction and discovery, are expressions of adjudicative comity. And doctrines that defer to foreign government actors as litigants, like a foreign government's privilege of bringing suit as a plaintiff and its immunity from suit as a defendant, are forms of sovereign party comity.

In each category, deference may take the form of recognition or restraint. But the distinction should not be overstated. There is obviously an element of restraint in recognition and an element of recognition in restraint. When an American court recognizes a foreign judgment, it restrains the exercise of its own authority to decide the merits of that case. When an American court enforces foreign law, it not only recognizes that a foreign state has jurisdiction to prescribe, but also restrains the prescriptive jurisdiction of the forum. Similarly, when an American court uses international comity as a principle of restraint, it is often because that court recognizes a foreign court as the more appropriate forum, a foreign lawmaker as a more appropriate source of rules, or a foreign government as a sovereign coequal with the United States.[286] Still, the prin-

285. See infra notes 382–385 and accompanying text (discussing deference to executive branch determinations of immunity).

286. In some areas, the connection between recognition and restraint is very close. The doctrine of foreign state compulsion, for example, restrains the application of U.S. law but depends on a prior recognition that foreign law requires the conduct that U.S. law would prohibit. See supra notes 198–203 and accompanying text (discussing foreign state compulsion). Under 28 U.S.C. § 1782 (2012), U.S. courts may recognize foreign proceedings by providing judicial assistance with discovery, but courts will exercise restraint when

ciples of recognition and restraint seem useful for grouping the international comity doctrines within each category.

Having focused in Part II on how the principle of international comity is incorporated in U.S. domestic law, this Article now turns in Part III to consider comity's relationship with international law.

III. INTERNATIONAL COMITY AND INTERNATIONAL LAW

The relationship between international comity and international law is often misunderstood. Justice Scalia, in particular, seems to treat them as interchangeable.[287] Justice Breyer has also sometimes asserted that a rule of prescriptive comity "reflects principles of customary international law."[288] But understanding the difference is critical to understanding how international comity works in American law.

International law binds the United States on the international plane,[289] and the United States is responsible to other states for violating it.[290] On the domestic plane, it is generally accepted today that Congress may pass statutes that violate customary international law or U.S. treaty obliga-

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discovery might in fact hinder the foreign proceeding. See supra notes 224–227 and accompanying text (discussing 28 U.S.C. § 1782). In the context of sovereign party comity, by contrast, recognition may preclude restraint. The Supreme Court has held that a foreign government may not be recognized as a plaintiff in U.S. courts and simultaneously claim immunity from suit. See Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 134 (1938) ("By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought."); see also 28 U.S.C. § 1607 (denying foreign government immunity from counterclaims).

287. See, e.g., Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2887 (2010) (Scalia, J.) (equating "international comity" with "customary international law"); Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (treating "international comity" and "international law" interchangeably); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404 (1990) (Scalia, J.) ("We once viewed the [act of state] doctrine as an expression of international law, resting upon 'the highest considerations of international comity and expediency.'" (quoting Oetjen v. Cent. Leather Co., 246 U.S. 297, 303–04 (1918))).

288. F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (Breyer, J.).

289. Restatement (Third) of the Foreign Relations Law of the United States, pt. I, ch. 1, intro. note at 17 (Am. Law Inst. 1987) ("States . . . treat it as law, consider themselves bound by it, attend to it with a sense of legal obligation and with concern for the consequence of violation.").

290. Rep. of the Int'l Law Comm'n to the General Assembly, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53d Sess., Supp. No. 10, art. 1, U.N. Doc. A/56/10, at 32 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 20, 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) ("Every internationally wrongful act of a State entails the international responsibility of that State."); Restatement (Third) of the Foreign Relations Law of the United States § 206 cmt. e ("A state is responsible to other states, and to some extent to international organizations and private persons, for breach of its duties under international law or agreement.").

tions.[291] But international law may bind the courts[292] and the President.[293] International comity, on the other hand, does *not* bind the United States on the international plane or give rise to international responsibility. The courts and Congress are free to fashion rules of international comity as they wish, and—assuming those rules give the executive branch discretion—the President is free to deny international comity in a particular case.

From the beginning, international comity has been understood to be a matter for each nation's discretion. Huber's third maxim stated that a government would give effect to foreign laws within its territory only "so far as they do not cause prejudice to the power or rights of such government or of its subjects."[294] Story described comity as an "imperfect obligation—like that of beneficence, humanity, and charity" and added that "[e]very nation must be the final judge for itself, not only of the nature and extent of the duty, but of the occasions on which its exercise may be justly demanded."[295] As noted above, in the late eighteenth and early nineteenth centuries, some rules of the law of nations were understood to be optional and thus more akin to comity.[296] But under the modern view of customary international law—"a general and consistent practice of states followed by them from a sense of legal obligation"[297]—comity is excluded by definition. A rule that makes compliance discretionary cannot be followed from a sense of legal obligation.

In some areas of foreign relations law, rules of international comity are layered on top of rules of international law. Under customary international law, for example, the United States may apply its law extraterri-

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291. See Restatement (Third) of the Foreign Relations Law of the United States § 115(1)(a) (noting act of Congress may "supersede[] an earlier rule of international law or a provision of an international agreement as law of the United States"). Such a statute is effective as domestic law but does not relieve the United States of responsibility for the international law violation. See id. § 115(1)(b) ("That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.").

292. See The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (Marshall, C.J.) ("Till such an act [of Congress] be passed, the Court is bound by the law of nations which is a part of the law of the land.").

293. See William S. Dodge, After *Sosa*: The Future of Customary International Law in the United States, 17 Willamette J. Int'l L. & Disp. Resol. 21, 34–38 (2009) (arguing President is constitutionally bound to obey international law under Take Care Clause).

294. Huber, supra note 74, at 164.

295. Story, supra note 54, § 33, at 38.

296. See supra note 108 (explaining early American understanding of law of nations).

297. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (Am. Law Inst. 1987).

torially only if it has a basis for jurisdiction to prescribe.[298] But courts often restrain the geographic scope of U.S. law beyond what international law requires by applying a presumption against extraterritoriality—a canon of interpretation based in part on international comity and not required by international law.[299] The same is true for questions of foreign state immunity and foreign official immunity. International law requires some immunities,[300] but domestic law is free to go beyond these minimum requirements and extend greater immunity as a matter of comity.[301] In these areas it makes sense to think of an international law "core" and a comity "penumbra."[302]

In other areas, there is no international law core, and the rules mediating the relationship of the U.S. legal system with other countries are entirely rules of international comity.[303] No rule of customary international law requires the recognition of foreign law,[304] the act of state doc-

298. See id. §§ 402, 404 (restating customary international law bases for jurisdiction to prescribe).

299. See supra notes 186–191 and accompanying text (discussing presumption against extraterritoriality).

300. See, e.g., Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 99, ¶ 78 (Feb. 3) (discussing state immunity for military activities during armed conflict); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 51 (Feb. 14) (discussing head-of-state immunity).

301. See, e.g., Estate of Kazemi v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, 194 (Can.) (noting Canada's State Immunity Act "has chosen to embrace principles of comity and state sovereignty over the interests of individuals wishing to sue a foreign state in Canadian courts for acts of torture committed abroad"); see also William S. Dodge, Is Torture an "Official Act"? Reflections on *Jones v. United Kingdom*, Opinio Juris (Jan. 15, 2014, 1:46 AM), http://opiniojuris.org/2014/01/15/guest-post-dodge-torture-official-act-reflections-jones-v-united-kingdom/ [http://perma.cc/Q755-J42H] (arguing customary international law does not require nations to treat torture as official act for purposes of conduct-based immunity).

302. Another example is discovery under the Hague Evidence Convention. See Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 529–44 (1987) (holding Hague Evidence Convention did not preclude use of U.S. discovery rules and then supplementing treaty with doctrine of comity); supra note 266–267 (discussing *Aérospatiale* in more detail).

303. There are treaties and supranational regulations governing the jurisdiction of courts, the enforcement of foreign judgments, and the question of applicable law. See, e.g., Regulation No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), 2012 O.J. (L 351) 1; Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6; Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339) 3. But the United States is not a party to any such treaty or supranational regulation.

304. See Restatement (Second) of the Foreign Relations Law of the United States § 9 (Am. Law Inst. 1965) ("A state is not required by international law to give effect to a rule prescribed or enforced by another state . . . , so long as its refusal to give it effect is not arbitrary according to the rules of the conflict of laws of states that have reasonably developed legal systems.").

trine,[305] or foreign state compulsion.[306] Customary international law does not require the recognition and enforcement of foreign judgments.[307] Many states exercise jurisdiction to adjudicate on bases that other states find exorbitant,[308] but no customary international law rule prohibiting the exercise of such jurisdictional bases has emerged.[309] And no rule of international law requires one country to allow the government of another country to bring suit in its courts.[310]

It is worth noting that the boundaries between international law and international comity may shift over time. The Supreme Court recognized in *The Paquete Habana* that "what originally may have rested in custom or comity, courtesy or concession" may "grow, by the general assent of civilized nations, into a settled rule of international law."[311] Some rules of foreign sovereign immunity may fit that description.[312] It is also possible

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305. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964) ("That international law does not require application of the [act of state] doctrine is evidenced by the practice of nations.").

306. See Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 222, cmt. a (Am. Law Inst., Preliminary Draft No. 3, 2015) ("There is no general doctrine of international law that requires a sovereign to excuse compliance with its law because of conflict with the law of another state.").

307. See Restatement (Third) of the Foreign Relations Law of the United States, ch. 8, intro. note at 591 (Am. Law Inst. 1987) ("[T]here are no agreed principles governing recognition and enforcement of foreign judgments, except that no state recognizes or enforces the judgment of another state rendered without jurisdiction over the judgment debtor.").

308. For example, these include personal jurisdiction based on service of process while the defendant is temporarily present in the forum, personal jurisdiction based on the nationality or domicile of the plaintiff, and personal jurisdiction based on the presence of property in the forum. See Kevin M. Clermont & John R.B. Palmer, Exorbitant Jurisdiction, 58 Me. L. Rev. 474, 477–504 (2006) (discussing bases of personal jurisdiction considered exorbitant). For a list of exorbitant bases permitted under the laws of the E.U. Member States but prohibited under the Brussels I Regulation (Recast), see The Information Referring to Article 76 of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2015 O.J. (C 4) 2, 2–3; see also Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, annex I, 2007 O.J. (L 339) 3, 31–32 (listing exorbitant bases of jurisdiction prohibited by Lugano Convention).

309. See Lori Fisler Damrosch et al., International Law 816 (5th ed. 2009) ("While these bases have been characterized as exorbitant or extraordinary, they have, thus far, not been asserted, on authoritative grounds, to be violative of international law."); Clermont & Palmer, supra note 308, at 476 ("[E]xorbitant jurisdiction is best understood less as an existing rule than as a normative statement about the appropriate scope of international jurisdiction.").

310. See Crawford, supra note 24, at 157 (noting while some countries allow recognized governments to sue in local courts, "great caution is needed in using municipal cases to establish propositions about recognition in general international law").

311. 175 U.S. 677, 694 (1900); see also Crawford, supra note 24, at 24 ("[P]articular rules of comity, maintained consistently without reservation, may develop into rules of customary law.").

312. See Crawford, supra note 24, at 24 n.18 (giving example of diplomatic tax exemptions).

for international law to shrink and leave gaps for comity to fill. This is what happened with jurisdiction to prescribe. As the old, territorial conception of jurisdiction under international law receded, a comity-based presumption against extraterritoriality came forward to limit the territorial reach of American law.[313]

International law and international comity both mediate the relationship between the U.S. legal system and other nations, but they are fundamentally different. International law binds the United States and gives rise to international responsibility. International comity is discretionary, allowing the United States to decide for itself how much recognition or restraint to afford in deference to foreign government actors. Some have asserted that this discretion must be exercised on a case-by-case basis and that the executive branch is more competent to apply the doctrines of international comity. Part IV challenges both of these myths.

IV. TWO MYTHS OF INTERNATIONAL COMITY

With a proper definition of international comity and an understanding of the full range of American doctrines manifesting that principle, this Article now turns to examine critically some of the conventional wisdom. Two assertions about international comity stand out: (1) that comity must be governed by standards rather than rules; and (2) that comity determinations are best left to the executive branch. The first has long made comity an object of criticism.[314] The second has been strongly advanced by Posner and Sunstein in recent scholarship.[315]

Neither myth withstands scrutiny. A review of the international comity doctrines in American law shows that many take the form of rules rather than standards—from foreign sovereign immunity, to the act of state doctrine, to the presumption against extraterritoriality. Even when adjudicative comity operates as a principle of restraint—the area in which international comity doctrines like forum non conveniens most frequently take the form of standards—more rule-like alternatives exist.

With respect to the second myth, it is important to recognize that the proper role of the Executive depends on the comity doctrine at issue. No one would assert that the executive branch, rather than a court, should decide whether a foreign judgment should be recognized or whether a particular case should be dismissed on grounds of forum non conveniens. On the other hand, the President clearly has constitutional authority to determine particular facts—like recognition of a foreign government—on which some comity doctrines turn. Agency interpretations of

313. See supra notes 124–126 and accompanying text (describing shift in Supreme Court's approach).

314. See infra notes 316–321 and accompanying text (discussing criticism of comity for being discretionary).

315. See infra notes 361–362, 393–395 and accompanying text (discussing Posner and Sunstein's argument).

the geographic scope of statutes should also be entitled to *Chevron* deference. Most problematic are international comity doctrines that would allow the Executive to dictate the outcome of particular cases, like the *Bernstein* exception to the act of state doctrine or the authority that the executive branch currently claims to make binding determinations with respect to the conduct-based immunity of foreign officials. Posner and Sunstein favor such deference, while this Article argues that it not only compromises judicial independence but also harms U.S. foreign relations by putting the Executive in the uncomfortable position of having to make decisions that may displease foreign governments.

A. *Rules and Standards*

The myth that rules of international comity are impossible goes back to Justice Story. In his 1834 treatise on conflicts, Story endorsed the view that "'comity is, and ever must be uncertain'" and "'must necessarily depend on a variety of circumstances, which cannot be reduced to [sic] any certain rule.'"[316] It is precisely this discretionary aspect of comity that attracted the most criticism over the years. Even in Story's day, Samuel Livermore called the comity of nations "a phrase, which is grating to the ear, when it proceeds from a court of justice."[317] Judge Cardozo wrote in *Loucks v. Standard Oil Co. of New York* that "[t]he misleading word 'comity' has been responsible for much of the trouble" in denying the enforcement of foreign law.[318] "It has been fertile in suggesting a discretion unregulated by general principles."[319] Similarly, Joseph Beale observed that "[t]he doctrine seems really to mean only that in certain cases the sovereign is not prevented by any principle of international law, but only by his own choice, from establishing any rule he pleases for the conflict of laws."[320] Modern courts and commentators have repeated the criticism.[321]

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316. Story, supra note 54, § 28, at 34 (quoting Saul v. His Creditors, 5 Mart. (n.s.) 665, 678 (La. 1827) (Porter, J.)) (misquotation).

317. Samuel Livermore, Dissertations on the Questions Which Arise from the Contrariety of the Positive Laws of Different States and Nations 26 (1828).

318. 120 N.E. 198, 201 (N.Y. 1918).

319. Id. at 201–02.

320. 3 Joseph H. Beale, A Treatise on the Conflict of Laws § 71, at 1965 (1935); see also A.V. Dicey, A Digest of the Law of England with Reference to the Conflict of Laws 10 (1896) (describing comity as "singular specimen of confusion of thought produced by laxity of language").

321. See, e.g., JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 423 (2d Cir. 2005) ("The doctrine has never been well-defined, leading one scholar to pronounce it 'an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.'" (quoting Harold G. Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law, 76 Am. J. Int'l L. 280, 281 (1982))); see also supra notes 13–20 and accompanying text (discussing modern complaints about comity).

Whether any particular legal doctrine should take the form of a rule or a standard is a perennial question.[322] Rules bind a court to decide a case in a particular way based upon a limited number of triggering facts, while standards invite a court to apply the background policy directly after considering the full range of facts. The distinction between rules and standards is a continuum, not a divide, and many doctrines combine aspects of rules and standards.[323] But reviewing the doctrines of international comity shows that many of them are more rule-like than standard-like.

Take the doctrines of sovereign party comity, for example. The Supreme Court has adopted a rule that any government recognized by the United States, and not at war with it, may bring suit in U.S. courts.[324] This rule turns on two easily ascertainable facts. In *Sabbatino*, the Court expressly rejected an alternative standard of friendly relations: "This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts."[325]

The doctrine of foreign state immunity, codified in the FSIA, is also quite rule-like. The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless an enumerated exception to immunity applies.[326] There are exceptions for express waivers of immunity, suits based on a commercial activity, expropriation in violation of international law, property in the United States, torts in the United States, agreements to arbitrate, and maritime liens,[327] as well as for state-sponsored terrorism[328] and counterclaims.[329] Each directs the court to determine particular relevant facts. A court has no discretion to decide on a case-by-case basis whether the purposes of foreign state immunity would be served by its application. The same is

322. The literature is voluminous. See, e.g., Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557 (1992); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379 (1985); Kathleen M. Sullivan, The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22 (1992).

323. See Sullivan, supra note 322, at 61 ("A rule may be corrupted by exceptions to the point where it resembles a standard; likewise, a standard may attach such fixed weights to the multiple factors it considers that it resembles a rule. All kinds of hybrid combinations are possible.").

324. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 319–20 (1978) ("[G]overnments recognized by the United States and at peace with us are entitled to access to our courts . . . .").

325. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964).

326. 28 U.S.C. § 1604 (2012).

327. Id. § 1605(a)–(b).

328. Id. § 1605A.

329. Id. § 1607.

largely true of foreign official immunity. Under the doctrine of head-of-state immunity, immunity from suit follows automatically from the executive branch's recognition of a particular person as a foreign head of state, head of government, or foreign minister.[330] Conduct-based immunity is more complicated and still developing, but the courts of appeals have so far adopted rule-like approaches, with the Fourth Circuit holding that violations of *jus cogens* norms can never be "official acts,"[331] and the Second Circuit holding that the only fact that matters is the State Department's determination of immunity.[332]

In the area of prescriptive comity, one finds both rules and standards. Conflicts methodologies vary from state to state. Those that follow the first Restatement of Conflicts are fairly rule-like, while those that follow the Restatement (Second) partake more of standards.[333] Although the Restatement (Second) adopts a "most significant relationship" standard,[334] it also articulates a number of presumptions that give the application of that standard a more rule-like quality. Thus, in personal injury suits, "the local law of the state where the injury occurred" generally applies,[335] while in contract suits, "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of that state will usually be applied."[336] The discretion afforded under the public policy exception may also make conflicts approaches seem like standards, but this discretion is cabined by the requirement that the forum's public policy be a "strong" one.[337] In sum, the conflict of laws in the United States today is governed by a mix of rules and standards. The federal act of state doctrine, on the other hand, is quite rule-like. In *Kirkpatrick*, the Supreme Court expressly rejected a standard of embarrassment to foreign governments and instead adopted a rule requiring courts not to question the validity as

330. See Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012) ("[H]ead-of-state immunity involves 'a formal act of recognition,' that is 'a quintessentially executive function' for which absolute deference is proper." (quoting Peter B. Rutledge, *Samantar*, Official Immunity and Federal Common Law, 15 Lewis & Clark L. Rev. 589, 606 (2011))).

331. Id. at 776 ("[A]s a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.").

332. See Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) ("[I]n the common-law context, we defer to the Executive's determination of the scope of immunity."); see also Rosenberg v. Pasha, 577 F. App'x 22, 23–24 (2d Cir. 2014) (reaffirming *Matar*).

333. See Adam I. Muchmore, Jurisdictional Standards (and Rules), 46 Vand. J. Transnat'l L. 171, 183–87 (2013) (characterizing First Restatement as based on rules and Second Restatement as mix of rules and standards).

334. See, e.g., Restatement (Second) of Conflicts of Laws § 145 (Am. Law Inst. 1971) (articulating standard for torts); id. § 188 (articulating standard for contracts).

335. Id. § 146.

336. Id. § 188(3).

337. Id. § 90.

a rule of decision of a foreign sovereign's official acts fully performed within its own territory.[338]

On the restraint side of the ledger, some courts applying section 403 of the Restatement (Third) of Foreign Relations Law have determined the geographic scope of U.S. statutes on a case-by-case basis.[339] *Empagran*'s presumption against unreasonable interference also has a standard-like quality, although the Court applied it in that case to generate clear rules about the applicability of the Sherman Act and expressly rejected case-by-case balancing.[340] Foreign state compulsion similarly operates on a statute-by-statute basis, although its application may depend on the degree of compulsion and on the good faith of the party asking to be excused from U.S. law.[341] But the predominant manifestation of prescriptive comity as a principle of restraint in American law today is the presumption against extraterritoriality, which operates as a rule. To be sure, the Supreme Court's decision in *Morrison* makes clear that the presumption does not turn mechanically on the location of the conduct but rather requires a court to determine the "'focus' of congressional concern."[342] Once that focus has been established and the territorial reach of a provision determined, however, the geographic scope of the provision remains the same in each case.[343]

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338. See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 409 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."). *Kirkpatrick*'s approach was more rule-like than the approach in *Sabbatino*, where the Court suggested a case-by-case balancing of factors. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (noting relevant factors and declining to lay down "inflexible and all-encompassing rule"). The lower courts' approach to extraterritorial acts of state is more of a standard, calling for an evaluation of the foreign act's consistency with U.S. policy in each case. See, e.g., Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 522 (2d Cir. 1985) ("Acts of foreign governments purporting to have extraterritorial effect . . . should be recognized by the courts only if they are consistent with the law and policy of the United States.").

339. See supra note 195 and accompanying text (discussing cases applying section 403).

340. See supra note 196 and accompanying text (discussing *Empagran*).

341. See supra notes 198–203 and accompanying text (discussing foreign state compulsion).

342. Morrison v. Nat'l Austl. Bank Ltd., 130 S. Ct. 2869, 2874 (2010). In *Morrison*, the Supreme Court applied the presumption against extraterritoriality to determine the geographic scope of section 10(b) of the Securities Exchange Act, codified at 15 U.S.C. § 78j (2012), which prohibits fraud in connection with the purchase or sale of a security. Although the alleged fraud occurred in the United States, the Court applied the presumption, reasoning "that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Morrison*, 130 S. Ct. at 2884. Because the securities in *Morrison* had been purchased on a foreign stock exchange, the Court held that plaintiffs failed to state a claim under section 10(b). Id. at 2888.

343. One post-*Morrison* decision has held that a transaction in the United States is a necessary but not sufficient condition for the application of section 10(b). See Parkcentral

In the area of adjudicative comity, the recognition of foreign judgments is governed in most states by two uniform acts that set forth relatively clear rules. Thus, the 2005 Uniform Act, for example, provides that "a court of this state shall recognize a foreign-country judgment to which this [act] applies," subject to a list of enumerated exceptions.[344] Some of those exceptions are mandatory. A court "may not" recognize a foreign judgment if "the judgment was rendered under a judicial system that does not provide . . . procedures compatible with . . . due process" or if the foreign court lacked personal or subject matter jurisdiction.[345] Other exceptions are called discretionary. A court "need not" recognize a foreign judgment if, for example, the defendant did not receive notice of the proceeding.[346] But U.S. courts treat most of these "discretionary" grounds for nonrecognition as mandatory in practice.[347] There is certainly an aspect of discretion in the public policy exception, but that discretion is limited by the Act's requirement that the foreign judgment be "*repugnant* to the public policy of this state or of the United States," a rather high bar.[348]

Judicial assistance to foreign tribunals under § 1782, on the other hand, is clearly discretionary. The statute expressly says that a district court "*may* order" a person within its district to provide evidence.[349] In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Supreme Court refused to impose a rule limiting assistance to information that would be discoverable under the foreign tribunal's rules[350] and instead articulated a number of "factors" to guide the district court's discretion.[351]

Glob. Hub Ltd. v. Porsche Auto. Holdings SE, 763 F.3d 198, 216 (2d Cir. 2014) (per curiam) (concluding "while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that these transactions were domestic would not *suffice* to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic"). *Parkcentral*'s holding may be limited to cases in which the defendants were not parties to the U.S. transactions. See id. at 216 n.12 (noting "where the parties to the suit were the parties to the transaction, the fact that the transaction was domestic might well be deemed sufficient"). In that case, *Parkcentral* would simply create a rule-like exception to *Morrison*'s rule-like transactional test. But cf. id. at 218 (Leval, J., concurring) (characterizing per curiam opinion as "based on a number of facts").

344. 2005 Uniform Act, supra note 106, § 4(a).

345. Id. § 4(b).

346. Id. § 4(c)(1). The other "discretionary" grounds for nonrecognition are: the judgment was obtained by fraud; the judgment is repugnant to public policy; the judgment conflicts with another final judgment; the judgment is contrary to a choice-of-court agreement; the foreign court was seriously inconvenient and jurisdiction rested only on service of process; there are substantial doubts about the integrity of the rendering court with respect to the particular judgment; or the defendant was not afforded due process. Id. § 4(c)(2)–(8).

347. See Restatement (Fourth) of the Foreign Relations Law of the United States: Jurisdiction § 404 cmt. b (Am. Law Inst., Tentative Draft No. 1, 2014) (noting only two grounds are treated as discretionary in practice).

348. 2005 Uniform Act, supra note 106, § 4(c)(3) (emphasis added).

349. 28 U.S.C. § 1782(a) (2012) (emphasis added).

350. 542 U.S. 241, 259–63 (2004) (rejecting "foreign-discoverability rule").

351. Id. at 264–65 (listing factors).

But it is only when adjudicative comity is used as a principle of restraint that standards clearly predominate over rules. Forum non conveniens, prudential exhaustion, international comity abstention, and the granting of antisuit injunctions all require a case-by-case weighing of factors and are reviewed on appeal for abuse of discretion.[352] The same is true of foreign discovery under *Aérospatiale*, which requires a "particularized analysis of the respective interests of the foreign nation and the requesting nation."[353]

There is nothing inherent in this category of comity doctrines, however, that precludes the adoption of rules. Certainly there is a rule-like quality to *Daimler*'s limitation of general jurisdiction to a forum where the defendant is "at home," which generally means an individual's domicile or a corporation's place of incorporation or principal place of business.[354] In *Aérospatiale*, Justice Blackmun argued in favor of a rule requiring first resort to the procedures of the Hague Evidence Convention, noting that "nothing inherent in the comity principle . . . requires case-by-case analysis."[355] And other countries moderate the jurisdiction of their courts with a doctrine of lis pendens that defers in rule-like fashion to the first court seized with jurisdiction.[356] Simply put, the notion that comity

352. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) ("The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion . . . ."); GDG Acquisitions, LLC v. Gov't of Belize, 749 F.3d 1024, 1030 (11th Cir. 2014) ("We also review the district court's decision to dismiss based on international comity for abuse of discretion."); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 755 (9th Cir. 2011) (en banc) (plurality opinion) (McKeown, J.) ("The district court did not abuse its discretion when it considered whether exhaustion was required under the controlling plurality opinion of this court."), vacated on other grounds, 133 S. Ct. 1995 (2013); Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., 369 F.3d 645, 651 (2d Cir. 2004) ("The standard of review for the grant of a permanent injunction, including an antisuit injunction, is abuse of discretion."). But see Henry J. Friendly, Indiscretion About Discretion, 31 Emory L.J. 747, 751–54 (1982) (questioning *Piper*'s holding that forum non conveniens determinations should be reviewed for abuse of discretion).

353. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543–44 (1987).

354. See Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014) (identifying place of incorporation and principal place of business as paradigm bases for general jurisdiction over corporations). *Daimler* allows for general jurisdiction over a corporation at some other place only in "an exceptional case." Id. at 761 n.19 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952)).

355. 482 U.S. at 554 (Blackmun, J., concurring in part and dissenting in part).

356. See, e.g., Regulation No. 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast), arts. 29–34, 2012 O.J. (L 351) 1 (governing lis pendens and related actions); see also George A. Bermann, Parallel Litigation: Is Convergence Possible?, 13 Y.B. Priv. Int'l L. 21, 23–28 (2011) (comparing forum non conveniens and lis pendens). For an argument that U.S. courts should adopt a similar rule, see Parrish, supra note 18, at 269–77 (arguing for stay in favor of action first filed unless manifest injustice would result). Campbell McLachlan has astutely observed that lis pendens does not require adoption of a first-seized rule. See Campbell McLachlan, Lis Pendens in International Litigation 36 (2009) ("In fact, the term denotes only the notion

"must necessarily depend on a variety of circumstances, which cannot be reduced to [sic] any certain rule,"[357] is a myth.

In effectuating the purposes of international comity, rules have some advantages over standards. Many of the comity doctrines are justified on the basis of respecting foreign sovereignty and fostering friendly relations.[358] Rules further these interests by binding courts to defer to foreign government actors even when they might prefer not to do so. Discussing prescriptive comity as a principle of restraint in the *Laker* case, Judge Malcolm Wilkey observed:

> If promotion of international comity is measured by the number of times United States jurisdiction has been declined under the "reasonableness" interest balancing approach, then it has been a failure . . . . A pragmatic assessment of those decisions adopting an interest balancing approach indicates *none where United States jurisdiction was declined* when there was more than a *de minimis* United States interest . . . . When push comes to shove, the domestic forum is rarely unseated.[359]

Rules may also have advantages with respect to comity's other purpose of promoting commercial convenience. As a general matter, predictable rules better enable commercial parties to plan their affairs.

But in the private-interest context there may be other factors that cut in favor of standards. Courts may be more concerned with achieving fairness in cases that involve private parties. Rules may also be more easily gamed, and courts may therefore prefer standards that allow them to police abusive litigation tactics. It is perhaps for such reasons that one sees standards dominating adjudicative comity as a principle of restraint

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of a dispute, a *lis*, already pending before another court or tribunal. That is a factual phenomenon, not a legal solution to it."). For an excellent review of possible solutions, see id. at 59–73.

357. Story, supra note 54, § 28, at 34 (quoting Saul v. His Creditors, 5 Mart. (n.s.) 569, 596 (La. 1827) (Porter, J.)) (misquotation).

358. See supra notes 152–154 and accompanying text (discussing emergence of foreign sovereignty rationale).

359. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 950–51 (D.C. Cir. 1984) (footnotes omitted). The same could be said of other areas in which comity has been employed as a standard rather than a rule. See, e.g., Hannah L. Buxbaum, Assessing Sovereign Interests in Cross-Border Discovery Disputes: Lessons from *Aérospatiale*, 38 Tex. Int'l L.J. 87, 100 (2003) ("[T]he *Aérospatiale* decision improperly de-emphasized system values as compared to particular interests raised in individual cases, and . . . this deemphasis has encouraged lower courts over the past fifteen years to ignore certain legitimate sovereign interests expressed by foreign states."). After examining a number of different doctrines, Maggie Gardner concludes that open-ended discretion promotes parochial outcomes systemically "because it enables the evolution of tests that increasingly lock in parochial results." Maggie Gardner, Parochial Procedure 4 (Aug. 20, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2651453 (on file with the *Columbia Law Review*).

(e.g., forum non conveniens), while rules dominate in the area of sovereign party comity.[360]

B. *The Role of the Executive Branch*

A second myth of international comity is the notion that the executive branch enjoys a comparative advantage in making comity determinations. Posner and Sunstein have argued that "there are strong reasons, rooted in constitutional understandings and institutional competence, to allow the executive branch to resolve issues of international comity."[361] Because of its expertise in foreign relations, "the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary."[362] Posner and Sunstein, however, discuss only a limited number of international comity doctrines.[363] When one looks at the full range, one sees quite a few with respect to which deference to the Executive seems completely inappropriate: the conflict of laws, the enforcement of foreign judgments, forum non conveniens, antisuit injunctions, and questions of foreign discovery, to name a few. These doctrines undoubtedly implicate foreign relations, but they also fall within the core responsibility of the courts to manage their dockets and decide cases. With a number of these international comity doctrines, the Supreme Court has emphasized that the "determination is committed to the sound discretion *of the trial court*."[364] The Executive rarely intervenes in such comity cases, and even when it does so, its views appear to receive no deference.[365]

With other comity doctrines, the question is more complicated, and it may be useful to draw some distinctions. As Curtis Bradley notes, "[s]ome forms of deference may be more defensible than others."[366] On the one hand, the executive branch plainly has authority to make some decisions that affect the application of international comity doctrines. The President may recognize a foreign government, for example, or an agency may interpret the geographic scope of a statute it administers.

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360. The author is grateful to Steve Bundy and David Sloss for these points.

361. Posner & Sunstein, supra note 33, at 1177.

362. Id. at 1205.

363. See id. at 1179–80 (discussing presumption against extraterritoriality, act of state doctrine, foreign sovereign immunity, and (mistakenly) *Charming Betsy* canon).

364. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (emphasis added); see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 546 (1987) ("The exact line between reasonableness and unreasonableness in each case must be drawn by the *trial court*, based on its knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies they invoke." (emphasis added)).

365. See, e.g., Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 950–53 (1st Cir. 1991) (Breyer, C.J.) (rejecting SEC's argument that district court misapplied doctrine of forum non conveniens).

366. Bradley, supra note 66, at 666.

Such decisions tend to be made categorically, outside the context of litigation. On the other hand, one should be skeptical of doctrines that allow the executive branch to dictate the outcomes of particular cases on foreign policy grounds. Such discretion invades the province of the judiciary and may harm, rather than advance, U.S. foreign relations.[367]

Least problematic is the Executive's authority to determine particular facts on which some comity doctrines turn. For example, the President has unreviewable authority to recognize foreign governments.[368] The act of state doctrine applies only to "the public acts [of] a recognized foreign sovereign power,"[369] and the recognition of a foreign government by the Executive will bring its previous acts within the scope of that doctrine.[370] Recognition automatically confers the privilege of bringing suit in U.S. courts as a matter of comity, at least in the absence of a state of war with the United States.[371] A strong case can be made that the President's recognition should also control a foreign state's entitlement to immunity under the FSIA. Lower courts have generally applied international law to decide if a defendant is a "foreign state" under the Act,[372] but as the First Circuit has pointed out, this may not be the best approach.[373] Under the

367. See infra notes 396–411 and accompanying text (discussing arguments against case-specific deference to executive branch).

368. Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126, 137 (1938) ("What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.").

369. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964); see also Belgrade v. Sidex Int'l Furniture Corp., 2 F. Supp. 2d 407, 418 n.73 (S.D.N.Y. 1998) (holding act of state doctrine did not apply to decree of unrecognized Federal Republic of Yugoslavia).

370. Oetjen v. Cent. Leather Co., 246 U.S. 297, 303 (1918) (holding "recognition is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence").

371. *Sabbatino*, 376 U.S. at 408–09 (holding privilege of bringing suit extends to governments recognized by United States and not at war with it); see also Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015) ("Recognized sovereigns may sue in United States courts . . . ."). In *Pfizer, Inc. v. Government of India*, the Court stated more broadly that "it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue," but in context the Court appears to have been referring to the President's recognition power and not any broader authority to deny recognized foreign governments access to U.S. courts. 434 U.S. 308, 320 (1978).

372. See, e.g., Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47–49 (2d Cir. 1991) (applying international law criteria to decide Palestine Liberation Organization was not foreign state).

373. See Ungar v. Palestine Liberation Org., 402 F.3d 274, 284 n.6 (1st Cir. 2005) ("It may be argued that a foreign state, for purposes of the FSIA, is an entity that has been recognized as a sovereign by the United States government."); see also Sokolow v. Palestine Liberation Org., 583 F. Supp. 2d 451, 458 (S.D.N.Y. 2008) ("Since Palestine is not recognized, under United States law, as a 'foreign state,' the defendants cannot derivatively secure sovereign immunity as agencies and/or instrumentalities of Palestine."); Knox v. Palestine Liberation Org., 306 F. Supp. 2d 424, 438–48 (S.D.N.Y. 2004) (holding even if Palestine met international law criteria, it should not be considered "foreign state" under FSIA unless recognized by United States); cf. *Zivotofsky*, 135 S. Ct. at 2084 ("Recognized

FSIA, Congress has also given the State Department express authority to permit terrorism suits against foreign states by designating them "state sponsor[s] of terrorism."[374] There is also nothing inappropriate about having doctrines of status-based foreign official immunity—like diplomatic immunity and head-of-state immunity—turn on the President's recognition of a foreign official's status.[375] In a sense, all of these doctrines defer to the executive branch. But they do so by attaching legal consequences to an exercise of executive authority made outside the context of litigation, rather than by deferring to the Executive's judgment about whether any particular case should be dismissed. The Supreme Court captured the distinction in its 1938 *Guaranty Trust* decision.[376] The Executive's "action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts," the Court noted.[377] But the courts "are free to draw for themselves its legal consequences in litigations pending before them."[378]

Another common exercise of executive branch authority is for an agency to interpret a statute it administers.[379] Posner and Sunstein correctly argue that courts should defer to agency interpretations of the geographic scope of federal statutes.[380] The reasons for this are the ordinary reasons for *Chevron* deference—that an ambiguous statute should generally

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sovereigns . . . may benefit from sovereign immunity when they are sued . . . ."). The possibility of case-specific deference to the Executive under the FSIA is considered below. See infra notes 386–388, 404–410 and accompanying text (discussing FSIA).

374. 28 U.S.C. § 1605A(h)(6) (2012).

375. See Yousuf v. Samantar, 699 F.3d 763, 772 (4th Cir. 2012) ("Like diplomatic immunity, head-of-state immunity involves 'a formal act of recognition,' that is 'a quintessentially executive function' for which absolute deference is proper." (quoting Rutledge, supra note 330, at 606). As noted above, diplomatic immunity is codified in the Vienna Convention on Diplomatic Relations, while head-of-state immunity is a rule of customary international law. See supra notes 280–281 and accompanying text (discussing diplomatic and head-of-state immunity). But the appropriateness of having the President make the status determination on which the doctrines turn does not depend on whether the doctrines are ones of comity or of international law.

376. Guar. Tr. Co. of N.Y. v. United States, 304 U.S. 126 (1938).

377. Id. at 138.

378. Id.

379. See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (holding if "Congress has not directly addressed the precise question at issue, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency").

380. See Posner & Sunstein, supra note 33, at 1204 ("[I]n cases in which the executive has adopted an interpretation via rulemaking or adjudication, or is otherwise entitled to deference under standard principles of administrative law, the executive's interpretations should prevail over the comity doctrines."); see also Bradley, supra note 66, at 691–94 (arguing for *Chevron* deference on questions of geographic scope); Zachary D. Clopton, Replacing the Presumption Against Extraterritoriality, 94 B.U. L. Rev. 1, 45 (2014) ("[I]f a statute is silent or ambiguous with respect to its extraterritoriality, and if Congress has explicitly or implicitly delegated responsibility for that statute to an administrative agency, the agency's ex ante interpretation is valid if it is a permissible construction of the statute.").

be read as a delegation of interpretative authority to an agency that administers it and that administrative agencies have special expertise with respect to statutory goals and how best to achieve them. But it is critical to emphasize that *Chevron* deference is deference to the interpretation of a statute to be applied across a whole range of cases, and not deference with respect to how any particular case should be resolved.

Much more problematic is judicial deference to the Executive with respect to the outcomes of particular cases. Some international comity doctrines have been interpreted to permit case-by-case discretion by the executive branch. The Second Circuit has held that the Executive may waive the act of state doctrine in a particular case under the so-called *Bernstein* exception.[381]

With respect to foreign official immunity, the executive branch has claimed authority to make binding determinations since the Supreme Court's 2010 decision in *Samantar*.[382] For status-based immunities, this authority derives from the President's recognition power and is uncontroversial, but there is no "equivalent constitutional basis" for determinations of status-based immunity.[383] Nevertheless, the Fourth Circuit gives

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381. Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375, 376 (2d Cir. 1954) (giving effect to State Department letter waiving act of state doctrine). Although six Justices rejected the *Bernstein* exception in First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972), they did so in three separate opinions, none of which commanded a majority of the Court. See id. at 772–73 (Douglas, J., concurring) (rejecting *Bernstein* exception); id. at 773 (Powell, J., concurring) ("I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction."); id. at 789 (Brennan, J., dissenting) (arguing executive branch "cannot by simple stipulation change a political question into a cognizable claim"). And while W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 408–09 (1990), rejected a broader role for the Executive in determining when the act of state doctrine should be applied, it did not formally pass on the validity of the *Bernstein* exception. Id. at 405 (finding it unnecessary to address possibility of "exception for cases in which the Executive Branch has represented that it has no objection to denying validity to the foreign sovereign act").

The President also has statutory authority under the Second Hickenlooper Amendment to invoke the act of state doctrine in cases where the statute would otherwise make the doctrine inapplicable—specifically where property expropriated in violation of international law is brought to the United States. See 22 U.S.C. § 2370(e)(2) (2012) (creating exception "in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States"). The President has never used this authority.

382. Samantar v. Yousuf, 130 S. Ct. 2278 (2010); see, e.g., Brief for the United States as Amicus Curiae Supporting Appellees at 10, Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012) (No. 11-1479) (arguing State Department determinations of foreign official immunity are "binding").

383. *Yousuf*, 699 F.3d at 773; see also Ingrid Wuerth, Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department, 51 Va. J. Int'l L. 915, 929–54 (2011) (considering and rejecting bases for executive lawmaking with respect to immunity). But see Lewis S. Yelin, Head of State Immunity as Sole Executive Lawmaking, 44 Vand. J. Transnat'l L. 911, 969 (2011) ("[T]he Executive Branch engages in undelegated lawmaking when it makes head of state immunity determinations.").

State Department determinations of conduct-based immunity "substantial weight,"[384] while the Second Circuit considers them absolutely binding.[385]

As for foreign state immunity, the FSIA was passed in 1976 with the express purpose of shifting immunity determinations from the executive branch to the courts.[386] In *Republic of Austria v. Altmann*, the Supreme Court refused to give any "special deference" to the Executive's views about how the FSIA should be interpreted but suggested that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy."[387] This suggestion drew a sharp dissent from Justice Kennedy, who noted that "judicial independence . . . is compromised by case-by-case, selective determinations of jurisdiction by the Executive."[388]

Finally, in the context of litigation under the Alien Tort Statute, the Supreme Court has raised the possibility of "case-specific deference to the political branches," stating that "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[389] Lower courts have tended to cabin this suggestion within the existing framework of the political question doctrine.[390] But the Ninth Circuit in *Mujica*, applying its newly minted doctrine of international comity abstention,[391] gave substantial weight to a U.S. statement of interest suggesting "that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States."[392]

Posner and Sunstein do not discuss any of these examples in detail,[393] but they come down firmly on the side of case-specific deference

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384. *Yousuf*, 699 F.3d at 773.

385. See Matar v. Dichter, 563 F.3d 9, 15 (2d Cir. 2009) ("[I]n the common-law context, we defer to the Executive's determination of the scope of immunity.").

386. See infra notes 406–409 and accompanying text (discussing legislative history of FSIA).

387. 541 U.S. 677, 701–02 (2004).

388. Id. at 735 (Kennedy, J., dissenting).

389. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

390. See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 58 (D.C. Cir. 2011) (noting deference suggested in *Sosa* "could implicate a number of the factors identified in *Baker v. Carr*," a leading political question case), vacated on other grounds, 527 F. App'x 7 (D.C. Cir. 2013); Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 261 (2d Cir. 2007) (equating deference suggested in *Sosa* with "prudential justiciability doctrine known as the political question doctrine" (internal quotation marks omitted)).

391. See supra notes 257–258 and accompanying text (discussing Ninth Circuit's decision in *Mujica*).

392. Mujica v. Airscan Inc., 771 F.3d 580, 609 (9th Cir. 2014) (internal quotation marks omitted). The panel quoted *Sosa* in support. Id. at 610.

393. They briefly assert that "courts continue to take account of the executive's views in FSIA cases." Posner & Sunstein, supra note 33, at 1200; see also id. n.97 (citing *Altmann*). They also refer to "a strain of thinking about the act of state doctrine . . . that courts should defer when the executive informs them that this doctrine should not apply

to the executive branch. Even outside the *Chevron* context, they argue, courts should defer "if the executive branch argues that the court should dismiss the case rather than reach the merits."[394] "[T]he argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive's accountability for foreign relations is more important than the courts' independence from political pressure."[395] But Posner and Sunstein elide some key distinctions between *Chevron* deference and case-specific deference and fail to respond to the two main normative arguments against a case-specific role for the executive branch in administering the doctrines of international comity.

First, as Justice Kennedy pointed out in his *Altmann* dissent, "judicial independence" is compromised when the Executive has the power to make "case-by-case, selective determinations" that dictate the outcome of cases.[396] Justice Douglas once made the point more colorfully in an act-of-state case, writing that such discretion makes the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others'."[397] Testifying before Congress in favor of the proposed FSIA, State Department Legal Adviser Monroe Leigh said that the State Department's "consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established."[398] Deferring to an agency's interpretation of the geographic scope of a statute under *Chevron* respects the established roles of Congress, the executive branch, and the courts.[399] Allowing the Executive to tell courts which cases to dismiss does not. Thus, the Supreme Court properly rejected the U.S. government's argument in *Kirkpatrick* that the act of state doctrine should bar adjudication whenever the Executive determined that

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in a particular case." Id. at 1201. And they appear to chide the Court for not going far enough in *Sosa* to embrace deference to the executive branch. See id. at 1202 & n.109 (expressing surprise courts have not fully embraced deference to Executive and citing *Sosa* as example). Of course, a few of the examples in this Article, like international comity abstention and foreign official immunity, did not have the same salience when Posner and Sunstein published their Article in 2007.

394. Id. at 1207; see also id. at 1177 ("Our argument also implies greater deference to the executive when it intervenes in private litigation."); id. at 1205–06 (discussing example of "litigation against China by Chinese victims of state repression").

395. Id. at 1207.

396. Republic of Austria v. Altmann, 541 U.S. 677, 735 (2004) (Kennedy, J., dissenting).

397. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Douglas, J., concurring in the judgment).

398. Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 94th Cong. 35 (1976) (testimony of Monroe Leigh, Legal Adviser, Dep't of State) [hereinafter Leigh Testimony].

399. Cf. INS v. Chadha, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility.").

a case would cause too much embarrassment to a foreign government.[400] "The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them."[401]

Second, the Executive's ability to make case-by-case comity determinations may harm, rather than advance, the foreign relations of the United States. In *Sabbatino*, Justice Harlan observed that "[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically."[402] Ironically, international comity doctrines that promise deference to the Executive put the Executive in the uncomfortable position of having to make decisions that may disappoint foreign governments.[403]

This was the U.S. experience with respect to foreign state immunity from the 1940s, when the Supreme Court adopted a rule of deferring to determinations of immunity by the State Department,[404] until Congress passed the FSIA in 1976.[405] As State Department Acting Legal Adviser Charles Brower testified, "We at the Department of State are now persuaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than by the executive branch."[406] The problem was that "some foreign states may be led to believe that since the decision can be

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400. See W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 408–09 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments . . . .").

401. Id. at 409. In an excellent review of the Roberts Court's foreign relations law cases, Harlan Cohen concludes that the current Court is less and less inclined to trust the executive branch. See Cohen, supra note 34, at 436 ("Special deference to the Executive on foreign affairs now seems ill-placed.").

402. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964).

403. See Sitaraman & Wuerth, supra note 34, at 1943 ("[T]he diplomatic contact between executive branch officials and their foreign counterparts is in some contexts a reason for courts not to defer because deference would mean that State Department officials might be held responsible for negative decisions or that they are lobbied heavily by foreign governments . . . ." (emphasis omitted)).

404. See Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); Ex Parte Republic of Peru, 318 U.S. 578, 589 (1943) (holding determination of state immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government").

405. For a summary of sovereign immunity determinations during that period, see generally Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977 (Michael Sandler et al., eds.), *in* John A. Boyd, Digest of U.S. Practice in International Law 1017 (1977).

406. Immunity of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 14 (1973) (statement of Charles N. Brower, Legal Adviser, Dep't of State) [hereinafter Foreign State Immunity Hearing].

made by the executive branch it should be strongly affected by foreign policy considerations" and that these states were "inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision."[407] In their letter of transmittal to Congress, the Department of Justice and the Department of State explained:

> The transfer of this function to the courts will also free the [State] Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts.[408]

Both the House and Senate Reports accompanying the FSIA emphasized that "[a] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations" and freeing the State Department "from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity."[409] Over the past four decades, the "FSIA (with little or no deference to the executive branch) has not generated major foreign policy problems."[410]

As former State Department Legal Adviser John Bellinger has noted, the same dynamic is likely to play itself out in the context of foreign official immunity, where the State Department currently claims unreviewable discretion to make case-by-case immunity determinations:

> I wonder whether, in a few years time, the Legal Adviser's Office will be in that same situation again, seeking another kind of FOIA—a "Foreign Officials Immunities Act"—just as 40 years ago it sought the FSIA to relieve the burden and political pressure of having to file statements of sovereign immunity in every case.[411]

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407. Id.; see also Leigh Testimony, supra note 398, at 34 (noting "disadvantages . . . of being able to enter a political judgment in the court" in "cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something").

408. Letter from Richard G. Kleindienst, Attorney Gen., & William P. Rogers, Sec'y of State, to the Speaker of the House of Representatives (Jan. 16, 1973), reprinted in Foreign State Immunity Hearing, supra note 406, at 34.

409. H. Comm. on the Judiciary, Jurisdiction of U.S. Courts in Suits Against Foreign States, H.R. Rep. No. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606; S. Comm. on the Judiciary, Define Jurisdiction of U.S. Courts in Suits Against Foreign States, S. Rep. No. 94-1310, at 9 (1976).

410. Wuerth, supra note 383, at 953.

411. John B. Bellinger III, The Dog that Caught the Car: Observations on the Past, Present, and Future Approaches of the Office of the Legal Adviser to Official Acts Immunities, 44 Vand. J. Transnat'l L. 819, 835 (2011).

Other international comity doctrines that allow the Executive to dictate the outcome in specific cases—the *Bernstein* exception to the act of state doctrine, *Altmann*'s possibility of deference to statements of interest under the FSIA, and *Sosa*'s suggestion of case-specific deference in ATS cases—present the same dangers. Each opportunity for deference invites pressure from foreign governments and creates the possibility of diplomatic backlash if the Executive decides not to support their positions.

Giving the executive branch authority to make case-by-case determinations under doctrines of international comity is a bad idea. It turns legal decisions into political ones, undermining not only the rule of law but also the foreign policy interests of the United States. The desirability of executive discretion over questions of international comity is not just a myth, it is a dangerous myth.

CONCLUSION

This Article aims to support the role of international comity in U.S. foreign relations law by providing a proper definition and analytic framework and by freeing international comity from some of the myths that have surrounded it. The principle of comity is manifested in a large number of American doctrines that mediate the relationship between the U.S. legal system and those of other nations. These international comity doctrines operate to recognize foreign law and to restrain the reach of American law. They recognize the judgments of foreign courts and limit the jurisdiction of American courts. They allow foreign governments to bring suit as plaintiffs, while shielding those governments and their officials from responding as defendants in some circumstances.

This Article provides the first comprehensive account of international comity in American law, as well as the "clear analytical framework" that previous writers have complained was missing.[412] The Article defines international comity in a way that is both clearer and more comprehensive than the Supreme Court's famously ambiguous statement in *Hilton*.[413] As this Article defines it, international comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.

Distinguishing between international and domestic law does not denigrate the important role of international law in mediating among national legal systems. In areas like foreign sovereign immunity and prescriptive

412. Childress, supra note 20, at 51.

413. See Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."); supra notes 26–31 and accompanying text (discussing *Hilton*).

jurisdiction, doctrines of international comity are layered on top of rules of international law, creating a comity penumbra that surrounds an international law core.[414] But the distinction clarifies the respective roles of international comity and international law. It also underlines the point that courts and legislatures may shape the international comity doctrines, as rules of domestic law, to achieve an appropriate level of deference to foreign lawmakers, foreign courts, and foreign governments as litigants.

This Article contributes to the ongoing debates over the shape of those doctrines by showing that international comity may be expressed in rules rather than standards and may be exercised by courts rather than the Executive. The Article should not be understood to suggest that there is a single form of international comity appropriate to every situation. Each of the international comity doctrines discussed above has its own requirements adapted to the particular context in which it is used. Some doctrines, like forum non conveniens, may properly take the form of standards rather than rules.[415] Others, like the presumption against extraterritoriality, may properly allow for deference to agency interpretations.[416] But whatever particular form a doctrine takes, it is a court's obligation to apply its requirements faithfully rather than treating international comity as a blank check for discretion, either by the court or by the executive branch.

414. See supra notes 298–302 and accompanying text (discussing foreign sovereign immunity and prescriptive jurisdiction).

415. See supra notes 229–237 and accompanying text (discussing forum non conveniens).

416. See supra notes 379–380 and accompanying text (discussing *Chevron*).