
NOTE

INTEREST BALANCING AND INTERNATIONAL ABSTENTION

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International parallel proceedings are expected to grow more frequent as cross-border litigation increases in step with globalization. In response to the costs and gamesmanship of duplicative litigation, U.S. courts have adapted domestic jurisdictional doctrines and reshaped them to the international context. One doctrine receiving considerable attention in recent years is international abstention, through which U.S. courts decline to exercise jurisdiction over cases in which an action is already pending abroad. Much about the doctrine remains uncertain, not least because the Supreme Court has yet to address the propriety of abstaining in favor of foreign courts and the form such abstention should take. Some circuits relegate international abstention to exceptional circumstances, while others weigh more heavily concerns of international comity. Meanwhile, taking cues from the European experience with the principle of lis alibi pendens, some commentators have called for the adoption of a presumption in favor of abstention. The proposed presumptive rules, however, do not adequately protect U.S. sovereign interests in the absence of the requisite mutual trust among courts of different nations. This Note argues that an interest-balancing approach is thus the best compromise for an international abstention doctrine that gives due regard to comity and U.S. jurisdictional interests alike.

INTRODUCTION

In the current climate of tight budgetary constraints, the efficient administration of justice is a vital imperative. But as courts strive to do more with less, globalization is contributing to the internationalization of legal disputes and adding to the workload of U.S. courts. A particularly problematic subset of international disputes is one in which two or more countries have

concurrent jurisdiction¹ and parallel proceedings² are initiated by the parties. Not only does such forum shopping raise concerns of inefficiency and waste of judicial resources, it carries the additional risk of creating legal uncertainty for the parties and tensions between sovereign countries. This Note focuses on abstention as one of the jurisdictional solutions³ devised by U.S. courts to deal with international parallel proceedings. Abstention, as the term is used in this Note, refers to the decision of a court, which has jurisdiction over a case and its parties, to refrain from exercising its jurisdiction either by dismissing the case or granting a stay until the parallel proceeding results in a judgment.⁴

Part I shows that federal courts in the U.S. currently have little authoritative guidance on whether they may abstain from exercising jurisdiction in cases pending before foreign courts. The abstention doctrine developed by the Supreme Court originated in federalism concerns and responded to

¹ Concurrent jurisdiction refers to a situation where two or more countries have jurisdiction over a dispute. Jurisdiction means the authority of states: (1) “to prescribe their law” (jurisdiction to prescribe, also known as legislative jurisdiction); (2) “to subject persons and things to adjudication in their courts and other tribunals” (jurisdiction to adjudicate, also known as judicial jurisdiction); and (3) “to enforce their law, both judicially and nonjudicially” (jurisdiction to enforce). RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, intro. note (1987).

² This Note adopts Professor James P. George’s broad definition of “parallel proceedings.” See James P. George, *International Parallel Litigation – A Survey of Current Conventions and Model Laws*, 37 TEX. INT’L L.J. 499, 535 (2002) (“[Parallel proceedings are two] or more lawsuits with sufficient identity of parties and claims that a decision in one is likely to have a preclusive effect on some or all of the claims in the remaining suit. This meaning thus embraces both parallel actions with identical claims and parties, and ones not perfectly identical but strongly related with a significant overlap of parties and claims.”).

³ Other jurisdictional solutions include “defensive institutions,” such as *lis alibi pendens* and forum non conveniens, as well as “aggressive institutions,” such as antisuit injunctions, antienforcement injunctions, and declaratory judgment actions. Bernd U. Graf, *International Concurrent Jurisdiction: Dealing with the Possibility of Parallel Proceedings in the Courts of More Than One Country* 4, 26, 57 (July 12, 1988) (unpublished LLM thesis, University of Georgia School of Law), available at http://digitalcommons.law.uga.edu/stu_llm/125 (defining defensive institutions as jurisdictional tools that “may be invoked as a defense against the bringing of a suit in a certain forum, as well as to their effect of restraining domestic proceedings,” and aggressive institutions as tools “which allow a party to counter proceedings instituted by the opposing party in a foreign country”). Another way to approach the problem is to allow parallel proceedings and resolve the issue at the judgment recognition stage by pleading *res judicata*.

⁴ In *Quackenbush v. Allstate Ins. Co.*, the Supreme Court held that dismissal on a theory of abstention is available “only where the relief being sought is equitable or otherwise discretionary”; dismissal is thus unavailable in a suit for damages. 517 U.S. 706, 707 (1996); see also GARY BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 552 (5th ed. 2011) (remarking that “[i]t is unclear whether, and to what extent, the holding[] in *Quackenbush* . . . appl[ies] in the context of international litigation”).

considerations of a purely domestic nature. Over time, the Court's abstention doctrine came to reflect other interests, principally relating to judicial economy. To this day, the doctrine concerns domestic litigation and has effectively left lower courts free to craft different approaches to abstention in international parallel proceedings. One such approach is based on the domestic abstention doctrine formulated in *Colorado River Water Conservation District v. United States*, which stresses federal courts' "virtually unflagging obligation" to exercise jurisdiction and allows abstention only in "exceptional circumstances."⁵ Another, more liberal approach to abstention developed by the Eleventh Circuit in *Turner Entertainment Co. v. Degeto Film GmbH* focuses instead on international comity.⁶

Given federal courts' inconsistent application of the abstention doctrine in international cases, there have been calls for a more coherent approach that would increase predictability for the parties and promote judicial economy.⁷ While commentators seem to agree on the need for a uniform, easily applicable doctrine, they hold divergent views as to what its substance should be. One writer, for example, advocates "a modified *lis alibi pendens* principle," which

⁵ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976) ("Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959))); *id.* at 817 ("This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.").

⁶ *Turner Entm't Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (setting forth a balancing test for international abstention weighing the three factors of "international comity," "fairness to litigants," and judicial economy). Comity, as the term is used in *Turner Entertainment*, is the comity of courts, not the comity which *Hilton v. Guyot*, 159 U.S. 113, 164 (1895), famously defined as "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." See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (distinguishing between "the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, . . . [and] what might be termed 'prescriptive comity': the respect sovereign nations afford each other by limiting the reach of their laws"). This Note is only concerned with the comity of courts, or what one scholar calls "adjudicatory comity." See N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT'L ECON. L. 601, 605 (2006).

⁷ See Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 244 (2010) ("Creating a rough symmetry between stay decisions and when a foreign court is considered a reasonable and appropriate forum under U.S. jurisdictional rules would create a fairer system for litigants, reduce the waste of unnecessary duplication, and, on balance, better serve long-term U.S. interests.").

would reverse the current “presumption” against abstention.⁸ Under this reverse presumption, courts should abstain if a case has already been filed in a foreign court that has jurisdiction “under U.S. jurisdictional principles.”⁹ Suggesting more modest changes, another commentator favors tweaking the domestic abstention doctrine to accommodate considerations that are specific to international parallel proceedings.¹⁰

Before considering these options, Part II broadens the perspective to other countries’ efforts to curb duplicative international litigation. The experience of European Union countries in this area is particularly relevant. Since the late 1960s, EU member and associated states have used treaties and secondary legislation to resolve jurisdictional conflicts in civil and commercial matters.¹¹

⁸ *Id.* For a description of *lis alibi pendens*, see George, *supra* note 2, at 537-38 (“*Lis alibi pendens* (suit pending elsewhere) is a special category of *lis pendens* notice, providing notice of a parallel action. It is used as the basis for a motion to stay or dismiss one of the actions. In several treaties and model laws originating outside the United States, the term *lis pendens* embraces *lis alibi pendens*, and its usage implies that the multiple suits must be perfectly identical in order for the doctrine to apply.” (footnotes omitted)).

⁹ Parrish, *supra* note 7, at 244.

¹⁰ Jocelyn H. Bush, Comment, *To Abstain or Not to Abstain?: A New Framework for Application of the Abstention Doctrine in International Parallel Proceedings*, 58 AM. U. L. REV. 127, 156-66 (2008) (proffering “suggestions of minor amendments to the *Colorado River* factors to be used if the standard is applied to address international parallel proceedings. These amendments are designed to improve the consistency with which they are applied and to promote a stricter adherence to the analytical framework originally provided by the Supreme Court in *Colorado River* and [*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*]”).

¹¹ The initial treaty, known as the Brussels Convention, was signed by the European Economic Community’s original six members (Belgium, Germany, France, Italy, Luxembourg, and the Netherlands) in 1968. See Convention concernant la compétence judiciaire et l’exécution des décisions en matière civile et commerciale [Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters] 72/454/CEE, Sept. 27, 1968, 1972 J.O. (L 299) 32 (entered into force Feb. 1, 1973), translated in 1978 J.O. (L 304) 36, consolidated version including subsequent accession agreements and protocols at 1998 O.J. (C 27) 3 [hereinafter Brussels Convention]. With the expansion of European Community competence over judicial cooperation in civil matters, see Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, arts. 73i(c) & 73m, Oct. 2, 1997, 1997 O.J. (C 340) 1, 28, 30, the treaty framework was replaced for the most part in 2001 by binding secondary legislation known as the Brussels I Regulation. See Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1 (EC) (entered into force Mar. 1, 2002) [hereinafter Brussels I Regulation] (promulgating “[p]rovisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation”); J.J. FAWCETT & J.M. CARRUTHERS, CHESHIRE, NORTH & FAWCETT: PRIVATE INTERNATIONAL LAW 204-05 (14th ed. 2008). Recently, the EU remodeled the

In this framework, conflicts of jurisdiction are resolved through the principle of *lis alibi pendens*, which holds that in the case of parallel proceedings a court must decline jurisdiction in favor of the court where the matter was filed first. This regime prizes simplicity but also protects the expectations of defendants.

Part III then examines whether a similar principle could guide U.S. courts' international abstention analysis, notably through the use of a first-to-file presumption in favor of abstention. This Note counsels against it. While the *Colorado River* abstention doctrine may allow international abstention in too few cases, a first-to-file presumptive rule errs on the other side, by making abstention more often the rule than not and restricting courts' evaluation of the interests at stake in each particular case. A presumptive approach has the advantage of providing federal courts with clear guidance, but it does not give them sufficient maneuvering room to balance private and public interests adequately. As a middle road between *Colorado River's* exceptional-circumstances test and a first-to-file presumption, this Note favors a balancing approach emphasizing international comity along the lines of *Turner Entertainment*.

I. DECLINING JURISDICTION IN INTERNATIONAL PARALLEL PROCEEDINGS: U.S. APPROACHES

Courts in the United States have traditionally had the power to decline jurisdiction in cases where it would otherwise exist. This power, which affords some judicial discretion, is grounded in the equity tradition. In a federal system, abstention is a useful doctrinal tool to resolve conflicts of jurisdiction between federal and state courts. Further, the abstention doctrine has served as a means of preventing wasteful duplicative litigation from consuming scarce judicial resources.

Since international parallel proceedings pose analogous concerns in terms of comity and efficiency, U.S. courts have had to consider the applicability of the

Brussels I Regulation (effective January 1, 2015) to better accommodate forum selection agreements and give discretion to stay proceedings in favor of courts of third states. See Regulation 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. 31, 33 & 34, 2012 O.J. (L 351) 1, 12, 13. In 1988, a convention nearly identical to the Brussels Convention and commonly referred to as the Lugano Convention was signed by the members of the European Community and members of the European Free Trade Association. See Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9. A "new" Lugano Convention replacing its 1988 forebear was signed in 2007 to "bring [the old Lugano Convention] into line as far as possible with the [Brussels I] Regulation." FAWCETT & CARRUTHERS, *supra*, at 343; see also Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Oct. 30, 2007, 2007 O.J. (L 339) 3. Taken as a whole, the interrelated rules created by the Brussels Convention, the Brussels I Regulation, and the Lugano Convention are commonly referred to as the "Brussels Regime."

abstention doctrine in international cases. Different approaches have emerged: some courts have hewed to the domestic abstention doctrine's stringent requirements, while others have emphasized the specificity of international litigation and tailored their approaches accordingly. This Part retraces the history of the abstention doctrine up to the present uncertainty regarding its application in international litigation.

A. *Origins of the Abstention Doctrine*

1. Equity

Anglo-American law has long emphasized that courts properly having jurisdiction over a case should not shirk their duty to adjudicate, a principle expressed in the Latin maxim *judex tenetur impertiri judicium suum* ("a judge is bound to decide (the case before him)").¹² This fundamental principle, however, is not absolute and must accommodate other goals of the justice system, such as judicial efficiency and fairness to parties, which may not always align with a categorical obligation to assert authority over a given case.¹³ Courts, therefore, must have the power to decline jurisdiction, which implies a certain degree of discretion and, with it, safeguards to prevent its abuse.¹⁴

¹² See *Clements v. Macaulay*, 4 M. 583, 593 (Scot.) ("It must never be forgotten, that in cases in which jurisdiction is competently founded, a Court has no discretion whether it shall exercise its jurisdiction or not, but is bound to award the justice which a suitor comes to ask. *Judex tenetur impertiri judicium suum*; and the plea under consideration must not be stretched so as to interfere with this general principle of jurisprudence."). For a similar American pronouncement, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

¹³ See *Calamita*, *supra* note 6, at 664 (referring to "the power that courts have held throughout Anglo-American legal history to balance the duty to entertain an action – '*judex tenetur impertiri judicium suum*' – with the equally important obligation to ensure that the exercise of jurisdiction conferred is used to do justice"). The tension is reflected in the Supreme Court's jurisprudence on the federal courts' "virtually unflagging obligation" to exercise jurisdiction, which is, however, tempered by their considerable discretion in tailoring this exercise in "exceptional circumstances." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976); see also David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) (opining that Justice Marshall's statement in *Cohens* and Justice Brennan's language in *Colorado River* "are far too grudging in their recognition of judicial discretion in matters of jurisdiction").

¹⁴ See Shapiro, *supra* note 13, at 574 ("A refusal to exercise jurisdiction for reasons within the sound, principled discretion of the court is not the kind of ad hoc refusal to entertain an action that flirts with treason to the Constitution."). This Note does not use "discretion" in the sense of the unreviewable, ad hoc type of discretion exercised by certain government officials within their prerogatives, the classic example of which is prosecutorial discretion. Rather, discretion in the abstention context is guided by doctrinal standards enabling courts to identify situations that warrant the withholding of jurisdiction. In this

Over the years, American courts have fashioned various tools to decline jurisdiction, most notably the forum non conveniens and abstention doctrines. The latter, which are the focus of this Note, developed out of the equity tradition. In *Quackenbush v. Allstate Insurance Co.*,¹⁵ the Supreme Court held that a federal court could not dismiss an action for damages on the basis of abstention,¹⁶ explaining that “it has long been established that a federal court has the authority to decline to exercise its jurisdiction when it ‘is asked to employ its historic powers as a court of equity.’”¹⁷ While categorizing abstention within a federal court’s equitable powers, the Court clarified that abstention was not a “technical rule of equity procedure,”¹⁸ but rather “extends to all cases in which the court has discretion to grant or deny relief,” including declaratory relief.¹⁹

2. Federalism Concerns

The federal courts’ power to decline jurisdiction also serves the idiosyncratic needs of federalism. Concurrent jurisdiction between federal and state courts creates constitutional problems that cannot simply be resolved by Congress’s cabining of federal courts’ jurisdiction. Abstention thus serves as a judicially created solution to difficulties inherent in concurrent federal-state jurisdiction.²⁰

The Supreme Court developed its abstention doctrine in a series of cases that addressed similar yet distinct problems.²¹ The first category of abstention,

sense, “discretionary” is the opposite of “mandatory.”

¹⁵ 517 U.S. 706 (1996).

¹⁶ *Id.* at 731.

¹⁷ *Id.* at 717 (quoting *Fair Assessment in Real Estate Ass’n, Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)).

¹⁸ *Id.* at 718 (quoting *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959)).

¹⁹ *Id.* Because abstention is an equitable doctrine, however, the Court reasoned that, in an action “at law” for damages, federal courts could not decline to exercise jurisdiction and “dismiss the federal suit altogether,” but could “enter a stay order that *postpones* adjudication of the dispute.” *Id.* at 719.

²⁰ Concurrent federal-state jurisdiction is the result of the constitutional design; as such, it is the baseline and not a problem per se. See U.S. CONST. art III, § 2. Speaking from the premise of parity between the federal and state systems, the Court explained in *Kline v. Burke Constr. Co.* that “[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings of the other court.” 260 U.S. 226, 230 (1922). That said, parallel proceedings can sometimes cause jurisdictional conflicts that go beyond merely inconveniencing the parties to a dispute. Sovereignities may clash. Certain duplicative litigation may be too costly for the court systems to bear. In these instances, abstention and other doctrines lubricate the cogs of overlapping jurisdiction by defusing friction between federal and state courts.

²¹ See Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrine Will Always Be With Us – Get Over It!*, 36 CREIGHTON L. REV. 375,

elaborated in *Railroad Commission of Texas v. Pullman Co.*,²² states that “[a]bstention is appropriate ‘in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law.’”²³ In *Pullman*, plaintiffs asked a federal court to use its equitable powers to enjoin an order of a state agency, which allegedly violated state law and the federal Constitution.²⁴ The Supreme Court held that federal courts should abstain from exercising jurisdiction where a state court could resolve the controversy. The Court reasoned that “[t]his use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers.”²⁵ In addition to serving the ends of federalism, the *Pullman* doctrine simultaneously functions as a jurisdictional variation on the constitutional avoidance doctrine, allowing federal courts to avoid deciding federal constitutional questions.²⁶

The second category of abstention, formulated in *Burford v. Sun Oil Co.*²⁷ and sometimes termed “administrative” abstention,²⁸ provides that “[a]bstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.”²⁹ In *Burford*, the plaintiffs sought to enjoin a state agency’s order granting an oil-drilling permit to the defendants.³⁰ The Court held that “questions of regulation of the industry by the State administrative agency . . . so clearly involve[] basic problems of [state] policy that equitable discretion should be exercised to give the [state] courts the first opportunity to consider them.”³¹ Thus, whereas *Pullman* counseled abstention in cases where federal jurisdiction may be unnecessary to resolve the dispute, *Burford*’s federalist rationale went further: it cautioned federal courts against interfering with states’ regulatory regimes so

377-83 (2003) (canvassing the various federal-state abstention categories elaborated by the Supreme Court); Bush, *supra* note 10, at 132-34 (summarizing the abstention cases that preceded *Colorado River*).

²² 312 U.S. 496 (1941).

²³ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959)).

²⁴ *Pullman*, 312 U.S. at 498.

²⁵ *Id.* at 501.

²⁶ *Birdsong*, *supra* note 21, at 377 (“With *Pullman* abstention, federal courts avoid decisions of federal constitutional questions when the case may be disposed of on questions of state law.”).

²⁷ 319 U.S. 315 (1943).

²⁸ See RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1076 (6th ed. 2009).

²⁹ *Colorado River*, 424 U.S. at 814.

³⁰ *Burford*, 319 U.S. at 316-17.

³¹ *Id.* at 332.

as “to avoid needless conflict with the administration by a state of its own affairs.”³²

In contrast to *Pullman* and *Burford*, the third category of abstention elaborated in *Louisiana Power & Light Co. v. City of Thibodaux*³³ does not involve federal question jurisdiction; in this scenario, the federal court declines to exercise diversity jurisdiction.³⁴ The *Thibodaux* case started as an expropriation proceeding filed in state court by a Louisiana city against a Florida power company and was later removed to federal court on diversity grounds.³⁵ The basis for the expropriation proceeding was a state statute that the Louisiana Supreme Court had not yet interpreted, but which the state attorney general opined did not grant the eminent domain power claimed by the city.³⁶ Focusing on the “special nature of eminent domain” as “a matter close to the political interests of a State” and “intimately involved with sovereign prerogative,”³⁷ the Court held that a stay was proper.³⁸ Underlying both *Burford* and *Thibodaux* may be the notion that “when state issues are sufficiently difficult, sufficiently important, and sufficiently bound with other state law issues and state administration, federal courts should sometimes abstain.”³⁹

The fourth category of abstention, partly laid out in *Younger v. Harris*,⁴⁰ adds that “abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings,” as well as “state nuisance proceedings antecedent to a criminal prosecution” and “collection of state taxes.”⁴¹ This category of abstention applies when there are pending, or soon-to-be-initiated, state criminal proceedings, state civil proceedings involving “important state interests,” and state administrative proceedings of a judicial

³² CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 52, at 325 (6th ed. 2002).

³³ 360 U.S. 25 (1959).

³⁴ FALLON ET AL., *supra* note 28, at 1076.

³⁵ *Thibodaux*, 360 U.S. at 25.

³⁶ *Id.* at 30.

³⁷ *Id.* at 28, 29. Justice Frankfurter stressed that the case raised “a further aspect of [state] sovereignty,” that is, the delicate question of “the apportionment of governmental powers between City and State.” *Id.* at 28.

³⁸ *Id.* at 30.

³⁹ FALLON ET AL., *supra* note 28, at 1082. Scholars argue that neither *Burford* nor *Thibodaux* constitute full-fledged abstention doctrines, given the dearth of Supreme Court cases decided on their authority. *Id.* at 1077-78, 1081-82 (explaining that the Court has applied *Burford* only once, in *Ala. Pub. Serv. Comm’n v. S. Ry. Co.*, 341 U.S. 341 (1951), and has never decided a case on *Thibodaux*). But they are still good precedents and therefore continue to bind the lower courts. *Id.* at 1079, 1081-82.

⁴⁰ 401 U.S. 37 (1971).

⁴¹ *Colorado River*, 424 U.S. at 816 (citing *Younger* and its progeny).

nature.⁴² In *Younger*, the plaintiff sued to enjoin state criminal proceedings against him, claiming that the state criminal statute under which he was being prosecuted was unconstitutional.⁴³ Even assuming the statute's unconstitutionality, the Court held that a federal court should not use its equitable powers to interfere with state proceedings.⁴⁴ In his paean to federalism, Justice Black explained that federal courts should avoid the Scylla of "blind deference" to state courts and the Charybdis of "unduly interfer[ing] with the legitimate activities of the States."⁴⁵

3. Judicial Administration Concerns

While the abstention doctrine is traditionally associated with the aforementioned categories, which deal with federal-state concurrent jurisdiction, the power of a federal court to decline jurisdiction in favor of a parallel proceeding extends beyond those categories. The Supreme Court has recognized courts' discretion to abstain in circumstances where exercising jurisdiction would raise significant problems in the administration of justice.

Before the emergence of a federal-state abstention doctrine, the Supreme Court had weighed in on the discretion of a federal district court to decline jurisdiction in favor of another district court, a situation one commentator terms "intrafederal" abstention.⁴⁶ In *Landis v. North American Co.*,⁴⁷ the U.S.

⁴² FALLON ET AL., *supra* note 28, at 1118-19, 1121-27; LARRY W. YACKLE, FEDERAL COURTS 532-40 (3d ed. 2009).

⁴³ *Younger*, 401 U.S. at 38-39.

⁴⁴ *Id.* at 54 ("[T]he possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it . . ."); *see also* WRIGHT & KANE, *supra* note 32, §52A, at 341-42 (arguing that the doctrine of abstention "teaches that federal courts must refrain from hearing constitutional challenges to state action under certain circumstances in which federal action is regarded as an improper intrusion on the right of a state to enforce its laws in its own courts").

⁴⁵ *See Younger*, 401 U.S. at 44.

⁴⁶ Bush, *supra* note 10, at 140. Since 1948, concurrent jurisdiction between federal courts can be resolved through a transfer, making intrafederal abstention unnecessary. Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law*, 49 AM. J. COMP. L. 203, 211 (2001) ("[W]ith the advent of a statutory transfer mechanism in 1948, the doctrine became irrelevant in federal litigation that could properly be lodged in another federal court."). A district court may transfer a proceeding to a more convenient forum. 28 U.S.C. § 1404(a) (2006) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."). Further, multiple federal proceedings may also be consolidated or coordinated through multidistrict litigation judicial panels. *Id.* § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.").

Attorney General sought a stay of two actions pending the outcome of a “test” case concerning a federal statute’s constitutionality.⁴⁸ The government argued that the “trial of a multitude of suits would have a tendency ‘to clog the courts, overtax the facilities of the Government, and make against that orderly and economical disposition of the controversy that is the Government’s aim.’”⁴⁹

The Court held that a district court had the discretionary authority to stay proceedings pending resolution of similar suits, characterizing this power as “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.”⁵⁰ Efficiency and judicial economy were deemed acceptable considerations for declining jurisdiction “in cases of extraordinary public moment . . . if the public welfare or convenience will thereby be promoted.”⁵¹ In exercising discretion, however, courts must balance “competing interests,” and “[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.”⁵² The Court further constrained district courts’ discretion by placing the burden of proof on the party seeking a stay.⁵³

Judicial administration concerns reemerged outside of the intrafederal context four decades later in *Colorado River*.⁵⁴ The case concerned the determination of water rights in Colorado’s Water Division No. 7.⁵⁵ While state proceedings were ongoing in the division, the U.S. government filed suit in federal district court in Denver seeking a declaration of the government’s water rights.⁵⁶ One of the defendants in the federal suit then asked the state court to join the United States as a defendant in the state proceedings pursuant to the McCarran Amendment, which waived sovereign immunity in such cases.⁵⁷ Faced with parallel proceedings, the federal district court decided to abstain and dismiss the suit.⁵⁸ The Supreme Court affirmed the dismissal, but

⁴⁷ 299 U.S. 248 (1936).

⁴⁸ *Id.* at 251.

⁴⁹ *Id.*

⁵⁰ *Id.* at 254-55.

⁵¹ *Id.* at 256.

⁵² *Id.* at 255.

⁵³ *Id.* (“[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.”).

⁵⁴ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

⁵⁵ *Id.* at 805-06. As part of a reform to the state’s “legal procedures for determining claims to water,” Colorado created seven water divisions, and state water referees and judges were tasked with adjudicating water claims in each division “on a continuous basis.” *Id.* at 804.

⁵⁶ *Id.* at 804-05.

⁵⁷ *Id.* at 806; see also 43 U.S.C. § 666 (2006).

⁵⁸ *Colorado River*, 424 U.S. at 806.

determined that “the dismissal cannot be supported under th[e] doctrine [of abstention] in any of its forms.”⁵⁹

Cautioning that “[a]bstention from the exercise of federal jurisdiction is the exception, not the rule,”⁶⁰ the Court described the discretionary power to abstain as “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.”⁶¹ Federal courts, the Court stressed, have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.”⁶² Exercising discretion to decline jurisdiction, therefore, meant that the case to be adjudicated had to meet an “exceptional circumstances” standard, “where the order to the parties to repair to the State court would clearly serve an important countervailing interest.”⁶³ The existence of parallel proceedings, by itself, would not warrant a court’s abstention.⁶⁴

Finding that none of the traditional abstention categories applied to the case and that no federalism concern was present, the Court went on to formulate an additional ground for a court to decline jurisdiction, namely “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.”⁶⁵ While the *Colorado River* approach is broader in scope than traditional federal-state abstention since it can be invoked in the absence of federalism concerns, its application is limited by the “exceptional circumstances” requirement.⁶⁶

The Court then applied the standard to the case before it, listing relevant factors pointing to the presence of “exceptional circumstances” that warranted declining jurisdiction, such as: (1) the “inconvenience of the federal forum”; (2) the “desirability of avoiding piecemeal litigation”; and (3) the “order in

⁵⁹ *Id.* at 813. Although the Court did not categorize its dismissal as falling under traditional abstention, the Court’s later jurisprudence treated *Colorado River* as just another branch of the doctrine. *See* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

⁶⁰ *Colorado River*, 424 U.S. at 813.

⁶¹ *Id.* (quoting *Cnty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)).

⁶² *Id.* at 817.

⁶³ *Id.* at 813 (quoting *County of Allegheny*, 360 U.S. at 188-89).

⁶⁴ *Id.* at 809; *see also id.* at 813-14 (remarking that “[t]here is no irreconcilability in the existence of concurrent state and federal jurisdiction” and that “[i]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it” (quoting *Ala. Pub. Serv. Comm’n. v. S. Ry. Co.*, 341 U.S. 341, 361 (1951) (Frankfurter, J., concurring in the result))).

⁶⁵ *Id.* at 817 (alteration in original) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

⁶⁶ *Id.* at 818 (“Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention.”).

which jurisdiction was obtained by the concurrent forums.”⁶⁷ Other factors the Court found “significant” in *Colorado River* included: (4) “the extensive involvement of state water rights” and (5) “the existing participation by the Government” in the state water rights proceedings.⁶⁸

Approximately seven years later, the Supreme Court further clarified *Colorado River*’s exceptional circumstances test in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁶⁹ The Court explained that the *Colorado River* approach did “not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case, with the balance heavily weighted in favor of the exercise of jurisdiction.”⁷⁰ It then listed a half-dozen factors weighing in favor of abstention by a federal court: (1) the prior assumption by the state court of “jurisdiction over any res or property”; (2) the existence of a “clear federal policy” to avoid piecemeal litigation; (3) “the absence of any substantial progress in the federal-court litigation”; (4) “the presence in the suit of extensive rights governed by state law”; (5) “the geographical inconvenience of the federal forum”; and (6) “the Government’s previous willingness to litigate similar suits in state court.”⁷¹

B. *Abstention in International Parallel Proceedings*

The traditional categories of the abstention doctrine rested on federalism and constitutional concerns; as such, they have little bearing on international parallel proceedings. In contrast, the *Colorado River* approach offered a rationale for declining jurisdiction based on wise judicial administration, which courts have found relevant in cases of concurrent jurisdiction between courts of different countries.⁷² Nonetheless, because the *Colorado River* approach was developed with only federal-state relations in mind, some courts have supplemented this approach with the principle of international comity.

⁶⁷ *Id.*

⁶⁸ *Id.* at 820.

⁶⁹ 460 U.S. 1, 19 (1983).

⁷⁰ *Id.* at 16.

⁷¹ *Id.* at 16, 19; *see also* Bush, *supra* note 10, at 140.

⁷² Professor Stephen B. Burbank finds the use of domestic abstention doctrines for international cases “indefensible.” Burbank, *supra* note 46, at 213 (“[T]he fact that [the federal-state and intrafederal abstention] approaches have been borrowed for, and coexist in case law treating, the same problems in international cases is indefensible.”). Part of the problem is the remaining uncertainty surrounding these doctrines as applied domestically. *See id.* at 215 (“[A]dditional changes are necessary in the doctrine for federal-state cases[;] . . . at least until such changes are made, it is not an appropriate model for international litigation. The federal-federal model is coherent, but in the absence of the unifying influences of a treaty, it is not obviously more appropriate for international cases.”).

1. *Colorado River* Applied to International Parallel Proceedings

It did not take long for the courts of appeals to apply the *Colorado River* factors in international proceedings. The circuits most wedded to the *Colorado River* approach are the Sixth, Seventh, and Ninth Circuits.⁷³ While these courts do not perceive a problem with using an approach developed in the context of domestic parallel proceedings, they differ in their acknowledgment of the special concerns raised by international parallel proceedings.

In *Ingersoll Milling Machine Co. v. Granger*,⁷⁴ the Seventh Circuit acknowledged that international parallel proceedings were “somewhat different” from “parallel state court proceedings” because the Belgian court with concurrent jurisdiction was “not the tribunal of a state of the federal union to which, under our Constitution, we owe a special obligation of comity.”⁷⁵ It nevertheless conceded that the *Colorado River* factors could “serve as a helpful guide in our evaluation.”⁷⁶ The court examined “considerations of judicial economy, especially the need to avoid piecemeal litigation,” and pointed out that the Belgian action had commenced before the American one (the third factor of the *Colorado River-Moses H. Cone* approach).⁷⁷ The court found there was “no particularly strong federal interest in ensuring that this dispute

⁷³ For an in-depth view of how the circuits stood vis-à-vis international parallel proceedings at the end of the twentieth century, see Margarita Treviño de Coale, *Stay, Dismiss, Enjoin, or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT’L L.J. 79 (1999). The Second Circuit seems to lean toward an approach based on *Colorado River*’s exceptional circumstances test. In *Royal & Sun Alliance Insurance Co. of Canada v. Century International Arms, Inc.*, the court recognized the differences between domestic and international abstention, but it refused to view the latter as demanding a more liberal abstention practice. 466 F.3d 88, 93-94 (2d Cir. 2006) (“[W]hile the relevant factors to be considered differ depending on the posture of the case, the starting point for the inquiry remains unchanged . . .”).

⁷⁴ 833 F.2d 680 (7th Cir. 1987). The case involved a former employee of an American company who moved to Belgium to work for the company’s Belgian subsidiary. *Id.* at 682. After his termination, the employee sued his former employer in a Belgian labor court. *Id.* The company counterclaimed, and then countersued in Illinois state court seeking a declaration of nonliability, with the case later being removed to federal district court. *Id.* The Belgian court awarded damages to the employee on his claims and to the company on its counterclaims, following which the district court stayed the U.S. proceedings pending appeal in Belgium. *Id.* at 683. Once the Belgian appellate court affirmed, the district court enforced the Belgian award in favor of the employee. *Id.* On appeal to the Seventh Circuit, the company argued that the district court had “improperly stayed the action in the district court because of the pendency of the Belgian action.” *Id.* at 684.

⁷⁵ *Id.* at 685.

⁷⁶ *Id.* The Seventh Circuit, in a subsequent case, explained that it applied the *Colorado River* approach to international proceedings “in the interests of international comity.” *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999).

⁷⁷ *Ingersoll*, 833 F.2d at 685.

be adjudicated in a federal district court or, indeed, in any American court.”⁷⁸ Finally, relying on *Landis*, the court also found it significant that the case’s disposition was through a stay rather than a dismissal, which was “clearly within the sound discretion of the trial court.”⁷⁹

The Ninth Circuit in *Neuchatel Swiss General Insurance Co. v. Lufthansa Airlines*⁸⁰ applied *Colorado River* to reverse the district court’s stay pending litigation in Switzerland.⁸¹ Repeating one of *Colorado River*’s caveats, the court stressed that “the mere fact that parallel proceedings may be further along does not make a case ‘exceptional’ for the purpose of invoking the *Colorado River* exception to the general rule that federal courts must exercise their jurisdiction concurrently with courts of other jurisdictions.”⁸² Unlike *Ingersoll*, which proceeded to balance the various factors under consideration, *Neuchatel* read *Colorado River* and *Moses H. Cone* as establishing an “exceptional circumstances” threshold; because the case was “an unexceptional commercial dispute,” there were “no ‘exceptional circumstances’ justifying the invocation of the *Colorado River* abstention doctrine.”⁸³ The Ninth Circuit was also less receptive to international comity than the court in *Ingersoll*, declaring that “the fact that the parallel proceedings are pending in a foreign jurisdiction rather than in a state court is immaterial” and rejecting “the notion that a federal court owes greater deference to foreign courts than to our own state courts.”⁸⁴

The Sixth Circuit recently came out in favor of the *Colorado River* approach in *Answers in Genesis of Kentucky, Inc. v. Creation Ministries International, Ltd.*⁸⁵ In this case, an Australian plaintiff had asked a federal district court in Kentucky to defer to prior-filed parallel proceedings in Australia and rule that “comity and fairness dictate staying the American litigation,”⁸⁶ following the

⁷⁸ *Id.* (“International judicial comity is an interest not only of Belgium but also of the United States.”).

⁷⁹ *Id.* at 686.

⁸⁰ 925 F.2d 1193 (9th Cir. 1991). The case concerned “an ordinary commercial dispute over the loss of cargo” in the course of an international journey. *Id.* at 1194. The district court decided to stay the action in deference to a suit pending in Switzerland, but the court of appeals vacated the stay and remanded for further proceedings. *Id.* at 1194-95.

⁸¹ *Id.* at 1194.

⁸² *Id.* at 1195.

⁸³ *Id.* The different applications of *Colorado River* in *Ingersoll* and *Neuchatel* show that the “exceptional circumstances” test is susceptible to alternative readings. Under one interpretation of the test, the court must apply the *Colorado River* factors first in order to determine whether exceptional circumstances exist. Under another interpretation, the existence of exceptional circumstances is an antecedent question.

⁸⁴ *Id.*

⁸⁵ 556 F.3d 459 (6th Cir. 2009).

⁸⁶ *Id.* at 466, 469.

example of *Turner Entertainment Co. v. Degeto Film GmbH*,⁸⁷ an Eleventh Circuit case.⁸⁸ The court declined to follow the Eleventh Circuit's international comity approach, instead retaining the *Colorado River* factors as "the most applicable to the case at bar because those factors and their relative weight match most closely the public-policy concerns the Supreme Court has identified as vital in the area of arbitration."⁸⁹

2. *Turner Entertainment's* International Comity Approach

Unlike the aforementioned circuits, the Eleventh Circuit in *Turner Entertainment* did not start from the premise that *Colorado River*, which is clearly applicable in federal-state parallel proceedings, necessarily governs in international cases.⁹⁰ Analyzing prior caselaw, the court discerned "at least two distinct but very similar approaches to international abstention": one using "the criteria enunciated in *Colorado River* and appl[ying] them to the international context," and another "developed in the Southern District of New York . . .

⁸⁷ 25 F.3d 1512 (11th Cir. 1994).

⁸⁸ *Turner Entertainment* is discussed *infra* Part I.A.2.b.

⁸⁹ *Answers in Genesis*, 556 F.3d at 466. The court of appeals may have misunderstood the weight to be accorded to avoidance of piecemeal adjudication. While the Court in *Colorado River* found that it was the "most important" factor in that particular case, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976), it admonished that "[n]o one factor is necessarily determinative," *id.* at 818. In *Moses H. Cone*, the Court stated that "[t]he weight to be given to any one factor may vary greatly from case to case, depending on the particular setting of the case." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

⁹⁰ See *Turner Entertainment*, 25 F.3d at 1518 (stating that, despite federal courts' "virtually unflagging obligation" to exercise jurisdiction, "in some private international disputes the prudent and just action for a federal court is to abstain from the exercise of jurisdiction" (quoting *Colorado River*, 424 U.S. at 817)). The case involved a contractual dispute between German public broadcasters and the American owner of licensed "entertainment properties." *Id.* at 1514. The license agreement provided for concurrent jurisdiction in both Germany and the United States. The German parties sued in Germany, followed a week later by the filing of the instant case by the American party in federal district court. *Id.* at 1516-17. The district court denied the German parties' motion to stay the American proceedings. *Id.* at 1517. By the time the court of appeals heard the hearing, however, the German court had already issued a decision on the merits, although a determination of damages remained outstanding. *Id.* at 1518.

The court framed the issue in narrow terms as "whether a federal court, which properly has jurisdiction over an action, should exercise its jurisdiction where parallel proceedings are ongoing in a foreign nation and a judgment has been reached on the merits in the litigation abroad." *Id.* Later decisions clarified that the same international comity approach would hold in the absence of a prior judgment in the parallel proceeding. See *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1223 (11th Cir. 1999) (holding that the same abstention principles applied to all international disputes, whether or not the parallel proceeding "had come to judgment").

with a clearer emphasis on the concerns of international comity implicated by the exercise of jurisdiction.”⁹¹

In an exercise of synthesis, the court developed its own test centered around three objectives: (1) “international comity”; (2) “fairness to litigants”; and (3) “efficient use of scarce judicial resources.”⁹² It further broke down these three objectives into additional lines of inquiry. Under the international comity prong, the court would examine the parallel proceeding for the possibility of fraud, due process violations, and prejudicial dimension.⁹³ Under the fairness prong, the court would look at the order of filing, the forums’ relative convenience, and “the possibility of prejudice to parties resulting from abstention.”⁹⁴ Finally, under the efficiency prong, the court would gauge the federal forum’s inconvenience, the importance “of avoiding piecemeal litigation,” the identity of the parties and issues, and “whether the alternative forum is likely to render a prompt disposition.”⁹⁵

As the above survey indicates, two competing international abstention models have emerged in the circuit courts: one, based on *Colorado River* and its judicial-economy rationale, would allow courts to use their discretion only in exceptional circumstances; the other, based on *Turner Entertainment*, would give courts broader discretion to decline jurisdiction by considering international comity concerns. In light of this ongoing debate, a look at other legal systems’ treatment of international parallel proceedings can be instructive. The following overview describes the experiences of EU countries in dealing with international parallel proceedings.

II. *LIS ALIBI PENDENS*: INSIGHTS FROM THE EUROPEAN EXPERIENCE

European courts, like their American counterparts, are at times confronted with the problem of parallel proceedings in different countries. The solution mandated by EU law is to decline jurisdiction by operation of the *lis alibi pendens* principle.⁹⁶ This principle generally holds that in the case of parallel proceedings a court must decline jurisdiction in favor of the court where the

⁹¹ *Turner Entertainment*, 25 F.3d at 1518. The court referred to a line of decisions in the Southern District of New York, beginning with *Continental Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408 (S.D.N.Y. 1982).

⁹² *Turner Entertainment*, 25 F.3d at 1518.

⁹³ *Id.* at 1519 (“General comity concerns include: (1) whether the judgment was rendered via fraud; (2) whether the judgment was rendered by a competent court utilizing proceedings consistent with civilized jurisprudence; and (3) whether the foreign judgment is prejudicial” (citations omitted)).

⁹⁴ *Id.* at 1521-22.

⁹⁵ *Id.* at 1522. Concluding that “the relevant concerns of international comity, fairness and efficiency point overwhelmingly, at this stage of the litigation, to deference to the German forum,” the court of appeals instructed the court below to stay the American proceedings. *Id.* at 1523.

⁹⁶ See Brussels I Regulation, *supra* note 11, arts. 27-30.

matter was filed first.⁹⁷ While U.S. courts are unlikely to ever adopt such a bright-line rule,⁹⁸ the *lis alibi pendens* principle may be recast as a flexible standard or even as a first-to-file presumptive rule.⁹⁹ The pendency of proceedings abroad could thus become an important factor in the federal courts' international abstention analysis. Part II provides an overview of the way the principle has been applied in Europe, which will then inform the discussion in Part III of the implications of the *lis alibi pendens* principle for U.S. courts.

EU law enshrines *lis alibi pendens* as a central jurisdictional principle, which the courts of the member states must follow in cases of intra-EU litigation. At the apex of the EU's legal system, the Court of Justice of the European Union (ECJ) ensures the principle's uniform application and interpretation across member states. Over the years, the ECJ has built a body of caselaw refining the principle's mechanics, especially in cases of conflict with national jurisdictional rules. While an analysis of the advantages and disadvantages of a discretionary versus a nondiscretionary approach to declining jurisdiction falls outside the scope of this Note,¹⁰⁰ a review of the ECJ caselaw offers insights into the rationale behind the *lis alibi pendens* principle.

A. *European Union Law*

Since the signing of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) in 1968, European countries have had a common legal framework governing civil litigation within Europe's borders, which is now embodied in EU Council Regulation 44/2001 (Brussels I).¹⁰¹ The underlying purpose of this common jurisdictional regime is to ensure "the sound operation of the internal

⁹⁷ *Id.* art. 27.

⁹⁸ Unlike the United States and other common law jurisdictions, civil law countries place jurisdictional issues outside the purview of courts and grant judges little, if any, discretion in these matters. See Brian Pearce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT'L L. 525, 535-36 (1994) ("[O]n the procedural level, English and Irish courts have historically shared the American courts' freedom to fashion their own rules defining the extent of their jurisdiction in cases with a foreign litigant, whereas civil-law courts must work within the confines of statutes delimiting their jurisdiction with greater specificity." (footnotes omitted)).

⁹⁹ See *infra* Part III (discussing the integration of *lis alibi pendens* into international abstention doctrine).

¹⁰⁰ This Note is ultimately concerned with determining which abstention doctrine U.S. courts should use in international parallel proceedings. Given that the U.S. legal system allows for some discretion in exercising or declining jurisdiction, a nondiscretionary application of the *lis alibi pendens* principle by U.S. courts is clearly inapposite.

¹⁰¹ See *supra* note 11.

market” through common, simple rules leading to predictable outcomes.¹⁰² Two provisions of Brussels I are of particular relevance to the problem of international parallel proceedings: Article 2, which provides the general rule of jurisdiction within the EU;¹⁰³ and Article 27, which establishes the *lis alibi pendens* principle as the general rule for resolving conflicts of jurisdiction between member states.¹⁰⁴

Whereas American courts apply a “minimal contacts” standard to determine whether jurisdiction exists over specific defendants, courts in the EU must apply the bright-line rule¹⁰⁵ contained in Article 2: with some exceptions, a plaintiff must sue a defendant in the EU member state where the defendant is domiciled.¹⁰⁶ If the defendant is not domiciled in an EU member state, national jurisdictional rules generally govern.¹⁰⁷ Brussels I further details that domicile is determined according to the laws of each member state.¹⁰⁸ In line with civil law understandings of jurisdiction, the exercise of jurisdiction on the basis of a defendant’s domicile under Article 2 is conceived as nondiscretionary: a court must accept jurisdiction over a case brought against a defendant in the EU member state where the defendant is domiciled.¹⁰⁹

Unlike the equitable doctrines giving courts discretion to decline jurisdiction (for example, forum non conveniens and the abstention doctrine), Article 27 is a bright-line rule that offers little room for discretion. In cases involving

¹⁰² Brussels I Regulation, *supra* note 11, recital 2 (stating that the Regulation aims to “unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments” between EU member states); *id.* recital 11 (“The rules of jurisdiction must be highly predictable . . .”).

¹⁰³ *Id.* art. 2 (providing that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”).

¹⁰⁴ *Id.* art. 27 (“[A]ny court other than the court first seised shall of its own motion stay its proceedings . . .”). For a general overview of the Brussels Regime, see FAWCETT & CARRUTHERS, *supra* note 11, at 204-352.

¹⁰⁵ This bright-line rule encourages a race to the courthouse. See Peter E. Herzog, *Brussels and Lugano, Should You Race to the Courthouse or Race for a Judgment?*, 43 AM. J. COMP. L. 379, 398 (1995).

¹⁰⁶ Brussels I Regulation, *supra* note 11, art. 2(1) (“[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of the Member State.”). There are exceptions to this principle for actions in contract, tort, and other matters, *id.* arts. 5-7; insurance matters, *id.* arts. 8-14; consumer contracts, *id.* arts. 15-17; and individual contracts of employment, *id.* arts. 18-21.

¹⁰⁷ *Id.* art. 4(1).

¹⁰⁸ *Id.* art. 59.

¹⁰⁹ The nondiscretionary nature of jurisdiction on the basis of domicile is reflected in the mandatory language used in Article 2. *Id.* art. 2 (“[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.” (emphasis added)); see also *id.* recital 11 (“[J]urisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground.”).

identical actions and parties,¹¹⁰ a court *must* decline jurisdiction in favor of the court where the case was filed first.¹¹¹ Only if the parallel proceedings concern related but not identical actions¹¹² do courts have the discretion to decline jurisdiction.¹¹³ As one of the recitals in Brussels I indicates, the purpose behind Article 27 is to ensure “the harmonious administration of justice” by “minimis[ing] the possibility of concurrent proceedings and . . . ensur[ing] that irreconcilable judgments will not be given in two Member States.”¹¹⁴

B. *The Jurisprudence of the Court of Justice of the European Union*

Although the Brussels Regime lays out clear and simple rules to allocate jurisdiction between EU member states, it has not entirely displaced national jurisdictional rules. One reason is that Brussels I applies only to some civil and commercial disputes.¹¹⁵ Another is that international litigation in an EU member state does not necessarily trigger Brussels I, for example, when the proceedings involve extra-European parties or events. The ECJ, therefore, has repeatedly been asked to clarify the scope of application of the Brussels Regime. As the following discussion shows, the jurisprudence of the ECJ has conferred a central place to the *lis alibi pendens* principle within the European Union, at times supplanting long-established national rules or doctrines meant to deal with the problem of parallel proceedings.

1. *Overseas Union Insurance Ltd. v. New Hampshire Insurance Co.*¹¹⁶

In *Overseas Union* the ECJ was asked whether the *lis alibi pendens* principle enunciated in Article 21 of the Brussels Convention (now Article 27 of the Regulation) applied if the defendant in the proceedings was not

¹¹⁰ This requirement is not as limiting as the words would suggest. See FAWCETT & CARRUTHERS, *supra* note 11, at 305 (discussing Case 144/86, Gubisch Maschinenfabrik KG v. Giulio Palumbo, 1987 E.C.R. 4871, which “held that the same subject matter requirement was satisfied” even if the two claims were not entirely identical).

¹¹¹ Brussels I Regulation, *supra* note 11, art. 27(2). If the first court’s jurisdiction is not yet established, the second court *must* stay its proceedings. *Id.* art. 27(1).

¹¹² Related actions are defined as actions that “are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.” *Id.* art. 28(3).

¹¹³ *Id.* art. 28(2) (allowing courts to “decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof”). If the first court’s jurisdiction is not yet established, the second court *may* stay its proceedings. *Id.* art. 28(1).

¹¹⁴ *Id.* recital 15.

¹¹⁵ Article 1 merely provides that the Regulation “shall apply in civil and commercial matters,” excluding tax, customs, administrative, family law, wills, bankruptcy, social security, and arbitration matters. *Id.* art. 1.

¹¹⁶ Case C-351/89, *Overseas Union Ins. Ltd. v. N.H. Ins. Co.*, 1991 E.C.R. I-3342.

domiciled in a state party to the Convention (a “contracting state”).¹¹⁷ The case involved an American company doing business in France and three reinsurers, one based in Singapore and two others in the United Kingdom.¹¹⁸ The American company had filed suit in France claiming that the reinsurers had breached their obligations under reinsurance contracts, and the reinsurers, who contested the French court’s jurisdiction, subsequently brought an action in England seeking “a declaration that they had lawfully avoided their obligations under the reinsurance policies.”¹¹⁹

The English trial court stayed the proceedings pending a decision of the French court on its jurisdiction in accordance with the *lis alibi pendens* principle of the Brussels Convention.¹²⁰ The reinsurers appealed, and the English Court of Appeals referred the following questions, among others, to the ECJ: (1) whether the *lis alibi pendens* principle applied “irrespective of the domicile of the parties to the two sets of proceedings,” and (2) whether a situation of *lis alibi pendens* mandated in all cases either a stay of proceedings or a decision to decline jurisdiction.¹²¹ Although the opinion did not spell out the reinsurers’ theory, they likely argued that the defendant in the English proceedings – the American company – was not domiciled in one of the contracting states, so Article 2 was not triggered and the Brussels Convention, including Article 21, did not apply.¹²²

Rejecting that theory, the ECJ held that the *lis alibi pendens* principle in Article 21 of the Convention applied regardless of the court’s asserted basis of jurisdiction.¹²³ It pointed out that Article 21 made “no reference to the domicile of the parties to the proceedings” and that the application of Article 21 did not hinge on “any distinction between the various heads of jurisdiction provided for in the Convention.”¹²⁴ The ECJ concluded that in the presence of parallel proceedings in contracting states, *lis alibi pendens* “applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State in accordance with Article 4 of the Convention” (that is, where jurisdiction is established under national rules).¹²⁵ Further, the ECJ held that the second-seized court had no choice but

¹¹⁷ *Id.* ¶ 8.

¹¹⁸ *Id.* ¶¶ 2-4.

¹¹⁹ *Id.* ¶¶ 6-7.

¹²⁰ *Id.* ¶ 7.

¹²¹ *Id.* ¶ 8 (asking, in addition, whether “the court second seised [is] obliged in all circumstances to stay its proceedings as an alternative to declining jurisdiction”).

¹²² *See id.* ¶¶ 13-14 (finding that Article 21 “must be applied both where the jurisdiction of the court is determined by the Convention itself and where it is derived from the legislation of a Contracting State”).

¹²³ *Id.* ¶ 13 (observing that the wording of Article 21 “makes no reference to the domicile of the parties”).

¹²⁴ *Id.*

¹²⁵ *Id.* ¶ 14.

to stay the proceedings or decline jurisdiction in favor of the first-filed case, and the second court could not inquire into the first court's jurisdiction.¹²⁶

2. *Gasser GmbH v. MISAT Srl*¹²⁷

Overseas Union clarified that the *lis alibi pendens* principle applies irrespective of the basis of jurisdiction under the Brussels Convention, but it left open the possibility of a narrow exception if the second-seized court has "exclusive jurisdiction" under the Convention.¹²⁸ This narrow exception was tested in *Gasser*, which involved a dispute between Austrian and Italian companies.¹²⁹

For a number of years, the Austrian company sold children's clothing to the Italian company, but their "business relations" had subsequently broken down.¹³⁰ The Italian company filed suit in Italy "seeking a ruling that the contract between them had terminated."¹³¹ The Austrian company followed up with an action in Austria seeking "to obtain payment of outstanding invoices."¹³² The Austrian company argued that Austrian courts had jurisdiction based on "the place of performance of the contract," pursuant to Article 5(1) of the Convention (now Article 5(1) of Brussels I), and on a forum-selection clause allegedly agreed to by the parties, pursuant to Article 17 of the Convention (now Article 23 of Brussels I).¹³³

The Austrian trial court stayed the proceedings in accordance with the *lis alibi pendens* principle in Article 21 of the Convention.¹³⁴ The Austrian company appealed, and the Austrian appellate court asked the ECJ to clarify whether an exclusive forum-selection clause fit the exception to the *lis alibi pendens* principle outlined in *Overseas Union*.¹³⁵ The Austrian court also asked the ECJ whether protracted proceedings in the court where the action was first filed warranted an exception to the *lis alibi pendens* principle.¹³⁶

¹²⁶ *Id.* ¶¶ 24-25 (holding that the second court's only alternative solution to declining jurisdiction "is to stay the proceedings if the jurisdiction of the court first seised is contested" and that "it cannot itself examine the jurisdiction of the court first seised").

¹²⁷ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, 2003 E.C.R. I-14721.

¹²⁸ *Overseas Union*, 1991 E.C.R. ¶ 20.

¹²⁹ *Gasser*, 2003 E.C.R. ¶ 11.

¹³⁰ *Id.* ¶¶ 2, 11, 12.

¹³¹ *Id.* ¶ 12.

¹³² *Id.* ¶ 13.

¹³³ *Id.*

¹³⁴ *Id.* ¶ 15.

¹³⁵ *Id.* ¶ 18.

¹³⁶ *Id.* ¶ 19. The defensive litigation strategy of racing first to a court known for protracted proceedings is commonly referred to as the "Italian torpedo" because of Italian courts' reputation for excessively long proceedings. See Trevor C. Hartley, *How to Abuse the Law and (Maybe) Come Out on Top: Bad-Faith Proceedings Under the Brussels Jurisdiction and Judgments Convention*, 13 K.C.L.J. 139, 143 (2002) ("The institution of

The ECJ rejected the argument that a forum-selection agreement pursuant to Article 17 of the Convention constituted an exception to the *lis alibi pendens* principle.¹³⁷ Again, the court distinguished the jurisdictional inquiry from the separate *lis alibi pendens* requirement, which, by allocating responsibility for establishing jurisdiction between courts, was “conducive to the legal certainty sought by the Convention.”¹³⁸ The court reiterated that the purpose underlying the *lis alibi pendens* principle was the prevention of parallel proceedings leading to irreconcilable judgments, and held that “Article 21 must be interpreted broadly so as to cover, in principle, all situations of *lis pendens* before courts in Contracting States.”¹³⁹ Finally, the ECJ refused to create an exception to the *lis alibi pendens* principle on the ground of “excessively long proceedings” in the first court seized, agreeing with the European Commission that the Brussels Convention was founded “on mutual trust and on the equivalence of the courts of the Contracting States.”¹⁴⁰

3. *Turner v. Grovit*¹⁴¹

Subsequent to *Gasser*, the ECJ emphasized the central role of the *lis alibi pendens* principle in resolving conflicts of jurisdiction within the European Union to the exclusion of contrary national rules. *Turner* concerned an employment dispute between a British lawyer and his Spanish employer.¹⁴² After submitting his resignation, the British lawyer filed an action in England claiming “that he had been the victim of efforts to implicate him in illegal conduct.”¹⁴³

The English tribunal found in the lawyer’s favor and awarded damages.¹⁴⁴ Meanwhile, the Spanish employer filed an action in Spain seeking damages

proceedings in one EU State as a device for blocking other proceedings elsewhere . . . is called ‘the Italian torpedo.’”). In *Gasser*, the ECJ gave short shrift to the U.K. government’s concerns about the use of such a litigation strategy. *See Gasser*, 2003 E.C.R. ¶ 53 (describing the tactic and explaining that the difficulties “are not such as to call in question the interpretation of any provision of the Brussels Convention”).

¹³⁷ *Gasser*, 2003 E.C.R. ¶¶ 44-49.

¹³⁸ *Id.* ¶ 51 (“[I]n view of the disputes which could arise as to the very existence of a genuine agreement between the parties, expressed in accordance with the strict formal conditions laid down in Article 17 of the Brussels Convention, it is conducive to the legal certainty sought by the Convention that, in cases of *lis pendens*, it should be determined clearly and precisely which of the two national courts is to establish whether it has jurisdiction under the rules of the Convention.”).

¹³⁹ *Id.* ¶ 41. Following *Gasser*, therefore, the narrow exception outlined in *Overseas Union* appears to be limited to cases of exclusive jurisdiction. *See* Brussels Convention, *supra* note 11, art. 16; Brussels I Regulation, *supra* note 11, art. 22.

¹⁴⁰ *Gasser*, 2003 E.C.R. ¶¶ 67, 72.

¹⁴¹ Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3578.

¹⁴² *Id.* ¶¶ 2-7.

¹⁴³ *Id.* ¶ 7.

¹⁴⁴ *Id.* ¶ 8.

“for losses allegedly resulting from Mr Turner’s professional conduct.”¹⁴⁵ The British lawyer then sought an antisuit injunction restraining the Spanish employer from pursuing parallel proceedings in Spain, which the English Court of Appeal granted.¹⁴⁶ On appeal, the Spanish employer argued that “English courts did not have the power to make restraining orders preventing the continuation of proceedings in foreign jurisdictions covered by the Convention.”¹⁴⁷

The ECJ held that the use of antisuit injunctions to restrain parallel proceedings in another EU member state violated the “principle of mutual trust” enshrined in the Brussels Convention.¹⁴⁸ The use of such injunctions “render[ed] ineffective the specific mechanisms provided for by the Convention for cases of *lis alibi pendens* and of related actions.”¹⁴⁹ Essentially, the English court had to trust the Spanish court to decline jurisdiction.¹⁵⁰ Since the English court was the first court seized, application of the *lis alibi pendens* principle sufficed to protect the English court’s jurisdiction. As *Turner* illustrates, European rules allocating jurisdiction between EU member states have pushed aside longstanding national rules and remedies.

The above cases show that the ECJ has construed the *lis alibi pendens* principle broadly to include any two proceedings filed in the member states’ courts. On the other side of the Atlantic, some commentators have suggested adapting this principle to the U.S. legal system and placing it at the center of federal courts’ international abstention doctrine.¹⁵¹ Part III evaluates the role, if any, that *lis alibi pendens* should play in the U.S. courts’ approach to international parallel proceedings.

III. INTEGRATING *LIS ALIBI PENDENS* INTO THE INTERNATIONAL ABSTENTION DOCTRINE

The current patchwork of U.S. courts’ approaches to international parallel proceedings is a source of legal uncertainty that will only end when the U.S. Supreme Court clarifies the proper scope of international abstention. Until then, federal courts are left with choosing how much weight to give to the pendency of foreign proceedings; in other words, courts must determine how much *lis alibi pendens* should factor into their decision to abstain.

In its search for an optimal international abstention doctrine, this Note probes the various solutions already put forth by U.S. courts and

¹⁴⁵ *Id.* ¶ 10.

¹⁴⁶ *Id.* ¶¶ 11-12.

¹⁴⁷ *Id.* ¶ 14.

¹⁴⁸ *Id.* ¶ 28.

¹⁴⁹ *Id.* ¶ 30.

¹⁵⁰ If the Spanish court did not decline jurisdiction or stay the proceedings, presumably the English party would have appealed the decision to a higher Spanish court.

¹⁵¹ See *infra* Part III.B.2.

commentators. These solutions range from the presumption against abstention found in *Colorado River*, which places little weight on the pendency of a foreign case, to the reverse presumption in favor of abstention advocated in the literature, which essentially functions as a softer version of the European *lis alibi pendens* rule. Because presumptive approaches are too rigid to account for all the interests at play in international litigation, this Note defends *Turner Entertainment's* balancing approach as an alternative solution that features *lis alibi pendens* as an important, albeit not a determinative, factor in the decision to abstain.

A. *Need for a Common U.S. Approach to International Parallel Proceedings*

Two first-order objections stand in the way of our inquiry into the optimal abstention doctrine. First, why should courts ever abstain in the face of foreign parallel proceedings? After all, U.S. courts seem to have a high tolerance for parallel proceedings.¹⁵² Second, why should there be a unified approach among U.S. courts to international parallel proceedings? These questions are addressed in turn below.

1. *Costs of International Parallel Proceedings*

International parallel proceedings are problematic for several reasons. For one, there is concern about the costs associated with duplicative proceedings in separate forums; this affects both domestic and international litigation. Parallel proceedings “impose[] a heavy financial burden on the parties by forcing them to litigate the same case simultaneously in two places, and sometimes in piecemeal fashion.”¹⁵³ Not only is this situation “wasteful,”¹⁵⁴ it is also inequitable to parties lacking the resources to litigate in multiple forums.¹⁵⁵ Further, parallel proceedings are costly to the public, as they impose unnecessary expenses on the justice systems of two or more countries.¹⁵⁶

Among other systemic costs, forum shopping undermines legal certainty and predictability: separate forums may end up applying different substantive law and providing different legal remedies. Additionally, whichever forum reaches judgment first will have the advantage of *res judicata*, unless the judgment is

¹⁵² See *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (“[T]he fundamental corollary to concurrent jurisdiction must ordinarily be respected: parallel proceedings on the same in personam claim should ordinarily be allowed to proceed simultaneously . . .”).

¹⁵³ Parrish, *supra* note 7, at 244-45.

¹⁵⁴ *Id.* at 244.

¹⁵⁵ Calamita, *supra* note 6, at 610 (“Such duplicative litigation carries with it increased costs and inconvenience to the parties and invites deep-pocketed litigants to attempt to exhaust less financially robust adversaries through the institution of multiple proceedings in different jurisdictions around the world.” (footnote omitted)).

¹⁵⁶ *Cf.* Parrish, *supra* note 7, at 245 (“It also needlessly consumes scarce court resources, as two judges work on the same legal problem.”).

not enforceable or recognizable in the other jurisdiction, in which case parties are exposed to potentially contradictory judgments.¹⁵⁷ The matter is made starker by the character of international parallel proceedings, which differ from domestic ones in degree and nature. Private and public legal costs are conceivably higher when the two forums are divided not only by geography, language, and culture, but also by incompatible legal regimes, procedures, and policies. Finally, commentators note the quasi-diplomatic costs of international parallel proceedings, although the magnitude of this problem is difficult to measure.¹⁵⁸

2. Advantages of a Common U.S. Approach

Given the problems associated with duplicative litigation, a unified judicial approach to international parallel proceedings is preferable to cacophony in the circuit courts. Compelling reasons for a common approach include legal certainty, fairness to litigants, and smooth international judicial cooperation.¹⁵⁹ The current situation, where various courts apply, and at times conflate, different abstention doctrines, is suboptimal. That said, a common approach to international parallel proceedings would have to fit within the U.S. jurisdictional paradigm.¹⁶⁰ Importing the EU's *lis alibi pendens* principle

¹⁵⁷ See Calamita, *supra* note 6, at 610-11 (“[P]arallel proceedings carry the risk of legal havoc caused by inconsistent decisions in different courts on the same issues between the same parties.”); Parrish, *supra* note 7, at 246 (“At the very least, the ability to file a concurrent, parallel action invites tactics designed to delay the suit from proceeding in the forum not of the plaintiff’s choice. This is the race to judgment problem.” (footnote omitted)); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 8-9 (2004) (“The lack of shared standards for parallel proceedings . . . within the United States and internationally, allows parallel proceedings to thrive and creates subsequent problems of enforceability.”).

¹⁵⁸ See Calamita, *supra* note 6, at 612 (“[T]he pendency of parallel proceedings in the courts of two or more countries may serve, in some cases, to increase tensions between those countries as a matter of state-to-state relations.”); Parrish, *supra* note 7, at 246-47 (“Continuing a case, when the same case between the same parties was already filed in a foreign forum, can implicate foreign relations and breed resentment. . . . In high-profile suits, duplicative litigation can potentially interfere with the executive management of foreign affairs.”).

¹⁵⁹ See Bush, *supra* note 10, at 147-48 (“To reduce the inconsistencies [between the various frameworks] and improve predictability, federal courts should adopt one approach . . . to determine when abstention is appropriate in parallel international proceedings.”). Bush also convincingly argues that other countries would more likely halt parallel proceedings pending in U.S. courts if they had more “clarity as to how, or even whether, the U.S. court might decide to abstain in favor of the foreign proceeding.” *Id.* at 148 n.133. Meanwhile, legal certainty is a foundational value of the Brussels regime. See Brussels I Regulation, *supra* note 11, recital 11.

¹⁶⁰ This Note borrows this concept from Professor Ralf Michaels. See Ralf Michaels,

wholesale would be inadequate insofar as the rule is incompatible with the American understanding of jurisdiction as a discretionary exercise modeled by courts within constitutional bounds.¹⁶¹ Nonetheless, as discussed below, it is possible to incorporate a *lis alibi pendens* element into the international abstention analysis.

3. The Problem of Mutual Trust

American state courts are already familiar with the *lis alibi pendens* principle. Between the several states, pendency of a suit is generally not considered a sufficient condition for declining jurisdiction,¹⁶² but state courts will generally stay the proceedings “where it is clear that [the] plaintiff can secure all the relief to which he is entitled in the first action.”¹⁶³ Thus, in the domestic context, state courts give some consideration to the pendency of a suit in another forum when deciding whether to continue parallel proceedings.¹⁶⁴ This discretionary, or soft, *lis alibi pendens* judicial practice is considerably more deferential than the approaches currently used by federal courts in cases of concurrent jurisdiction with foreign courts. Although

Two Paradigms of Jurisdiction, 27 MICH. J. INT’L L. 1003, 1011 (2006) (“Similarities of goals notwithstanding, each side remains in its own paradigm of jurisdiction, and these paradigms are significantly different.”).

¹⁶¹ See *id.* at 1008 (“U.S. law . . . give[s] judges discretion to fine-tune and equilibrate jurisdiction in individual cases. . . . Instead, Europeans consider jurisdictional bases non-discretionary, resolving the problem of parallel proceedings through a *lis alibi pendens* rule that uses a strict formal criterion of which court was seized of the matter first.”); Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT’L L. 327, 339-40 (2004) (“American law does not generally include a formal *lis pendens* doctrine Like the related common law doctrine of *forum non conveniens*, the standard for this type of ‘international abstention’ is a discretionary one.”).

¹⁶² See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 86 (1971) (“A state may entertain an action even though an action on the same claim is pending in another state.”); Burbank, *supra* note 46, at 213 (“[A]s between American state courts, there is no federally imposed obligation of *lis pendens* and . . . there are reasons for state courts to be sparing in the use of antisuit injunctions against litigation in other states.”).

¹⁶³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 86 cmt. b; see also Calamita, *supra* note 6, at 646-49 (discussing how U.S. state courts slowly shaped a *lis alibi pendens* doctrine out of comity principles).

¹⁶⁴ According to Professor Burbank, the *lis pendens* principle plays out even more strongly in the intrafederal context. Burbank, *supra* note 46, at 213 (“When parallel litigation is pending in two federal courts, something very close to a system of *lis pendens* operates, with a strong preference in favor of the first filed case. For these purposes federal courts consider themselves part of the same system of courts, even when different state substantive laws would govern in the respective cases. They are not shy about implementing the first-filed preference through antisuit injunctions as well as dismissals or stays.”). As mentioned above, however, motions to transfer lessen the need for intrafederal abstention. See *supra* note 46.

Colorado River, under the order of filing factor, and *Turner Entertainment*, under the fairness prong, take into account the pendency of an action in a foreign country, they do not place primary emphasis on that factor. In fact, federal courts seem to have a high tolerance for parallel proceedings, and abstention is more the exception than the rule.¹⁶⁵

Meanwhile, in Europe, *lis alibi pendens* is an adjustable concept.¹⁶⁶ A few member states do not apply a *lis alibi pendens* rule when the parallel suit is pending outside the EU.¹⁶⁷ Other member states use an approach similar to the soft *lis alibi pendens* practice of American state courts.¹⁶⁸ For example, in France and Italy, a court may stay proceedings in favor of a prior-filed proceeding in a non-European country if the court determines that the foreign proceeding would result in an enforceable judgment with *res judicata* effect in the European forum.¹⁶⁹ This conditional regime differs markedly from the nondiscretionary, or strict, *lis alibi pendens* rule found in Brussels I. Under this conditional regime, civil law judges, like their American state court counterparts, exercise considerable discretion whether to proceed with a case.¹⁷⁰

Thus, despite differences in perspectives, both American and European courts exhibit a pattern of bifurcated approaches depending on whether the parallel proceedings are internal or external to the federal (or quasi-federal) legal order.¹⁷¹ Parallel proceedings within the federal order are more readily subject to the application of the *lis alibi pendens* principle, while those outside the federal order are more closely scrutinized by the courts. The level of mutual trust existing internally within each legal order may easily explain this

¹⁶⁵ *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 684 (7th Cir. 1987); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 926 (D.C. Cir. 1984) (“The sufficiency of jurisdictional contacts with both the United States and England results in concurrent jurisdiction to prescribe. Both forums may legitimately exercise this power to regulate the events that allegedly transpired as a result of the asserted conspiracy.”).

¹⁶⁶ Brussels I’s strict *lis alibi pendens* rule only applies to pending proceedings in other EU member states. *See* Brussels I Regulation, *supra* note 11, art. 27(1).

¹⁶⁷ As of 2007, six EU countries, including the Netherlands, lacked a *lis alibi pendens* rule for extra-EU pending proceedings. CAMPBELL MCLACHLAN, *LIS PENDENS IN INTERNATIONAL LITIGATION* 111, 112 & nn.259-60 (2009) (citing ARNAUD NUYTS, *STUDY ON RESIDUAL JURISDICTION, GENERAL REPORT* (2007), available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf).

¹⁶⁸ *See id.* at 115 & n.267 (citing NUYTS, *supra* note 167, at 77 & n.216) (listing these countries as Austria, Belgium, Cyprus, Estonia, France, Italy, Slovenia, Spain, and Sweden).

¹⁶⁹ *Id.* at 96-102.

¹⁷⁰ Pearce, *supra* note 98, at 557-58.

¹⁷¹ As Professor Campbell McLachlan explains, the choice between strict and soft *lis alibi pendens* rules does not neatly follow the dichotomy between common law and civil law systems. MCLACHLAN, *supra* note 167, at 92 (“[A]nalysis of the development of the rules in this field shows divergent choices being made within Civil and Common Law systems as to the proper approach to be taken to parallel foreign litigation.”).

dualism. In the United States, the Full Faith and Credit Clause assures recognition of judgments across the states, so addressing duplicative proceedings at the jurisdictional stage may simply be an efficient anticipation of the *res judicata* effect of another state's judgment.¹⁷² Likewise, the *lis alibi pendens* rule in Article 27 of Brussels I promotes the "rapid and simple recognition and enforcement of judgments" among EU member states and "ensure[s] that irreconcilable judgments will not be given in two Member States."¹⁷³ Where mutual trust is lacking, however, the forum is less assured that the foreign proceeding will result in an enforceable judgment and is therefore reticent to deny access to its courts.¹⁷⁴

B. *Inadequacy of Presumptive Approaches*

Unlike EU member states, the United States is not a party to a treaty that establishes *lis alibi pendens* as a solution to conflicts of jurisdiction.¹⁷⁵ U.S. courts, therefore, cannot model an international abstention doctrine on a strict *lis alibi pendens* rule. Nonetheless, the fact that a suit is pending abroad should factor into the abstention analysis. On one end of the spectrum, *Colorado River*'s multifactor test takes into account the respective order of each suit's filing, but stacks the cards against abstention: the party seeking abstention has the burden of showing that exceptional circumstances warrant the court declining jurisdiction. On the opposite end of the spectrum, commentators have suggested a reverse presumption in favor of abstention: the party seeking abstention only has to show that parallel proceedings are pending abroad before the burden shifts to the party resisting abstention.¹⁷⁶ As this Note shows,

¹⁷² Cf. Burbank, *supra* note 46, at 209-11 (explaining that, although "[t]he capacious language of the Full Faith and Credit Clause of the Constitution" did not result in "a federal law of *lis pendens*," the doctrine of "interstate *lis pendens* remained available at the option of the individual states" as a means of addressing duplicative litigation).

¹⁷³ See Brussels I Regulation, *supra* note 11, recitals 2, 15.

¹⁷⁴ See Julie E. Dowler, Note, *Forging Finality: Searching for a Solution to the International Double-Suit Dilemma*, 4 DUKE J. COMP. & INT'L L. 363, 385 (1994) (opining that the *lis alibi pendens* principle "fails to address all the risks to United States litigants and courts" because "the United States does not share full faith and credit obligations with any other sovereign nation").

¹⁷⁵ The Hague Conference on Private International Law attempted to draft an international convention, but these efforts have since sputtered out. See Andrea Schulz, *Reflection Paper to Assist in the Preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters* (Hague Conference on Private Int'l Law Prel. Doc. No. 19, 2002), available at http://www.hcch.net/upload/wop/jdgm_pd19e.pdf; Memorandum from Professors Andreas F. Lowenfeld & Linda Silberman to Am. Law Inst.'s Council (Nov. 30, 1998), available at http://www.ali.org/doc/1999_LowenI.pdf.

¹⁷⁶ See *infra* Part III.B.2.

these presumptions either understate or overstate the importance of pendency of foreign proceedings in the abstention analysis.

1. Shortcomings of *Colorado River*'s Presumption Against Abstention

The Supreme Court elaborated the *Colorado River* abstention doctrine in the context of federal-state concurrent jurisdiction. This doctrine, while suited for domestic proceedings, is deficient in the international context, where different concerns arise. In a 2008 student comment, Jocelyn H. Bush defended the adoption by federal courts of an international abstention doctrine based on the *Colorado River* doctrine with some adjustments to address the particular concerns stemming from international parallel proceedings.¹⁷⁷ In particular, and in line with scholars in the field,¹⁷⁸ Bush found that international comity was "a relevant consideration supporting the right of federal courts to consider abstention in international parallel proceedings."¹⁷⁹

At the same time, Bush supported *Colorado River*'s "exceptional circumstances" limitation.¹⁸⁰ First, she argued that *Colorado River* is an appropriate standard for international parallel proceedings "because it is designed to apply to situations in which substantially similar lawsuits are before two courts in separate court systems," one state and one federal.¹⁸¹ According to this argument, since international proceedings take place in different court systems, *Colorado River* is also apposite.¹⁸² The problem with this argument is that federal-state concurrent jurisdiction involves unequal sovereigns whose relations are regulated by federalism principles.¹⁸³ By contrast, concurrent jurisdiction between countries involves equal sovereigns, a situation which *Colorado River* does not address.

¹⁷⁷ Bush, *supra* note 10, 148-49 ("The analysis not only should be built on the jurisprudence of *Colorado River* and its progeny but also should specifically address the unique concerns of concurrent international parallel proceedings.").

¹⁷⁸ *Id.* at 153 n.156 (citing Professor Calamita as a proponent of emphasizing international comity in the abstention analysis).

¹⁷⁹ *Id.* at 153.

¹⁸⁰ *Id.* at 151 ("*Colorado River*, because of the underlying concerns for which it was developed and the higher burden it places on a litigant to show abstention is appropriate, is a more appropriate standard to apply to determinations of abstention in international parallel proceedings.").

¹⁸¹ *Id.* at 149.

¹⁸² *Id.* ("International parallel proceedings raise concerns more analogous to those involved in state-federal abstention cases because concerns of respect for a different court system are at play.").

¹⁸³ Calamita, *supra* note 6, at 670 ("[T]he domestic abstention doctrines ever and always have been creatures of the federal-state arrangements, designed to operate with specific attention to the issues raised in the peculiar context of the U.S. system of federal government."). While it is true that state and federal courts are considered co-equals within the U.S. constitutional system, *see* YACKLE, *supra* note 42, at 182, this vision of parity does not detract from the federal legal order's supremacy, *see* U.S. CONST. art. VI, cl. 2.

Second, Bush favored *Colorado River* because it “places a heav[y] burden on the moving party to prove abstention is required,” and a high standard of proof would ensure a plaintiff’s right to access the court of his or her choice.¹⁸⁴ One may question, however, the underlying premise that a plaintiff’s interest in the forum of his or her choice is equally strong in international as in domestic parallel proceedings. Undoubtedly, that interest is strong, as the Supreme Court’s forum non conveniens jurisprudence attests.¹⁸⁵ But is it so strong as to limit abstention to “exceptional circumstances” in international cases?

Transposing the result of domestic interest balancing to international parallel proceedings is questionable. The Supreme Court’s command in *Colorado River* that federal courts fulfill their “virtually unflagging obligation”¹⁸⁶ to exercise jurisdiction does not mean that the exceptional circumstances test is well suited to international parallel proceedings. The command applies to the whole set of cases where federal courts have jurisdiction. International parallel proceedings, however, are a small subset of such cases, and they raise unique concerns. As a group, they may require abstention more frequently than domestic parallel proceedings. This is not to say that courts should abstain more often than not when confronted with cases pending abroad, which is the implication of the first-to-file presumptions discussed below. Rather, the implication is that *Colorado River*’s exceptional circumstances test is to be taken with a grain of salt outside the federal-state concurrent jurisdiction context.

2. Shortcomings of Presumptions in Favor of Abstention

Because a hard-and-fast first-to-file rule along the lines of the strict *lis alibi pendens* principle in Article 27 of Brussels I would not work within the U.S. legal system, some scholars have adjusted the concept by proposing a presumption rather than a rule. Professors Austen L. Parrish and N. Jansen Calamita both propose that U.S. courts use a first-to-file presumption in favor of abstention.¹⁸⁷ As Parrish notes, this would constitute the reverse of what

¹⁸⁴ Bush, *supra* note 10, at 150 (“[W]hen a court abstains from hearing a case rightfully before it, the court is taking away a litigant’s right to have a suit heard in a court that has jurisdiction over the claim.”).

¹⁸⁵ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (“[A] plaintiff’s choice of forum should rarely be disturbed.”).

¹⁸⁶ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

¹⁸⁷ Calamita, *supra* note 6, at 674; Parrish, *supra* note 7, at 244. The idea for a U.S. first-to-file presumption goes further back, with Professors Linda Silberman and Andreas Lowenfeld’s “modified *lis pendens* rule.” Silberman, *supra* note 161, at 345 (describing a “Declination of Jurisdiction When Prior Action is Pending” rule based on U.S. jurisdictional and judgment recognition principles). Silberman and Lowenfeld proposed this rule in their role as reporters for a project of the American Law Institute that produced a proposed federal statute for foreign judgments recognition and enforcement. *Id.*; see also AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED

U.S. courts currently do, that is, presume that parallel proceedings should go forward and only in exceptional circumstances abstain from exercising jurisdiction.¹⁸⁸

These proposals are valuable inasmuch as they question the “exceptional circumstances” test favored by courts that follow the *Colorado River* approach. They go too far in the opposite direction, however, by making abstention the general outcome of the *lis alibi pendens* analysis when U.S. proceedings are not filed first. By elevating first filing to a presumption-triggering act, these proposals give undue importance to a circumstance that is often the result of chance, if not of improper preemptive motives.

a. *First-to-File Presumption Based on U.S. Jurisdictional Principles*

Parrish’s proposal is inspired by practices in Europe, where courts may stay proceedings if a first-filed case pending abroad would result in an enforceable judgment in the forum.¹⁸⁹ His test, however, does not hinge on a prediction of a foreign judgment’s enforceability, but rather on a jurisdictional analysis carried out by U.S. courts. According to this approach, a presumption in favor of abstention would be triggered “if the moving party can establish that: (1) it filed a parallel foreign action first; and (2) the foreign court would have jurisdiction consistent with U.S. jurisdictional principles.”¹⁹⁰

As Parrish explains, the presumption is triggered once the moving party meets this initial burden, and the burden of proof then shifts to the opposing party, who must show that allowing a stay would represent a “manifest injustice.”¹⁹¹ For example, the opposing party could make a usurpation argument, that is, show that he was the “natural plaintiff,”¹⁹² while the defendant, in filing first, merely sought to escape liability.¹⁹³ In this case

FEDERAL STATUTE § 11, at 25-26 (2006).

¹⁸⁸ Parrish, *supra* note 7, at 244.

¹⁸⁹ *Id.* at 244 n.26 (noting that his proposal “would be similar to what some have referred to as the ‘recognition prognosis’ that has been adopted in many Western European countries” (citing J.J. FAWCETT, *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW* 36-37 (1995))); *see also supra* text accompanying note 154 (explaining that in some European countries a court can stay a proceeding if a previous action has been filed in a foreign jurisdiction and the outcome of that action has res judicata effect).

¹⁹⁰ Parrish, *supra* note 7, at 270. The first prong limits the presumption to “reactive” litigation – that is, where the defendant in the second-filed suit is the plaintiff in the first-filed suit – as opposed to “repetitive” litigation where the plaintiff files two or more parallel proceedings in different jurisdictions. *See id.* at 241 n.12. The author does not explain this particular choice, but one reason may be that the order of filings in repetitive litigation is controlled entirely by the plaintiff. This situation does not present the race-to-the-courthouse problems seen in reactive litigation, which a first-to-file rule typically attempts to address.

¹⁹¹ *Id.* at 272.

¹⁹² *Id.* at 272 n.176 (“Under the common law, the natural plaintiff is the aggrieved party and the ‘master of the complaint.’”).

¹⁹³ Calamita, *supra* note 6, at 675 (describing a situation where “the foreign action was

abstention would be “fundamentally unfair.”¹⁹⁴ Or the opposing party could attack the test’s second prong by showing that, although the foreign forum would have jurisdiction under U.S. jurisdictional principles, a U.S. court standing in the shoes of the foreign court would decline jurisdiction under the doctrine of *forum non conveniens*.¹⁹⁵

Although Parrish claims that “a version of comity underlies the proposed approach,”¹⁹⁶ his test is mostly geared toward the private interests of the litigants, who are thereby spared the inconvenience of litigating the same matter in two forums. Indeed, the second prong of his test essentially asks whether a foreign court’s jurisdiction over the defendant would satisfy U.S. constitutional due process requirements under *International Shoe*.¹⁹⁷ Such an inquiry does not explicitly weigh the respective public interests of the domestic and foreign forums, as would be expected under an approach based on comity.¹⁹⁸ In so doing, Parrish overlooks an important part of the abstention analysis. Declining jurisdiction in favor of another country’s courts, whether through *forum non conveniens* or abstention, implicates sovereign interests, and as the *forum non conveniens* doctrine suggests, a court must consider these interests before shutting its doors to litigants.¹⁹⁹ Consequently, a presumption

contrived to usurp the ‘natural’ plaintiff’s choice of forum by bringing a preemptive claim for a declaration of nonliability”).

¹⁹⁴ Parrish, *supra* note 7, at 272.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 276.

¹⁹⁷ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (“[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have 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))).

¹⁹⁸ See Michaels, *supra* note 160, at 1027 (describing the U.S. due process analysis as a paradigm that “focuses on the vertical relation between the court and the parties,” not “the horizontal relation between the forum state and other states”). Perhaps Parrish’s first-to-file presumption accounts for public interests in the sense that these are “endogenous” to the presumption. Cf. Pearce, *supra* note 98, at 563 (explaining that the balancing of private and public interests in civil law countries is “endogenous to the law; that is, the civil-law judge is expected to apply jurisdictional rules which are the result of the legislature’s diplomatic balancing of the permissible public and private interests”). But it is doubtful that U.S. courts would accept such endogenous balancing without legislative imprimatur. Cf. Burbank, *supra* note 46, at 229 (“It is time to implement the Full Faith and Credit Clause, the grants of judicial power in Article III, and federal statutes conferring subject matter jurisdiction, with legislation that provides federal *lis pendens* standards, binding in state and federal courts alike . . .”).

¹⁹⁹ See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (“To guide trial court discretion, the Court provided a list of ‘private interest factors’ affecting the convenience of the litigants, and a list of ‘public interest factors’ affecting the convenience of the forum.” (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947))).

based on U.S. jurisdictional principles does not provide a workable approach to international abstention.

b. *First-to-File Presumption Based on Comity Principles*

Calamita also endorses a first-to-file presumptive rule, but he derived his rule from principles of comity. According to Calamita, every state court in the U.S. has invoked comity as a justification for staying second-filed suits, “whether that court be in another state or another country.”²⁰⁰ And although comity principles equally underpin courts’ analyses for foreign judgment enforcement under the *forum non conveniens* and *lis alibi pendens* analyses, Calamita explains that different presumptions apply under each of the three scenarios.²⁰¹ Thus, courts use a presumption against plaintiffs seeking to relitigate issues or claims put to rest by a foreign judgment.²⁰² By contrast, under the *forum non conveniens* analysis, when there is no foreign judgment and no pending case, a court “shifts its presumption in favor of the plaintiff.”²⁰³

For *lis alibi pendens* cases, Calamita proposes a first-to-file presumption in favor of a moving party who can show that: “(1) the foreign action was filed first; (2) the foreign action involves substantially the same parties and issues as the U.S. action such that *res judicata* would apply between the two; and (3) the foreign court is able to provide adequate relief on the parties’ claims.”²⁰⁴ If the elements are met, the burden shifts to the opposing party, who must rebut the presumption by showing “special circumstances . . . that undercut the goals behind principles of adjudicatory comity.”²⁰⁵ For example, the court would not grant a stay if the foreign proceeding led to a violation of “domestic public policy,” was prejudicial to the plaintiff’s rights under U.S. law, or “usurp[ed] the ‘natural’ plaintiff’s choice of forum” through a “preemptive [action] for a declaration of nonliability.”²⁰⁶ The presumption would only kick in if the foreign court was the first to be seized. Otherwise, traditional *forum non conveniens* analysis would apply.²⁰⁷

²⁰⁰ Calamita, *supra* note 6, at 649 (emphasis omitted) (citing a long string of precedents in the state courts).

²⁰¹ *Id.* at 673 (“[T]he distinction between the application of adjudicatory comity in a U.S. *forum non conveniens* case, and a prior-pending foreign *lis alibi pendens* case is really only about the presumptions that should apply to the distinct factual circumstances of the two kinds of cases.”).

²⁰² *Id.* at 673-74.

²⁰³ *Id.* at 674.

²⁰⁴ *Id.* at 674-75.

²⁰⁵ *Id.* at 675.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 677-78. For the alternate view that the *forum non conveniens* doctrine should equally apply to international parallel proceedings, see Kimberly Hicks, *Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 REV. LITIG. 659, 703 (2009).

Calamita's presumptive rule has the advantage of offering courts useful guidance on how to apply comity principles in international parallel proceedings while providing flexibility in individual cases. A case like *Gasser*,²⁰⁸ which exemplifies the excessive rigidity of the strict *lis alibi pendens* rule under Article 27 of Brussels I, would have come out differently under Calamita's presumptive rule. Because the Italian party had filed a preemptive suit seeking a declaration of nonliability, the Austrian party would have been able to invoke the usurpation exception and avoid a stay. By contrast, under Article 27, the aggrieved Austrian party lost access to its country's courts and had to defend against what appeared to be a vexatious claim in the slow-moving Italian courts.²⁰⁹ Thus, Calamita's approach avoids sacrificing fairness to litigants without significantly undermining legal certainty.

Like Parrish, however, Calamita tips the balance too far in the direction of abstention. It is difficult to reconcile the Supreme Court's command that federal courts are under a "virtually unflagging obligation" to exercise jurisdiction with a presumption that urges the opposite result. Courts should be able to balance in each case their "virtually unflagging obligation" to exercise jurisdiction with the public interests affected by parallel proceedings, including comity concerns. The approach afforded by *Turner Entertainment* allows such balancing.

C. *An Alternative to Presumptions: Interest Balancing Focused on International Comity*

A balancing test that emphasizes international comity, such as the one adopted by the Eleventh Circuit in *Turner Entertainment*, better preserves courts' ability to weigh the various interests present in each case, while allowing courts to abstain more routinely than under the *Colorado River* doctrine. Like the first-to-file presumptive rules, a balancing approach takes into account the interests of the foreign forum, but unlike such rules, it gives courts more leeway in protecting the sovereign interests of the domestic forum. After presenting the balancing test's flexibility, this Note illustrates how the test fares in comparison to competing approaches by using the facts of the aforementioned case, *Answers in Genesis*.

1. Flexibility of an Interest-Balancing Approach

The pendency of foreign proceedings generally induces courts to recognize that the jurisdictional analysis does not stop at the private interests of the litigants and the public interests of the forum. A fourth dimension is brought

²⁰⁸ Case C-116/02, *Erich Gasser GmbH v. MISAT Srl*, 2003 E.C.R. I-14721 (holding that an Austrian action was barred due to a previously filed Italian action).

²⁰⁹ See *supra* Part II.B.2.

into the picture: the interests of the foreign forum.²¹⁰ At the margin, the pendency of a foreign proceeding principally raises the issue of the proper incorporation into the jurisdictional analysis of multilateral concerns that are usually the province of the executive or legislative branches of government,²¹¹ and which courts have historically considered under the heading of international comity.²¹² Although comity concerns can be taken into account in various ways, including through the use of presumptions,²¹³ a comity-based balancing approach is better suited to grasp the case-specific contours of a foreign state's jurisdictional interests.

The foreign state's interest in hearing a pending case will depend on various factors. One such factor is the basis of jurisdiction, which reflects the importance the foreign state attaches to jurisdiction over certain types of disputes or certain parties.²¹⁴ Not all bases of jurisdiction are equal.²¹⁵ It may be, for example, that the foreign court's exercise of jurisdiction is founded on an exclusive basis under its national law, a forum-selection clause, domicile, nationality, or even an "exorbitant" basis.²¹⁶ Comity does not require a U.S. court to give as much weight to a foreign state's interest founded on an exorbitant basis as one founded on an exclusive basis of jurisdiction.

That said, even though the foreign court asserts jurisdiction on a basis that may not exist under U.S. jurisdictional principles, a U.S. court may still find it

²¹⁰ See Pearce, *supra* note 98, at 564 ("[C]ommon-law judges also undertake a quasi-diplomatic analysis of additional foreign-relations factors relating to the interests of alternative forum states Thus the common-law judge adds a fourth, public international dimension to [Hans] Smit's trilateral balancing of a hybrid or private foreign interests as against domestic private and public interests.").

²¹¹ See Michaels, *supra* note 160, at 1037 (pointing out that, while international considerations figure in the jurisdictional analysis, "deference in multilateral issues to the executive branch ensures that the Court remains in a domestic, not international, paradigm").

²¹² Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 68 (1991) ("[O]ne of the central functions of comity [is] avoiding conflict with the political branches, especially the executive, in the conduct of foreign relations.").

²¹³ See Calamita, *supra* note 6, at 673-75.

²¹⁴ For a list of bases of jurisdiction from an American perspective, see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 421 (1987).

²¹⁵ See BORN & RUTLEDGE, *supra* note 4, at 563 (discussing the relevance of a jurisdictional claim's strength).

²¹⁶ The term "exorbitant" is obviously value-laden. The *Restatement (Third) of Foreign Relations Law*, which reflects the American view, labels "exorbitant" any basis of jurisdiction that is not "reasonable," such as "the nationality of the plaintiff or the presence of property unrelated to the claim." *Id.* pt. IV, ch. 2, intro. note; see also Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 474 (2006) (defining exorbitant jurisdiction to "comprise[] those classes of jurisdiction, although exercised validly under a country's rules, that nonetheless are unfair to the defendant because of a lack of significant connection between the sovereign and either the parties or the dispute").

appropriate, as a matter of comity and respect for the foreign court, to stay the proceedings until the parallel proceedings result in a judgment. It is important, therefore, for U.S. courts to have the ability to tailor the degree of comity warranted in individual cases, and to balance the interest of the foreign forum with those of the parties and the domestic forum. *Turner Entertainment* provides that flexibility by letting the court scrutinize the parallel proceeding for the possibility of fraud, due process violations, and prejudicial dimension.²¹⁷

2. Standards Versus Rules

A balancing approach focusing on comity, such as the one presented in *Turner Entertainment*, is susceptible to the usual criticism levied against the use of standards instead of rules. This criticism is misplaced because the problem of international parallel proceedings is one that is best addressed through standards. “Rules tend to be clear in advance but crude in application.”²¹⁸ Admittedly, a balancing approach creates more uncertainty and less predictable outcomes than the bright-line *lis alibi pendens* rule contained in Article 27 of Brussels I. But so do the presumptive rules, which are riddled with exceptions. A measure of predictability must be sacrificed to preserve U.S. courts’ discretionary power to decline jurisdiction.²¹⁹ As between the balancing approach and the presumptive rules, the comparison is not so damaging. A balancing approach may be more unpredictable compared to *Colorado River*’s exceptional circumstances test, which would generally result in parallel proceedings, or the presumptive first-to-file rules proposed by Parrish and Calamita, which would generally lead to abstention. But the marginal loss in predictability is outweighed by the marginal benefits of fully accounting for and preserving U.S. sovereign interests. Cases will arise where the first filer meets its burden of proof but the other party cannot rebut the presumption because there is no “manifest injustice” in the court abstaining (or “special circumstances” that rise to that level). Yet, this may be a case that warrants adjudication by a U.S. court – perhaps out of concern for the proper enforcement of U.S. laws and their uniform application, or similarly important policy objectives. An explicit balancing of public and private interests, with international comity as a linchpin, would ensure that courts give due attention to the interests of foreign states and fulfill their “virtually unflagging obligation” to exercise jurisdiction.

Moreover, it is far from clear that a balancing approach would impose heavier administrative costs on the courts.²²⁰ Surely, under presumptive rules

²¹⁷ *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1519 (11th Cir. 1994).

²¹⁸ WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 165 (2007).

²¹⁹ See *supra* note 100.

²²⁰ *Contra* FARNSWORTH, *supra* note 218, at 167 (suggesting that a standard, such as a balancing test, is more administratively costly than a precise rule).

the allocation of the burden of proof does a lot of the work and simplifies the court's decisionmaking process: the inquiry is orderly and follows a clear sequence. The balancing approach, meanwhile, does not provide guidance on how to weigh the various factors the court must consider and in which order to weigh them. But this is a minor concern. At this stage of the litigation, the court does not engage in particularly taxing factual determinations. Whether it considers the abstention factors as a whole or sequentially, it must exercise judgment under either approach. The mechanics of the presumptive rules, therefore, do not confer such a clear advantage over the balancing approach.

Finally, as a standard, the balancing approach is fairer to litigants. It places both parties on a level playing field by denying a strategic advantage to the first filer. The order of filing is a factor in the analysis, but not one that should be given special weight over other factors, such as the forum's convenience and the prejudicial consequences of abstention. The presumptive rules, by contrast, tend to relegate fairness to an afterthought: the rules enter the analysis only after the presumption has been triggered and the burden of proof shifts to the party opposing abstention.

3. Comparing Interest Balancing with First-to-File Presumptions: An Illustration

Discussing the benefits of interest balancing in the abstract has its limitations. Indeed, one may justifiably ask whether a balancing approach based on comity is really that different from first-to-file presumptions, and whether they lead to different results in actual disputes before the courts. In many cases, these critics would be proved right. Take *Turner Entertainment*, for example. The Eleventh Circuit deferred to the first-filed German proceedings out of comity;²²¹ the presumptive rules in favor of abstention, either à la Calamita or à la Parrish, would likewise have led the U.S. court to abstain. Or take *Ingersoll*, the aforementioned Seventh Circuit case, which, although decided under the *Colorado River* doctrine, gave a nod to international comity.²²² The fact that proceedings were first filed in Belgium played a significant part in the court's decision to abstain.²²³ The same result would have obtained under a first-to-file presumption. To grasp how different the outcome may be under an interest-balancing approach based on international comity vis-à-vis a first-to-file presumption, the Sixth Circuit case discussed above, *Answers in Genesis*, provides an apt illustration.

Answers in Genesis concerned a dispute between two related creationist organizations, one based in Australia and the other in the United States.²²⁴ For

²²¹ *Turner Entertainment*, 25 F.3d at 1523.

²²² *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (stating that the court "owe[s] a special obligation of comity" even though the alternative forum is not a state or federal court given deference under the federal Constitution).

²²³ *Id.* at 685-86.

²²⁴ *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 462

years, the two groups worked closely together.²²⁵ Over time, however, the success and growth of the American group were such that it overshadowed its Australian counterpart, resulting in tensions over governance, cost sharing, and intellectual property rights.²²⁶ Seeking to “heal the developing schism,” the boards of the two organizations signed a memorandum of understanding (MOA) – which, inter alia, provided for new cost-sharing arrangements – as well as a deed of copyright license (DOCL) through which the Australian group granted the American group the right to use its publications.²²⁷

The MOA contained a broadly worded arbitration clause, which provided that “[i]n the event of a disagreement of the parties regarding the meaning or application of any provision of this Agreement or any related agreements, the parties” would refer the matter to mediation, and if that failed, “to Christian arbitration to a Christian arbitrator agreed upon by them.”²²⁸ Meanwhile, the DOCL contained a forum selection clause stating that “the parties submit to the non-exclusive jurisdiction of [State of Victoria, Australia] courts and courts of appeal from them.”²²⁹ The bright spell was short-lived: the Australian group soon sought to renounce the agreements and eventually sued in Australia.²³⁰ The American group countered with its own action in the United States seeking to compel arbitration.²³¹

On appeal from the district court’s decision to compel arbitration, the Australian party invoked *Turner Entertainment* to argue that the court should have abstained from exercising jurisdiction because of the pending suit in Australia.²³² As indicated above, the Sixth Circuit rejected *Turner Entertainment*’s balancing test in favor of *Colorado River*’s more stringent approach, and ultimately held that abstention was inappropriate.²³³

(6th Cir. 2009). Creationism is “the belief that the universe and the various forms of life were created by God out of nothing (*ex nihilo*). . . . Biblical creationists believe that the story told in Genesis of God’s six-day creation of all things is literally correct.” *Creationism Definition*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/142233/creationism> (last visited Jan. 19, 2013).

²²⁵ *Answers in Genesis*, 556 F.3d at 462.

²²⁶ *Id.* at 462-63.

²²⁷ *Id.* at 463-64.

²²⁸ *Id.* at 466.

²²⁹ *Id.* at 465.

²³⁰ *Id.* at 464.

²³¹ *Id.*

²³² *Id.* at 466.

²³³ *Id.* at 467-69. The court’s rejection of *Turner Entertainment* was not categorical; the court circumscribed its choice of approach to the case before it. *Id.* at 467 (“We believe the factors found in *Colorado River* are the most applicable to the case at bar because those factors and their relative weight match most closely the public-policy concerns the Supreme Court has identified as vital in the area of arbitration.”).

Nevertheless, the court went on to consider international comity.²³⁴ The court deemed it “difficult to see how comity concerns could come into play where both Australia and the United States, as signatories to the [New York] Convention, apply the same law” and were both bound to compel arbitration.²³⁵ That is, even if the court had followed a *Turner Entertainment*-style balancing approach based on international comity, it would likely have reached the same conclusion and held that abstention was not warranted. Whether the court gave sufficient consideration to international comity is debatable; after all, comity is more about which court decides a dispute than what law applies, and the American court arguably took the decision to compel arbitration away from the Australian court. Nonetheless, the Sixth Circuit considered the interests of the foreign forum, Australia, and weighed those against the interests of the domestic forum, the United States, in the particular case before it.

In contrast, had the court followed a presumptive first-to-file rule, it would likely have had to abstain. Under Calamita’s version, a presumption in favor of abstention would be triggered because the Australian proceedings were filed first, concerned the same parties and issues, and would provide adequate relief to the parties.²³⁶ The American group would have had a hard time rebutting that presumption. First, the Australian proceedings did not violate U.S. public policy since both the United States and Australia were parties to the New York Convention. Second, they did not prejudice the American party’s rights under U.S. law since the only right at issue for the American party was the right to compel arbitration, one that derives from the New York Convention. And third, the Australian party did not seek to usurp the Americans’ choice of forum by seeking a preemptive declaration of nonliability (although perhaps the Americans could have argued that the Australians’ request to invalidate the MOA and DOCL was tantamount to that).²³⁷

What transpires from the above comparison between interest balancing and first-to-file presumptive rules is that the latter places too heavy a burden on the party resisting abstention and too little leeway for the courts to exercise their discretion in each given case. Admittedly, *Turner Entertainment*’s interest-balancing comity-based approach is messier and cruder than the elegant solutions devised by Calamita and Parrish. At the end of the day, however, it remains the best approach to preserving U.S. sovereign interests while accommodating the interests of foreign nations having concurrent jurisdiction.

²³⁴ *Id.* at 469.

²³⁵ *Id.* The New York Convention specifically pertains to the international enforcement of arbitral awards. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

²³⁶ *See supra* Part III.B.2.b.

²³⁷ Under Parrish’s version of the presumption, the same result would occur: the Australian court had jurisdiction under U.S. jurisdictional principles and no “manifest injustice” exception was available to the American party. *See supra* Part III.B.2.a.

CONCLUSION

Two main variations of international abstention have emerged in U.S. courts. One approach, designed along the lines of *Colorado River*, calls for abstention only in exceptional circumstances and functionally operates as a presumption against abstention. The analysis takes into account whether proceedings are pending abroad, but this fact alone cannot overcome the presumption. The other approach, represented by *Turner Entertainment*, adopts a more liberal position and makes the pendency of foreign proceedings an important factor in favor of abstention. In sum, courts disagree over the importance the pendency of foreign proceedings should play in their abstention analysis.

No U.S. court, however, has come close to endorsing *lis alibi pendens*, a principle which lies at the heart of the European model for resolving conflicts of jurisdiction. Refashioning the international abstention doctrine along this principle by creating a presumption in favor of first-filed proceedings offers clear advantages over *Colorado River*'s exceptional circumstances test, which is better suited to federal-state conflicts. Such a presumption, however, presupposes a higher level of mutual trust than currently exists between U.S. and foreign courts. Furthermore, it is hard to reconcile with the command in *Colorado River* that federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. In contrast, *Turner Entertainment*'s interest-balancing approach allows courts to honor this obligation while giving due weight to pendency as an important factor in the abstention analysis. Balancing gives courts sufficient leeway to weigh all the relevant interests at play in international litigation, whether public or private. Therefore, in the absence of an international treaty creating reciprocal obligations between the U.S. and other nations, U.S. courts should consider following in the steps of the Eleventh Circuit and adopting an interest-balancing test for international abstention.