# \*\*\*\*\*Comity Controversy Area Proposal\*\*\*\*\*

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# Core Proposal

## Executive Summary

### Overview

#### The NDT/CEDA community should select international comity as the 2022-2023 legal controversy.

#### International comity is the mutual recognition of laws and judicial decisions between nations.

#### This topic would require the affirmative to defend jurisprudence that is considerably less deferential to foreign governments and actors than in the status quo (or in other words, expand the scenarios where American law applies outside the country). Negative teams would defend counterplans advocating for alternate modes of legal engagement with other countries, disadvantages about violating the sovereignty of other nations and permitting international issues in American courts, and critiques regarding comity doctrine’s potential assumptions about the inferiority of other nations’ legal systems.

#### Legal topics are tough because it is often hard to differentiate between what makes a policy conundrum “legal” in nature. We believe international comity is ideal because it captures what we perceive at the unique benefits of a legal topic (requiring relatively more evidence production from law reviews and case law, as well as deep discussions of precedents and court decisions), and avoids what we perceive as the more dreaded components of legal topics (agent counterplan and politics debates).

### Literature Controversy & Timeliness

#### Comity is more important now than ever before. Given recent changes in armed conflicts (such as Russia’s re-escalation of Ukraine and the US pullout of Afghanistan), increased focus on coordinated regulation of emerging technologies, and concerns about interdependence in the wake of COVID, how countries interact with one another is highly relevant.

#### Debates over comity occur across two axes. First, there is controversy over whether the United States should pursue a cooperative or adversarial relationship with other nations that hold different legal values. Advocates of the former point out that America is but one country in a global community, and judicial doctrines that sovereignty violations will impede coordination to solve global problems. Advocates of the latter see no benefit in accommodating governmental systems hostile to liberal democracy.

#### Second, comity jurisprudence has spawned a robust debate about the diplomatic mediums through which countries ought to interact. A comity topic would generally ask the affirmative team to advocate legally prioritizing American laws over the laws of other countries, as opposed to pursuing more light-handed approaches involving legal reciprocity (positive comity) or multilateral fora.

#### This introductory book chapter sketches out the controversy—comity is timely, touches on a wide variety of relevant dilemmas, and has a deep bench of academics with opposing viewpoints.

Vibert 21—(Associate of the Centre for the Analysis of Risk and Regulation at the London School of Economics, Graduate of Oxford University). Frank Vibert. 2021. “Comity: Multilateralism in the New Cold War”. Edward Elgar Publishing. https://doi.org/10.4337/9781800889354.

We live in a disordered world. We would all prefer to live in a world at peace, where the countries, federations and unions to which we belong all respect common standards of behaviour and a common international law. We would like them to cooperate in solving problems that concern all our futures.

Unfortunately, we do not live in such a world. We live in a world where President Trump tweeted his foreign policy decisions at night in his pyjamas, where the Chinese ruling communist party jails opposition figures on charges of ‘corruption’ and forcibly ‘re-educates’ its peoples, and where Russia, North Korea, Iran and Saudi Arabia resort to poison, assassination and force.

The international policies of the major players oscillate. They swing between mutual engagement one moment and containment the next, between partnerships and unilateralism, between the impulsive and the calculated, and between lip service to the rule of law and the use of force to achieve their objectives. They are inconsistent actors in an unstable and unpredictable world.

THE CURRENT FRAMEWORK

There is no shortage of international bodies that could provide focal points for common international action. It is a crowded world, built on different organising principles. It is often criticised as fractured, fragmented and incoherent. However, what is now fatally weakening the international capacity and resolve to act is not the multiplicity of bodies. It is the fundamental disagreements that exist among the 190-plus participants within the memberships of fully international bodies.

THE SOURCES OF DISAGREEMENT

The main elements in the international structure as we know it were put in place at the end of the Second World War at a unique juncture in history. The allies were united in their desire to rebuild and recover, the United States (US) provided an unchallenged leadership and there was a common desire to avoid the weaknesses of the pre-war League of Nations, as well as agreement on the need to avoid self-defeating trade and exchange rate policies. In all too short a time, the critical moment passed, replaced by fundamental disagreements, frozen by the Cold War. Two rival visions of social organisation, with different world views, coexisted in a stalemate of mutually assured destruction. That period too has ended. But the hope that the ending of the Cold War would usher in a new period of global cooperation and a convergence and consensus on norms of behaviour has proved illusory.

We are now at another critical juncture. The disagreements we see in the world today arise partly from the tensions that inevitably accompany any major shift in the relative power of nations. China and India are growing powers. The European Union (EU) wishes to assert itself as a unitary actor and to use its importance as a trading bloc in order to leverage up its weight and influence in other areas of global policy. Russia wishes to reassert itself. The US has become hesitant about carrying the burdens of leadership. At the same time, President Trump damaged both American democracy and America’s external alliances.

However, the disagreements that stand in the way of global rulemaking are not just those that inevitably accompany changes in the distribution of power between countries. They reflect, much more importantly, fundamental disagreements over the values that should be applied in rulemaking. The disagreements flow from the different political character of governments and, in particular, depend on whether they are democratic or autocratic. Character matters. If values were shared, we would be very much less concerned by shifts in power.

What gives a dangerous edge to the disruption is that the new rising power of China is autocratic. Alongside an old autocratic power – Russia – it can provide support and cover for smaller autocracies in Central Asia and elsewhere in the world. The values of democracies face a fresh and potent challenge from the outside world at the very same moment when democracies face their own internal challenges in backsliding.

VALUES: THE TECHNICAL AND THE POLITICAL

For much of the post-war period there has been a deliberate and conscious effort to set aside differences in the domestic character of government and the underlying differences in political values. The domestic character of governments has been treated as a matter of ‘sovereignty’ and of no concern to other countries or to the outside world. With the major exceptions of peacekeeping and humanitarian assistance, including gross abuses of human rights that trigger a ‘duty to protect’, much of international rulemaking, from trade and finance to food security, health and the environment, has been framed as a separate, largely technical exercise, constructed around function-specific international bodies.

This separation between the principles and values underlying the domestic organisation of governments and functionalism at the international level is now impossible to maintain. The different character of systems of government has become the major obstacle to international rulemaking in the areas where international rules are most required.

The key reason why the separation is now impossible to maintain is that many of the rulemaking issues that arise in new areas of international concern and attention go deeply into domestic policy, law-making and regulation and bring into play the core values underlying the internal organisation of political authority.

We used to think of international rulemaking in terms of rules to manage the exchange of traded goods and commodities and the capital and money flows that made the exchange possible. But now we live in a world where much of what matters in generating exchange is information, intellectual ideas and property, content and knowledge. In the knowledge economy the key medium of exchange is data. The rules thus have to be shaped according to the value we attach to the probity and integrity of data, to privacy, the extent of the private realm, honesty, fairness and the duty of care in contracting, and freedom of expression and association. The uses to which we put information, knowledge and innovation have to respect the person and personhood. If countries do not treat the same fundamental values in the same way in their domestic political arrangements, they will only rarely agree on what values are applicable in international rulemaking.

It is not just a question of fundamental disagreement about what values are applicable. Democratic countries also need to be able to validate the positions they take on rulemaking in international bodies to their electorate. The link is thin. Electorates do not generally pay much attention to what their governments do in international forums. But some degree of consistency between the approach taken to the content of international rules and the underlying suppositions of democratic societies provides the most readily understood connection and form of validation for democratic governments in front of their citizens.

Because the content of international rulemaking now brings into focus the internal political character of different regimes, the majorities required to take decisions in international bodies have become much more difficult to orchestrate. Democratic governments do not want their core values eroded by outside pressures. They not only wish to defend their core values; they also wish to assert them relative to others. At the same time, authoritarian governments have no wish to be exposed, ranked and compared with other countries in relation to their basic form of government. Least of all do they want to have their own legitimacy questioned.

There are areas of international rulemaking and cooperation, such as the need to address income inequalities, health and climate change, that appear to transcend underlying differences between the basic political character of regimes. But they too are not impervious to underlying political values. We have seen how an authoritarian communist party in China seems to have suppressed accurate data on the start of the Coronavirus disease in 2019 (COVID-19) in a way that delayed the response to a global pandemic that affected us all. Similarly, it took monitoring stations in South Korean and Japan to detect the production in China of a type of ozone-depleting chlorofluorocarbon (CFC) banned under the 1987 Montreal Protocol to safeguard the ozone layer (to which China itself is a signatory). Power inequalities within authoritarian countries produce wealth and income disparities as pronounced as anywhere in the world.

We now live, therefore, in a world where differences between the principles of government at the domestic level make a profound difference to approaches to the content of rulemaking at the international level, to the willingness of governments to engage with the substance of rulemaking, and to the capacity of international bodies to take decisions. The old Cold War is over, but a new trial between opposing values is now underway. The old Cold War centred on rivalry between different comprehensive world views. The new tensions lack this comprehensive ideological framework. They are about the connection between how power is exercised, justified and validated within societies and how it is exercised at the international level.

TWO FUTURES

In a world where the principles of government do not reflect shared values, and where, as a result, governments will only infrequently coalesce in their approach to global rulemaking, we can look at two future scenarios.

In one future scenario we can rely on a world without a conductor. We can look to the metaphor of the autonomous, driverless car. We can hope that, despite the problems in making global rules of behaviour, the car will still stay on the road through the uncoordinated efforts of the many actors with a vital interest in predictable international rules of behaviour – actors such as international investors, manufacturers with international supply chains, providers of cashless payments systems, and the providers of internet platforms and their content. We can also look to cooperation between the professionals engaged with the ecology of the planet; the health, safety and education of its population; corporate governance; the probity of capital markets and the rule of law. We can support voluntary international organisations. We can hope for self-restraint by governments. We can hope that instability among smaller nations and in politically unsettled regions of the world will not drag in the major powers and their rivalries.

Alternatively, in a different scenario, we can think about new ways, or revive old ways, for achieving international cooperation.

This book examines one such alternative, older, model for achieving international agreements. It does not depend on arriving at global agreements in fully international organisations. It relies on cooperation between like-minded democratic countries. They retain their different jurisdictions and their own authority. But, because they share the same expectations about underlying values and behaviours, they can agree on common rules that each will adopt. Together, individually and collectively, they can try to promulgate these rules in the wider world, side-by-side and, if necessary, in competition with other sources of rulemaking. The approach of side-by-side rulemaking in the same space represents a particular variety of what is generally referred to as ‘comity’.

COMITY

Outside the study of law, ‘comity’ is not a familiar word. It came into use in the seventeenth century at the time when ‘sovereign’ states were emerging as the main unit for organising the functions of government, and it addressed the conduct of relations between them. It links to a broader class of settings, both historical and continuing today, where different systems of law coexist alongside each other in an overlapping space. ‘Comity’ as used in this analysis of the global space refers to rulemaking that coexists between fully international rulemaking and the unilateral projection of rules. It is applied to a system of international rulemaking that is more than unilateral but less than fully international in its making. The term is deployed to refer to a form of rulemaking with an international reach without a fully international basis.

Comity has been chosen as the over-arching organising concept for this book for three reasons. Firstly, it provides a point of entry for a normative perspective on the multiplicity of rules and rule makers we see in the world today. This normative perspective distinguishes it from much orthodox discussion of the ‘transnational’. It places the spotlight on the importance of normative ties between rule makers in shaping institutions, relationships and the policy process.

Secondly, comity provides for a focus on the growing departure from a traditional presumption against laws that have external effect – ‘extraterritoriality’. It looks at the processes and techniques of domestic rulemaking that have external influence and that provide means of influence, short of the application of force, in the external world. It brings together the range of measures that democracies can take to defend their values from external influences reaching in, and that enable them to express their own values and to reach out.

Thirdly, the concept implies a predisposition to avoid open conflict. Comity is traditionally associated with ‘deference’, where one system defers to another. However, the concept opens up for analysis the wider range of choices involved in managing relationships in order to avoid conflict. Comity maps a path away from the kind of frozen positions associated with the old Cold War. At the same time, it steps back from claims that a new consensus is emerging around the nature of a new global order.

THE POTENTIAL OF COMITY

The possibilities of comity depend on ‘like-mindedness’. ‘Like-mindedness’ defines the groups that can engage productively in rulemaking in the ‘in-between’ space between the fully multilateral and the unilateral.

Like-mindedness stands for a common way of thinking about the content of new rules and to congruent ways of making rules. It allows governments that share expectations about underlying values, rulemaking procedures and behaviour to move ahead with common rulemaking and to sidestep those who do not share the same values. It shapes the form of the organisations they set up for rulemaking. In addition, the like-minded can adopt mutually supportive policies to extend the reach of their common approaches to the outside world. Where other countries buy into the provisions, the rules can be adopted in ever-wider circles beyond the group itself. Rulemaking by like-minded groups can stand on its own. It can also provide a pathway to the later adoption of rules on a fully international basis.

Like-mindedness is a principle both of inclusion and of exclusion. It can be applied at the level of governments and it can also be applied at the level of people and their groups. It is applied at both levels in this book. At the level of governments, it is used to distinguish between democratic and autocratic governments. At the level of people, it is used to refer to the professionals and experts who are key to their rulemaking.

Like-mindedness has both strengths and flaws. At the level of like-minded governments, the great strength is that the processes for rulemaking are simplified and eased. The weakness is that the process of widening the adoption of rules is not an automatic one. The response of the wider world is often uncertain and tension inevitable. At the level of people, ‘in groups’ can define their own boundaries for good reasons, such as to maintain professional standards and in order to narrow their focus on to practical problems. ‘In groups’ can also fall prey to ‘group think’ and exclude other actors, or narrow down their agenda, in ways that are damaging to public policy and to wider social norms. They can become overpowerful. The analysis therefore addresses both sides of the coin.

THE RELATIONSHIP WITH DEMOCRACY

In international rulemaking we now face a fundamental impasse based on the different underlying characters of governments. On the one side stand democratic countries that wish to assure the mutual coherence and congruence of the values applicable to new areas of rulemaking with their own central values. On the other side are authoritarian countries whose values are quite different and whose rulers are only interested in the protection and exercise of their own power. They are unconstrained by domestic opinion. We cannot wish away this divide.

Even democratic governments that share fundamental underlying values may still not see eye to eye on where to draw the actual lines in the new areas of international concern. There are different varieties of democracy, and democratic opinion can reasonably differ on where exactly to draw the line in such areas of public policy as cyber security, the protection of personal data or the role of artificial intelligence (AI), or on the safeguards around genetic engineering and modification.

However, despite such differences, countries that share democratic values in their domestic political organisation will recognise the centrality of their core values for the new areas of international rulemaking. They will share common concerns when the same values that underpin their domestic political systems become salient in the context of international rulemaking. Aware of the fragility of their own systems, they will wish to defend and project their own core values in international rulemaking. Their own rulemaking can provide the model for the wider world.

THE WARNINGS AGAINST COMITY

There are many warnings about what happens when separate and distinctive systems of law and rulemaking try to operate side-by-side in the same space. These warnings mainly derive from the academic literature around ‘legal pluralism’.

There are two main warnings. The first is that history suggests that pluralism does not lead towards a wider consensus. Instead, it leads to inevitable rivalry and conflict between jurisdictions. If so, then the focus of comity on ways to avoid conflict and to provide a pathway to a wider international adoption of rules will end in disappointment. The second is that the most powerful actors will dominate the rivalry. If so, then the focus of comity on managing normative differences rather than on power relationships will end in deception. Both warnings remain valid.

The potential for conflict between like-minded democratic groups and other jurisdictions cannot be avoided. Like-minded groups may prefer to avoid challenge, prefer to remain silent in the face of disagreement with others outside the group, provide incentives and hope to persuade them to converge in their own rulemaking. However, persuasion and incentives will not always work. In the presence of unresolved disagreements, the influence of other jurisdictions reaches in; the like-minded groups will want the influence of their rulemaking to reach out. Friction is inevitable.

The danger that the ‘powerful’ will dominate takes two forms. The first, very traditional, form is that rulemaking will be dominated, at the level of governments, by the most powerful states. In cases where the ‘powerful’ stay outside like-minded groups, the classic response lies in the formation of new alliances of the like-minded and the strengthening of old relationships. In cases where the ‘powerful’ are participants within the group, later analysis points to the ways that smaller participants within like-minded groups can defend themselves from dominance by their most powerful members. However, a different, second kind of power resides within like-minded groups. It is wielded at the level of people by the webs of professionals who instigate the rules in new areas. The danger is that professional elites may capture the key rulemaking processes.

Both the risk of capture within the system and the risk of conflict between systems raise questions about the legitimacy of comity in an international setting. If like-minded democratic groups are to provide a path towards fully international rules, the legitimacy of what they do has itself to be firmly rooted.

LEGITIMACY

The observance of democratic values by like-minded groups within their own domestic settings does not confer automatic legitimacy on what they do together in an international setting. It appears directly contrary to the two main ways of visualising an ideal harmonised world. It runs against the ideal of a global authority based on global values. It also runs against the alternative vision of rules interpreted and legitimised by validation from all the different countries in the world.

There is, however, a third way of understanding legitimacy, based on the voluntary acceptance by individuals of the mode of rulemaking. It is the closer rooting in the individual acceptance of rulemaking that underpins the claim of like-minded democratic groups to have legitimacy for what they do. Coherence between the content of their rules and what democratic countries stand for, and the congruence of their rulemaking procedures with democratic processes, together enable like-minded democratic groups to claim a closer relationship with the individual acceptance of rulemaking than other forms of international rulemaking.

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The wave of hope that accompanied the effort to build an international rule of law in the immediate post-war world did not survive the confrontation of the Cold War. A second wave of optimism that accompanied the fall of communism in the Soviet Union is also foundering. The hope that we could see a natural dynamic at work, taking us from law centred on the state to a comprehensive system of international law under some kind of global institutional framework, is receding. Rivalries between the changing powers in the world have acquired a new edge. Fundamental norms have not converged.

In a world where there exist basic divergences in values between democratic and authoritarian countries, we cannot rely on bodies with global memberships to be able to agree on international rules of behaviour where we now need them. At the same time, we cannot rely on the great powers in the world to set aside their rivalries. We thus need to look again in depth at the potential for rulemaking among those like-minded groups that share basic democratic values and that bring these values to the negotiating table. We can hope that their efforts can lead in turn towards a wider international consensus.

### Topicality: “Legal” / “International”

#### Comity is an important part of jurisprudence that would incentivize robust and novel legal research college debate has not previously dealt with.

#### 1—Common law foundations necessitate legal research. Because large aspects of comity are judicial constructs akin to common law, debating the topic would require delving into relevant caselaw. Many, if not most, solvency advocates write about new standards and tests to be adopted by the court system, as opposed to legislative action.

#### 2—Comity analysis is distinct from topics that have dealt with international law. Whereas international law generally deals with how the United States interacts with treaties and multilateral fora, international comity is generally about interactions between American laws and the domestic laws of foreign nations.

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.

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

### Antitrust Overlap?

#### The 2021-2022 antitrust topic was relatively wide-ranging compared to its precursor about alliance commitments. One subset of the antitrust discussion involved its extraterritorial application. In fact, thinking about antitrust AFFs regarding the international effects of American jurisprudence (and the associated NEGs) inspired me to write this paper.

#### Some might be concerned that a comity-focused topic offers too much overlap with last year. This is not persuasive:

#### 1—Discussions of comity on the antitrust topic were limited. Kansas, Minnesota, and Michigan were the primary schools that read AFFs about extraterritoriality, and only for parts of the season. While these debates certainly scratched the surface of the comity debate, they did not grapple with it nearly enough to justify excluding a comity-focused topic.

#### 2—Discussions of comity on the proposed topic will be distinct.

#### 3—“Antitrust mentioned it” is too high a bar. Antitrust touches everything. Food sovereignty, pharmaceuticals, space commercialization, patents, state medical boards, blockchains, airplane alliances, bank regulations, megaships, the defense industrial complex, investment diversification, and labor organizing were all the central focus of an antitrust 1AC at some point. No conceivable legal topic can avoid talking about everything the antitrust topic talked about.

### International Overlap?

#### International topics can often be polarizing. Recent topics that addressed international issues have seen the United States decreasing its military posture (presence, executive authority, alliances), or adjusting its involvement in formal cooperation or treatymaking (executive authority, space). Though I will probably not convince steadfast opponents of discussing other countries or the effects of US laws outside the US, this topic is sufficiently distinct from past international topics to assuage most concerns about an excess of international discussions.

#### 1—Cross-border judicial interactions are under-explored in debate. Recent international topics have generally dealt with legislative and executive policies guiding US interactions abroad. Comity is different because it addresses how the *court system* views and reacts to the laws of other nations.

#### 2—Domestic laws of other countries are under-explored in debate. Cross-apply “Dodge 15” from above. Past topics that have included debates about international law have focused on treaties and formal cooperation. Comity is different because it involves parallel, uncoordinated decisions by various nations’ judiciaries. Its focus is also on resolving conflicts over the domestic laws of different countries, as opposed to international laws enshrined in treaties and agreements.

#### 3—“No international discussion” is not a feasible goal. I largely agree with criticisms that debate is too quick to assume the merit of a policy is solely dependent on whether raises or lowers the likelihood of great power war. That said, topics written specifically to exclude discussions of international issues will not solve this problem. Both structural incentives to outweigh disadvantages and the fact that the world is increasingly interconnected make affirmative advantages written to solve global crises inevitable.

## Core Affirmative Ground

### Overview

#### This section presents three traditional “policy” AFFs; one in each of the three areas of comity explored.

#### The two “K” AFF advocates (focusing on comity’s interactions with labor law and the war on drugs) could either be incorporated into more “literal” critical AFFs that advocate policies to alleviate soft-left impacts, or more “metaphorical” AFFs that seek to expand understandings of extraterritoriality.

### AFF: Policy—Presumption Against Extraterritoriality

#### The presumption against extraterritoriality means US courts generally assume that laws are designed to apply exclusively within the territorial bounds of the United States by default.

#### The presumption of extraterritoriality should be eliminated—extraterritoriality disputes should be settled by domain-specific caselaw.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

The presumption against extraterritoriality tells courts to read a territorial limit into statutes that are ambiguous about their geographic reach. This canon of construction has deep roots in Anglo-American law, and the US. Supreme Court recently reaffirmed this principle of statutory interpretation in Morrison v. National Australia Bank and Kiobel v. Royal Dutch Petroleum. Yet as explained in this Article, none of the purported justifications for the presumption against extraterritoriality hold water. Older decisions look to international law or conflict-of-laws principles, but these bodies of law have changed such that they no longer support a territorial rule. Modern courts suggest that the presumption avoids conflicts with foreign states and approximates legislative attention, yet these same decisions show the presumption is poorly attuned to either of these laudable goals. And while separation ofpowers and due process are superficially served by this rule, they too crumble in the face ofserious scrutiny.

Although courts continue to rely on this outmoded presumption, some scholars have noted the incongruity between its goals and its execution. These scholars have offered alternative rules such as a presumption against extrajurisdictionality or a dual-illegality rule. But these alternative proposals fall into the same trap as the presumption - they uncritically apply a single approach to all types of cases. Instead, different statute types call for different rules: the Charming Betsy doctrine for private civil litigation, a rule of lenity for criminal statutes, and Chevron deference for administrative cases. These rules, not a singular presumption, best support the public policy interests that are important in each of these classes of disputes, and they also suggest an approach to Alien Tort Statute litigation that could serve as an alternative to the Supreme Court's recent decision in Kiobel.

INTRODUCTION

The presumption against extraterritoriality has been applied in U.S. courts for more than a century, receiving perhaps its most prominent endorsement from no less than Justice Oliver Wendell Holmes, Jr.: "[A]ll legislation is prima facie territorial."' In the 1990s, Chief Justice Rehnquist reaffirmed this principle in its modem formulation: "[L]egislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." 2 And in 2013, Chief Justice Roberts quoted Justice Scalia for the proposition that: "When a statute gives no clear indication of an extraterritorial application, it has none." 3

As these Justices explained, and as its name suggests, the presumption against extraterritoriality instructs courts to construe geoambiguous statutes to apply only to the territory of the United States.4 The presumption against extraterritoriality has been cited in hundreds of reported decisions,5 and the Supreme Court has continued to "wholeheartedly embrace" the presumption against extraterritoriality in transnational litigation in U.S. courts. 6

Judicial and scholarly advocates point to a range of justifications for the presumption against extraterritoriality: it reflects international law and conflict-of-laws principles, 7 it insulates U.S. foreign relations interests by minimizing conflicts with foreign laws,8 it approximates congressional intent,9 it maintains the separation of powers among the coordinate branches,10 and it protects due process rights of defendants." Each of these goals is laudable, but the presumption against extraterritoriality is a crude tool to achieve these ends and at times it is counterproductive for its stated purposes.' 2 For these reasons, the presumption against extraterritoriality merits reevaluation. Part I of this Article takes up that task.

The examination of the presumption and its purposes is important for a few reasons. The presumption against extraterritoriality is a widely cited judicial rule, and it affects topics from securities regulation 3 to employment discrimination 4 to piracy.' 5 These decisions have consequences for regulated individuals and entities, and for those protected by such laws. The question of extraterritoriality further connects with foreign relations issues that have consequences for the United States and for foreign states. Interpretative rules also have dynamic effects.16 The behavior of legislators, regulators, and prosecutors is colored by the background rules established by courts, so ideally those background rules will be grounded in a justified normative foundation. More generally, transnational litigation and policy are significant. Professor Harold Koh, for example, has noted a recent emphasis on issues of extraterritoriality, which he attributes to an increase in transnational economic activity, the transnational interests of nation states, and the rise of transnational regulation." The presumption against extraterritoriality is one significant piece of this transnational legal landscape.

Part I of this Article marshals evidence that the presumption against extraterritoriality is ill-suited for its purported purposes. These specific criticisms also reveal a deeper concern with current approaches to extraterritoriality. Although courts may adopt truly transsubstantive rules without exceptions, courts must make judgments about both the content of the rule and the scope of its application for many areas of statutory interpretation and procedure. Decisions about a rule's application reflect choices about the nature of cases; like cases should be treated more alike than unlike ones. The presumption against extraterritoriality reflects a judgment of this kind: it assumes that cases meeting the definition of "extraterritorial"' 8 are enough alike to be treated similarly for purposes of determining prescriptive jurisdiction.' 9 Scholarly proposals to replace the presumption against extraterritoriality track this conclusion, suggesting alternative rules to apply in all extraterritorial cases. 20 And a wider literature about foreign relations law takes as a given that "foreign relations cases" - whatever that term means - should be treated as a unified category. 21 But this conclusion is not required. Instead, at least with respect to the presumption against extraterritoriality, the relevant values may be best served by first considering other aspects of the case.

Part II of this Article applies this insight and the purposes identified in Part I to frame a new approach to extraterritoriality and related cases. Unlike the aforementioned alternatives, the approach in Part II treats statute type rather than territory as the first cut. Once statutes are divided into civil, criminal, and administrative, then social values are more easily pursued. Indeed, Part II shows that the relevant values are served by existing case-type-specific doctrines of statutory interpretation: the Charming Betsy doctrine for private civil litigation, 22 the rule of lenity in criminal statutes,23 and Chevron deference in administrative cases.24 Part II explains that these rules, rather than the presumption, should govern extraterritorial cases in those three areas.

### AFF: Policy—Comity Abstention

#### Comity abstention involves courts declining to hear a case if it potentially intrudes upon the powers of a foreign court.

#### Comity abstention is overly broad and should be abolished—alternate doctrines would naturally develop and ensure clarity for human rights and commerce-related litigation.

Gardner 19—(Assistant Professor of Law at Cornell Law School). Maggie Gardner. March 2019. “Abstention at the Border”. 105 Virginia Law Review 63. <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2754&context=facpub>.

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

This Article argues against "international comity abstention" both as a label and as a generic doctrine. As a label, it leads courts to conflate abstention with other comity doctrines that are not about abstention at all. And as a generic doctrine, it encourages judges to decline their jurisdiction too readily, in contrast to the presumption of jurisdictional obligation. In lieu of a single broad doctrine of "international comity abstention, " then, this Article urges federal judges to specify more narrow grounds for abstention in transnational casesgrounds that can be separately justified, candidly addressed, and analyzed through judicially manageable frameworks. For example, a primary basis for "international comity abstention" has been deference to parallel proceedings in foreign courts, a common problem that deserves its own dedicated analytical framework. A separate doctrine for deferring to integrated foreign remedial schemes may also be appropriate. Perhaps other limited bases for transnational abstention could be identified as well. The goal should not be a strict formalism that insists that judges' hands are tied, but rather a channeling of judicial discretion so as to promote-rather than displace-interbranch dialogue about the proper role of comity in the courts.

INTRODUCTION

For the second time last Term, the Supreme Court heard a case that the lower courts had dismissed based on "international comity abstention."' And for the second time, the Court carefully avoided deciding whether abstention based on international comity is legitimate, much less what the parameters of such abstention would be.2 No one else seems to know, either. The tests applied by the lower courts vary not just across circuits, but within them as well. 3 The courts are using different tests because they are invoking "international comity abstention" to address a range of different problems. Sometimes it is invoked to avoid a potential conflict with foreign law, akin to the foreign-state compulsion defense.4 This category arguably includes both of the Supreme Court cases, Animal Science Products v. Hebei Welcome Pharmaceutical Co.5 and Hartford Fire Insurance Co. v. California.6 At other times, and using a different set of factors, federal courts have invoked "international comity abstention" to dismiss cases they fear are too politically sensitive,7 a sort of addendum to the political question doctrine or a variant of foreign affairs preemption.8 For example, the Ninth Circuit in Mujica v. AirScan, Inc.9 used "international comity abstention" to dismiss state-law claims in a human rights suit based primarily on a concern that the case would harm U.S. foreign relations.10 At yet other times, courts invoke "international comity abstention" to stay or dismiss cases in light of parallel litigation in foreign courts." Though this is the least controversial use of "international comity abstention," even here the lower courts are divided as to the appropriate standard to apply.12 Nor is there any authoritative secondary source on what "international comity abstention" entails; what minimal scholarly attention it has received so far has been fleeting, fragmented, and inconclusive.13

In short, "international comity abstention" is an amorphous and malleable tool that allows the federal courts to decline jurisdiction in a wide array of cases for a wide variety of reasons. In addition to inviting uncertainty and inconsistency, that open-ended use of abstention in transnational cases is in tension with the Supreme Court's renewed emphasis on the "virtually unflagging obligation" of the federal courts "to exercise the jurisdiction given them" by Congress.14 This presumption of jurisdictional obligation is of course not new,' 5 nor is the debate over how far it extends. 16 The Court has never fully endorsed Professor Martin Redish's famous argument that judicial abdication is illegitimate.17 But in the time since Professor David Shapiro's equally famous rejoinder that federal courts traditionally have exercised discretion in smoothing out the edges of their jurisdiction"-the Court has been busy curtailing the very prudential doctrines on which Shapiro's defense of discretion relied. 19 As others have noted,20 the Court has signaled a retreat from domestic doctrines of abstention,21 cast doubt on prudential standing and ripeness requirements,22 and emphasized the narrowness of the political question doctrine.23 When judges decline to exercise the jurisdiction they otherwise have, the Court has warned, they encroach on Congress's prerogative to set the jurisdiction of the federal courts.24 Underlying the Court's recent wariness of prudential doctrines, in other words, is a separation-of-powers concern that these doctrines of "judicial restraint" have only served to increase judicial power.25

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

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

The resulting analytical framework will be a familiar one for the Court, akin to its unanimous rejection in Taylor v. Sturgell28 of "virtual representation" in preclusion doctrine.29 The starting point is a strong default rule: here, the presumption that federal courts should exercise the jurisdiction granted by Congress. There may be exceptions to that default, but those exceptions should be narrow and defined with particularity. A broad, amorphous exception (like "international comity abstention") risks undermining the default rule, denying due process to litigants, and imposing unnecessary analytical burdens on judges.30 But as in Taylor, this is not an inflexible approach; additional exceptions may be identified and developed as needed. This approach only requires that such exceptions be tailored and transparent. 1

This analytical structure is a pragmatic formalism, one that accounts for the institutional and psychological pressures of judicial decision making without disclaiming all judicial discretion. This is the third, normative goal of the Article: to advocate for such pragmatic formalism in treating procedural questions. If the goal is judicial humility vis-d-vis the other branches, that goal can be undermined not only by open-ended discretion, but also by firm rules that declare judges' hands to be tied. 3 2 Strict formalism-because it is defined and enforced by judges--can shut down helpful dialogue between the component parts of government. 3 3 The better approach is not to deny all ability to abstain in transnational cases, but to precisely identify and defend grounds for such abstention in a manner that invites intervention by the other branches.

The discussion here should thus be of practical interest to federal judges and those who appear before them, but it bears on a broader range of conversations as well. For those interested in international commerce and private international law, this doctrinal clarification will add much-needed clarity and predictability to judicial decision making.3 4 For those interested in human rights litigation, the currently muddled doctrine of "international comity abstention" is an obstacle to state courts and state law being able to fill the void left by Kiobel v. Royal Dutch Petroleum Co.3 5 And for those concerned about the domestic division of power within our constitutional system, the current approach to abstention in transnational cases unnecessarily aggrandizes the federal judicial power at the expense of Congress and the states.

### AFF: Policy—Forum Non Conveniens

#### Forum non conveniens (FNC) allows suits to be dismissed on the grounds that a foreign forum exists that is adequate and more convenient to hear the litigation.

#### Forum non conveniens must be curtailed—specifically, immediate appeals against FNC dismissals should be permitted to preserve separation of powers and court efficacy.

Eible 19 – (Matthew J. Eible, Duke University School of Law, J.D. / LL.M. in International & Comparative Law; 2019, Duke Law Journal, Vol. 68, "Making Forum Non Conveniens Convenient Again: Finality And Convenience For Transnational Litigation In U.S. Federal Courts," doa: 4-19-2022) url: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3974&context=dlj

Imagine that you are a defendant in a lawsuit in U.S. federal court. For more than three and a half years, you spend significant time and resources litigating a claim. Although you initially file a motion to dismiss the case, the district court denies your motion. This forces you to proceed to trial, where you lose on the case’s merits. Afterwards, you make an appeal to the circuit court of appeals. There, as suddenly as the litigation began, it ends without any discussion of the merits. This time, you emerge victorious: the circuit court orders the trial court judgment vacated and the case removed from the U.S. legal system in favor of litigation in a foreign state’s courts.

Your victory is bittersweet. While you achieved your desired result, you know that you will never get back the time, money, and energy spent litigating a case that you sought dismissed—for the very reasons provided by the circuit court, no less—over three years earlier. The rules for appealing decisions in federal courts did not allow you to seek reversal of the district court’s earlier denial of your motion, and this forced you to continue litigating until the court of appeals could hear your case after final judgment at trial.

This hypothetical was the reality in Gonzalez v. Naviera Neptuno A.A., 1 a case dealing with the “wrongful death claims of the Peruvian survivors of a Peruvian sailor killed in the United States while serving on a Peruvian flag vessel, owned by Peruvian citizens, under articles prepared pursuant to a Peruvian collective bargaining agreement.”2 Following a trial on the merits, the case was dismissed on appeal based on a motion to dismiss first filed by the defendant and denied by the district court judge more than three years earlier.3

The motion at issue was a motion to dismiss for forum non conveniens (“FNC”), which, in the federal courts,4 argues that an alternative forum exists outside of the United States that is both adequate to hear the litigation and more convenient for this purpose than the U.S. court.5 The FNC doctrine is a judicially developed common law doctrine 6 that U.S. courts have used for more than two centuries.7 The doctrine remains a viable tool for courts to dismiss transnational cases from the U.S. legal system,8 but a dismissal for FNC is initially left to the discretion of a federal trial judge.9

A difficulty arises when one of the litigants seeks review of the district court judge’s ruling on a motion to dismiss for FNC. If the trial judge grants the defendant’s motion to dismiss, the plaintiff may immediately appeal that decision to the circuit court,10 arguing that the judge abused her discretion in granting the motion.11 However, if the trial judge instead denies the motion to dismiss for FNC, no immediate appeal as of right is permitted; the movant only has a right to raise the issue on appeal following a final judgment.12

This dichotomy in appealability as of right for FNC rulings arises from the Supreme Court’s decision in Van Cauwenberghe v. Biard. 13 In Biard, the Court held that denials of motions to dismiss for FNC do not fall within the collateral order doctrine—a narrow exception to the final judgment rule that permits appellate review of certain interlocutory orders.14 Consequently, litigants, like those in Gonzalez, may proceed through the time and expense of discovery, motion practice, and trial only to be kicked out of the U.S. legal system on appeal.15

Yet few parties will ever successfully obtain reversal by an appellate court of a district court’s denial of a motion to dismiss for FNC after trial on the case’s merits.16 This is not because erroneous denials of motions to dismiss do not occur; rather, numerous factors— notably including the significant financial costs of and time involved in litigating a case on the merits—lead the vast majority of litigants to settle their cases before trial.17 In addition, a party challenging an FNC denial after final judgment “must display substantial prejudice” on appeal.18 Such prejudice cannot be shown when the moving party is otherwise successful on the merits during the appeal.19 Consequently, “review after final judgment is ineffective to vindicate a wrongfully denied motion for FNC.”20

Further, parties are rarely able to seek immediate appellate review of a denied motion to dismiss for FNC before final judgment.21 Defendants in the Gonzalez case sought such review through a certification for interlocutory appeal and a writ of mandamus.22 Both efforts were unsuccessful,23 and this is the norm for defendants seeking immediate appellate review of a denied FNC motion.24

The dichotomy in the availability of prompt appellate review for FNC decisions has particular salience in the context of transnational litigation, where forum selection concerns are particularly acute.25 This Note adopts a working definition of transnational litigation as “cases involving foreign parties, foreign harms, or foreign law.”26 In transnational cases, the choice of forum is highly contested because different forums can substantially affect the outcome of a case on its merits.27 Numerous reasons exist for the impact of various forums on transnational litigation, including that rules governing procedure, substance, and choice of law differ far more significantly across countries than they do across U.S. states.28 Moreover, differences in political and socioeconomic backgrounds of lawyers and courts are more pronounced in the transnational setting, as are risks of forum bias and concurrent litigation proceedings.29 Finally, judgment enforcement can be more difficult in the transnational litigation context than when litigating within a single domestic jurisdiction.30

Additionally, forum selection for transnational litigation is especially important when one of the potential forums is a U.S. federal court.31 Jury trials, contingency fees, broad discovery, high damages awards (including punitive damages), and the fact that each party typically covers its own attorneys’ fees are all distinguishing features of litigation in a U.S. forum compared to litigation elsewhere in the world.32 These characteristics tend to be plaintiff friendly,33 and they have resulted in the general idea that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”34

Yet the Supreme Court has recently made it tougher for transnational litigation to proceed in U.S. federal courts.35 For example, the Supreme Court has restricted the extraterritorial reach of numerous federal statutes, tightened the requirements for personal jurisdiction over foreign defendants, and heightened the pleading standards required of plaintiffs, all of which help to limit transnational litigation in U.S. federal courts.36 The FNC doctrine remains a key tool for defendants seeking the dismissal of complaints with extensive foreign connections, but the Supreme Court has not altered the landscape of appellate review for FNC motions in its recent decisions despite otherwise increasing restrictions on transnational litigation.

This Note argues that the Supreme Court should reverse its current doctrine to allow for immediate appeals as of right from orders denying motions to dismiss for FNC. Doing so would be in line with the Court’s current jurisprudential trends restricting transnational litigation in U.S. federal courts. Immediate appellate review would also further the policy rationales—including respect for the separation of powers, adherence to general principles of international comity, and concerns about litigation fairness and efficiency—underlying recent Supreme Court decisions in this area.

This argument contributes to the burgeoning academic discussion surrounding transnational litigation in U.S. courts 37—a conversation with important global implications for litigants, lawyers, and the legal profession. This Note engages with this dialogue by taking the Supreme Court’s recent jurisprudence and supporting policy rationales as a given while suggesting an additional mechanism by which the Court could further its stated goal of limiting transnational litigation: reforming the appellate regime for denied motions to dismiss for FNC.

### AFF: Critical—Imperial Geographies

#### Current academic understandings of comity paper over the violent selectivity with which the US applies its laws abroad, such as unwillingness to forefront labor protections—a frame of imperial geography that recognizes extraterritoriality as an extension of the national economy is necessary.

Irani 19—(https://doi.org/10.1177/1354066119869801). Freya Irani. 2019. “Beyond de jure and de facto boundaries: tracing the imperial geographies of US law”. European Journal of International Relations 1–22. <https://doi.org/10.1177/1354066119869801>.

Since 1945, US judges have extended numerous “domestic” US laws (including securities and antitrust laws) to govern economic transactions taking place “abroad”. However, they have generally failed to extend US labor and employment laws to govern employer– employee relationships outside “US territory”. Through a close reading of federal court decisions and drawing on recent work in the field of critical legal studies, this article makes an argument for centering the study of jurisdiction in International Relations scholarship and for approaching states as instantiated in their jurisdictional assertions. I suggest that such an approach enables us to capture the geographies—including the imperial geographies—of US law in the “normal,” everyday course of affairs. In particular, such an approach allows us to see that, since the mid-20th century, the legal authority and legal relations of the US government have come to be organized around the notion of the national economy (rather than simply around, for example, notions of territory or citizenship). What this means is that it is increasingly a posited relationship to this national economy that determines whether people and corporations, wherever in the world they are located, are subjected to or protected by US law.

Since 1945, US courts have frequently used US laws to adjudicate certain kinds of civil disputes arising anywhere in the world. They have also allowed the Department of Justice to use these laws to criminally prosecute individuals and corporations (including “nonUS” citizens and corporations) for certain kinds of conduct carried out “abroad”.1 US courts have justified these extensions of US laws (which are referred to as instances of “extraterritorial jurisdiction”) in a variety of ways, pointing, for instance, to a need to protect US citizens located abroad from acts of “terrorism” or to otherwise safeguard the vital “national interests” of the United States.

International Relations (IR) scholars have been increasingly attentive to these practices. However, reflecting the traditional realist and liberal, and more-recent constructivist, foci of the discipline, they have generally focused on how these practices have unfolded in two contexts—security and human rights (Liste, 2014, 2016; Lohmann, 2016; Shambaugh, 1999). With some important exceptions (Putnam, 2009, 2016; Slaughter, 1995; Slaughter and Zaring, 1997), IR scholars have been less attentive to extensions of US “economic” laws, such as antitrust and securities laws, to govern conduct taking place abroad. An important aspect of these extensions is their routineness. Unlike extensions of, for example, US “terrorist financing” laws, which are often represented as necessitated by “exceptional” circumstances, extensions of US economic laws are significant precisely because of such laws’ applicability to, and impact on, routine commercial activities. As such, studying such extensions allows us to capture an important modality through which the US government structures and regulates global economic activity. It further enables us to capture the geographies—including the imperial geographies—of US law in the “normal,” everyday course of affairs.

Since World War Two, the extraterritorial extension of US economic laws has often taken place pursuant to the “effects doctrine.” As described by US courts, the effects doctrine states that governments may apply their own laws to conduct that takes place outside their territorial boundaries, but that has effects (of a particular magnitude) within such boundaries. Before 1945, courts, including the Permanent Court of International Justice (PCIJ), had used the doctrine to uphold jurisdictional assertions by governments over conduct taking place abroad but having physical effects within their territories (S. S. Lotus [France v. Turkey], PCIJ, 1927). The frequently-cited example was a bullet fired across an international border giving rise to jurisdiction where the bullet landed. However, in 1945, a US federal appellate court held for the first time that economic effects, within the United States, of extraterritorial conduct would be sufficient to trigger the application of US law. Specifically, in United States v. Aluminum Company of America (“Alcoa”), the Second Circuit Court of Appeals (1945) applied the Sherman Antitrust Act of 1890 to the allegedly-anticompetitive activities of a Canadian company, taking place in Switzerland. The court justified its decision by pointing to the effects of these activities on quantities of aluminum imported into, and on prices of aluminum within, the US In subsequent decades, US courts invoked this “economic” version of the effects doctrine in a variety of contexts, using it, for instance, to apply US securities and trademark laws to conduct taking place abroad (Schoenbaum v. Firstbrook, Second Circuit, 1968; Steele v. Bulova Watch Co., US Supreme Court, 1952). However, they failed or refused to apply the doctrine in other contexts, and in particular, refused to apply US employment and labor laws to govern conduct taking place abroad (Foley Bros. v. Filardo, US Supreme Court, 1949 (“Foley”); Equal Employment Opportunity Commission v. Arabian American Oil Co., US Supreme Court, 1991 (“Aramco”)).

In this article, through an examination of US courts’ effects-based extraterritoriality since 1945, I do two things. First, I provide a descriptive account of the geographies of the jurisdictional boundaries of the United States, understanding “jurisdictional boundaries” as the shifting lines between spaces in which, and subject areas and people to which, US law does and does not apply. There has long been a disjuncture between these jurisdictional boundaries and the territorial boundaries that the US government claims as its own. This article moves beyond a simple demonstration of such a disjuncture, to trace its precise (though ever-changing) shapes. Through a close reading of US court decisions in the antitrust and employment/labor contexts, I show that, in the post-World War Two (“postwar”) period, in addition to the notion of territory, the jurisdictional boundaries of the United States have come to be organized around a (partly-legal) construct called the “national economy.” What this means is that it is increasingly a posited relationship to this national economy that determines whether US law applies in a particular case, and so also determines where US law applies.

Through my descriptive account, I also make a broader argument for foregrounding jurisdictional assertions in IR scholarship, and for approaching states as both instantiated in and constituted by these jurisdictional assertions. In particular, I show the potential of such an approach in helping us think about the state “around” (Reid-Henry, 2010: 752) or “beyond” (Glassman, 1999: 669) the territorial trap.2 I show that, by foregrounding and tracing jurisdictional assertions, we are better able to empirically capture the shifting geographical coordinates of states’ legal boundaries. Furthermore, I show that, by foregrounding and tracing jurisdictional assertions, we are able to reconceptualize such legal boundaries, to see them as not static and singular, but shifting and multiple. Some such borders are “clearly visible in the landscape,” others are “hidden from immediate view” (Cowen, 2009: 70)—though no less consequential, and—crucially— no less “formal” or “legal” for that.

In one sense, then, my argument is a very specific, empirical one about US extraterritoriality. I am not suggesting a similar rise in extraterritoriality elsewhere in the post World War Two period: rather, as I explain in the next section, I view postwar “economic” extraterritoriality as, until recently, a largely US practice, enabled primarily by and enabling of US economic preeminence. Yet my argument is also a broader one in its proposal of a particular approach to states’ boundaries, an approach which finds these shifting boundaries in the routine, seemingly-mundane jurisdictional assertions of states. I show that, by tracing these jurisdictional assertions, we can better capture the multiple ways in which legal authority is organized and authorized in the contemporary world— sometimes around and by the notion of territory, sometimes around and by the notion of the national economy, sometimes in still other ways.

In highlighting the multiple ways in which legal authority is organized in the contemporary world, this article does not suggest that the notion of territory is no longer important—quite the contrary. My concern is rather with the political productiveness of the very assumption of the territorial organization of jurisdiction, of the assumption that legal authority is both supreme and even within, and limited by, territorial boundaries. For example, in settler-colonial states, the assumption of supremacy and evenness of the settler government’s jurisdiction within its claimed territory works to obscure rival indigenous forms of authority and law (Pasternak, 2017). So too, this assumption serves to obscure, and so enable, ongoing violent processes through which such jurisdiction needs to continually be imposed on, and is continually resisted by, indigenous peoples (Pasternak, 2017). At the same time, and as this article shows, the assumption of the territorial limitedness of the US government’s jurisdiction works to obscure, and so to enable, the routine reach of US law “abroad.” At its core, then, this article aims to counter these assumptions of the territorial exclusiveness and limitedness of jurisdiction, and so to make possible the consideration and tracing of other contemporary geographies of law, and specifically, of the imperial geographies of law.

In the section “Centering jurisdiction”, drawing on work on jurisdiction and territory in IR and law (Dorsett, 2002; Dorsett and McVeigh, 2012; Elden, 2013; Kaushal, 2015; McVeigh, 2007; Pahuja, 2013; Ryngaert, 2016; Valverde, 2009), I detail my approach to jurisdiction, and describe how it diverges from conventional approaches to the same. In the sections “The emergence of effects-based extraterritoriality” and “Delineating the US economy”, I show that, since 1945, the jurisdictional boundaries of the United States have come to be organized around a construct called “national economy.” I do this in two steps. In the section “The emergence of effects-based extraterritoriality”, contrasting two cases decided 36 years apart, I demonstrate the importance of this construct, which was only at play in the latter case, in enabling the extraterritorial extension of US law. In the section “Delineating the US economy”, I detail the ways in which US judges continually construct the national economy through their decisions, by articulating some people and conduct to, and disarticulating other people and conduct from, that national economy. I suggest that, in doing so, these judges draw US jurisdictional boundaries in ways that include US corporations but exclude US workers employed abroad. The final section concludes.

Centering jurisdiction

IR scholars and international lawyers tend to think and talk about jurisdiction—the authority to speak or enunciate the law—primarily in terms of territorial sovereignty. Territorial sovereignty is generally seen as coming before jurisdiction, in two ways. First, territorial sovereignty is seen as giving rise to jurisdiction, as providing grounds for the authority to speak the law. Second, territory—already-formed territory—is seen as setting the spatial extent of jurisdiction: a state’s jurisdictional boundaries are seen as normally limited by its existing territorial bounds. Such an approach has crucial implications for the study of jurisdiction: as Sundhya Pahuja (2013: 70) writes, it casts jurisdiction as “a technical question concerned with whether a particular sovereign state, or any judicial or quasi-judicial body constituted according to [. . .] law, can exercise legal authority over a territory, dispute, person or issue.”

Recent writings on jurisdiction by critical legal scholars (Dorsett and McVeigh, 2012; Kaushal, 2015; Pahuja, 2013) have called into question this view of territorial sovereignty as anterior to jurisdiction. These writings have instead stressed the “inaugural” quality of jurisdiction, the ways in which jurisdictional practices, rather than being carried out by already-constituted political communities, serve as important sites for the constitution and reconstitution of such community (with all the violent inclusions, displacements, and expulsions that such processes often involve) (Kaushal, 2015: 781–782).3 In this article, I draw on this flipped characterization of legal authority, but I add an emphasis on practice. In my account, legal assertions not only form, border, and construct “the state”: they are the state. The state is instantiated in its jurisdictional assertions: it is “the ever-changing snapshot emerging from [multiple] jurisdictional assertions, the very pattern of assertions of jurisdiction, not an entity that ponders whether to assert jurisdiction or not” (Malley et al., 1990: 1296). Changing jurisdictional assertions do not simply change what “the state” does: they further change what the state is, who and what it includes and excludes, and crucially, where it is located.

Approaching the state as both constituted by and instantiated in its jurisdictional assertions effects a transformation in our understandings of the geographies of states and their borders. In particular, it enables us to better capture the imperial geographies of some states and their borders. Rather than entities that exert legal authority uniformly within, and only within, fixed lines-on-maps, states come to have multiple boundaries, formed in particular moments, through particular assertions. Territorial borders become only one among many legalized boundaries of state authority; territory becomes only one way of organizing and limiting state law. This opens up space to think about other (nonor less-territorial) legalized boundaries of state authority, other (non- or less-territorial) ways of organizing and limiting state law, ways that—far from being superseded at Westphalia or overcome with decolonization and the supposed universalization of the state form—actually exist in the contemporary world.

In IR scholarship, the primary place these other ways of organizing and limiting jurisdiction make an appearance is in the historical scholarship on territory (Elden, 2013; Ruggie, 1993). Such scholarship generally describes a shift in the organization of legal authority, variously identified as taking place sometime between the 14th century and the Peace of Westphalia: while prior to this period, multiple legal authorities had coexisted in given spaces, during this time period, governments for the first time began to claim exclusive authority over bordered spaces and the people they “contained.” I draw from this work a recognition of the historical situatedness and specificity of the territorial organization of jurisdiction, a recognition which opens up space to both consider multiple ways of organizing jurisdiction and investigate their techniques and micro-politics— as I do below. But I diverge from this work in emphasizing that such multiple ways of organizing jurisdiction are contemporaneous and contemporary, rather than successive or primarily of historical interest.4

To capture the existence of multiple contemporaneous and contemporary ways of organizing jurisdiction, I employ the concept of jurisdictional rationalities, or modes of jurisdictional thought and action (Dorsett and McVeigh, 2012: 32). Much like political rationalities, different jurisdictional rationalities can be understood as different “conceptions of the proper ends and means of government” and law (Miller and Rose, 1990: 5). These rationalities can be distinguished by the particular “concept or category” around which jurisdiction is “centered” (for example, “territory” or the “national economy”) (Dorsett and McVeigh, 2012: 48). Different jurisdictional rationalities “engage” law differently: they are associated with different kinds of legal subjects, spaces, and institutions (Dorsett and McVeigh, 2012: 42, 48). For example, while “territory” (as a mode of jurisdictional thought and action) is associated with “sovereign-subject (or citizen) relations distributed in territorial terms” (Dorsett and McVeigh, 2012: 41), the “national economy” is associated with—and brings into being—other kinds of subjects and relations (for example, relations between the “United States” and corporations located abroad whose actions are understood as affecting prices within the United States). Conversely, as I show below, thinking about legal authority in terms of a national economy can erase sovereign-citizen relations, when such relations are understood as unimportant to the economy of the United States.

In subsequent sections, I examine the jurisdictional rationalities, the modes of jurisdictional thought, underlying US judges’ decisions about whether or not to extend US antitrust and labor laws to govern conduct “abroad.” I show that, while territory remains important as an organizing principle for legal authority, there emerged, in the postwar period, a new mode of thinking and talking about legal authority, which centered on the national economy. I show that, in decisions in this period in which judges considered whether or not to extend US laws abroad, they increasingly represented people, corporations, and activities in terms of their relationships to “US commerce” or “the US economy,” rather than solely in terms of where they were located, incorporated, or born. It is these relationships that served—and continue to serve—to make possible, or to preclude, the extension of US law.

These relationships—between various people, corporations, and activities and the “US economy”—are not ones that pre-exist the decisions in which they are invoked, although they are portrayed by judges as such. Such relationships are not found or noticed by judges: judges create them. For instance, as I will show below, judges draw on general economic “laws” to make connections between extraterritorial agreements to restrain production of a particular commodity and prices of that commodity within the United States. In so doing, they characterize the parties to such agreements as affecting the US economy, and so as subject to the legal authority of the US government. Of course, in defining particular people and activities as “part of” or as “affecting” the US economy, judges delineate the US economy itself. It is, in part, in and through particular legal decisions that the national economy is given form and limits, and is modified, over and over again. What this means is that the national economy is constructed in and through the decisions for which it serves as jurisdictional grounds.5

I discuss this process of construction in subsequent sections. In doing so, I focus on judges’ reasoning, on the texts of their decisions. However, it bears mentioning that these decisions have material effects, in part because they are enforced. Enforcement is a complicated legal question in an international context: legal scholars generally agree that, while states may sometimes declare their laws applicable to particular kinds of conduct taking place anywhere in the world (a form of jurisdiction known as “prescriptive jurisdiction”), they may rarely legally “enforce” these laws or judgments in another state’s territory without permission (a form of jurisdiction known as “enforcement jurisdiction”) (Lowe, 2003: 338). Nonetheless, this general rule obscures the US government’s frequent use of “indirect territorial means” of enforcement (for example, the seizure of assets located within the United States, a ban on travel to the United States) to enforce the judgments of US courts (Ryngaert, 2008: 24–25).

Crucially, “indirect territorial means” for enforcement are differently available to different states. Enforcement, in particular, depends on the material capabilities and economic positioning of states. In theory, any government can employ the economic effects doctrine to apply its domestic law to conduct taking place abroad. In practice, however, it is the “presence of assets” within the territorial boundaries of a state that “giv[es] these expansive jurisdictional claims bite,” because it is against such assets that a legal judgment can most easily be enforced (Raustiala, 2009: 113). As such, the centrality of the United States to global economic activity is absolutely crucial in enabling the effective exercise of extraterritorial jurisdiction by US courts. This point is obscured by US governmental officials who have defended the extraterritorial extension of US laws by suggesting that other states could similarly extend their laws to govern conduct taking place abroad (Bell, 1978). But it is crucial in understanding the practices described in this article, and specifically, in understanding the uniquely-broad scope of US extraterritoriality, the relative ease with which the United States is able to extend its laws to govern conduct taking place anywhere in the world.6

### AFF: Critical—Psychedelic Consciousness

#### Current law presumes territoriality is solely geographic, ignoring the states of consciousness subjected to the War on Drugs’ extraterritorial application—a corrected conception of extraterritoriality recognizes states of mind on the same plane as ‘nation’-states.

Falcon 21—(Department of Global and Sociocultural Studies, Florida International University). Joshua Falcon. 2021. “Consciousness as a domain of extraterritoriality”. Culture, Theory and Critique. 10.1080/14735784.2021.1908904.

ABSTRACT

Traditional understandings of extraterritoriality have overlooked human consciousness as an intimate province of territorial governance. Whereas traditional approaches to extraterritoriality often adopt a modernist understanding of territory, this article expands on the concept by referring to extraterritoriality as the process and practice of discovering, reifying and intervening in new domains of territorial governance. Insofar as territorial practices adapt in accordance with emergent knowledges and technologies, the realm of human consciousness appeared as an object of governmental interest during the mid-twentieth century alongside advances in neuroscience and psychopharmacology. Through the subsequent illegalisation of psychedelic plants and fungi, in combination with the hegemonic norms established through disciplinary institutions, the full spectrum of human consciousness has since become territorialised as a new domain of governmental intervention and management. As such, this article argues that the regulation of cognition enforced through drug prohibitions and sanctions enfold human consciousness as an extended domain of extraterritoriality.

Introduction

To understand why some people take certain substances, and why others declare these substances ‘unlawful’ and savagely punish those who take them, we must begin at the beginning, with the basic principles of social congregation and social control. (Szasz 1974: 22)

This article argues that the regulation of psychoactive substances enacted through the United States’ war on psychedelic drugs constitutes a form of extraterritoriality. By expanding on traditional understandings of both territory and extraterritoriality, this work conceives of extraterritoriality as a practice and process through which new domains not previously territorialised become objects of territorial governance. When viewed in such a way, traditional understandings of extraterritoriality that centre on juridico-legal notions of rights and sovereignty can therefore be considered as one particular form of territory that exists alongside an array of territorial practices. Expanding on the concept of extraterritoriality in this way entails recognising how practices of state territoriality adapt in accordance with epistemological and technological advancements. As such, practices of extraterritoriality may refer to the processual discovery and capture of new domains of governance which persistently arise in conjunction with scientific knowledge production and technology. Insofar as an intimate connection between psychoactive drugs and human consciousness has been established through the disciplines of psychopharmacology and neuroscience, the management of human cognition has thereby become enfolded as a novel site of territorial reign. As this article will argue, the prohibition of certain psychoactive drugs has delimited the states of consciousness that are otherwise potentially available to humans; states of consciousness which carry with them their own modes of perception, behaviour, subjectivity and capacity to form relations.

To approach the subject of extraterritoriality from such a vantage point, however, requires understanding extraterritoriality in a non-traditional way from the first. The term ‘extraterritoriality’ has customarily been evoked to denote the extension of a government’s laws unto territories which are not its own (Colangelo 2013). Traditionally, then, extraterritoriality refers to the ways in which states may claim ‘exclusive jurisdiction’ over their citizens in other states, thereby extending the scope of their legal authority beyond the borders of their corresponding nation-state (Kayaoglu 2010: 2). Although extraterritoriality is regularly understood in this manner – from a modernist understanding of territory wherein a person moves from one territorial boundary to another (Larsson 2007: 778) – extraterritoriality can also be conceived of in a more subtle and pernicious sense in which the state extends control unto new domains which lie outside of those already territorialised, such as the body of the individual. The latter sense of extraterritoriality as an extension of state power resonates with non-modernist approaches to the concepts of territory and territoriality themselves, wherein they are also expanded to include domains such as subject formation as a form of territorial practice (Brighenti 2010).

In fact, to approach extraterritoriality in a non-traditional manner is contingent upon expanding on the concepts of territory and territoriality themselves in a way that goes beyond their conventional juridico-legal framing. In turning to critical social theory as a guide, human geographers have shown that modernist approaches to the concept of territory often refer to notions of the territorial state. The territorial state itself, however, is ‘a highly specific historical entity’ that emerged during the end of religious wars in Europe and therefore does not capture how practices of territoriality have arisen in particular sociohistorical configurations (Gregory et al. 2009: 746; see also Elden 2010a). As Agnew (1994) has further argued, theoretical discussions on territory are rife with modernist assumptions, such as the idea that the state has always been territorially bound. Moving beyond a modernist understanding, territory can be understood as both a practice and an effect which expresses a ‘certain relationship with a world’ through organising social relations and shaping forms of identity (Brighenti 2010: 64). As a practice and an effect which includes managing subject-formation and social relations, territoriality also refers to a process which works to make individuals subjects through their psychic attachments to various social and environmental phenomena. Territoriality therefore denotes ongoing practices, or territorialising schemes, that seize human capacities to form social relations while also channeling these relations and capacities in certain ways rather than others (Hardt and Negri 2000).

To further illuminate just how territoriality, and extraterritoriality by extension, can be understood as a process and practice that involves capturing and managing new domains of governance, I turn to critical social theorists who have demonstrated how state control is extended onto the human body and its manifold forms of expression (Foucault 2007; Butler 1990). Not only have feminist geopolitical theorists stressed the political importance of the human body in terms of the encroachment of state power, but they have also shown how the body can be considered a territory its own right (Hyndman 2003; Gilmartin and Kofman 2004; Dowler and Sharp 2010). In addition, critical thinkers drawing on Foucauldian biopolitical theory have argued that both disciplinary and biopolitical technologies have worked their way into the most intimate areas of human life, including human physiology, genetic makeup, subjectivity, and capacity to form relations with other material bodies (Rose 2001; Braun 2007; Coleman and Grove 2009; Anderson 2012). By regarding territoriality as a process and a practice which centripetally works across myriad domains of life through biopower and other means, extraterritoriality can therefore be conceived of as the process through which new domains not previously territorialised become objects of governance.

To illustrate how the concept of extraterritoriality can productively be expanded on in this way, I argue in this article that the United States’ war on drugs encompasses a new domain of territoriality and, as such, constitutes a form of extraterritoriality in a non-traditional sense. The war on drugs here refers to the multifaceted educational, military and legal campaign against narcotic and hallucinogenic drugs originally launched by President Richard Nixon over fifty years ago in the US. Although the groundwork for the contemporary war on drugs enterprise was established through the Harrison Act of 1914 and the United Nations Single Convention on Narcotic Drugs, with the rise of the scientific disciplines of psychopharmacology and neuroscience during the mid-twentieth century, a newfound knowledge of the biochemical physiology of human consciousness set the stage for the governmental intervention into the management of consciousness.

By taking ‘classic psychedelic substances’ as a case in point, I argue that the illegalisation and persecution of psychedelic drugs, including those individuals who cultivate, sell, or otherwise utilise them, has effectively limited the conscious states that would otherwise be available to individuals and thereby constitutes a form of extraterritoriality. To support this argument, I draw on the contemporary resurgence of scientific research on the ‘classic psychedelics’. Within roughly the last two decades, an overwhelming amount of new scientific evidence has been amassed which attests not only the medicinal and spiritual import of ‘psychedelic experiences’ (Griffiths et al; 2008; Nichols, Johnson, and Nichols 2017), but also to their capacity to allow individuals to form new relations with themselves and others while also provoking novel modes of thought (Watts et al. 2017; Carhart-Harris et al. 2018). Insofar as contemporary scientific evidence on psychedelics contradicts the US Drug Enforcement Administration’s (DEA) classification of them as having no medicinal value and a high potential for abuse, further investigation into both the illegalisation and the effects of psychedelic substances is warranted.

This article aims to add nuance to our understanding of extraterritorial spaces by considering consciousness as an underexplored domain. I develop this argument by bringing together critical social theory on territoriality and biopolitics to illustrate how the war on drugs in the United States constitutes a form of extraterritoriality. To validate this argument, I begin the article with a review of traditional understandings of the concepts territory and extraterritoriality, followed by an overview of how these concepts can be expanded through drawing on theoretical developments from the discipline of human geography. Once the concept of extraterritoriality is expanded on to refer to the process and practice of discovering new domains of governance which lie outside of those spheres already territorialised, I proceed to illustrate how work on biopolitical theory further illustrates how practices of territoriality have worked in centripetal fashion to even draw in the human body and biology as political spaces to be managed. In the subsequent section, I extend biopolitical theory to human consciousness as a space of extraterritoriality by arguing that consciousness became an object of knowledge and governance through the convergence of epistemological and technological advances in the sciences of psychopharmacology and neuroscience. By drawing on contemporary scientific evidence on what are known as the ‘classic psychedelics’ as a case in point, the final section concludes by arguing that since classic psychedelics can potentially confer a wide range of physiological and psychosocial benefits to individuals who utilise them, their illegalisation constitutes a form of extraterritoriality that detrimentally regulates human consciousness, experience and affectual capacities.

## Core Negative Ground

### Overview

#### Generic “policy” arguments in the form of DAs and CPs are straightforward.

#### The “critical” ground described here involves link concepts related to the topic that crop up in most popular branches of critical theory read in debate—see appendix.

### DA: Sovereignty

#### Attempts at expanding application of US laws abroad would be perceived as an affront to the sovereignty of foreign nations, resulting in international backlash.

#### This is the core NEG DA to the topic. The fundamental justification for most forms of comity is to avoid conflicts with foreign law and avoid irritating other nations, in order to preserve goodwill for trade agreements, reciprocal law enforcement, and other cooperation.

### DA: Court Generics

#### Court clog and court politics are ever-present. A redeeming factor is that there exist specific criticisms of comity jurisprudence based on political and efficiency concerns that are important to understanding the doctrine’s development, allowing for more nuanced versions of these arguments.

### DA: Area Specific

#### Each area listed has specific justifications for why it exists in the first place, which translate to disadvantages. Examples include interaction between FNC and human rights suits, the presumption against extraterritoriality and separation of powers, and comity abstention and court efficiency.

### CP: Reciprocity

#### Rather than apply US laws extraterritorially, the US could induce foreign countries hosting entities that violate US law to prosecute those individuals for the US.

#### Two flavors of this counterplan seem apparent—the US could either induce foreign countries with incentives unrelated to comity, or engage in reciprocal agreements. For example, the US might prosecute individuals living in the United States who have violated Canadian law, as long as Canada prosecutes individuals living in Canada who have violated US law.

#### To beat this genre of CP, AFFs would need a justification for the unique penalties and processes of US law.

### CP: Multilateral

#### Rather than apply US laws extraterritorially, the US could propose rule changes within an international body.

#### There are likely many flavors of this CP, with varying degrees of legitimacy and competition based on whether they solicit the plan, allow other countries to provide input, fiat international actors, or must overturn court precedents to solve.

#### To beat the more germane versions of CP, AFFs would rely on criticisms of multilateral fora based on efficiency, capture, and legitimacy (see appendix).

### CP: States

#### Rather than apply federal law extraterritorially, the 50 states or a subset could pursue application of their laws abroad.

#### We do not predict states being a high-value strategy given the nature of AFFs generally being predicated on resolving splits in federal circuits, the existence of the states CP serves as a functional limit against small AFFs that attempt to change the focus from federal comity jurisprudence generally to advantages about specific sectors or situations.

### K: Critical Geography Studies

#### Most AFF authors are wed to a traditional understanding of territoriality based on the borders of nation-states. Criticisms that propose understandings of how certain territories are deemed ‘justiciable’ based on human consciousness (see AFFs), racial imperialism, and settler colonialism offer competitive alternatives.

### K: Orientalism

#### A fundamental justification for most advocacies of extraterritorial application is the inferiority of other nations’ laws. Many authors point out how this can be weaponized against Asian countries and the Middle East—racialized biases regarding what an ‘ideal’ jurisprudence looks like justify the United States subjecting foreigners to our laws without concern for their preferences and values.

### K: Legalism

#### This is a given, considering it’s a legal topic. “Legalism”-style Ks of comity exist in many forms, including criticisms of American legalese as inaccessible to foreign plaintiffs, traditional arguments about legal change being insufficient, and historical narratives regarding past uses of comity jurisprudence to perpetuate violence.

## Resolution Wordings

### Overview

#### Wordings below are cursory, and listed in order of “maximum AFF flexibility and caselist size” to “minimum AFF flexibility and caselist size”. We believe this topic requires a list of sub-topics within the realm of comity to be coherent and limited.

#### Below is a list of topics within comity. Highlighted areas were the focus of this paper, but more can certainly be considered.

#### The table below lists author-created categories on the left, and regularly discussed legal doctrines and concepts on the right. They are:

#### --Presumption Against Extraterritoriality--Presumption Against Unreasonable Interference--Interest Balancing Under Restatement (Third) Section 403--Foreign State Compulsion--Forum Non Conveniens--International Comity Abstention--Prudential Exhaustion--Antisuit Injunctions--Due Process Limits on Personal Jurisdiction--Foreign Discovery Under *Aeroptiale*--Foreign State Immunity--Foreign Official Immunity

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.



### Resolution 1: Reform + At Least + Limit

#### The United States federal government should reform its comity jurisprudence by at least substantially limiting one or more of the following doctrines:

#### Forum Non Conveniens

#### International Comity Abstention

#### Presumption Against Extraterritoriality

#### This provides the maximal AFF flexibility and ground. The AFF could partially limit any of the above doctrines, and could specify new standards, enforcement, or legal reasoning in their place as per ‘reform’.

### Resolution 2: Limit

#### The United States federal government should substantially limit one or more of the following doctrines:

#### Forum Non Conveniens

#### International Comity Abstention

#### Presumption Against Extraterritoriality

#### This preserves a large number of AFF cases since it only requires ‘limiting’ one of the doctrines, but does not include the ‘reform’ bit that would allow AFFs to specify if anything replaces current jurisprudence.

### Resolution 3: Reform + At Least + Abrogate

#### The United States federal government should reform its comity jurisprudence by at least abrogating one or more of the following doctrines:

#### Forum Non Conveniens

#### International Comity Abstention

#### Presumption Against Extraterritoriality

#### AFFs under this topic would be required to ‘abrogate’ a doctrine, which is stronger and more holistic of a diminishment than a ‘limit’. However, AFFs would still be able to engage in ‘reform’ beyond the abrogation.

### Resolution 4: Abrogate

#### The United States federal government should abrogate one or more of the following doctrines:

#### Forum Non Conveniens

#### International Comity Abstention

#### Presumption Against Extraterritoriality

#### This would permit the AFF only to abrogate one of the doctrines.

### Definition: Reform

#### This is the term we are least committed to. Other options might be “amend”, “change”, “alter”, etcetera.

#### Reform means to improve.

Macmillan Dictionary – (Macmillan Dictionary, English Language Dictionary; ‘Definition of reform,’ doa: 4-24-2022) url: https://www.merriam-webster.com/dictionary/reform

Definition of reform (Entry 1 of 4)

transitive verb

1a: to put or change into an improved form or condition

b: to amend or improve by change of form or removal of faults or abuses

#### When used as a verb reform means to change or improve the law.

Collins Dictionary – (Collins Dictionary, English Language Dictionary; ‘Definition of reform,’ doa: 4-24-2022) url: https://www.collinsdictionary.com/us/dictionary/english/reform

reform

2. TRANSITIVE VERB

If someone reforms something such as a law, social system, or institution, they change or improve it.

...his plans to reform the country's economy.

### Definition: Abrogate

#### “To abolish by authoritative action”

Merriam-Webster—Abrogate. Merriam-Webster. <https://www.merriam-webster.com/dictionary/abrogate>.

formal : to abolish by authoritative action

#### ‘Abrogate’ used in context.

Canon 79—(Professor of Political Science at the University of Kentucky). Bradley C. Canon & Dean Jaros.1979. “The Impact of Changes in Judicial Doctrine: The Abrogation of Charitable Immunity”. Law & Society Review , Summer, Vol. 13, No. 4. <https://www.jstor.org/stable/3053152>.

To the uninitiated, the common law appears tortoise-like if not completely static. Of course, its ancient raison d'etre em- phasizes stability and predictability-concepts embodied in the doctrine of stare decisis. Nonetheless, as Holmes (1881: 3) re- minded us, the life of the common law has been experience rather than logic or precedent. Consequently, the courts are constantly being called upon to modify, expand, abrogate or ini- tiate new common law doctrines in response to ever-changing technological situations and social mores. These changes invite systematic policy impact analysis. In deciding to adopt, modify, or abandon common law doctrines, courts necessarily make choices among alternative public policies. In adopting the fel- low-servant, contributory negligence, and assumption of risk doctrines, 19th-century courts in England and the United States were essentially deciding to minimize financial risk for develop- ing industrial enterprise and shift much of the social and fiscal burden for industrialization to the working class. Similarly, in abrogating the venerable doctrine of sovereign immunity, courts today are shifting the burden of tort compensation to the solvent party, the taxpayers generally, rather than letting it fall on the comparatively inpecunious state employee at fault, or upon the victim

### Definition: Doctrine

#### “A single important rule or a set of rules that is widely followed in a field of law”.

LII ND—(online legal dictionary). Doctrine. Legal Information Institute. <https://www.law.cornell.edu/wex/doctrine>

Doctrine

A single important rule or a set of rules that is widely followed in a field of law. In general, doctrines are simply rules or principles with such a long history in the law that lawyers and scholars have given them the more prestigious label of "doctrine."

More specifically, calling something a doctrine usually means at least one of two things: that it is very important to some field of law, or that it provides a comprehensive way to resolve a certain type of legal dispute.

#### “A legal principle that is widely adhered to”.

USLegal ND—(online legal dictionary). Doctrine. <https://definitions.uslegal.com/d/doctrine/>

Doctrine is a legal principle that is widely adhered to. It is a rule or principle of the law established through the repeated application of legal precedents. Common law lawyers use this term to refer to an established method of resolving similar fact or legal issues as in "the doctrine of stare decisis".

Different branches of law contain various doctrines, which in turn contain various rules or tests. For example, the test of non-occurrence of crucial event is part of the doctrine of frustration which is part of contract law. Doctrines can even grow into a branch of law. For example, restitution is now considered a branch of law separate to contract and tort.

### Definition: Comity

#### To “take the interests of one or more other jurisdictions into consideration in making legal decisions”.

Gerber ND—(Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology). David Gerber. Comity, Global Dictionary of Competition Law, Concurrences, Art. N° 12200. <https://www.concurrences.com/en/dictionary/Comity>

DEFINITION

The term “comity” is used in public and private international law to urge or demand that the institutions of one jurisdiction take the interests of one or more other jurisdictions into consideration in making legal decisions. Two levels of meaning may be relevant to competition law. One uses comity as a general concept to inform decisions. In this use it is not an element of enforceable law. In some countries, however, the concept has a second level of meaning in which it is an element of enforceable law that requires legal decision makers to take foreign interests into account in specific ways in specific situations.

#### Comity is defined as the reach of a nation’s courts’ sovereignty.

Schultz 17 - (\*Thomas Schultz & \*\*Niccolo Ridi, \*Professor of Law, King’s College London; SNSF Research Professor of International Law, Graduate Institute of International and Development Studies, Geneva; Editor-in-Chief, Journal of International Dispute Settlement. \*\*LLB (Florence); LLM (Cantab); Modern Law Review Scholar and PhD Candidate, Dickson Poon School of Law, King’s College London; Research Fellow, Graduate Institute of International and Development Studies, Geneva; 50 CORNELL INT’L L.J. 577 (2017), “Comity and International Courts and Tribunals,” doa: 4-19-2021)

What the cases (and the list could be extended quite at length) have in common is not the originating regime, the factual matrix at issue, or the legal problem in question, but rather the reliance on a specific, if multifaceted, principle: comity. Most legal systems look at the word with some suspicion because there seems to be no end to the debate on its meaning.6 In the field of international law, the problem is even greater, as to talk of a principle of “comity” is to talk of a principle that does not satisfy the legality threshold.7 Yet, this is a concept that can lay claim to a long history, and stubbornly refuses to go away: with some generalizations, the traditional definition of comity may be that of a principle in the name of which courts would fine-tune the reach of their national substantive law and jurisdictional rules, refrain from questioning the lawfulness of another sovereign state’s acts, and restrict themselves from issuing such judgments and orders when to do so would amount to an unjustifiable interference. Whatever one thinks of it, comity is widely referred to in the case law of domestic courts.8 And of more immediate relevance for our purposes, there are indications that it may be resurfacing in the context of international adjudication.9 While it was never really a stranger in their chambers, its recent rediscovery by international courts and tribunals can be better explained against the background of the proliferation of judicial and arbitral institutions and the interactions deriving therefrom

#### “deference to foreign government actors”

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.

INTRODUCTION

For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity. Comity has long served as the basis for the conflict of laws1 and the enforcement of foreign judgments in the United States.2 Today, American courts also use international comity to restrain the reach of domestic law.3 The Supreme Court has repeatedly characterized foreign sovereign immunity as a “gesture of comity” 4 and, conversely, has used comity to explain why foreign governments should be allowed to bring suit as plaintiffs in American courts.5 The act of state doctrine was once said to rest on “the highest considerations of international comity and expediency.” 6 The Supreme Court has looked to international comity to reinforce constitutional due process limitations on personal jurisdiction.7 The Court has also told district courts to engage in a comity analysis when considering the discovery of evidence abroad for use in U.S. courts8 and the discovery of evidence in the United States for use in foreign courts.9 Lower federal courts have used “international comity” as an abstention doctrine to defer to parallel proceedings in foreign courts,10 and alternatively to decide whether to enjoin the parties from continuing such proceedings.11 American law is full of international comity doctrines.12

Yet courts and commentators repeatedly confess that they do not really understand what international comity means. Courts complain that comity “has never been well-defined.” 13 They frequently refer to it as “vague” 14 or “elusive.” 15 One court recently observed that “[a]lthough comity eludes a precise definition, its importance in our globalized economy cannot be overstated.” 16 Scholars echo these complaints.17 They also point out that “courts appear to have little understanding of what exactly comity consists,” 18 or at a minimum that courts are “not always clear or consistent.” 19 As Trey Childress has noted, because there is “no clear analytical framework” for exercising international comity, “courts have been left to cobble together their own approach.” 20

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

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

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

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

The supposedly indeterminate nature of comity has long made it an object of criticism. Judge Cardozo called comity a “misleading word” that “has been fertile in suggesting a discretion unregulated by general principles.” 32 Comity’s connection to foreign relations has led some to conclude that international comity determinations would be better made by the executive branch than by courts.33 Yet this suggestion raises problems of its own. Many judges resist the notion that the Executive should be able to dictate results in particular cases.34 And even the executive branch has concluded, in the context of foreign state immunity, that case-by-case discretion does not help U.S. foreign relations.35

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

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

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

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

This Article’s definition of international comity is based on a reading of all the U.S. Supreme Court cases that use the word “comity” 38 as well as a large number of lower court cases. This approach reflects the supposition that courts using the term have the sense, however inchoate, that a common principle lies behind certain doctrines. Once the doctrines that seem to rest at least in part on international comity were identified, it became clear that each involved deference to foreign lawmakers, to foreign courts, or to foreign governments as litigants. It also became clear that some doctrines worked to recognize foreign acts or actors and that some worked to restrain U.S. acts or actors.39 Based on this survey, this Article adopts a functional definition of international comity that captures its uses in American law today: International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.

### Definition: Jurisprudence

#### “Science or philosophy of law”.

Nolen 18—(Encyclopaedia Britannica Editor). Jeannette L. Nolen. 2018. Jurisprudence. Encyclopaedia Britannica. <https://www.britannica.com/science/jurisprudence>.

jurisprudence, Science or philosophy of law. Jurisprudence may be divided into three branches: analytical, sociological, and theoretical. The analytical branch articulates axioms, defines terms, and prescribes the methods that best enable one to view the legal order as an internally consistent, logical system. The sociological branch examines the actual effects of the law within society and the influence of social phenomena on the substantive and procedural aspects of law. The theoretical branch evaluates and criticizes law in terms of the ideals or goals postulated for it.

#### “Philosophy of law”.

LII ND—(online legal dictionary). Jurisprudence. Legal Information Institute. <https://www.law.cornell.edu/wex/jurisprudence>

The word jurisprudence derives from the Latin term juris prudentia, which means "the study, knowledge, or science of law." In the United States jurisprudence commonly means the philosophy of law. Legal philosophy has many aspects, but four of them are the most common:

The first and the most prevalent form of jurisprudence seeks to analyze, explain, classify, and criticize entire bodies of law. Law school textbooks and legal encyclopedias represent this type of scholarship.

The second type of jurisprudence compares and contrasts law with other fields of knowledge such as literature, economics, religion, and the social sciences.

The third type of jurisprudence seeks to reveal the historical, moral, and cultural basis of a particular legal concept.

The fourth body of jurisprudence focuses on finding the answer to such abstract questions as "What is law?" and "How do judges (properly) decide cases?"

#### ‘Comity Jurisprudence’ used in context:

Buxbaum 8—(Associate Dean for Research and Professor of Law, Indiana University School of Law). Hannah Buxbaum. 2008. “Mandatory Rules in Civil Litigation: Status of the Doctrine Post Globalization”. Articles by Maurer Faculty, 292. <https://www.brandeis.edu/ethics/about/sorensen/sorensen-keynote-biij.html>

In legal systems lacking such legislation, a general comity jurisprudence might be in place that permits the application of foreign law.34 In addition, where the foreign mandatory rule in question is part of the lex contractus – that is, where it is a rule of the state whose law was chosen by the parties to govern the contract35 – a court may turn to the general conflicts principle favoring party autonomy, and enforce the rule on that basis.36 Understandably, however, the further a forum court is from a clear directive covering a particular substantive area, the less likely it is to follow such a path and apply foreign mandatory rules.

### Definition: Forum Non Conveniens

#### Forum non conveniens dismisses suits when a foreign court is both adequate to hear the litigation and more convenient for this purpose than the U.S. court.

Eible 19 – (Matthew J. Eible, Duke University School of Law, J.D. / LL.M. in International & Comparative Law; 2019, Duke Law Journal, Vol. 68, "Making Forum Non Conveniens Convenient Again: Finality And Convenience For Transnational Litigation In U.S. Federal Courts," doa: 4-19-2022) url: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3974&context=dlj

The motion at issue was a motion to dismiss for forum non conveniens (“FNC”), which, in the federal courts,4 argues that an alternative forum exists outside of the United States that is both adequate to hear the litigation and more convenient for this purpose than the U.S. court.5 The FNC doctrine is a judicially developed common law doctrine 6 that U.S. courts have used for more than two centuries.7 The doctrine remains a viable tool for courts to dismiss transnational cases from the U.S. legal system,8 but a dismissal for FNC is initially left to the discretion of a federal trial judge.9

### Definition: International Comity Abstention

#### Application to foreign proceedings of the federal abstention doctrine based on *Colorado River*

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.

A larger number of circuits have recognized a doctrine of abstention based on “international comity.” 250 In most circuits, international comity abstention is simply an application to foreign proceedings of the federal– state abstention doctrine articulated in Colorado River, 251 which requires a showing of “exceptional” circumstances after consideration of several factors.252 The circuits following Colorado River have held that international comity abstention is appropriate only where parallel foreign proceed ings are pending,253 and then only upon a showing of “exceptional” circumstances.254

#### “doctrine under which a district court surrenders jurisdiction to a parallel action in a foreign nation in deference to international comity and after a specific finding of exceptional circumstances”

<https://www.quimbee.com/keyterms/international-comity-abstention>

A doctrine under which a district court surrenders jurisdiction to a parallel action in a foreign nation in deference to international comity and after a specific finding of exceptional circumstances.

### Definition: Presumption Against Extraterritoriality

#### “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States”.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

I. THE PRESUMPTION AND ITS PURPOSES

The presumption against extraterritoriality is a judge-made rule of statutory interpretation. Over the years, courts and scholars have justified the presumption with respect to various interests and values.29 This Part addresses each of the purported justifications for this rule. Before doing so, though, it is helpful to supplement the Introduction's brief comments about the presumption's operation.

The presumption against extraterritoriality instructs courts that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."30 This rule is a tool of federal statutory interpretation. It is not a constitutional principle,3' and it does not govern the extraterritorial reach of the Constitution.32 It does not speak to the role of U.S. states in foreign affairs - it addresses only federal laws.33 Nor does it address legislative authority, as courts have placed virtually no limits on the power of Congress to legislate outside the borders of the United States. 34 And, at least until 2013, the presumption has not been applied to common law causes of actions, but instead has been a tool to construe statutes.35

# Evidence Library/Appendix

## AFF: By Area

### Extraterritoriality AFF: Solvency Mechanisms

#### Numerous pieces of scholarship advocate different ways to replace or fix the doctrine.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

II. REPLACEMENTS FOR THE PRESUMPTION

If the presumption against extraterritoriality is not justified, what if any rule should take its place? Scholars who have criticized the presumption also have offered rules to replace it. Professor Jeffrey Meyer argued for a "dual illegality rule," applying U.S. law extraterritorially if the conduct is similarly regulated in the foreign state. 125 Gary Born called for an international law presumption.126 Professor John Knox suggested a presumption against extrajurisdictionality, relying on the international law of prescriptive jurisdiction and congressional signaling. 127 Professor Jonathan Turley proposed a presumption in favor of extraterritoriality.12 8

### Extraterritoriality AFF: UQ

#### Presumption against extraterritoriality is high now.

Eible 19 – (Matthew J. Eible, Duke University School of Law, J.D. / LL.M. in International & Comparative Law; 2019, Duke Law Journal, Vol. 68, "Making Forum Non Conveniens Convenient Again: Finality And Convenience For Transnational Litigation In U.S. Federal Courts," doa: 4-19-2022) url: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3974&context=dlj>

A. Expansion of the Presumption Against Extraterritoriality

A prominent example of the Supreme Court’s recent skepticism toward transnational litigation is its expansion of the presumption against extraterritoriality. The presumption is a canon of statutory interpretation that limits the reach of federal statutes beyond U.S. territory.140 The “presumption had all but been given up for dead” through the 1980s, but recent cases invoking the presumption have served to “foreclose[] a large amount of transnational litigation that had formerly been taken for granted, including suits by U.S. plaintiffs.”141 These cases include Morrison v. National Australia Bank Ltd., 142 which applied the presumption to securities fraud actions,143 Kiobel v. Royal Dutch Petroleum Co., 144 which applied the presumption to the Alien Tort Statute (ATS),145 RJR Nabisco, Inc. v. European Community, 146 which indicated that the presumption applied to certain portions of the Racketeer Influenced and Corrupt Organizations Act (RICO),147 and Jesner v. Arab Bank, PLC, 148 which extended Kiobel to categorically foreclose the possibility of suing foreign corporations under the ATS.149

RJR Nabisco identifies the robust process a court must now follow when determining whether a statute has extraterritorial reach: “At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.”150 If Congress has shown such intent in the statute, then the statute (or the relevant provisions) apply extraterritorially.151 However,

[i]f the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute’s “focus.” If the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.152

The outcome of this recent “retreat to territoriality” by the Supreme Court has not been lost on litigants and commentators.153 “Lower courts are taking the directive seriously, applying the doctrine to other areas long thought to defeat the presumption, including . . . federal criminal law.”154 Practitioners have argued that Morrison “revolutionized” the federal courts’ handling of litigation involving U.S. securities laws because, among other things, it “categorically extinguished” securities cases involving foreign plaintiffs, foreign defendants, and foreign conduct (“foreign-cubed” cases) from U.S. federal courts.155 Together, Morrison, Kiobel, RJR Nabisco, and Jesner illustrate a clear trend by the Supreme Court to curb the ability of transnational litigation to proceed in U.S. federal courts.

### Extraterritoriality AFF: FoPo Advantage

#### Current presumption of extraterritoriality risks ruining foreign policy—clarification is key.

Gardner 19—(Assistant Professor of Law, Cornell Law School). Maggie Gardner. 2019. “Minding the Empagran Gap”. 55 WILLAMETTE L. REV. 509.

II. THE EMPAGRAN GAP

The new Restatement (Fourth) treats prescriptive comity purely as a matter of statutory interpretation.10 In particular, it collects a series of interpretive tools for identifying the geographic scope of federal statutes. First, the presumption against extraterritoriality limits the application of federal statutes to U.S. territory "unless there is a clear indication of congressional intent to the contrary."" Second, if there is such a clear indication, the outer reach of the statute is circumscribed by the Charming Betsy12 canon, under which judges presume that Congress did not mean to extend U.S. prescriptive jurisdiction beyond the bases recognized by international law (at least absent clear language to the contrary).1 3 In practice, however, Charming Betsy does not provide much of a limit as the bases of prescriptive jurisdiction under international law are extremely permissive.1 4 Third, if the statute so construed conflicts directly with a foreign statute, such that a person acting in good faith to avoid the conflict is nonetheless likely to be sanctioned by one country for obeying the laws of another, a judge may have discretion to excuse such a violation or reduce the sanctions applied.' 5 However, according to the Restatement (Fourth), that discretion is derived from statutory text;16 it is not a free-standing defense created by either federal or international law.' 7

These tools of statutory interpretation still allow significant space for concurrent jurisdiction, or circumstances in which a dispute covered by a U.S. statute will also fall under the jurisdiction of another country. Often concurrent jurisdiction is not a problem. But in some cases, the exercise of U.S. jurisdiction may create friction with other countries whose jurisdiction is also implicated. Other times, the dispute may seem too far removed from U.S. interests to have merited congressional attention; the "literal catholicity" of some statutes, to adopt Justice Jackson's phrase, requires some limiting principle.' 8 This is what Empagran's "unreasonable interference" consideration attempts to provide. The Restatement (Fourth) has generalized Empagran into a "principle of statutory interpretation" that allows U.S. courts to "interpret federal statutory provisions to include other limitations on their applicability" beyond the presumption against extraterritoriality.19

Relying on Empagran and the new section 405 to manage concurrent jurisdiction as a matter of statutory interpretation, however, introduces two complications. First, the idea of "unreasonable interference" is underdefmed. As the Restatement (Fourth) acknowledges, the lower courts have by necessity developed additional analytical frameworks to implement this general directive, but those frameworks vary by circuit and by statute. 20 ThuS, section 405 is worded even more generally than Empagran, simply recognizing the possibility of "other limitations" on federal statutes' applicability.

A saving grace is the Restatement (Fourth)'s acknowledgment that administrative agencies may step in to fill this gap by providing interpretations of the geographic scope of federal statutes. 2 1 These agency interpretations, which would merit Chevron deference, may better reflect the legitimate sovereign interests of other states based in 22 part on agency coordination with foreign peers. But for statutes for which federal agencies have not adopted such a limiting construction, the challenge of implementing Empagran and section 405's broad mandate remains.

Second, and more fundamentally, there is a mismatch between the generality of statutory interpretation and the context-specific nature of an "unreasonable interference" inquiry. Determining what counts as "unreasonable interference" with the interests of other states would seem to call for identifying and weighing those foreign interests. But the interests of other states are not interchangeable. Treating "unreasonable interference" as a matter of statutory interpretation, then, risks elevating and locking in the interests of some states over the (potentially contrary) interests of other states.2 3 Or put another way, it is difficult at the wholesale level required by statutory interpretation to figure out what will count as "unreasonable interference" with other states' interests, or whose "legitimate sovereign interests" are at stake.

These challenges of uncertainty and generality may be encouraging judges to avoid the question of extraterritorial reach altogether, avoidance that can in turn distort other inquiries. One option for avoiding the Empagran gap is to rely more heavily on doctrines of adjudicatory comity, which allow judges to voluntarily decline their jurisdiction on the belief that foreign courts are better suited to resolve a particular dispute. I have elsewhere explained my concerns, however, about overreliance on doctrines like forum non conveniens and international comity abstention.2 4 Because these doctrines involve declining to exercise congressionally granted jurisdiction, they should be used sparingly and as a last resort. But the broad framing of such inquiries (in conjunction with the Empagran - 25 gap) instead invites their over-application.

Another option for avoiding the gap is to lean more heavily on the presumption against extraterritoriality. 26 This extra reliance on the presumption can take two different forms, both of which are problematic. First, courts might apply Morrison step one vigorously to interpret a federal statute as not applying extraterritorially. This is arguably what the Supreme Court itself did in RJR Nabisco v. European Community,27 when it acknowledged that RICO's substantive provisions apply extraterritorially but avoided having to articulate limits to that extraterritorial reach by instead re-applying the presumption against extraterritoriality separately to RICO's provision for civil remedies (and concluding that the remedial provision did not rebut the presumption).28

Second, courts might skip directly to Morrison step two and assert that regardless of potential geographic scope, the application of the statute in the present case would be domestic. In WesternGeco LLC v. ION Geophysical Corp.,29 for example, the Court avoided a difficult question about the potentially global reach of U.S. patent remedies by jumping to step two and concluding that the infringement at issue was a domestic act. 30 This move is pragmatic in the short run, but it puts greater weight on the "focus" inquiry in the long run-an inquiry that is already showing signs of strain. As Professor Aaron Simowitz has argued, identifying the "focus" of a statute may sound objective, but it is a formalism that like all formalisms devolves into malleable decisions: How broadly or narrowly should the focus be defined? Can a statute have more than one "focus"? What if the focus is intangible and thus not located in any physical space? 31

In addition to these practical problems, both avoidance movesthe turn to adjudicatory comity to decline congressionally granted jurisdiction and the application of formalistic fictions to constrain federal statutes-also make it harder for Congress, when it does want particular laws to apply to persons or conduct outside of U.S. territory, to effectuate that intent. The Supreme Court's recent decisions have ratcheted up how much Congress must say and how clearly it must say it before its laws will be allowed to have extraterritorial effect. 32 And even if Congress does speak with surpassing clarity, the federal courts may nonetheless assert the power to decline to hear those disputes as a matter of judicial discretion. 33

### Extraterritoriality AFF: Chevron Advantage

#### ‘Chevronizing’ comity is key to executive flexibility and American-led extraterritorial governance.

Sunstein 6—(\*Kirkland & Ellis Professor of Law, University of Chicago; \*\*Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago). \*Cass R. Sunstein & \*\*Eric A. Posner. June 2006. “Chevronizing Foreign Relations Law”. University of Chicago Public Law & Legal Theory Working Paper Number 128. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1054&context=public_law_and_legal_theory>.

III. Executive Power

In our view, the executive should be permitted to interpret statutory ambiguities so as to defeat the international relations principles. It would follow, for example, that the executive should be permitted to construe the civil rights statutes or NEPA so as to apply extraterritorially. The executive is in the best position to make the underlying judgments. Moreover, the constitutional position of the President in the domain of foreign affairs strongly supports this conclusion. But to understand these claims, it is necessary to back up a bit.

A. The Chevron Doctrine

1. Two steps. Outside of the context of foreign affairs, the argument for executive authority should be familiar, for courts regularly defer to executive interpretations of ambiguous statutory provisions. The central idea is most famously associated with Chevron v. Natural Resources Defense Council, 72 which involved an ambitious effort by the EPA to increase private flexibility under the Clean Air Act.73 Upholding the rule, the Supreme Court created a two-step inquiry for assessing executive interpretations of law. The first inquiry is whether Congress has directly decided the precise question at issue.74 If not, the second inquiry is whether the agency’s decision is “permissible,” which is to say reasonable.75 The resulting rule is that executive interpretations of ambiguous statutes must be upheld so long as they are reasonable—a dramatic grant of law-interpreting power to executive agencies.

In explaining this rule, the Court could not, and did not, contend that the relevant provision of the Clean Air Act contained any explicit delegation to the executive. Hence the Court noted that “sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit.”76 The Clean Air Act does give the EPA the power to issue regulations; in granting that power, perhaps the Act is best taken to say that the EPA is implicitly entrusted with the interpretation of statutory terms. The Court referred to this possibility, noting that Congress might have wanted the agency to strike the relevant balance with the belief “that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so.”77 But lacking any evidence on the question, the Court did not insist that Congress in fact so thought. On the contrary, it said that Congress’s particular intention “matters not.”78

Instead the Court referred to two points about institutional competence: as compared with executive agencies, judges lack expertise and they are not politically accountable. Technical specialization is relevant to interpretation of the Clean Air Act, and here the executive has conspicuous advantages over courts.79 And in interpreting law, the agency may “properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is.”80 The Court was alert to the fact that it was reviewing a decision made by the Reagan Administration, altering an interpretation by the Carter Administration; and to say the least, the Reagan Administration had a self-conscious program for reorienting the administrative state. Some of that program would inevitably be undertaken through fresh interpretations of statutory terms. In the Court’s view, that was hardly objectionable. It would be appropriate for agencies operating under the Chief Executive, rather than judges, to assess “competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved in light of everyday realities.”81

What is most striking about this passage, and most relevant for present purposes, is the suggestion that resolution of statutory ambiguities requires a judgment about how to assess “competing interests.” This is a candid recognition that assessments of policy are sometimes indispensable to statutory interpretation—a point with particular importance in the context of relations with other nations. Of course we can imagine cases in which courts resolve ambiguities through the standard sources — by, for example, using dictionaries, consulting statutory structure, deploying canons of construction, or relying on legislative history if that technique is thought to be legitimate.82 Under Chevron Step One, the executive will lose if the standard sources show that it is wrong.83 (To the extent that the international relations canons operate as part of Step One, they trump executive power under Chevron – a proposition on which we shall cast some doubt.84) But sometimes those sources will leave gaps; Chevron itself is such a case, and there are many others. If the Court’s analysis is accepted on this point, its deference principle seems readily understandable; we shall shortly investigate its relationship to the international relations doctrines.

It is an understatement to say that the foundations of the Chevron approach have been disputed. Perhaps the Court was saying that the resolution of statutory ambiguities sometimes calls for technical expertise, and that when expertise matters, deference would be appropriate. On this view, having roots in the New Deal’s enthusiasm for technical competence,85 specialized administrators, rather than judges, should make the judgments of policy that are realistically at stake in disputes over ambiguous terms. But the Court’s emphasis on accountability suggested a second possibility: Perhaps the two-step inquiry is based on a healthy recognition that in the face of ambiguity, agency decisions must rest on judgments of value, and those judgments should be made politically rather than judicially. On this view, having roots in legal realism,86 value choices are a significant part of statutory construction, and those choices should be made by democratically accountable officials. This reading suggests a third and more ambitious possibility: Perhaps Chevron is rooted on the separation of powers, requiring courts to accept executive interpretations of statutory ambiguities in order to ensure against judicial displacement of political judgments.87 In the domain of foreign relations, this possibility might seem especially attractive.

But the Supreme Court has settled on a different understanding of the foundations of Chevron: Courts defer to agency interpretations of law when and because Congress has told them to do so. 88 On this view, the deference principle is a reading of legislative instruction, and hence Congress has ultimate control over the deference question. The problem is that Congress hardly ever states its instructions on the deference question with clarity, and hence Chevron cannot be grounded on an explicit or implicit legislative instruction on that question. It follows that Chevron rests on a kind of legal fiction,89 to the effect that a grant of the authority to make rules and conduct adjudications, and perhaps other authority as well,90 carries with it interpretive power too. This, at any rate, is the prevailing account of Chevron.

This account raises many questions, and we shall return to it below. For the moment, the central point is that executive officers, entrusted with implementing the law, are frequently entitled to settle the meaning of ambiguous statutory provisions – a claim with evident implications for the international relations doctrines.

3. Limits on deference. Chevron grants a great deal of power to the executive.

Nonetheless, the deference principle is not unlimited. For our purposes, three limitations have particular importance.

(a) Delegated power of interpretation? The executive may not receive Chevron style deference if the agency has not exercised delegated power to make rules or to undertake adjudications.91 It follows that if Congress has not given the relevant agency rulemaking or adjudicatory power, or if the agency, while delegated that power, has not exercised it in interpreting the law, the ordinary level of deference may be unavailable.92

In this way, administrative law principles make it important to distinguish the various procedures that precede executive interpretation. At one end of the spectrum is the rulemaking or adjudicative procedure that produces an interpretation of an ambiguous statute. At the other end of the spectrum is the mere “litigating position,” where the executive asserts a particular interpretation for the first time in litigation in which the executive is a party or an amicus. Interpretations produced by rulemaking or adjudication receive Chevron deference.93 Agency interpretations that emerge from policy statements, or from interpretive rules, are often not entitled to Chevron deference, but they do receive a measure of respect under Mead and Skidmore. 94

By contrast, litigating positions receive no deference at all, apparently on the theory that Congress would not want courts to defer to positions that may be opportunistic and that are not preceded by any kind of check on possible arbitrariness.95 The refusal to defer to litigation positions is plausible in general. But it may well be inapplicable in the foreign relations setting, where the executive branch simply may not be able to set policy through formal procedures or in advance because of the fluidity of events. We will return to this point below.

(b) Nondelegation canons? Courts have sometimes denied the executive lawinterpreting authority on the ground that the key decisions must be explicitly made by the national lawmaker. The most important principle is that the executive is not permitted to construe statutes so as to raise serious constitutional doubts.96 So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. Some canons of interpretation thus operate as part of the court’s analysis during Step One; the executive’s interpretation might fail because it is inconsistent with the meaning of the statute, as established, in part, by reference to the canon against constitutional avoidance.

Why does the Avoidance Canon overcome the executive’s power of interpretation? The reason is that we are speaking of a kind of nondelegation canon— one that attempts to require Congress to make its instructions exceedingly clear, and that does not permit the executive to make constitutionally sensitive decisions on its own.97 Other interpretive principles, also serving as nondelegation canons, trump Chevron as well. One of the most general is the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal defendants.98 Similarly, the executive cannot interpret statutes and treaties unfavorably to Native Americans.99 Consider also the notion that unless Congress has spoken with clarity, the executive is not allowed to apply statutes retroactively.100 There are many other examples.101 In areas ranging from broadcasting to the war on terror,102 the nondelegation canons operate as constraints on the interpretive discretion of the executive.

(c) Organic statutes and others. Under administrative law principles, it is also important to distinguish between statutes that authorize agency action (sometimes called “organic” statutes), and more general statutes, such as the Freedom of Information Act (FOIA) and the Administrative Procedure Act (APA),103 which regulate agency behavior. According to standard principles, agencies are entitled to deference insofar as they are construing statutes with whose implementation they are charged, but not to deference in the interpretation of the more general statutes that regulate their conduct.104 The Environmental Protection Agency, for example, does not receive deference insofar as it is interpreting FOIA to permit it to keep certain information secret.

For our purposes, we might therefore distinguish between statutes that grant the executive the authority to address some foreign affairs problem (“authorizing statutes”) and statutes that incorporate a background comity (or anticomity) judgment that applies to a range of disputes (“international relations” statutes). Authorizing statutes may be general, such as the statute that provides the president with authority to regulate immigration,105 or specific, such as the Authorization for Use of Military Force against al Qaeda.106 International relations statutes apply regardless of the type of cause of action or enforcement, and indeed apply even to common law litigation. Typical international relations statutes include the Foreign Sovereign Immunities Act and the Uniform Foreign Money Judgment Act. Statutes of this kind are indeed general, but they are not akin to statutes limiting agency authority, such as FOIA and the APA.

It is generally agreed that an authorization statute, such as the Immigration and Naturalization Act or the Food and Drug Act, is subject to analysis under Chevron. 107 In addition, there is no reason in principle why that analysis—understood as a recognition of the executive’s primary role in advancing interpretations of statutes—cannot be extended to an authorization statute such as the Authorization for Use of Military Force, which initiated the military attack on Afghanistan.108 To be sure, the law is not settled here. When rulemaking and adjudication are not involved, deference may not be available.109 In our view, however, deference is fully appropriate under any delegation of foreign affairs authority to the President. We shall return to the issue in more detail below;110 for now, let us simply assert that when Congress grants such authority to the President, it ought to be understood to instruct courts to defer to his reasonable interpretations of ambiguous statutory terms. Further, international relations statutes may be ambiguous, in general or as applied in particular cases, as they reflect general judgments by Congress, whose meaning may not be clear in any particular case; again deference to the executive’s reasonable interpretations of ambiguous provisions is justified, or so we will argue.

C. The Executive and International Comity

The executive plays an important role in litigation that affects foreign sovereigns, even when the executive is not a party. Deference to the executive is an established element of many international relations doctrines, but the law has not—peculiarly— settled on a general principle of deference where an executive agency advances an interpretation of a statute that has foreign relations implications.

In this section, we first discuss the established rules and then we turn to our recommendations. The argument has a degree of complexity, and it may be useful to set out the basic argument in advance. In many cases, the executive should be entitled to Chevron deference under the terms of existing doctrine, because it will be acting pursuant to some kind of formal procedure or otherwise through channels that trigger Chevron. Even if no formal procedure and no such channels are involved, a grant of authority to the executive in the domain of foreign affairs ought generally to include a power of interpretation, so that Chevron deference is appropriate. If a relevant interpretation exists, the comity doctrines are trumped, because they should not be taken to operate as constraints on the executive under Chevron Step One. If the interpretation is unreasonable, of course, it will be invalid under Step Two; but Step Two invalidations are rare in the domestic sphere,111 and they should be rare here as well. If there is no interpretation of a statutory term, but simply a policy judgment by the executive, the courts should defer as well, using Chevron as an analogy. The Avoidance Canon provides an important exception, and there are others; but the comity doctrines do not belong in the same category as that canon or other exceptions.

1. Traditional Deference to the Executive in Foreign Relations

In some ways, deference to the executive in foreign relations cases is commonplace. Before the enactment of the FSIA, courts would relax sovereign immunity when the executive suggested that courts should do so. This practice was institutionalized in the twentieth century; the Department of State would intervene in cases when it believed that the court should take or deny immunity, and courts typically followed the view of the Department.112 Indeed, courts deferred to a whole “executive jurisprudence,” parsing State Department opinions for principles that would control cases where the State Department did not intervene.113 Today, courts continue to take account of the executive’s views in FSIA cases114 and engage in pre-FSIA style deference to the executive in cases involving head-of-state immunity.115

A strain of thinking about the act of state doctrine has also long held that courts should defer when the executive informs them that the act of state doctrine should not apply in a particular case.116 In a clear analogy to Chevron, courts also usually defer when the executive advances a treaty interpretation,117 and when the executive expresses a view about head of state immunity.118 They defer absolutely to executive determinations of whether a foreign state “exists” or not.119 And even when the executive and Congress come into conflict about the extent of their foreign relations responsibilities, in most instances courts effectively defer to the executive by refusing to decide on the merits because of concerns about justiciability.120 In the face of such a refusal, the views of the executive effectively prevail.

Deference to the executive in foreign relations cases is traditionally based on both constitutional and functional considerations. Courts sometimes say that the executive has the primary foreign relations power.121 This power is sometimes traced to the vesting clause of the Constitution, the Commander-in-Chief clause, and other provisions.122 But the explicit grants of foreign relations power to the executive are rather sparse and ambiguous. From the document itself, it is hardly clear that the executive has “primary” authority in the domain of foreign affairs.123 Hence the underlying justifications are often less textual than functional, or based on traditional practices and understandings. The nation must speak in “one voice” in its foreign policy; the executive can do this, while Congress and the courts cannot.124 The executive has expertise and flexibility; can keep secrets; can efficiently monitor developments; can act quickly and decisively. The other branches cannot.125 Unlike the courts, and as emphasized in Chevron, the executive is politically accountable as well as uniquely knowledgeable, and its accountability argues for deference to its judgments about how to assess the competing facts and values. Of course, none of these advantages justify absolute deference to the executive in all cases, and courts have not gone this far. The executive cannot violate a clear law (putting constitutional questions to one side). But in cases of ambiguity, courts are inclined to defer to the position of the executive.

2. Conflicts Between Regulations and International Comity (Including A Brief Tour)

In light of this longstanding deference to the executive, it is surprising that courts

have not, so far, consistently and clearly indicated that they will accept the views of the

executive about whether to apply the international relations doctrines.126 Suppose that the

executive interprets a statute in a manner that violates those doctrines. Should a court

defer to the interpretation, or should it reverse the interpretation on the grounds that it

violates the doctrines?

This question might well pose a literal conflict between Chevron deference and the international relations principles. Suppose, for example, that an agency entitled to Chevron deference issues a regulation that conflicts with the international relations principles. If so, the court must develop rules of priority. Alternatively, the conflict might not literally involve Chevron, because the executive has not exercised delegated power to make rules or to conduct adjudications127—but it might nonetheless present a difficult question of how to reconcile executive power with comity. Suppose, for example, that the Department of Justice concludes that the antitrust law should apply outside the territorial boundaries of the United States, but the decision does not follow any kind of formal procedure; it is offered in litigation. If so, it is possible that Chevron deference would be denied to that decision, on the ground that litigating positions do not receive deference.128 Nonetheless, we believe that such deference is due to litigating positions in the domain of foreign relations; and even if this judgment is rejected, a court might want to pay a great deal of attention to the relevant position of the executive, and hence a conflict with the comity principles is easily imaginable.

In the face of such a conflict, a court might take one of three positions. First, it could hold that the international comity doctrines prevail over the executive’s interpretation. Perhaps the principles would be treated as part of Chevron Step One, and hence defeat the executive’s view. Second, a court could hold that the executive’s interpretation prevails. Perhaps the executive, in effect, has discretion whether to interpret a statute in a way that violates international law or potentially offends foreign sovereigns. Third, a court might hold that some middle way is preferable: perhaps the executive interpretation and the international comity doctrines receive equal weight. A court might, for example, require that the executive take account of international comity, but defer to an interpretation that endangers comity for especially good reasons.

The case law, so far, reflects a range of positions and is difficult to parse; there is no settled view about the relationship between the views of the executive and the doctrines. In some cases, the views of the executive have proved crucial. In other cases, courts have referred to the comity doctrines without paying much attention to the position of the executive.

A leading case is Jama v. Immigration and Customs Enforcement, 129 where the Supreme Court indicated the importance of the executive’s view. An alien was ordered to be removed to Somalia, his country of birth and citizenship; he objected that he could not be removed without consent from Somalia. The statute was unclear, and the Court was badly divided on whether such consent was a prerequisite for removal. In resolving the question in the government’s favor, the Court seemed to suggest that so long as there was room for ambiguity, the executive’s view would prevail.130 Indeed, the Court appeared to go well beyond Chevron so as to adopt a kind of clear statement principle, arguing that the view of the President would settle the law unless Congress had clearly provided otherwise: “To infer an absolute rule of acceptance where Congress has not clearly set it forth would run counter to our customary policy of deference to the President in matters of foreign affairs.”131 The Court stressed that removal decisions “may implicate our relations with foreign powers and require consideration of changing political and economic circumstances.”132 In these circumstances, the Court was reluctant to construe an ambiguous statute to limit the executive’s discretion. Strikingly, the Court made no reference to the possible relevance of international law and the international relations doctrines, emphasizing instead the views of the executive.

A contrary signal can be found in EEOC v. Arabian American Oil Co., which involved the EEOC’s interpretation of Title VII to prohibit employment discrimination by an American employer against an American employee on foreign territory.133 The defendant argued that the EEOC’s interpretation of the statute violated the presumption against extraterritoriality. The Court agreed, but it did not directly confront the Chevron issue, because the EEOC does not have the authority to issue rules and EEOC’s interpretations have not been consistent.134 In line with our argument here, it would have been possible for the Court to follow the view of the current executive and hence to apply Title VII extraterritorially because the executive argued for that result. In his concurring opinion, Justice Scalia suggested that the presumption against extraterritoriality must prevail over the agency’s interpretation, but he gave no account of why the presumption should receive priority. More recently, the Court has endorsed the presumption without indicating that the executive’s view matters at all; it has treated the presumption as part of the analysis under Step One.135

The Court offered mixed and confusing signals in Spector v. Norwegian Cruise Line, Ltd., 136 where it held that the Americans with Disabilities Act may be applied to foreign-flagged ships except to the extent that application of the ADA would interfere with the internal affairs of those ships. In his plurality opinion, Justice Kennedy wrote that “general statutes are presumed to apply to conduct that takes place aboard a foreignflag vessel in United States territory if the interests of the United States or its citizens, rather than interests internal to the ship, are at stake.”137 But such statutes do not apply to regulate matters “that involve only the internal order and discipline of the vessel, rather than the peace of the port”—an exception rooted in “international comity.”138

Cruise ships flying under foreign flags offer accommodations and travel services to over seven million Americans each year,139 and hence the United States had considerable interest in protecting its citizens against violations of the ADA (a fact that helps account for the executive’s claim that the statute should indeed apply). Hence there would be no blanket rule against application of that statute; the outcome would depend on whether there would be an effect on the internal affairs of the ship. In answering that question, the plurality emphasized the International Convention for Safety of Life At Sea, and thus suggested the importance of taking “conflicts with international law into account”—but it did so only in the context of indicating that attention to the convention was explicitly “urged by the United States” in its brief.140 It is noteworthy, however, that no member of the Court paid a great deal of attention to the position of the executive, or suggested that that position might be determinative—a striking difference from Jama, decided only six months earlier. It would be easy to imagine an opinion to the effect that application of the ADA would be justified in large part by reference to the claims of the executive, which was in the best position to balance the competing interests.

In Ali v. Ashcroft, 141 the court of appeals refused to defer to the Immigration and Naturalization Service’s interpretation of a statute that provides for the deportation of aliens. The petitioners argued that the statute did not permit deportation to countries without functioning governments—Somalia, in this case as in Jama. The government claimed that INS regulations permitted such deportation, and were a reasonable interpretation of the statute. The court disagreed, holding that, in fact, INS regulations did not provide for such deportation. Much more relevantly for our purposes, the court said that the petitioners’ interpretation of the statute was consistent with international law— including customary international law of human rights and three human rights treaties— given that the petitioners would be subject to human rights abuses if they were returned to Somalia. Hence the court suggested that the international comity principles would trump the executive’s interpretation, though the absence of clarity in the governing regulations made the suggestion less than a holding. It is not at all clear that the court’s analysis survives the Supreme Court’s more recent decision in Jama.

In Ma v. Ashcroft, 142 the court of appeals spoke in similar terms. It held that the INS could not indefinitely detain an alien convicted of manslaughter because his home country would not repatriate him. The court rejected the agency’s interpretation of its authority to detain because Chevron was trumped by the existence of a serious constitutional question—here, under the due process clause.143 The court said that Chevron principles “are not applicable where a substantial constitutional question is raised by an agency's interpretation of a statute it is authorized to construe.”144 This use of the Avoidance Canon is entirely compatible with our approach here.145 But the court, citing the Charming Betsy canon, also noted that indefinite detention would violate international law.146 The notation played only a modest role in the court’s analysis, but it is noteworthy that there was no suggestion that the executive’s view might prevail over international law.

A major contrast is provided by Corus Staal BV v. Department of Commerce, 147 in which the court of appeals allowed an agency’s interpretation of a statute to defeat the Charming Betsy canon. In the court’s view, the agency’s methodology for determining whether a firm has engaged in illegal dumping was based on a reasonable interpretation of an ambiguous statute, and thus entitled to respect under Chevron. The appellant argued that this methodology had been rejected by the World Trade Organization in several interpretation of the Antidumping Agreement, a provision of the General Agreement on Tariffs and Trade. The court simply rejected the argument that it should give deference to either the GATT or the WTO’s interpretations of GATT articles; the executive’s interpretation prevailed.148

These cases leave a great deal of uncertainty, but we can summarize them, or at least their hints, as follows. Where the executive does not express a view on the meaning of a statute or the outcome of litigation, courts apply the international relations doctrines. Where the executive’s interpretation is ambiguous, arguably unconstitutional, unreasonable, or ambiguous, the international comity doctrines are given considerable and perhaps decisive weight. Where the executive’s interpretation can be found in a formal rule or adjudication, there is a chance that it will prevail over the doctrines. But, as noted earlier, cases in the last category are extremely rare—only the trade cases decided by the Federal Circuit seem clearly to belong to this category—so the actual approach of courts when Chevron and the comity doctrines conflict remains uncertain.149 It is also unclear whether courts would defer to the executive when it issues its interpretation in an informal manner, not preceded by rulemaking or adjudication.

The conflicts discussed so far concern the conventional Chevron-style setting where the executive advances an interpretation of an ambiguous statute. Other conflicts occur without any such interpretation. A recurring controversy is whether in act of state cases, courts should defer to the executive’s determination that a decision on the merits would or would not cause foreign relations problems. The courts have wavered on this issue. In earlier cases, courts generally deferred.150 Although more recently the Supreme Court has divided on this issue, courts usually give the executive’s views some weight.151 In Foreign Sovereign Immunity cases, the courts similarly will take into consideration the judgment of the executive that adjudicating the liability of a foreign sovereign would interfere with foreign relations.152 In Anti-Terrorist Act and Alien Tort Statute cases, courts have also paid close attention to the executive’s views about the implications of the litigation for foreign relations.153

By contrast, we are unaware of cases in which the executive has intervened to argue that foreign law or foreign judgments should, or should not, be enforced because of their foreign relations implications. As a general matter, however, courts agree that the executive’s views should be taken into account when determining whether international comity requires them to abstain from deciding a case on the merits.154

From a doctrinal perspective, this latter group of cases and the Chevron cases are different. In the Chevron setting, courts defer to the executive’s interpretation of an ambiguous statutory provision because they interpret the authorizing statute as implicitly delegating law-interpreting authority to the executive.155 In the other setting, the statute or common law is more or less clear, and the court abstains or grants immunity because of the executive’s views about the foreign policy implications of a decision on the merits. In analytical terms, however, the two settings are similar, and raise identical normative and institutional questions. In both settings, the background legal rules reflect a crude balancing of the costs and benefits of judicial decisions that may offend foreign sovereigns. And in both settings, the question arises whether these background rules are so crude, so insensitive to day-to-day changes in foreign relations, and so clumsy in the hands of judges who lack information and expertise about foreign relations, that it would be better if judges defer to the executive whenever they can do so.

D. The Argument for Executive Power

Our account of the international relations doctrines and the rationale for the Chevron rule imply that in the context of foreign relations, the executive’s interpretations should prevail over the comity doctrines. Those doctrines should not be treated as part of the court’s analysis under Step One. It follows that courts should defer to the executive’s judgment unless it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable, because the executive is in the best position to reconcile the competing interests, and in the face of statutory silence or ambiguity, Congress should therefore be taken to have delegated interpretive power to the executive. If the executive decides that the statute should be interpreted so as to overcome the comity principles, it ought to be permitted to interpret the statute in that way. There is no reason to distrust the executive’s competence in making the underlying choices. In fact the Chevron approach literally applies to any executive interpretation that follows formal procedures, and the logic of the case suggests that it should literally apply as well to interpretations in the domain of foreign relations that do not follow such procedures.

It is relevant here that considerations of constitutional structure argue strongly in favor of deference to the executive—a point that makes the argument for deference stronger than in Chevron itself. Hence it should not be important whether the executive’s decision follows rulemaking or adjudication, or otherwise has the force of law. In the context of foreign relations, the answer is supplied by the interpretation of the executive, subject to the constraint of reasonableness.

1. Comparative advantages. This conclusion follows whatever the ground for the international comity principles. We have criticized the entanglement theory; but even if the theory is right, the executive branch, unlike the judiciary, is in a good position to know whether concerns about entanglement justify a decision to invoke comity. Litigation produces entanglement problems when the decision on the merits is likely to offend a foreign sovereign, perhaps leading it to withdraw cooperation in some area of foreign relations that are vital to America’s interests. The court has no expertise in determining whether a certain kind of litigation will offend a foreign sovereign or not, whether the sovereign is likely to respond by reducing cooperation, and whether such cooperation is valuable or not. These judgments are all at the core of the foreign relations expertise of the executive.

Now consider the consequentialist theory. Recall that this theory holds that the U.S. should defer to a foreign act only if (1) the foreign state will or is likely to reciprocate for comity, or retaliate for violating the comity rules; and (2) the benefits from such reciprocation or nonretaliation exceed the costs of deference. These two conditions require complex inquiries, with empirical and normative dimensions, for which the executive’s institutional position gives it a decisive advantage over the courts. Three points are important here.

First, the executive branch carefully tracks relations with foreign states, and it is in a better position to predict whether a particular act of deference is likely to result in reciprocation by foreign states, or whether such statutes would retaliate for a violation of the comity principles. The prediction is based on subtle factors—including the nature of the relationship with the foreign state, the cultural norms of that state, its legal system and other institutions, its politics, and so forth. These are factors followed and assessed by the Department of State. They are well beyond the usual kind of judicial factfinding.

Second, the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the court is. Suppose, for example, that, in response to litigation against China by Chinese victims of Chinese repression, China begins to issue vague threats to Taiwan. Are these threats credible? Are they meant to signal that China will take a more confrontational stance toward Taiwan if the U.S. allows Chinese citizens to sue China for human rights violations? Or perhaps they merely signal a general chilling of relations, in which case the U.S. may have more trouble obtaining Chinese assistance in pressuring Iran to abandon its nuclear plans? Courts cannot answer these questions; the executive can.

The third point involves accountability. In deciding whether American law should be applied abroad, or whether a statute should be construed conformably to international law, the executive must balance competing interests and make judgments of value. It must ask questions not only about reciprocity and retaliation, but also about the importance of applying (say) the National Labor Relations Act to protect Americans aboard a foreign ship in American waters, or the ban on sex discrimination to American companies doing business in China, or the Endangered Species Act to the activities of American institutions operating in Japan.156 At least at first glance, those judgments should be made by those who are accountable to the public, not by courts. The executive might well pay a price if it concludes that American civil rights or environmental law ought not to be applied to American activities in other nations. As in the Chevron context, the executive is far more likely to be punished by the public if it causes or fails to resolve tensions with other countries or a foreign policy crisis than a court is. Indeed, although courts routinely anger foreign sovereigns,157 we cannot think of any case where the public has put pressure on courts because of such crises—probably because the connection between judicial decisions and international tensions is not salient enough.

The flip side of accountability is concern about political bias. Because courts are independent, they may be more neutral than the executive is, and thus, perhaps, more likely to interpret the statute impartially. But this concern is identical in the Chevron context, where, as we noted, courts have plausibly concluded that the executive’s control over policy justifies its heightened authority over the interpretation of statutes. In any case judges may have biases of their own. Any relevant “bias” on the part of the executive, in the domain of foreign affairs, is best understood as the operation of democracy in action—at least if the executive’s interpretation is reasonable and if constitutionally sensitive issues are not involved.158

Thus, the expertise rationale for deference to the executive is stronger in the foreign relations setting than in the traditional Chevron setting, while the accountability rationale for deference is at least equally strong. These conclusions suggest that if the approach in Chevron is correct, then deference to executive interpretations in foreign relations cases must also be the appropriate approach. The core reason is that resolution of statutory ambiguities involve judgments of policy, and those judgments are best made by the executive. None of this means that courts have no relevant expertise. Courts might have a better sense of how enforcement of foreign judgments may harm the integrity of the American judicial system than the executive does. But this advantage is relatively minor compared to the advantages of the executive.

What we have said so far also applies outside the Chevron setting, where statutes and common law are relatively clear, and the executive branch argues that the court should not decide on the merits. Here, to be sure, there is a greater danger of conflict between the executive and Congress, but Congress has not objected to the traditional doctrines of executive deference, and until it does so, the constitutional problems seem more theoretical than real.159 The normative question is whether the executive’s institutional expertise gives it advantages over courts in this setting as it does in the Chevron setting, and the answer is surely yes. In both cases, the argument for deference to the executive is that it has more expertise in foreign relations than the courts do, and that the executive’s accountability for foreign relations is more important than the courts’ independence from political pressure.160

A possible counterargument is that Congress, in one important instance, reduced the executive’s influence over foreign relations, and did so with the executive’s approval. As noted above, the FSIA was enacted, in part, because diplomatic pressure on the Department of State to grant immunity to foreign sovereigns resulted in inconsistent decisions.161 Before the statute was enacted, courts would permit lawsuits against foreign sovereigns if the Department of State sanctioned such suits, and the Department of State generally sanctioned suits when the disputed act was commercial in nature—for example, when the defendant was a business owned by the foreign sovereign—and not otherwise. The FSIA codified the State Department’s jurisprudence, with some modifications.162 In doing so, it drastically reduced the State Department’s discretion to depart from its own rules in order to reward friends or punish enemies where United States foreign policy interests so required. But the statute itself contains important pockets of executive discretion.163 And, more to the point, the Supreme Court has signaled that courts should take into account the executive’s view about whether they should exercise jurisdiction over a sovereign in any particular case.164 Thus, even a statute that to all appearances takes away the discretion of the executive has been “Chevronized.” The executive and a majority of the Supreme Court appear to believe that, although courts can handle routine cases involving foreign sovereign defendants, they should continue to defer to the executive when it states an interest, despite the fact that such an approach reopens the door to political pressure. Once again, the executive’s flexibility and expertise takes precedence.

2. A response. It would be possible to respond that all or some of the comity doctrines should be seen as nondelegation principles, and that if this is so, then a clear statement from Congress is required in order to produce a result that compromises comity. Perhaps the doctrines apply under Step One, and thus forbid contrary interpretations from the executive. The most obvious candidate for this approach is the principle calling for conformity to international law; perhaps Congress should be required to speak clearly if it wants to require to authorize a violation. The same analysis might be applied to the canon against extraterritoriality;165 perhaps the executive should not be permitted to decide on extraterritorial application of domestic law on its own.

In our view, however, it would not be easy to categorize the comity doctrines as nondelegation principles. It is reasonable to say that Congress must speak clearly if it seeks to raise a serious constitutional question, and hence that the executive may not raise such a question on its own166; courts plausibly insist that the national lawmaker must expressly authorize invasions of constitutionally sensitive domains. But in light of the distinctive role of the executive in the area of foreign relations,167 a clear statement principle, in that area, would make no structural sense, at least as a general rule. A more refined argument would attempt to disaggregate the comity principles and urge that one or a few of them, such as the principle against violations of international law, trump executive interpretations, perhaps if the United States has independently committed itself to the relevant international law. At most, however, this argument would justify a narrow use of clear statement principles,168 and even such a narrow use is not simple to defend.

E. A Historical Evolution

Many of the international relations principles are very old. The Charming Betsy doctrine, the presumption against extraterritoriality, international comity, foreign sovereign immunity, the penal and revenue rules, and the act of state doctrine can all be traced back to the nineteenth century, and most of them to the early years of the republic.169 Many of them evolved during the ascendancy of ideas that are no longer important or even relevant in American jurisprudence—including natural law ideas and the pre-Erie conception of the common law—and in a period when the U.S. was a small, weak nation whose foreign policy was inward-looking and in some ways isolationist. The national government was weaker relative to the states, and the presidency was weaker relative to Congress, than they are today.170

To say the least, things are almost unimaginably different today. The vast changes in foreign policy, the greater relative power of the United States, the institutional structure of American government, and ways of thinking about law suggest, at the least, that the international relations principles need to be reconceived. We offer here a brisk overview of the relevant developments. The basic point is that Chevron represents a clear judicial recognition of changing developments in the domestic domain; a parallel shift, recognizing interpretive power for the executive, might well be taken as a recognition of related developments on the international side. Indeed, the latter shift, in the domain of foreign affairs, is far simpler to explain and to defend than the former one. In these circumstances, the real oddity is that domestic law has been “Chevronized” whereas foreign relations law has not been.

It is a commonplace that the rise of the administrative state in the twentieth century revolutionized constitutional law.171 Under nineteenth century constitutional law, it was assumed that while Congress would regulate the national market, most important domestic issues would be controlled by states and municipalities; these included labormanagement relations, environmental protection, commercial fraud, antitrust problems, workplace safety, and much more.172 Massive technological change in the late nineteenth century -- and the emergence of an industrialized, interdependent, highly urbanized national economy -- undermined this allocation of authority. In the twentieth century, courts and the political branches ultimately agreed that much regulation would need to occur at the national level, despite the losses to local control and other federalism values.173 They also agreed that although the executive usually could not act without congressional authorization,174 broad delegations of regulatory authority to the executive were necessary and permissible because of the many institutional advantages of the executive, including specialization and a capacity for rapid change over time.175 Chevron itself can be seen as a culmination of this development. Indeed, the decision is a natural product of the repudiation of judge-made common law and of the large-scale shift to lawmaking by executive institutions.176

It is easy to see a parallel process occurring in foreign relations law, though with one wrinkle.177 The wrinkle is that the framers agreed that the national government’s foreign relations powers would be less restricted than its domestic relations powers, and so formally the national government has had a freer hand from the beginning.178 The major change was thus in the realm of separation of powers, and specifically the massive increase in the executive’s foreign affairs power relative to that of Congress.179 Critics of this transformation greatly fear executive overreaching,180 and there is reasonable dispute about the extent of this risk and about how best to limit it; but critics and supporters agree that changes in the global environment justify at least some expansion of executive powers. A modern president, unlike George Washington, needs to be able to respond quickly to intercontinental ballistic missiles, cyberattacks, terrorist attacks, global financial crises, and other dangers that will not wait for Congress to act. The critics of broad executive power have not argued that ambiguities in federal statutes should be construed by judges, rather than by the President and those who operate under him.

### Extraterritoriality AFF: ATS Advantage

#### Extraterritoriality determines the scope of Alien Tort Statute enforcement.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

The application of the presumption to an ATS case was not out of nowhere, but it did not have a long pedigree. Although at one time the United States government argued that the presumption against extraterritoriality should limit the ATS, 251 and an occasional judge adopted this view,252 courts did not endorse the application of the presumption to the ATS before Kiobel. In Sosa v. Alvarez-Machain, for example, the Supreme Court was presented with the argument that the presumption limits the ATS, and not a single Justice endorsed it.2 53 And many extraterritorial ATS cases had been litigated in federal courts. 254

There are sound doctrinal reasons that the presumption against extraterritoriality should not apply to ATS cases. Unlike the statutes to which the presumption has been applied, the ATS is a "strictly jurisdictional" statute. 255 The presumption against extraterritoriality never had been applied to a jurisdictional statute prior to Kiobel.256 Moreover, the torts for which the ATS grants jurisdiction are common law causes of action, not statutory ones, 257 and the presumption is explicitly a tool of divining congressional intent in substantive statutes.258 The ATS is simply not the type of statute to which the presumption had been applied, not to mention the various historical arguments that would seem to undermine the presumption's role with respect to this statute. 259 But the Supreme Court sees the issue differently, so if this Article seeks to replace the presumption in all its forms, the ATS must be addressed as well.

#### There’s a real and recent controversy over whether ATS should be expanded or if other laws are more suitable.

Mulligan 22 – (Stephen P. Mulligan, Legislative Attorney; 1-11-2022, Congressional Research Service, "The Alien Tort Statute: A Primer," doa: 4-18-2022) url: https://sgp.fas.org/crs/misc/R44947.pdf

After nearly two centuries of relative obscurity, the ATS emerged as a prominent legal mechanism for human rights and terrorism-related litigation after the Second Circuit’s decision in Filártiga. 215 While many suits premised on the ATS were filed by foreign nationals in the aftermath of Filártiga, the Supreme Court has never ruled in the plaintiff’s favor in an ATS case.216 Instead, the Court placed significant limitations on the scope of viable ATS claims through decisions in Sosa, Kiobel, Jesner, and, most recently, Nestlé. 217 Some commentators see the Supreme Court’s ATS jurisprudence as having limited the statute’s jurisdictional reach so significantly as to result in the end of the ATS’s era of importance.218 Others interpret the Court’s rulings as having left the door open for certain limited categories of cases against natural persons or U.S. corporate defendants.219

According to the Supreme Court, “Congress is well aware of the necessity of clarifying the proper scope of liability under the ATS[,]”and “further action from Congress” is needed before courts may expand ATS jurisdiction beyond its 18th century roots. 220 Despite the Court’s suggestion that the legislative branch should consider clarifying the ATS, there have been infrequent discussions in Congress to amend the statute. 221 In the 109th Congress, the Alien Tort Statute Reform Act would have amended the ATS to, among other things, specify six violations of international law that are actionable under the statute,222 but no congressional action was taken on the bill, and similar legislation amending the ATS has not since been introduced.

Commentators have suggested a variety of ways to amend the ATS to address disputes raised in litigation. Observers’ proposals include legislation that: specifies the actionable violations of international law; 223 provides that the ATS applies to conduct overseas; 224 or expressly makes corporations subject to ATS jurisdiction.225 Other commentators suggest that the ATS has been an ineffective avenue to address human rights abuses, and Congress should focus on other legislative initiatives, such as crafting alternative dispute resolution procedures 226 or mandating corporate supply chain due diligence to ensure that companies do not benefit from labor practices that violate international law. 227

### FNC AFF: State Removal Mechanism

#### Congress should amend removal statute to require remand to state court when a federal court dismisses on FNC grounds.

Springer 15—(JD Candidate at UPenn). Brian J. Springer. 2015. “An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants To Escape State Court Jurisdiction”. University of Pennsylvania Law Review. <https://www.pennlawreview.com/wp-content/uploads/2020/04/163-U-Pa-L-Rev-833.pdf>

INTRODUCTION

Imagine you are a foreign citizen. You have been injured in a foreign country due to the negligence of a U.S. company and have a legitimate tort claim for millions of dollars against the company. You file suit in the state court in Missoula, Montana—located at 200 W. Broadway, Missoula, Montana 59802.1 The defendant company removes the case, on the basis of diversity of citizenship, to the United States District Court of Montana— located at 201 E. Broadway, Missoula, Montana 598022—and argues that the case should be dismissed under the doctrine of forum non conveniens. The state court probably would not have granted the motion, but rather would have allowed the case to proceed to the merits.3 But now that the case has been moved just two blocks away4 to a federal district court, that court can exercise its discretion under federal forum non conveniens doctrine and dismiss the case.5 This sequence of events does not occur infrequently.6

Because almost every federal court applies federal forum non conveniens law in diversity cases,7 defendants can remove cases to federal court solely for the purpose of getting them dismissed on forum non conveniens grounds. In cases where a state would not dismiss under its own forum non conveniens doctrine, it is unfair for defendants to exploit removal to obtain dismissal. Allowing defendants to engage in this practice undercuts the rights of the parties and undermines the purpose of the forum non conveniens doctrine.

The appropriate remedy is for courts to find that defendants who remove from state court waive their right to argue forum non conveniens in federal court when the state would not have dismissed the case under its forum non conveniens law. This would prevent the injustice of defendants using removal as a mechanism for dismissal. However, courts may be unwilling to adopt waiver. Ultimately, I propose that Congress remedy this injustice by amending the removal statute to permit remand to the state court when the federal court dismisses on forum non conveniens grounds.

In this Comment, I discuss the inequities of the current system and why my proposal would remedy this injustice. In Part I, I trace the development of the forum non conveniens doctrine and delineate its importance in cases today. In Part II, I explain how the decision of most federal courts to use federal forum non conveniens law in diversity cases creates an inequity that has effects beyond the forum non conveniens inquiry. Finally, in Part III, I propose that the proper remedy is to impute waiver of forum non conveniens arguments to defendants who remove a case from a state that would not have dismissed under its forum non conveniens doctrine. The courts could do this themselves by adopting waiver into the common law. But ultimately, to remedy this inequity, Congress should amend the removal statute to require remand to state court, rather than outright dismissal, when a federal court concludes that it is an inconvenient forum.

### FNC AFF: Adequacy Mechanism

#### FNC should only apply when there exists a realistically adequate alternative.

Jernigan 8—(JD Candidate at University of Texas School of Law). Finity Jernigan. April 2008. “Forum Non Conveniens: Whose Convenience and Justice?”. Texas Law Review Vol. 86:1079. <https://www.corteidh.or.cr/tablas/R08080-4.pdf>.

Many cases analyzing forum non conveniens have found its adequate alternative-forum requirement is satisfied merely because a defendant is amenable to process in a proposed alternative jurisdiction. As a result, U.S. courts have come to use the doctrine of forum non conveniens to dismiss cases despite the fact that no adequate alternative forum can or will actually hear the plaintiffs’ claims. In Abdullahi v. Pfizer, Inc., the Southern District of New York dismissed one such case after finding Nigerian courts were adequate to hear tort claims against a U.S. corporate defendant. If the court had undertaken a deeper inquiry into the realistic adequacy of the Nigerian forum, the outcome on this issue would likely have been different. This Note proposes that the mere existence of another forum that could theoretically hear the plaintiffs’ claims is not sufficient to meet the adequate-alternative-forum test. First, this Note suggests that U.S. courts should decide whether an alternative forum realistically—rather than theoretically—exists for the plaintiffs. Specifically, unless a U.S. court is convinced that another forum can and likely will provide a timely, fair, and impartial remedy, the court should not relinquish its obligation to exercise its jurisdiction by granting a forum non conveniens dismissal. Second, this Note discusses how comity considerations favor a realistic evaluation of the proposed alternative forum. This approach would prevent courts from using forum non conveniens to allow a defendant’s convenience to outweigh a plaintiff’s right to litigate his claims in the only forum where it is realistically possible to do so.

I. Introduction

In evaluating an American defendant’s motion to dismiss on the ground of forum non conveniens, federal courts should give more consideration to whether an adequate alternative forum is actually available. For example, if a U.S. federal court has jurisdiction over a defendant U.S. corporation, a foreign plaintiff’s claim should not be dismissed on the ground of forum non conveniens unless the defendant can demonstrate that an adequate alternative forum actually exists. An alternative forum is only adequate if, in addition to having jurisdiction and a legal basis to hear the plaintiff’s claims, the forum is also able and willing to provide a realistic remedy by hearing the claims in a timely, fair, and impartial manner. According greater weight to the actual adequacy or inadequacy of an alternative forum is a more probing inquiry than merely asking whether less favorable law applies in the proposed alternative forum, which Piper Aircraft Co. v. Reyno1 held is an insufficient ground for a forum non conveniens dismissal.2

Part II of this Note begins by explaining the history and decisions in a case brought by numerous Nigerian plaintiffs in the Southern District of New York against Pfizer Pharmaceutical Company based on Pfizer’s allegedly tortious conduct in testing an experimental drug, Trovaflozacin Mesylate, or Trovan, on Nigerian children during an outbreak of meningitis in Nigeria.3 Part III discusses the development and current application of forum non conveniens in the United States, including the two-part test courts use to analyze forum non conveniens: (1) whether an adequate alternative forum exists and (2) if so, whether the balance of private- and public-interest factors points to dismissal. Subpart III(C) acknowledges that the current application of this balancing test is itself inadequate, particularly because it often focuses on the private interests of the parties—specifically U.S. defendants—to the exclusion of U.S. public-policy interests. Although this Note will suggest that public-policy considerations should weigh heavily in this balancing test, especially when they relate to a forum’s actual adequacy, a rich literature details the private- and public-interest factors, which are largely beyond the scope of this Note and will not be discussed in great detail.

Both U.S. courts and literature have seriously neglected the question of adequacy. Part IV proposes that forum non conveniens dismissals should depend on whether a realistically adequate alternative forum is available. If no adequate alternative is available, courts should not even engage the private-and-public-interest-factor balancing test described in subpart III(C). In Abdullahi v. Pfizer, Inc.4 and a well-developed line of similar cases, U.S. courts have presumed that a court is adequate if it can legally assert jurisdiction or the defendant has agreed to subject itself to the court’s jurisdiction.5 Yet, the adequacy requirement additionally demands that parties not be deprived of all remedies or treated unfairly.6 By failing to consider what realistically will or will not occur in an alternative forum, courts misapply the forum non conveniens test and in so doing neglect their unflagging obligation to exercise the jurisdiction with which they are entrusted.7

## AFF: Offcase Ans

### General AFF: CP Ans—US Key

#### US law is key.

Eible 19 – (Matthew J. Eible, Duke University School of Law, J.D. / LL.M. in International & Comparative Law; 2019, Duke Law Journal, Vol. 68, "Making Forum Non Conveniens Convenient Again: Finality And Convenience For Transnational Litigation In U.S. Federal Courts," doa: 4-19-2022) url: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3974&context=dlj

Additionally, forum selection for transnational litigation is especially important when one of the potential forums is a U.S. federal court.31 Jury trials, contingency fees, broad discovery, high damages awards (including punitive damages), and the fact that each party typically covers its own attorneys’ fees are all distinguishing features of litigation in a U.S. forum compared to litigation elsewhere in the world.32 These characteristics tend to be plaintiff friendly,33 and they have resulted in the general idea that “[a]s a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”34

#### US is key.

Sunstein 6—(\*Kirkland & Ellis Professor of Law, University of Chicago; \*\*Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago). \*Cass R. Sunstein & \*\*Eric A. Posner. June 2006. “Chevronizing Foreign Relations Law”. University of Chicago Public Law & Legal Theory Working Paper Number 128. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1054&context=public_law_and_legal_theory>.

E. A Historical Evolution

Many of the international relations principles are very old. The Charming Betsy doctrine, the presumption against extraterritoriality, international comity, foreign sovereign immunity, the penal and revenue rules, and the act of state doctrine can all be traced back to the nineteenth century, and most of them to the early years of the republic.169 Many of them evolved during the ascendancy of ideas that are no longer important or even relevant in American jurisprudence—including natural law ideas and the pre-Erie conception of the common law—and in a period when the U.S. was a small, weak nation whose foreign policy was inward-looking and in some ways isolationist. The national government was weaker relative to the states, and the presidency was weaker relative to Congress, than they are today.170

To say the least, things are almost unimaginably different today. The vast changes in foreign policy, the greater relative power of the United States, the institutional structure of American government, and ways of thinking about law suggest, at the least, that the international relations principles need to be reconceived. We offer here a brisk overview of the relevant developments. The basic point is that Chevron represents a clear judicial recognition of changing developments in the domestic domain; a parallel shift, recognizing interpretive power for the executive, might well be taken as a recognition of related developments on the international side. Indeed, the latter shift, in the domain of foreign affairs, is far simpler to explain and to defend than the former one. In these circumstances, the real oddity is that domestic law has been “Chevronized” whereas foreign relations law has not been.

#### More evidence.

Sorensen 3—(JD from University of Nebraska). Theodore Sorensen. 2003. “International Jurisprudence: The Best and Worst of Times”. Brandeis Institute for International Judges program in Salzburg, Austria. <https://www.brandeis.edu/ethics/about/sorensen/sorensen-keynote-biij.html>

They did not need to worry. In over 35 years of travel abroad as a lawyer, I was quite careful not to criticize my government or my country's policies while abroad. And I made it a practice not to talk about a particular administration unless I could speak well of it. That might eliminate my speech entirely tonight. The fact is that the United States — in the field of international jurisprudence, as in virtually every other field, due to the preponderance of weapons, wealth and other materials that the United States possesses — is the 800-pound gorilla. You all know the story about the couple that claimed they had, as a pet, an 800-pound gorilla in their New York apartment. They were asked "Where does he sleep?" The answer: "Anywhere he wants!"

The United States follows that policy almost exactly. They demonstrated it most recently this month with the announcement that they — by they I mean the leaders of my country — are cutting off military assistance. That means money for arms, equipment, training, education, to 35 countries who have refused to grant immunity to any United States citizens who commit genocide, or other crimes against humanity, on their territories. Those 35 countries are those that subscribed to what I regard as the most important and the most exciting institutional development in the world of international law — the new International Criminal Court.

### General AFF: CP Ans—Multilat Fails

#### AFF is a pre-requisite to the multilat/bilat counterplan.

Vibert 21—(Associate of the Centre for the Analysis of Risk and Regulation at the London School of Economics, Graduate of Oxford University). Frank Vibert. 2021. “Comity: Multilateralism in the New Cold War”. Edward Elgar Publishing. https://doi.org/10.4337/9781800889354.

Rulemaking by like-minded groups adds a further layer of complexity to the already incoherent space of international rulemaking. For both expressive and defensive reasons, the motivation for like-minded groups to take action with intended external effects is likely to grow. The groups can both avoid some of the weaknesses of unilateralism while at the same time avoiding the ineffectiveness of the fully international. Their rulemaking can set an example for others to follow. The group can establish rules that can be adopted in a wider circle outside the group and eventually on a fully international basis. Against this aspiration stands a long-standing warning, with deep historical roots drawn from legal pluralism, that relationships between side-by-side jurisdic-tions do not end in convergence but in conflict.

The academic literature on the perils of legal pluralism identifies two different types of conflict. The first involves a direct clash of principles — for example. those invoked in shaping the market to reflect concerns about the environment or privacy. Secondly, the conflict may take the form of a 'crowd-ing out' effect. For example. rulemaking by smaller like-minded groups might be seen as having the effect of pushing aside the aspirations for building a fully international rule of law. The fear of 'crowding out' is of less concern where like-minded groups hope to set an example for others to adopt. However, the potential for direct clashes with other jurisdictions remains. Comity places attention precisely on the need to find a means to govern disputes involving a clash of principles between different jurisdictions.

The 'dualist' structure of the EU provides a formal framework to contain the potential clash between the scope of EU jurisdiction and the role of the courts in member states in protecting their own constitutional principles. In the case of international rulemaking, a formal structure is missing. Conflict avoidance depends on a judgemental use of principles for handling normative interrelationships. Thus, the different norms that can help manage relationships and mitigate unnecessary frictions between rival jurisdictions with contending values become critical.

#### Fails—capture, lack of consensus, rollback

Vibert 21—(Associate of the Centre for the Analysis of Risk and Regulation at the London School of Economics, Graduate of Oxford University). Frank Vibert. 2021. “Comity: Multilateralism in the New Cold War”. Edward Elgar Publishing. https://doi.org/10.4337/9781800889354.

Warnings: capture

The traditional warning that the powerful will end up dominating when differ-. lit jurisdictions operate in the same space has two aspects. The first applies dominant powers outside the group. The implication is that like-minded toloops will not be able to extend their rulemaking to those outside the group in the face of strong opposition. The international space will divide into different raleinaking enclaves.

The traditional response to this lies in the formation of alliances. Like-minded ,zroups can look to extend their influence by forming and extending cohesive alliances. This response is referred to later in the conclusions to the analysis.

The second aspect refers to dominant participants within the group. As discussed earlier, the key defence against the most powerful members of a group lies in the consensus or unanimity rule for taking decisions. In addition, the flexibility given to each participant in choosing how to implement an agreement also provides further protection against the imposition of unequal costs. However, neither of these responses to warnings about the role of dom-inant players, either inside or outside the group, applies to a different form of dominance in rulemaking — power at the level of people and, in particular, the dominance of technocrats.

The strength of like-minded groups lies in their bringing together congruent professionalism. Congruent professionalism is also where their critical weak-ness lies. The source of the vulnerability flows from the high degree of discre-tion that rests with professional practitioners in the making of the rules. It is a weakness that applies to international rulemaking in general but applies with particular force to like-minded groups. Lightly institutionalised arrangements give pride of place to the technocratic world of professional practitioners and brings with it the concomitant danger of ceding too much power to professional technocrats. When we think of who wields power in international rulemaking we tend to think of power in terms of states. However, the key to building a consensus within like-minded groups rests with the professional practitioners themselves. It is their power and dominance that needs to be assessed.

DISCRETION AND THE LAYING ON OF HANDS

Anyone who has sat through international meetings of government ministers very quickly becomes aware that ministers are unlikely to be experts in the subject under consideration. They have risen to their position for 1.\_ do with their political skills..Such skills come in many forms. The a`b4-ii.o.ns to interpret and mobilise a public mood, or to explain. a position to the Pubit.les to be able to judge what is acceptable to the public, may all be admirable essential qualities in a politician. But they do not confer mastery of a % - Sometimes there are exceptions. Cabinet-level appointments under a p.m tial system of government may offer more space for appointees who are fessionally qualified in their area of responsibility. However, even this assured. President Biden's cabinet picks illustrate the importance of b political criteria such as balancing the different factions, interests and within a political party)

Capable politicians will provide their officials with a general sense of direction. They will select an item from the menu and leave the official experts to do the cooking. Less capable ministers will simply be lookin a policy or problem 'fix'. However, to a large extent even capable mini are in the hands of the professionals, the officials and the experts who done the groundwork for an international meeting and laid the basis to agreement. The cooks will determine what is on the menu. At best, a min\* may have mastered a brief prepared by their officials seated in the row behind.

The key contribution a minister makes to meetings at the international level is to make a policy commitment, in front of other governments, on behalf the government to which they belong. Sometimes, senior officials can do on behalf of a minister. On the most important matters, a minister is involve If the minister is not ready to commit their government, then there will be n agreement. A commitment represents a promise to take the next steps. Th' may involve executive or legislative action in the state concerned. The prom to take these next steps represents a laying on of hands — a secular blessing o the agreement. Ministerial meetings are ceremonial more than substantive.

A Discretionary Space

Governments typically allow a considerable degree of discretionary authority in providing general policy guidance to officials. The negotiations take place at a distance from their publics and in a patchwork of different institutions whose functions may not be generally recognised and that are known, if at all, only by their acronyms. What the acronyms, such as `G7' or TATF', actually stand for may be a mystery to the public. Democratic governments know that there is a possibility of pushback from their constituents. Nevertheless, "eir, publics rarely engage with matters that are seen to belong to 'foreign policy, even when the subjects involve them closely — for example, on matters ot, health policy, or the privacy of personal communications or the security °I their financial system. What governments are looking for are outcomes that are in some general way 'convincing' to their publics.' 'Convincing' outcomes are Apni 11000 ins° • ns to the public of 'doing something' that enable governments to blame or to take credit.

When like-minded groups get together to seal their agreements an even it latitude for governmental discretion is likely to prevail than in full gre-rn-eratonai gatherings. Agreements arc less than full international agree' °Int, under international law: at the same time, they arc made outside normal cinol mestie law-making procedures. Since the groups agreements are likely to be limited to declarations of intent, the procedures for the domestic review of the agreement itself may be less rigorous than in the case of fully international treaty agreements. Democratic governments know, when faced by pushback, that they may have to explain what they have agreed to their domestic audience and to show that they have acted in a way to defend and to project values consistent with the core values of their society. Nevertheless, the fact that something has been aereed at an international level is often presented as a factor that itself confers a legitimacy on the government's decision and follow-up actions. Thus, they remain able to operate with considerable latitude. It is the size of the discretionary space for rulemaking in like-minded groups that prompts warnings.

TWO WARNINGS

There are two general warnings. The first is about the dangers of 'instrumentalism\* or goal-focused rulemaking. The second is about the potential for the 'capture' of the system by expert elites.

Instrumentalism

The first warning about rulemaking in like-minded groups is that because what they are trying to achieve is generally well-intended, the means to the end get overlooked. 'Instrumentalism' means that the focus of efforts among those Involved is on the end results to be achieved. The agreement itself is simply an Instrument. In this setting the authority of the collective membership to make agreements, and to arrive at understandings, is taken as a given. There is no Introspective questioning of where authority has come from, or what it requires to gain legitimacy.

A special focus of these warnings is on the techniques of agreement dis-cussed earlier. The understandings, guidelines and recommendations appear to be advisory and exhortatory. But in practice, like-minded governments will implement their common understandings through firmly binding domestic law. The techniques can be viewed as stealth tactics designed to evade serious scrutiny.

Capture

The second warning. about 'capture', refers to situations where the levers of pulled by those outside politics and whose own position of political power and influenceis not derived from the prescribed procedures 0f. political power are politics. . ascribed to the world of business interests and lobby.

Capture is typically ascribed to the world of business interests and lobbyists.3 We can think of the Russian oligarchs surrounding Putin, or the billionaire families around the leadership of the Chinese communist party, or the lobbyists lining K Street NW in Washington DC.

However, the capture of political power by business interests is only one form of capture. In the context of international rulemaking, it is capture by the professionals and experts who inhabit this world that is the relevant form. It has increasing eassainidgthat the 'true' democratic deficit in international rulemaking is the influence of an unelected, unaccountable, global technocratic elite.4

The two warnings about 'instrumentalism' and 'capture' are linked. Within the rulemaking setting all the different classes of professionals have an incen-tive to work together. Theorists usually want to see advances in their under-standing of a field accepted by others and having an influence. Practitioners want to apply new understandings. Professional administrators want to show that their institution is relevant. Policy advisors want to be able to offer persua-sive policy responses for politicians to consider. Politicians do not want to be told just that there is a problem. They also want to be told there is a solution. Everyone benefits from working towards an agreement. As a consequence, one of the main risks of the world of like-minded groups is that there is too much togetherness among the actors involved. In the shared interest of reaching agreement among themselves they may lose sight of the public interest they are meant to serve.

There are two important implications for like-minded groups that flow from these warnings. Firstly, a focus on the goal of reaching internal consensus within the group and the cohesiveness among the professional participants may limit the policy options being considered. In particular, the in-group may not look at the consequences for those outside. The result could be that it will tional setting. be difficult to extend agreements reached within the group to a wider international setting.

Secondly, both warnings are relevant to concerns about the legitimacy of rulemaking in like-minded groups. Any lack of concern about the basis of the authority of the groups and any overlooking of the need to observe the standards of representative democracy on such matters as transpareny, consultation and review will undermine the legitimacy of their efforts.

Since these two warnings share common links, the analysis in this chapter focuses especially on the danger of capture. pt PROFESSIONAL CAPTURE Professional capture is about how the experts and officials in the world of rule-making join together in what is sometimes referred to as a 'linked ecology'.5 They have a shared incentive to link together in order to convert superior expertise and information from the knowledge world into practical authority in the world of law and rulemaking. They are not part of the representative branch. Their influence rests on their professionalism.

#### Fails—not enforced.

Vibert 21—(Associate of the Centre for the Analysis of Risk and Regulation at the London School of Economics, Graduate of Oxford University). Frank Vibert. 2021. “Comity: Multilateralism in the New Cold War”. Edward Elgar Publishing. https://doi.org/10.4337/9781800889354.

In July 2016 an international arbitration tribunal in The Hague, conven under the UN's International Convention on .the Law of the Sea, delivered a judgement against China's territorial claims in the South China Sea. It fouend, that China's claims, registered in the form of a dotted line around the disput-e'd area, were without foundation. It also ruled against China's occupation of two islands within the disputed area.

China reacted by rejecting the ruling and the legitimacy of the tribunal. The judgement has not been enforced. China continues to build its military presence on the disputed islands. In this case there is a straightforward clash between the jurisdictional claims of a state and the jurisdictional claims of international law. It is a traditional case of power politics and territorial claims pitted against the ideal of an international rule of law.

Rulemaking by a like-minded group adds yet another layer of potential tension. The group operates in the space between fully international law and the state. It is defending its own values in international rulemaking. In addition, it aims to actively assert its own standards through a mix of positive incentives and penalties. These standards are not about territorial claims. They are about the values that should be observed in international transactions and relation-ships. They may still provoke an active rejection. The traditional warning that side-by-side relationships end, inevitably, in conflict seems fully justified.'

### General AFF: Clog Ans

#### AFF link turn.

Chachko et al. 20 - (Elena Chachko, Lecturer on Law, Harvard Law School; Postdoctoral Fellow, Perry World House, University of Pennsylvania; 2-21-2020, Fordham University School of Law’s International Law Journal, "The Judicial Power and US Foreign Affairs," doa: 4-29-2022) url: https://www.fordham.edu/download/downloads/id/14406/ilj\_judicial\_power\_materials.pdf

Finally, the defendants note that this case ‘‘is not a typical, garden variety lawsuit—it raises significant substantive and procedural issues and challenges that could prove to be a substantial drain on the Court’s resources.’’ Defs.’ Mem. at 33 (citing MBI Grp., Inc. v. Credit Foncier du Cameroun, 558 F.Supp.2d 21, 34 (D.D.C. 2008) (‘‘The administrative difficulties of trying this case in a forum thousands of miles away from the majority of witnesses and the evidence are obvious.’’ (internal quotations and citations omitted))). The plaintiffs counter that ‘‘[t]here is no evidence that Hungarian courts are less congested than this Court,’’ and assert that the defendants ‘‘fail to specify why this factor weighs in their favor.’’ Pls.’ Opp’n at 40. Given the size of the class the plaintiffs seek to certify, the age of the claims, relevant witnesses and documents, and the location, language, and condition of much of the evidence in this case, the administrative burden posed on this Court is not insignificant. Those burdens would be somewhat lessened on the Hungarian courts, based on Hungary’s status as the location where all of the conduct giving rise to this litigation occurred, with familiarity with the language and proximity to archived documents and available witnesses.

### General AFF: SOP DA Ans

#### No separation of powers DA.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

The separation of powers justification of the presumption fails for a few reasons, even putting aside charges that the courts should not abdicate their role in foreign affairs.94 Beginning with the judicial-activism critique, critics worry that courts might extend extraterritorially those statutes that Congress intended to be territorial. But, by this logic, courts also would engage in judicial activism when they constrain territorially those statutes that Congress intended to be extraterritorial. 95 The presumption against extraterritoriality is supposed to be used only when congressional intent is unclear, so by definition it is ambiguous whether applying the statute territorially or extraterritorially would be the "activist" position.96 This theoretical objection is made more serious in practice. Because the courts have required a fairly strong showing of congressional intent to overcome the presumption,97 there will be cases where courts override strong, but less than "clear," evidence of congressional intent. Professor Brilmayer, in her scathing critique of Morrison, argues that Justice Scalia's opinion did just that - "marginalize[d] Congress and then showcase[d] judicial creativity." 98

The executive's place in the separation of powers also challenges the presumption.99 It is commonplace to remark on the executive's central role in foreign affairs; the Supreme Court famously commented in Curtiss- Wright about "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." 00 But judges repeatedly have ignored the views of the executive branch in favor of the presumption against extraterritorially. In Aramco, the Supreme Court rejected the opinion of the Equal Employment Opportunity Commission (EEOC) when it held that Title VII should not be applied extraterritorially,' 0 and recently the Ninth Circuit relied on Morrison to reject the Department of Labor's interpretation that a federal worker's compensation statute had an extraterritorial effect.102 In these decisions, the courts rejected the position of the executive branch directly. They also may have rejected the position of the legislative branch indirectly if Congress intended to delegate the interpretive task to the executive.103 In short, if the presumption is intended to respect the decisions of the political branches - legislative and executive - it needs work.

## NEG: By Area

### Extraterritoriality NEG: Securities

#### Extraterritorial application of US securities laws risks international backlash.

The Economist 19—(British weekly news magazine). January 19, 2019. “The trouble with America’s extraterritorial campaign against business”. The Economist. <https://www.economist.com/leaders/2019/01/19/the-trouble-with-americas-extraterritorial-campaign-against-business>.

The United States leads the world in punishing corruption, money-laundering and sanctions violations. In the past decade it has increasingly punished foreign firms for misconduct that happens outside America. Scores of banks have paid tens of billions of dollars in fines. In the past 12 months several multinationals, including Glencore and zte, have been put through the legal wringer. The diplomatic row over Huawei, a Chinese telecoms-equipment firm, centres on the legitimacy of America’s extraterritorial reach (see article).

America has taken it upon itself to become the business world’s policeman, judge and jury. It can do this because of its privileged role in the world economy. Companies that refuse to yield to its global jurisdiction can find themselves shut out of its giant domestic market, or cut off from using the dollar payments system and by extension from using mainstream banks. For most big companies that would be suicidal.

Wielding a stick is often to be applauded. Were it not for America’s tough stance against fifa, for instance, the dodgy officials who ran world football would not have been brought to book. But as the full extent of extraterritorial legal activity has become clearer, so have three glaring problems.

First, the process is disturbingly improvised and opaque. Cases rarely go to court and, when they are settled instead, executives are hit with gagging orders. Facing little scrutiny, prosecutors have applied ever more expansive interpretations of what counts as the sort of link to America that makes an alleged crime punishable there; indirect contact with foreign banks with branches in America, or using Gmail, now seems to be enough. Imagine if China fined Amazon $5bn and jailed its executives for conducting business in Africa that did not break American law, but did offend Chinese rules and was discussed on WeChat.

Second, the punishments can be disproportionate. In 2014 bnp Paribas, a French bank, was hit with a sanctions-related fine of $8.9bn, enough to threaten its stability. In April zte, a Chinese tech firm with 80,000 employees, was banned by the Trump administration from dealing with American firms; it almost went out of business. The ban has since been reversed, underlining the impression that the rules are being applied on the hoof.

Third, America’s legal actions can often become intertwined with its commercial interests. As our investigation this week explains, a protracted bribery probe into Alstom, a French champion, helped push it into the arms of General Electric, an American industrial icon. American banks have picked up business from European rivals left punch-drunk by fines. Sometimes American firms are in the line of fire—Goldman Sachs is being investigated by the doj for its role in the 1mdb scandal in Malaysia. But many foreign executives suspect that American firms get special treatment and are wilier about navigating the rules.

America has much to be proud of as a corruption-fighter. But, for its own good as well as that of others, it needs to find an approach that is more transparent, more proportionate and more respectful of borders. If it does not, its escalating use of extraterritorial legal actions will ultimately backfire. It will discourage foreign firms from tapping American capital markets. It will encourage China and Europe to promote their currencies as rivals to the dollar and to develop global payments systems that bypass Uncle Sam. And the doj could find that, having gone all guns blazing into marginal cases, it has less powder for egregious ones. Far from expressing geopolitical might, America’s legal overreach would then end up diminishing American power.

### Extraterritoriality NEG: Chevron/SOP DA

#### ‘Chevronizing’ comity is a terrible idea—executive flexibility is bad.

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.

B. The Role of the Executive Branch

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

With other comity doctrines, the question is more complicated, and it may be useful to draw some distinctions. As Curtis Bradley notes, “[s]ome forms of deference may be more defensible than others.” 366 On the one hand, the executive branch plainly has authority to make some decisions that affect the application of international comity doctrines. The President may recognize a foreign government, for example, or an agency may interpret the geographic scope of a statute it administers. Such decisions tend to be made categorically, outside the context of litigation. On the other hand, one should be skeptical of doctrines that allow the executive branch to dictate the outcomes of particular cases on foreign policy grounds. Such discretion invades the province of the judiciary and may harm, rather than advance, U.S. foreign relations.367

Least problematic is the Executive’s authority to determine particular facts on which some comity doctrines turn. For example, the President has unreviewable authority to recognize foreign governments.368 The act of state doctrine applies only to “the public acts [of] a recognized foreign sovereign power,” 369 and the recognition of a foreign government by the Executive will bring its previous acts within the scope of that doctrine.370 Recognition automatically confers the privilege of bringing suit in U.S. courts as a matter of comity, at least in the absence of a state of war with the United States.371 A strong case can be made that the President’s recognition should also control a foreign state’s entitlement to immunity under the FSIA. Lower courts have generally applied international law to decide if a defendant is a “foreign state” under the Act,372 but as the First Circuit has pointed out, this may not be the best approach.373 Under the FSIA, Congress has also given the State Department express authority to permit terrorism suits against foreign states by designating them “state sponsor[s] of terrorism.” 374 There is also nothing inappropriate about having doctrines of status-based foreign official immunity—like diplomatic immunity and head-of-state immunity—turn on the President’s recognition of a foreign official’s status.375 In a sense, all of these doctrines defer to the executive branch. But they do so by attaching legal consequences to an exercise of executive authority made outside the context of litigation, rather than by deferring to the Executive’s judgment about whether any particular case should be dismissed. The Supreme Court captured the distinction in its 1938 Guaranty Trust decision.376 The Executive’s “action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts,” the Court noted.377 But the courts “are free to draw for themselves its legal consequences in litigations pending before them.” 378

Another common exercise of executive branch authority is for an agency to interpret a statute it administers.379 Posner and Sunstein correctly argue that courts should defer to agency interpretations of the geographic scope of federal statutes.380 The reasons for this are the ordinary reasons for Chevron deference—that an ambiguous statute should generally be read as a delegation of interpretative authority to an agency that administers it and that administrative agencies have special expertise with respect to statutory goals and how best to achieve them. But it is critical to emphasize that Chevron deference is deference to the interpretation of a statute to be applied across a whole range of cases, and not deference with respect to how any particular case should be resolved.

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

With respect to foreign official immunity, the executive branch has claimed authority to make binding determinations since the Supreme Court’s 2010 decision in Samantar. 382 For status-based immunities, this authority derives from the President’s recognition power and is uncontroversial, but there is no “equivalent constitutional basis” for determinations of status-based immunity.383 Nevertheless, the Fourth Circuit gives State Department determinations of conduct-based immunity “substantial weight,” 384 while the Second Circuit considers them absolutely binding.385

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

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

Posner and Sunstein do not discuss any of these examples in detail,393 but they come down firmly on the side of case-specific deference to the executive branch. Even outside the Chevron context, they argue, courts should defer “if the executive branch argues that the court should dismiss the case rather than reach the merits.” 394 “[T]he argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive’s accountability for foreign relations is more important than the courts’ independence from political pressure.” 395 But Posner and Sunstein elide some key distinctions between Chevron deference and case-specific deference and fail to respond to the two main normative arguments against a case-specific role for the executive branch in administering the doctrines of international comity.

First, as Justice Kennedy pointed out in his Altmann dissent, “judicial independence” is compromised when the Executive has the power to make “case-by-case, selective determinations” that dictate the outcome of cases.396 Justice Douglas once made the point more colorfully in an actof-state case, writing that such discretion makes the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.” 397 Testifying before Congress in favor of the proposed FSIA, State Department Legal Adviser Monroe Leigh said that the State Department’s “consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.” 398 Deferring to an agency’s interpretation of the geographic scope of a statute under Chevron respects the established roles of Congress, the executive branch, and the courts.399 Allowing the Executive to tell courts which cases to dismiss does not. Thus, the Supreme Court properly rejected the U.S. government’s argument in Kirkpatrick that the act of state doctrine should bar adjudication whenever the Executive determined that a case would cause too much embarrassment to a foreign government.400 “The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.” 401

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

This was the U.S. experience with respect to foreign state immunity from the 1940s, when the Supreme Court adopted a rule of deferring to determinations of immunity by the State Department,404 until Congress passed the FSIA in 1976.405 As State Department Acting Legal Adviser Charles Brower testified, “We at the Department of State are now persuaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.” 406 The problem was that “some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations” and that these states were “inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision.” 407 In their letter of transmittal to Congress, the Department of Justice and the Department of State explained:

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

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

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

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

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

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

### Extraterritoriality NEG: Relations DA

#### Extraterritoriality enrages foreign countries.

Briggs 15—(Co-Chair of the Antitrust & Competition Practice at Axinn, Veltrop & Harkrider LLP, Adjunct Professor of International Competition Law at George Washington Law School). John DeQ Briggs & Daniel S. Bitton. 2015. “Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity”. 16 Sedona Conf. J. 327. <https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle_Extraterritorialty%20and%20Comity.16TSCJ327.pdf>.

In a variety of settings foreign governments have expressed and are expressing concerns about the extraterritorial application of U.S. law. The United States occupies a unique position in global trade and finance. The United States also has enacted far-reaching legislation involving commerce, banking and finance, business conduct, mergers and acquisitions, foreign corrupt practices, and a variety of other matters. The extraterritorial application of laws in these areas challenges the sovereignty of other nations and is often viewed as offensive. In antitrust, the United States’ influence is the result of its status as the world’s largest importer of goods and services.18 In finance, this influence is the result of the U.S. dollar’s status as the international unit of account: “Pretty much any dollar transaction— even between two non-US entities—will go through New York City at some point, where it comes under the jurisdiction of US authorities.”19

The rampant extraterritorial application of U.S. laws has ruffled the feathers of foreign governments for a long time, beginning essentially with the cluster of private and government actions in the Uranium cartel cases back in the 1970’s and 1980’s. Close American allies, including Australia, Canada, France, South Africa, the UK, and others, reacted with hostility to the extraterritorial activism of the domestic judiciary by enacting “blocking” and “claw back” legislation.20 Such reactions included the enactment of laws by the United Kingdom and Canada that prohibit enforcement of foreign judgments awarding multiple damages21 and laws passed by the United Kingdom, France, Australia, and the Canadian provinces of Quebec and Ontario that limit or prohibit the removal of documents in response to a foreign order.22

More recently, a number of governments have expressed their concerns about the application of U.S. laws abroad through amicus briefs, including Australia, Belgium, Canada, China, France, Germany, Japan, the Netherlands, South Korea, Switzerland, Taiwan, and the United Kingdom:23 most of the United States’ top fifteen trading partners. These foreign governments have expressed a fairly wide variety of concerns about the potential for extraterritorial application of U.S. laws to interfere with those governments’ policy decisions on such matters as liability, procedure, and damages. While most governments have regulatory regimes in place to police, for example, securities fraud and cartel behavior, these differ in many regards both from the American approach and also from each other, reflecting different cultural, social, and economic factors. These differences include the required showing for liability (e.g., definition of materiality in securities fraud cases),24 procedural protections (e.g., class-action formation and punitive) damages.26 Applying U.S. law to actors, conduct, and effects appropriately considered under a set of foreign laws undermines a foreign government’s ability to govern its own domain and, in the end, becomes an affront to its sovereignty.

Stepping on the toes of foreign governments’ regulatory regimes also risks stymying the international development of policies and regulations beneficial to the United States. Countries without well-developed regulatory apparatuses are less likely to develop them if the behavior is already policed by private plaintiffs in the United States or if the apparatuses would see their policy choices effectively overruled by U.S. policies.27

Foreign governments have also taken the view that extraterritorial application of treble damages threatens to undermine their own enforcement efforts. For example, they claim availability of private treble damages in the United States against their national companies for local conduct may have a detrimental effect on foreign leniency programs. These programs are a key tool for them in rooting out cartel activity, which has traditionally proven difficult to detect and prosecute.28 “These leniency policies seek to balance the interests of disclosure, deterrence, and punishment,” but “disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy.”29 When that reach is expanded outside of U.S. consumers in a U.S. court, “the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.”30 And as Germany and Belgium informed the Supreme Court in Empagran,31 “[h]istorically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty.” 32

### Abstention NEG: General

#### Comity abstention is good—retaining it in some form is critical to resolve a litany of foreign relations puzzles.

Lee 20—(Dwight D. Opperman Professor of Law & Codirector, Institute for Judicial Administration, New York University School of Law). Thomas H. Lee & Samuel Estreicher. 2020. “In Defense of International Comity”. Southern California Law Review. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2028&context=faculty_scholarship>.

Abstract: A chorus of critics, led by the late Justice Scalia, have condemned the practice of federal courts’ refraining from hearing cases over which they have subject-matter jurisdiction on the basis of international comity—respect for the governmental interests of other nations. They assail the practice as unprincipled abandonment of judicial duty and unnecessary given statutes and settled judicial doctrines that amply protect foreign governmental interests and guide the lower courts. But existing statutes and doctrines do not give adequate answers to the myriad cases in which such interests are implicated given the scope of present-day globalization and features of the U.S. legal system that attract foreign litigants. The problem is ubiquitous: four cases decided in the Supreme Court’s 2017 October Term implicated international comity and illuminate the Court’s difficulty grappling with these issues.

This Article cuts against prevailing academic commentary (endorsed by the newly-minted Restatement Fourth on the Foreign Relations Law of the United States) and presents the first sustained defense of the widespread practice of international comity abstention in the lower federal courts—a practice the Supreme Court has not yet passed upon but will almost certainly decide soon. At the same time, we acknowledge that the critics are right to assert that the way lower courts currently implement international comity—through a multi-factored interest analysis—is too manipulable and invites judicial shirking. Consequently, we propose a new federal common law framework for international comity drawn from historical practice from the Founding to the early twentieth century when the federal courts frequently dealt with cases implicating foreign governmental interests with scant congressional or executive guidance, primarily in the maritime context. What is called for is forthright recognition of a federal common law doctrine of international comity that has four essential elements: 1) measured executive deference; 2) consideration of reciprocal treatment; 3) guidance and sometimes direction from relevant legislation and treaties; and 4) awareness of the implications of foreign parallel proceedings. This doctrinal reformulation enables courts to exercise principled discretion in dealing with alleged foreign governmental interests and clears up conceptual confusion between prescriptive and adjudicative manifestations of international comity.

Introduction

Globalization has multiplied the types and complexity of cases in U.S. federal courts implicating international comity—the respect one nation should pay to the governmental interests of other nations. 1 Facing suits often brought by foreign parties with little obvious connection to U.S. interests but posing risk of tensions with other nations, the courts have invoked international comity as a basis for abstention or otherwise mitigating those risks – sometimes without reasoned justification. This trend has led to calls to abandon or curtail international comity as an independent ground for judicial discretion, which the late Justice Scalia somewhat dismissingly termed the “comity of courts.” 2 Freestanding adjudicative comity has no place, they argue, when statutes and settled doctrines like act-of-state and forum non conveniens adequately enforce U.S. interests in international comity, and courts have a “virtually unflagging obligation”3 to decide cases over which they have subject-matter jurisdiction. Although the U.S. Supreme Court has not decided the specific question, academics have ramped up their criticism in recent years.

This Article presents the first sustained defense of international comity as an independent judicial doctrine. 4 At the same time, we acknowledge that critics are right to point out that the lower courts have developed sprawling, unworkable doctrinal formulations. Consequently, we propose a new federal common law framework, drawn from historical practice from the Founding until the early twentieth century. There were few statutes then, and the judiciary played a key role in managing the nation’s foreign relations and maintaining international peace, particularly in the maritime context. Although the judiciary is no longer expert in foreign affairs today, and there are more statutes to guide them, those statutes, canons of statutory interpretation to amplify them, and settled doctrines cannot possibly manage the myriad contexts in which international comity concerns arise. Moreover, using general-purpose doctrines like personal jurisdiction to plug these gaps risks distorting the larger doctrines in domestic contexts where foreign sovereign interests are not implicated.

Our proposed federal common law framework has four central elements: (1) deference to specific, well-considered State Department statements of interest regarding whether the court should exercise its jurisdiction in a particular case; (2) ascertaining the relevant practice of other nations – particularly the reciprocal practice of any nation directly implicated; (3) respecting applicable U.S. statutes or treaties indicating a strong U.S. sovereign interest in hearing the case, or conversely, statutory authorization to ignore or displace foreign sovereign acts or interests; and (4) findings as to whether parallel proceedings have been commenced or concluded in an alternative foreign forum. These four elements—executive deference, reciprocal practice, guidance from adjacent statutes and treaties, and parallel proceedings— inform what U.S. courts should do in suits posing risks of significant tensions with other countries. They address what is called “adjudicative comity,” as contrasted with “prescriptive comity” which deals with the question of which substantive law to apply—whether a state has a sufficiently strong interests in a controversy or connection with the litigants such that its substantive law ought to apply irrespective of the interests of other states. We believe that international comity, thus constrained and focused, can and should continue to serve as an important tool for the federal courts to manage the unruly and growing thicket of cases on their dockets where foreign governmental interests are asserted.

The Article proceeds in four parts. Part I describes the modern puzzle and current controversy over whether international comity is a freestanding judicial doctrine justifying federal courts in refraining to hear cases over which they have subject-matter jurisdiction. Part II distinguishes international comity as an independent doctrine of judicial abstention from other modern usages of international comity. Clarification of the concept is essential in light of widespread confusion about what international comity is, or should be, among courts and commentators. Part III tells the long but forgotten history of the federal judiciary’s case-by-case discretionary navigation of international comity from the Founding to the early twentieth century. This historical practice confirms that judicial discretion to dismiss or decline to exercise jurisdiction over cases implicating sensitive foreign governmental interests as a federal common law matter, even in the face of statutes plainly extending subject-matter jurisdiction, was the norm not the exception. Having described the history in Part III, Part IV sets out a new analytical framework for a freestanding federal common law doctrine of international comity based on four key elements derived from U.S. Supreme Court cases jurisprudence. It then applies that framework to the bellwether cases described in Part I. A brief conclusion follows.

I. The International Comity Puzzle

Questions of international comity arise with increasing frequency in U.S. litigation today. For instance, international comity was implicated in four cases decided in the Supreme Court’s 2017 October Term.5 And yet, surprisingly, there is no clear understanding of how courts should implement international comity; nor, for that matter, what it is exactly and how it is related to international law and U.S. federal law. For the purposes of this Article, we define “international comity” simply as the respect that one nation should pay to the governmental interests of other nations. It is homegrown federal common law grounded in Supreme Court case law, informed by—but independent of—customary international law. Consider five modern examples of litigation in U.S. courts in which foreign governmental interests have been implicated and international comity invoked.

\*A foreign government files an amicus curiae brief in a U.S. district court to set aside a jury verdict against companies based in the foreign country. The jury found that the companies had fixed prices on exports to the United States in violation of the Sherman Antitrust Act and awarded nearly $150 million in damages.6 The foreign government’s brief alleges that the companies fixed prices to comply with its domestic laws and regulations. The U.S. district court denies the motion, but the appellate court reverses and sets aside the verdict. In so doing, the appellate court accords binding deference to the foreign government’s statement of its own law and cites the need for U.S. courts to exercise their judicial power consistently with “international comity.”

\*Plaintiffs bring state-law tort claims in a U.S. federal district court against U.S. companies to recover damages suffered in another country by foreign civilians in a bombing conducted by their nation’s air force against local insurgents.7 The plaintiffs allege that employees of U.S. companies planned and participated in the air attack. The U.S. State Department files a Statement of Interest (SOI) advising the U.S. court that it believes that entertaining the suit would damage the United States’ relations with the foreign country, a key Latin American ally. The U.S. defendants also assert that the plaintiffs had already prevailed in a suit for damages against the government actors in their home court, and that they can still sue the U.S. companies in the foreign court. The U.S. court abstains from exercising jurisdiction in the suit on the ground of international comity, relying heavily on the State Department’s statement.

\* Foreign-incorporated hedge funds and litigation funders refuse to accept “haircuts” and initiate litigation in U.S. courts against a foreign sovereign issuer seeking full payment on sovereign-debt bonds they bought at a discount on secondary markets. The U.S. Supreme Court has held that selling bonds in U.S. markets fits within the “commercial activity” exception of the Foreign Sovereign Immunities Act (“FSIA).8 Moreover, the debt instruments have New York forum-selection and sovereign-immunity waiver clauses consenting to jurisdiction in U.S. courts. The foreign state refuses to pay damages the U.S. court awards; the hedge funds subsequently seek subpoenas directed at the foreign state’s banks in the United States regarding the foreign state’s assets located outside of the United States. The foreign state invokes international comity as a reason to deny such discovery regarding its extraterritorial assets.9

\* Foreign and U.S. plaintiffs bring expropriation and conversion claims against Hungary’s state-owned railroad and central bank for Holocaust-related claims of stolen property.10 The plaintiffs assert that the Hungarian government is subject to suit under the expropriation exception to the FSIA. Hungary, invoking international comity, argues that the district court should dismiss the case because the plaintiffs should first exhaust any available remedies in Hungarian courts, the forums with primary and logical jurisdiction over the claims.

\*A U.S. video game maker sues a foreign company in a U.S. court for infringement of its U.S. copyrights and trademarks and seeks a preliminary injunction to stop the infringement in the United States and in the foreign country.11 The U.S. court finds infringement of federal trademark law but denies extraterritorial effect to its injunction. It gives international comity as the reason for its denial, because the foreign infringer has trademark protection under its home country laws which it has not violated. The U.S. court reasons that to give U.S. trademark law extraterritorial effect under this circumstance would displace that other nation’s trademark laws.

In each of these five real-world examples, a U.S. federal court faces an argument grounded in international comity: the court is urged to dismiss or stay its proceedings to avoid interfering with sensitive foreign governmental interests. The request for U.S. judicial forbearance is often accompanied by the assertion that a credible foreign forum is available to vindicate the claims. 12 Plaintiffs typically counter that dismissal would effectively terminate the litigation and that alternative forums are inadequate. How is international comity to be applied in such cases?

To date, the lower courts have lacked a “clear analytical framework” for how to implement international comity. 13 A threshold confusion concerns the difference between prescriptive comity – respect for foreign governmental interests applied to substantive law—and our subject of interest, adjudicative comity, or how a court should handle a case where it has subject-matter jurisdiction and license to apply U.S. substantive law when the case implicates important foreign governmental interests. One common move has been to construe applicable statutes, particularly the Foreign Sovereign Immunities Act, as occupying the field and therefore precluding any independent judicial discretion to dismiss or stay proceedings. 14 Another reaction is to rely on settled, generalpurpose judicial doctrines like personal jurisdiction or forum non conveniens as the doctrinal rubric for all analysis and potential dismissal calls. 15 This is consistent with Justice Scalia’s view, as noted above, that there is no independent judicial discretion as far as adjudicative comity is concerned.

When courts do engage in an independent comity analysis, however, they have resorted to an all-things-considered inquiry that defies principled application. The Ninth Circuit’s formulation in Timberlane Lumber Co. v. Bank of America, an antitrust case, enumerates ten factors to weigh:

(1)Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue.16

Crafted in an era when multivariate balancing tests were widely adopted and embraced, the ten-factor Timberlane test seems quaint and hopelessly indeterminate today. The factors to be weighed also mix up prescriptive or regulatory comity concerns (e.g., nationality of the parties) with considerations of adjudicative comity (e.g., reciprocal practice). And yet, in the absence of controlling Supreme Court precedent, the Timberlane Lumber test stands as the benchmark doctrinal formulation for how U.S. courts should decide to dismiss or stay cases based on international comity

### FNC NEG: UQ

#### FNC plays an important role, and isn’t being removed absent fiat.

Brand 13—(Chancellor Mark A. Nordenberg University Professor and Director). Ronald A. Brand. 2013. “Challenges to Forum Non Conveniens”. 45 New York University Journal of International Law and Politics 1003. <https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1037&context=fac_articles>.

Forum non conveniens is an imperfect doctrine, developed and existing mostly in common law jurisdictions, and subject to easy criticism. At the same time, it has survived largely because it serves a legitimate purpose for which no superior substitute has been presented. Its resilience has been demonstrated despite numerous challenges. It is likely to continue to survive and evolve in most states around the world in which it exists. Interestingly, the United Kingdom (including Scotland, which is credited with having given birth to the doctrine') is perhaps the state in which the doctrine is most at risk.2

### FNC NEG: Fairness/Equity DA

#### Alternatives to FNC sacrifice accuracy for efficiency.

Brand 13—(Chancellor Mark A. Nordenberg University Professor and Director). Ronald A. Brand. 2013. “Challenges to Forum Non Conveniens”. 45 New York University Journal of International Law and Politics 1003. <https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1037&context=fac_articles>.

The doctrine of forum non conveniens is, in part, a response to the possibility of parallel litigation. Most common law legal systems allow parallel litigation, and thus create a race to judgment, with one forum then being more-or-less obliged to recognize and enforce the judgment first rendered and thereby terminate all other litigation. Courts may employ forum non conveniens to exit this race to judgment. Most civil law jurisdictions seek to prevent parallel litigation, largely through the doctrine of lis alibi pendens.2 1

Civil law jurisdictions tend to give as little discretion to judges as possible. Thus, the idea that, under a doctrine such as forum non conveniens, a court could exercise discretion to stay or dismiss a case in favor of a foreign court is inconsistent with the basic understanding of a judge's role. Moreover, such an action is seen by some as inconsistent with every person's (and every plaintiffs) right of access to the courts.

The lis pendens approach is codified in the structure of the

jurisdictional rules of the Brussels I Regulation in the European Union,22 which approaches parallel litigation with a simple and predictable rule. Article 27 states:

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.23

Through case law, this has become one of the preeminent rules of the Brussels I Regulation, trumping even Article 23, which otherwise allows parties to choose the court in which their disputes will be decided. 24

While forum non conveniens has its problems, the lis pendens alternative is far from perfect. A comparison of the two doctrines highlights the differences between the general common law quest for equity/fairness and the civil law quest for efficiency. The doctrine of forum non conveniens, developed in common law jurisdictions, favors equitable analysis over efficient rules, and it gives courts discretion in determining the most appropriate forum for a single dispute. 25 By contrast, the civil law lis alibi pendens approach provides a predictable rule, more efficiently applied.26 Neither approach to parallel litigation is wholly satisfactory. The lis pendens approach favors efficiency and predictability (values focused on societal interests) over equity and fairness (values focused on individual interests). The result is a race to the courthouse that can interrupt (and perhaps prevent) rational negotiated resolution of disputes before tensions are raised by formal legal proceedings. The common law approach (forum non conveniens) requires that courts be given discretion (something disfavored in civil law systems), and brings with it significant uncertainty.

### FNC NEG: Diplomacy DA

#### Forum non conveniens shields the legal system from making inflammatory assessments of foreign laws.

Wurmnest 5—(Research Fellow, Max Planck Institute for Foreign Private and Private International Law, Hamburg, Germany). Wolfgang Wurmnest. Winter 2005. “Foreign Private Plaintiffs, Global Conspiracies and the Extraterritorial Application of U.S. Antitrust Law.” Hastings International and Comparative Law Review, vol. 28.

It is difficult to see how a judge shall proceed when confronted with such a situation. The problems of assessing the "adequacy" and "efficiency" of foreign regulatory policy and practice respectively are manifold. First, setting a threshold for "adequacy" of foreign legal norms is already a thorny problem. It is hard to see how U.S. courts can rate foreign antitrust enforcement schemes which are, as pointed out above,' °5 often very distinct from U.S. law. Second, with regard to the "efficiency" of foreign enforcement practices the question arises whether U.S. courts should consider only the foreign "law in the books", or whether they have to investigate the "law in action" and determine whether there is a steady practice by foreign courts or competition authorities respectively to enforce their antitrust rules.

These troubles have led U.S. courts in forum non conveniens cases to refrain from engaging in a detailed analysis comparing U.S. and foreign law' 0 6 for good reasons: any rating of foreign legal systems inevitably leads to diplomatic friction. Even though developing countries have not yet raised objections against the extraterritorial application of U.S. antitrust law, it is likely that a state having enacted antirust laws would protest against U.S. court decisions openly labeling enforcement mechanisms of that state as "non-efficient." To avoid such clashes, U.S. courts have generally been very cautious to pronounce judgment on the "quality" of foreign sovereigns' policy choices. For example, in the Bhopal case' 0 7 concerning tort claims of victims from a disastrous gas leak at a chemical plant in Bhopal, India, Judge Keenan was very hesitant to evaluate whether Indian courts were able to manage such a complex mass tort case. He dismissed the action brought by Indian plaintiffs against the American tortfeasor, despite the fact that a litigation before Indian courts would be more burdensome, emphasizing that to retain litigation in this forum "would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules on a developing nation."',0 8 The underlying rationale of this prudent jurisprudence must also apply when assessing the international reach of U.S. antitrust law. Therefore, judges should not take into account the state of antitrust enforcement in foreign jurisdictions.

### FNC NEG: ATS/Human Rights

#### Current FNC doctrine is sufficient to solve human rights concerns.

Short 1—(JD from University of Texas School of Law). Aric K. Short. 2001. “Is the Alien Tort Statute Sacrosanct--Retaining Forum Non Conveniens in Human Rights Litigation”. 33 N.Y.U. J. Int'l L. & Pol. 1001. https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1192&context=facscholar&httpsredir=1&referer=.

"Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."

"As a moth is drawn to the light, so is a litigant drawn to the United States."

I. INTRODUCTION

During the past twenty years, the number of lawsuits filed in U.S. courts by persons alleging human rights abuses occurring in foreign countries has grown steadily. In that time, citizens of the Philippines, Nigeria, Ethiopia, Israel, Burma, Indonesia, Ghana, Guatemala, Argentina, Algeria, South Korea, Bosnia-Herzegovina, and many other countries have filed suit in U.S. courts alleging human rights violations committed in their home counties by persons or corporations resident outside the United States. Handling this new breed of case has presented federal courts with a variety of procedural and substantive challenges, with none more important or controversial than subject matter jurisdiction. As non-resident plaintiffs bring their cases into U.S. courts in ever-growing numbers, they often rely on one of the oldest jurisdictional provisions in effect today: the Alien Tort Statute (ATS).

The ATS, established by the Judiciary Act of 1789, 3 is an important, though before 1980 seldom-used, vehicle that provides federal subject matter jurisdiction in cases brought "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."4 Although ATS litigation has increased substantially over the past twenty years as plaintiffs in human rights cases have used it to seek relief in U.S. courts, 5 significant disagreement has existed over how properly to interpret and apply the statute. Scholars and courts have debated whether the ATS merely confers federal court jurisdiction or whether it provides not only a federal forum but also a federal cause of action; 6 whether the ATS ever was intended to reach human rights claims; 7 what exactly a "violation of the law of nations" is meant to be and whether that phrase should be construed as referring only to such violations as they existed in 1789 or whether the "law of nations" under the ATS is a constantly developing concept that incorporates newly-recognized international legal rights and obligations;8 and whether federal courts, consistent with the U.S. Constitution, may exercise jurisdiction over suits between aliens for violations of the law of nations. 9

One issue that has been raised recently in scholarship and litigation that deserves further analysis is whether tie ATS does or should confer jurisdiction on U.S. courts that is immune from the traditional forum non conveniens analysis. The once academic question of whether human rights cases ever should be subject to such an analysis has now become, in recent litigation, a practical issue raised by plaintiffs. In a recent decision by the U.S. Court of Appeals for the Second Circuit,10 the court established an unprecedented approach to this issue that undermines the invocation of forum non conveniens in human rights cases. How future courts address the interplay between forum non conveniens and the ATS will have significant implications for the development of international human rights law and federal court practice and %%ill be particularly important given what, in all likelihood, will be a growing number of human rights claims brought in U.S. courts by citizens of other countries.

Plaintiffs who flee human rights abuses in foreign states also often flee corrupt governments or judiciaries incapable of providing them justice. Many human rights plaintiffs in the United States may not be able to return to the countries of abuse to seek judicial compensation from their abusers, and they should not be forced to do so by U.S. courts. However, recent arguments seeking the abolition of forum non conveniens in ATS suits go too far, attempting unnecessarily to tie the hands of federaljudges when lawsuits before them have no significant connection to the United States, when relevant considerations urge dismissal, and when foreign courts fully are capable of administering justice in those cases.

I argue in this article that no reasonable basis exists to justify federal courts refusing to consider forum non conveniens arguments in cases brought under the ATS; in fact, good reasons exist to retain the doctrine in its undiluted form. The purpose and design of forum non conveniens make it sufficiently flexible to be invoked in even the most compelling human rights cases brought in the United States. If applied properly, the doctrine will identify ATS cases that cannot and should not be dismissed to foreign fora; however, if forum non conveniens operates as it should, it also will determine when alleged violations of the law of nations would be addressed more appropriately by the courts of other countries. By identifying such exceptional cases meriting dismissal, the doctrine will help advance a global development of customary international law norms in the area of human rights and will help ensure that U.S. courts do not antagonize international relations unnecessarily.

## NEG: Disadvantages

### Sovereignty DA: UQ

#### Extraterritoriality is scaled back now.

Parrish 17—(Dean and James H. Rudy Professor, Indiana University Maurer School of Law). Austen L. Parrish. 2017. "Fading Extraterritoriality and Isolationism? Developments in the United States.” Indiana Journal of Global Legal Studies. Vol. 24, Issue 1, Article 9. https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1644&context=ijgls.

In the United States, globalization and transnational law have been closely intertwined. For the last twenty-five years or more, international civil litigation has been one of the ways the United States engages in the international arena.3 Extraterritorial regulation through litigation has permitted unilateral private initiative to advance global justice while avoiding messy political battles, the anti-internationalism often present in Congress, and the traditional American uneasiness in embracing additional international commitments. 4 Litigation in domestic courts has also been perceived as a way to close, at least to some degree, the international system's enforcement gap. Until recently, many scholars seemed bullish that this kind of litigation would be a primary way to integrate international legal norms into domestic law and to enforce those norms in advancing global justice. This attempt to further public goals through private litigation was viewed as a uniquely American-styled response, progressive in its orientation, to globalization.

That effort, however, has been derailed. In a number of recent decisions, the U.S. Supreme Court has scaled back on the ability of plaintiffs to litigate foreign claims against foreign defendants in the United States. The Court is not enamored with the idea that American courts should be the world's courts, and is wary of adjudicating claims absent a meaningful connection between the case and the United States. The Court has rejected the notion that we live in a postnational world or, at least, has declined the invitation to hasten a move in that direction. This trend to limiting international litigation has occurred, to varying degrees, in both public and private law cases.

#### Comity/deference high now.

Donovan 22—(Partner in New York @ Winston & Strawn LLP). Molly M. Donovan. 1/11/22. "Vitamin C Ruling May Trigger Comity Defense Resurgence.” Mondaq. https://www.mondaq.com/unitedstates/antitrust-eu-competition-/1149056/vitamin-c-ruling-may-trigger-comity-defense-resurgence.

In an August 2021 decision in the long-running In re: Vitamin C Antitrust Litigation, the U.S. Court of Appeals for the Second Circuit dismissed price-fixing claims against several Chinese pharmaceutical companies on international comity grounds, holding that Chinese law essentially required the defendants to engage in the conduct alleged.1

The implications of the case go beyond antitrust, and beyond even merits-based defenses.

This article explores a possible resurgence of comity-based defenses in discovery disputes-which have been asserted in the past with mixed success-but which could gain traction now post-Vitamin C.2

In Vitamin C, the Second Circuit twice reversed a judgment against defendants for coordinating supply and prices of Vitamin C in China that was later exported to the United States.3

In the first instance, the Second Circuit held that the district court was bound to defer to the explanation of Chinese law that was submitted by China's Ministry of Commerce, which said that the defendant companies were bound by Chinese law to engage in the alleged anti-competitive conduct.4

The U.S. Supreme Court reversed because, it said, the Second Circuit afforded too much deference to the MOC and should have tested its statements against additional objective sources.5

On remand, the Second Circuit once again reversed and dismissed the action. In reaching that decision, the court looked beyond the statement from the MOC and examined the regulations in the Vitamin C industry in China and various other pieces of evidence, including industry records and other administrative materials, all of which corroborated the MOC's position that the defendant companies were required to coordinate on supply and price in accordance with the China Chamber of Commerce for Import and Export of Medicines and Health Products.

The court ultimately concluded that it was impossible for the defendant companies to comply with U.S. antitrust law and Chinese law, and it was required to defer to Chinese law under the principles of international comity.

#### ET is largely curtailed.

Hall 18—(JD from Fordham). Thomas J. Hall, Seth M. Kruglak, & Thomas J. McCormack. December 2018. “US courts retreat from applying major federal statutes to extraterritorial activity”. Norton Rose Fulbright. https://www.nortonrosefulbright.com/en/knowledge/publications/ae5cfa02/us-courts-retreat-from-applying-major-federal-statutes-to-extraterritorial-activity#section3

Introduction

Business transactions routinely touch the United States in one manner or another. A recent and discernible trend from the US Supreme Court indicates a clear retreat from reflexively applying major federal statutes to extraterritorial conduct.

Multinational businesses frequently engage in activities that may, however circumscribed, touch the US One concern of non-US parties is whether conduct that touches the US in a de minimis manner is enough for a US court to apply its law to those actions. Recent US Supreme Court cases have marked a reversal from the historic trend of expanding the scope of US law. Indeed, the Court has recently stated that “United States law governs domestically but does not rule the world.” To that end, the Court now presumes that a statute does not apply extraterritorially unless the text clearly shows the US Congress intended such a result. With President Trump solidifying a conservative block in the Supreme Court’s majority for the foreseeable future, this trend will likely continue unabated. Commercial disputes practitioners should be familiar with this significant trend in US law.

Threshold matter of personal jurisdiction

Although distinct from the extraterritorial application of US law, a threshold step in any US lawsuit is the court’s determination of whether it may properly exercise jurisdiction over a non-US defendant. There are two types of personal jurisdiction in the US: general and specific. Where an entity is subject to general jurisdiction, US courts may exercise jurisdiction over that entity for any dispute no matter where it occurred, even if it has no connection to the forum. Recent US Supreme Court case law has significantly limited the scope of general jurisdiction. Historically, US courts exercised general jurisdiction over an entity if it conducted business in the forum state on a regular and continuous basis. Now, general jurisdiction is limited to where a party is “home,” meaning the locale in which it is incorporated or has its principal place of business. While the precise contours of this approach will be developed in future case law, for non-US entities with their place of incorporation and principal place of business outside of the US, this likely means they are no longer subject to general jurisdiction in the US. On the other hand, US courts will continue to exercise specific jurisdiction over parties where the claims arise from the party’s transaction of business in the forum state or where it engages in a tort outside the US that causes injury in the forum state. Thus, specific jurisdiction requires a nexus between some aspect of the claim and the forum state; it does not extend to all claims regardless of where they arise. These developments significantly narrow the potential forums to which non-US entities might be subject to suit, and provide greater predictability about where foreign parties may be sued.

The presumption against the extraterritorial reach of federal statutes

The Supreme Court’s presumption against extraterritoriality stems from the conservative majority’s strict adherence to the principle that “legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” Morrison v Nat’l Australia Bank Ltd., 561 US 247, 255 (2010). Accordingly, “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect,” the Court will “presume it is primarily concerned with domestic conditions.” If a statute has no clear, affirmative indication that it applies extraterritorially, the Court will then examine the statute’s “focus” to determine whether the application of the statute in the case at hand involves a domestic application of the statute in question. RJR Nabisco, Inc. v European Cmty., 136 S. Ct. 2090, 2101 (2016).

The Supreme Court has stated that the presumption “serves to avoid the international discord that can result when US law is applied to conduct in foreign countries” and “also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind.” Therefore courts must apply “the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law.”

The Securities Exchange Act

Although global practitioners may be aware of the Supreme Court’s 2010 groundbreaking opinion in Morrison v National Australia Bank Ltd. holding that Section 10(b) of the Securities Exchange Act (and Rule 10b-5 promulgated thereunder) does not apply extraterritorially, it is helpful to review as it is an important bellwether1.

Section 10(b) is used to challenge material misstatements and omissions made in connection with the purchase or sale of securities. In Morrison, the Court first held that the statutory text of these anti-fraud provisions does not apply extraterritorially. The Court next examined whether the activity at issue – the purchase of securities of a foreign issuer by foreign persons on a foreign exchange – fell within the “focus” of Section 10(b). Plaintiffs argued that because the misstatements at issue arose from the activities of the defendant issuer’s Florida subsidiary and public statements made in Florida, they were seeking a domestic application of the statute that fell within the statute’s focus. The Court disagreed and held that “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.” Accordingly, Section 10(b) would only apply to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies.” As the late Justice Scalia stated for the Court: “For it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case.”

The Racketeer Influenced and Corrupt Organizations Act (RICO)

In 2016, the Supreme Court extended Morrison’s reasoning to RICO in RJR Nabisco, Inc. v European Cmty., 136 S. Ct. 2090 (2016). RICO is a major federal statute that encompasses dozens of separate state or federal offenses committed in a pattern of racketeering activity. The acts are termed “predicate acts” and include crimes such as mail and wire fraud, money laundering, bribery, and embezzlement. A private right of action exists for persons injured in their business or property to sue for treble damages, costs and attorneys’ fees. In RJR, the Court first asked, does the statute giving rise to the predicate act in question give a clear, affirmative indication that it applies extraterritorially? This answer might not be straightforward. For example, federal courts are presently split as to whether the federal wire fraud statute applies extraterritorially.

Second, if the predicate act statute does not apply extraterritorially, does the case involve a domestic application of the statute? This question is answered by looking to the statute’s “focus.” According to the Court, “[i]f the conduct relevant to the statute’s focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in US territory.”

Finally, a private plaintiff in a civil RICO action must allege and prove injury in the US to business or property and cannot recover for non-US injuries. The Court held that the statute providing a private right of action did not provide for extraterritorial application, and allowing recovery for non-US injuries in a civil RICO action – including treble damages – presents a danger of international friction.

The Bankruptcy Code

The trend against extraterritoriality has extended into the bankruptcy context as well. In a high-profile decision from the Southern District of New York, the court barred the clawback of subsequent transfers made from offshore feeder funds of Madoff Securities to non-US investors. See Sec. Inv’r Prot. Corp. v Bernard L. Madoff Inv. Sec. LLC, 513 B.R. 222 (S.D.N.Y. 2014). The court determined that the avoidance and recovery statute at issue did not apply extraterritorially and that the “focus” of the statute was on the transfers themselves – which here occurred outside the US The court also recognised that mere passage through a New York bank account did not make a transfer sufficiently domestic to fall within the statute’s reach. In the court’s words, “[i]t cannot be that any connection to a domestic debtor, no matter how remote, automatically transforms every use of the various provisions of the Bankruptcy Code in a [Securities Investor Protection Act] bankruptcy into purely domestic applications of those provisions.”

Notably, the court held that even if the statute applied extraterritorially, it would rule that international comity concerns would preclude its application in this instance. It recognised that many of the foreign feeder funds were currently involved in their own liquidation proceedings in foreign countries, and concluded that “[t]he Trustee is seeking to use SIPA to reach around such foreign liquidations in order to make claims to assets on behalf of the SIPA customer-property estate – a specialised estate created solely by a US statute, with which the defendants here have no direct relationship … [T]hese foreign jurisdictions have a greater interest in applying their own laws than does the United States.”

The Foreign Trade Antitrust Improvements Act (FTAIA)

In the antitrust realm, by statute the FTAIA limits the extraterritorial application of the Sherman Antitrust Act. As interpreted by the US Supreme Court, the FTAIA “initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act’s reach.” F. Hoffmann-LaRoche Ltd. v Empagran S.A., 542 US 155, 162 (2004). The FTAIA then “brings such conduct back within the Sherman Act’s reach provided that the conduct both (i) sufficiently affects American commerce, i.e., it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, and (ii) has an effect of a kind that antitrust law considers harmful, i.e., the effect must ‘giv[e] rise to a [Sherman Act] claim’.”

One notable application of the FTAIA occurred in the recent Foreign Exchange Benchmark Rates Antitrust Litigation in the Southern District of New York. See In re Foreign Exchange Benchmark Rates Litigation, 74 F. Supp. 3d 581 (S.D.N.Y. 2015); No. 13 Civ. 7789 (LGS), 2016 WL 5108131 (S.D.N.Y. Sept. 20, 2016). In this series of cases, plaintiffs claimed that over a dozen large banks conspired to “fix the Fix,” which they alleged to be the most widely used bid-ask spread for currency trading globally. The court held that Sherman Act claims could proceed where a US entity operating in the US trades foreign exchange with a foreign desk of a defendant because such claims fall squarely within the FTAIA’s import commerce exclusion. However, the FTAIA barred Sherman Act claims for transactions where a US-domiciled plaintiff transacted in FX instruments on a foreign exchange, or where a US-domiciled plaintiff operating abroad transacted in FX instruments directly with a foreign desk of a defendant. The import commerce exception did not apply because the transactions occurred exclusively abroad. Plaintiffs argued that there was a “single” global FX market and that supra-competitive prices in the US directly impacted the prices paid in foreign FX transactions, meaning that without US domestic effects, there would be no foreign injury. The court rejected this argument and held it failed to show the foreign prices paid were proximately caused by any domestic effects.

Conclusion

Application of US law is a concern for global businesses. In light of the recent trends against extraterritorial application of major federal statutes, non-US companies can take some comfort that US courts will not reflexively apply its laws to foreign activity.

### Sovereignty DA: Internal/Impact

#### Comity-based deference undergirds all of foreign relations—anything else causes sovereignty violations that ruin trade and interstate cooperation.

Ginsburg 17—(Professor of Law, Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the Global Antitrust Institute’s International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice). Douglas Ginsburg & John Taladay. 2017. "The Enduring Vitality of Comity on a Globalized World." George Mason Law Review, volume 24, pages 1069-1090.

IV. COMITY IN ACTION

Strong comity principles localize the enforcement of competition laws. They allow nations to regulate their economies as they see fit and in accordance with local culture and custom. When applied, comity reduces the likelihood that one country would enforce its laws in a manner that greatly disrupted (whether intentionally or not) another country’s economy.96

Where there is a direct conflict of laws, the cases make clear that comity has an important role to play in respecting the policy decisions reflected in the laws, actions, and pronouncements of other jurisdictions.97 In these cases, U.S. courts have taken action to retract the reach of the U.S. antitrust laws in order to ensure that foreign governments’ interests are respected.98 But there is an equally important application of comity that requires antitrust enforcement authorities to apply comity out of respect for the interests of foreign governments. That application lies in declining to enforce competition laws, and avoiding the application of remedies beyond the borders of an agency’s own jurisdiction, when a foreign jurisdiction affirmatively has chosen a less restrictive application of its competition laws. In these cases, where “Jurisdiction A” has affirmatively decided and declared that it will not enforce its competition laws against certain commercial activity, “Jurisdiction B” should not only respect that approach, but take pains to ensure that its application of its competition laws does not overtake the non-enforcement decision of Jurisdiction A.

For this and other reasons, U.S. enforcement agencies have explicitly included comity considerations in their guidance concerning prosecutorial discretion: “The U.S. enforcement agencies recognize that concepts of international comity must play a role in antitrust enforcement. Accordingly, even when jurisdiction exists, the Department of Justice will consider ‘whether significant interests of any foreign sovereign would be affected.’”99 It is not clear, however, that foreign competition authorities have comparable positions.

Without this recognition of comity by competition authorities, the international competition community faces the potential for a “most restrictive means” approach to competition law enforcement, with those jurisdictions having the lowest tolerance dictating the outcome for other jurisdictions globally. This type of approach would allow a single jurisdiction to act as the ‘global competition police’ according to whatever competition standard it enforces. This creates the potential, and indeed the incentive, for jurisdictions to use competition law enforcement as an aggressive tool of industrial policy.100

A good example of the application of a domestic antitrust law that is in conflict with foreign antitrust laws, with arguable industrial policy objectives, is the recent decision of the Korea Fair Trade Commission (“KFTC”) against Qualcomm, which seeks to impose a global remedy based upon Korean antitrust standards that are not applicable elsewhere.101 In that case, the KFTC concluded that Qualcomm’s licensing practices violated Korean competition law because the company refused to license its standard essential patents, and “coerced” licensees to pay “unilaterally determined royalty rates,” in circumvention of its FRAND commitments.102 Both the “refusal to license” theory and the “coercion” theory, which is a thinly veiled excessive pricing claim, would not be recognized theories of antitrust harm in the United States.

Nonetheless, the KFTC imposed a “global remedy” that would force Qualcomm to change its licensing practices worldwide. It reasoned that:

[T]he illegal conduct of [Qualcomm has] been carried out not only against the Korean enterprises and the Korea-registered patents in the territory of Korea, but also in the remaining parts of the world, in the same way and at the same time. The effects of the illegal conduct influence overseas markets as well as the domestic market. . . . [I]t is reasonable not to limit the [remedial measures] and the scope of application only to the territory of Korea and the Korea-registered patents, in order to effectively remove the anti-competitive effects influencing the Korean market.103

But the KFTC wrongly assesses the need for the application of comity. It considers comity only in the case of affirmative conflict stemming from an application of another country’s laws:

The issue of international comity related to a law enforcement of other countries is to be considered in cases where there is any conflict between the [remedial orders] issued by KFTC and any law enforcement of another country, etc. The issue of international comity does not arise simply because a conduct carried out of the country is included in the matters subject to a [remedial order].104

Thus, the KFTC ignores completely situations in which the antitrust laws of other countries would permit, or even endorse, the actions it is prohibiting Qualcomm from taking in those countries.105 For example, the KFTC condemns as per se unlawful Qualcomm’s use of so-called portfolio licensing,106 but the policies of many other jurisdictions not to preclude portfolio licensing suggests it can be viewed as harmless or efficiency enhancing. The KFTC’s order nonetheless would seek to preclude portfolio licensing globally, ignoring the approach of other jurisdictions as to what constitutes permissible conduct.

In short, the KFTC would respect comity only if, as is the case in most instances of cooperation, the foreign jurisdiction has a parallel enforcement proceeding on the same substantive basis. In all other circumstances, other countries are forced to abide by the KFTC’s rules on how the commercial market should function. This is evident from the KFTC’s determination of when comity might require different action: “[Qualcomm] may request the Korea Fair Trade Commission to re-review this [remedial order] if the final and binding judgment, measure or order of a foreign court or competition authorit[y] . . . conflicts with this [remedial order], making it impossible to comply with both of them at the same time.”107

This would result in Korea exercising direct control over the licensing of U.S. and other jurisdictions’ patents, despite the fact that those other jurisdictions clearly have a greater interest in the protection of the intellectual property rights they have granted than does Korea. By contrast, the U.S. generally does not use compulsory licensing as a remedy in non-merger cases.108

Comity directly addresses this condition, requiring a jurisdiction to balance its own enforcement priorities against the interests of the foreign jurisdiction(s) in which the enforcement action would have effects.

The KFTC decision can be contrasted with the decision of China’s National Development and Reform Commission (“NDRC”) in an investigation of the same conduct. In February 2015, the NDRC found Qualcomm guilty of abuse of market dominance and engaging in monopolistic activities that eliminated and restricted competition, namely: “(1) charging unfairly excessive patent royalties; (2) tying patents that are not standard-essential patents in the telecom industry without a legitimate reason; and (3) imposing unreasonable conditions in the sale of baseband chips.”109 Qualcomm was ordered to cease its infringing activities and was fined $975 million, which represented about eight percent of its 2013 revenue in China.110 The NDRC expressly kept its decision and remedy, however, territorial in nature. The NDRC focused on: (1) licensing of Chinese standard essential patents (2) to Chinese manufacturers (3) for use in China.111

The NDRC decision applies comity far more conscientiously than does the KFTC decision. Even though the substantive competition laws of China differ significantly from the laws of the United States and many other jurisdictions, China’s remedial measures are appropriately limited to ensure that the commercial result is not forced upon other jurisdictions that might have a significant, indeed greater, interest in regulating the use and licensing of intellectual property.

Intellectual property, along with other technology products and services, may be among the interests particularly subject to adverse effects from the lack of comity. These and other products and services commonly transited across borders, such as energy, commercial banking, natural resources, and electronics, differ from traditional products and services that are typically local or regional in scope. Therefore, jurisdictions should be particularly vigilant in these sectors to respect the legitimate interests of other sovereigns with different competition laws.

CONCLUSION

Traditional comity requires more than avoidance of conflicting outcomes and remedies; it also requires respect for differences in the scope and commercial effect of the laws of foreign sovereigns. If competition agencies do not apply comity in the application of their laws and in limiting the extraterritorial scope of their remedies, then international competition enforcement will quickly devolve into a “race to the bottom,” in which the country with the most restrictive competition laws will regulate commercial conduct for the entire world. The effects doctrine is a legitimate basis upon which to apply competition laws and impose remedies but, just as an agency considers how foreign conduct affects its domestic consumers, it likewise should ensure that its remedy does not unnecessarily affect foreign governments, agencies, business interests, or consumers. Comity should be invoked to prevent the effects doctrine from becoming a way for one jurisdiction to impose its domestic commercial policy on the conduct of businesses outside its borders. Otherwise competition enforcement turns from a policy to protect consumers into a slightly disguised way of implementing industrial policy.

### Sovereignty DA: Extraterritoriality Link

#### Extraterritoriality enrages foreign countries.

Briggs 15—(Co-Chair of the Antitrust & Competition Practice at Axinn, Veltrop & Harkrider LLP, Adjunct Professor of International Competition Law at George Washington Law School). John DeQ Briggs & Daniel S. Bitton. 2015. “Heisenberg’s Uncertainty Principle, Extraterritoriality and Comity”. 16 Sedona Conf. J. 327. <https://thesedonaconference.org/sites/default/files/publications/Heisenberg%27s%20Uncertainty%20Principle_Extraterritorialty%20and%20Comity.16TSCJ327.pdf>.

In a variety of settings foreign governments have expressed and are expressing concerns about the extraterritorial application of U.S. law. The United States occupies a unique position in global trade and finance. The United States also has enacted far-reaching legislation involving commerce, banking and finance, business conduct, mergers and acquisitions, foreign corrupt practices, and a variety of other matters. The extraterritorial application of laws in these areas challenges the sovereignty of other nations and is often viewed as offensive. In antitrust, the United States’ influence is the result of its status as the world’s largest importer of goods and services.18 In finance, this influence is the result of the U.S. dollar’s status as the international unit of account: “Pretty much any dollar transaction— even between two non-US entities—will go through New York City at some point, where it comes under the jurisdiction of US authorities.”19

The rampant extraterritorial application of U.S. laws has ruffled the feathers of foreign governments for a long time, beginning essentially with the cluster of private and government actions in the Uranium cartel cases back in the 1970’s and 1980’s. Close American allies, including Australia, Canada, France, South Africa, the UK, and others, reacted with hostility to the extraterritorial activism of the domestic judiciary by enacting “blocking” and “claw back” legislation.20 Such reactions included the enactment of laws by the United Kingdom and Canada that prohibit enforcement of foreign judgments awarding multiple damages21 and laws passed by the United Kingdom, France, Australia, and the Canadian provinces of Quebec and Ontario that limit or prohibit the removal of documents in response to a foreign order.22

More recently, a number of governments have expressed their concerns about the application of U.S. laws abroad through amicus briefs, including Australia, Belgium, Canada, China, France, Germany, Japan, the Netherlands, South Korea, Switzerland, Taiwan, and the United Kingdom:23 most of the United States’ top fifteen trading partners. These foreign governments have expressed a fairly wide variety of concerns about the potential for extraterritorial application of U.S. laws to interfere with those governments’ policy decisions on such matters as liability, procedure, and damages. While most governments have regulatory regimes in place to police, for example, securities fraud and cartel behavior, these differ in many regards both from the American approach and also from each other, reflecting different cultural, social, and economic factors. These differences include the required showing for liability (e.g., definition of materiality in securities fraud cases),24 procedural protections (e.g., class-action formation and punitive) damages.26 Applying U.S. law to actors, conduct, and effects appropriately considered under a set of foreign laws undermines a foreign government’s ability to govern its own domain and, in the end, becomes an affront to its sovereignty.

Stepping on the toes of foreign governments’ regulatory regimes also risks stymying the international development of policies and regulations beneficial to the United States. Countries without well-developed regulatory apparatuses are less likely to develop them if the behavior is already policed by private plaintiffs in the United States or if the apparatuses would see their policy choices effectively overruled by U.S. policies.27

Foreign governments have also taken the view that extraterritorial application of treble damages threatens to undermine their own enforcement efforts. For example, they claim availability of private treble damages in the United States against their national companies for local conduct may have a detrimental effect on foreign leniency programs. These programs are a key tool for them in rooting out cartel activity, which has traditionally proven difficult to detect and prosecute.28 “These leniency policies seek to balance the interests of disclosure, deterrence, and punishment,” but “disclosure and reform are greatly hindered when a company risks the imposition of treble damages in a U.S. court for confessing to another nation or authority that it has participated in an international conspiracy.”29 When that reach is expanded outside of U.S. consumers in a U.S. court, “the prospect of ruinous civil liability in U.S. courts far outweighs the benefits most companies would receive from participating in an amnesty program.”30 And as Germany and Belgium informed the Supreme Court in Empagran,31 “[h]istorically, other nations have bristled at extraterritorial applications of United States antitrust laws. These concerns have resulted in foreign governments taking a number of measures to counter what they perceive to be an illegitimate encroachment into their sovereignty.” 32

### Sovereignty DA: FNC Link

#### Forum non conveniens shields the legal system from making inflammatory assessments of foreign laws.

Wurmnest 5—(Research Fellow, Max Planck Institute for Foreign Private and Private International Law, Hamburg, Germany). Wolfgang Wurmnest. Winter 2005. “Foreign Private Plaintiffs, Global Conspiracies and the Extraterritorial Application of U.S. Antitrust Law.” Hastings International and Comparative Law Review, vol. 28.

It is difficult to see how a judge shall proceed when confronted with such a situation. The problems of assessing the "adequacy" and "efficiency" of foreign regulatory policy and practice respectively are manifold. First, setting a threshold for "adequacy" of foreign legal norms is already a thorny problem. It is hard to see how U.S. courts can rate foreign antitrust enforcement schemes which are, as pointed out above,' °5 often very distinct from U.S. law. Second, with regard to the "efficiency" of foreign enforcement practices the question arises whether U.S. courts should consider only the foreign "law in the books", or whether they have to investigate the "law in action" and determine whether there is a steady practice by foreign courts or competition authorities respectively to enforce their antitrust rules.

These troubles have led U.S. courts in forum non conveniens cases to refrain from engaging in a detailed analysis comparing U.S. and foreign law' 0 6 for good reasons: any rating of foreign legal systems inevitably leads to diplomatic friction. Even though developing countries have not yet raised objections against the extraterritorial application of U.S. antitrust law, it is likely that a state having enacted antirust laws would protest against U.S. court decisions openly labeling enforcement mechanisms of that state as "non-efficient." To avoid such clashes, U.S. courts have generally been very cautious to pronounce judgment on the "quality" of foreign sovereigns' policy choices. For example, in the Bhopal case' 0 7 concerning tort claims of victims from a disastrous gas leak at a chemical plant in Bhopal, India, Judge Keenan was very hesitant to evaluate whether Indian courts were able to manage such a complex mass tort case. He dismissed the action brought by Indian plaintiffs against the American tortfeasor, despite the fact that a litigation before Indian courts would be more burdensome, emphasizing that to retain litigation in this forum "would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules on a developing nation."',0 8 The underlying rationale of this prudent jurisprudence must also apply when assessing the international reach of U.S. antitrust law. Therefore, judges should not take into account the state of antitrust enforcement in foreign jurisdictions.

### Clog DA: Links

#### AFFs would open the floodgates to new suits!

Tucker 10 - (Kelly L. Tucker, J.D. Candidate, May 2010, Fordham University School of Law; B.A., International Politics, 2003, American University; 2010, Fordham Journal of Corporate & Financial Law, Vol. 15, Issue 3, Article 7, "In The Wake of Empagran – Lights Out on Foreign Activity Falling Under Sherman Act Jurisdiction? Courts Carve Out A Prevailing Standard," doa: 4-29-2022) url: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1200&context=jcfl

The Court justified its holding on two grounds. First, the Court looked at the purpose behind the application of American antitrust laws to foreign conduct. The Court found that application of American antitrust laws to foreign conduct was reasonable and consistent with principles of prescriptive comity,102 insofar as such application is in an effort to redress domestic injury. 03 The Court further noted, however, the potential for serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. 10 4 The Court expressed concern that allowing such suits (those which involve wholly foreign harm) would open a floodgate, wherein a foreign plaintiff could sue in American courts for wholly foreign conduct by simply noting an unnamed third party in the United States who could also potentially and theoretically state a cause of action. °5 The Court noted the difference in damages remedies available to plaintiffs who prove anticompetitive conduct-the United States provides for treble damages in private causes of action-has caused significant controversy in the international community. The Court reasoned that serious comity concerns would arise if the Court were to hold that foreign plaintiffs may properly bring a claim alleging solely foreign injuries under the American antitrust laws. 106

#### Cases impose a heavy burden.

Gardner 21 - (Maggie Gardner, Associate Professor of Law, Cornell Law School; 2021, University of Pennsylvania Law Review, Vol. 169, "Deferring To Foreign Courts," doa: 4-29-2022) url: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9753&context=penn\_law\_review

The need to update the Gulf Oil test is illustrated by the contrast between the forum non conveniens analyses in Imamura and Cooper. That Imamura was dismissed for forum non conveniens while Cooper was not is not in itself surprising, given the current state of the doctrine. First, the Supreme Court in Piper approved a lesser degree of deference to foreign plaintiffs’ choice of a U.S. forum.81 That made it easier to dismiss Imamura, which was brought by foreign plaintiffs, than Cooper, which was brought by U.S. residents.82 Second, while Gulf Oil’s private interest factors are not particularly helpful in weighing modern-day inconveniences, they will ironically place greater emphasis on the burden that such discovery imposes on U.S. defendants like General Electric as compared to foreign defendants like TEPCO. When the defendant is based in the proposed alternative forum, like TEPCO was in Cooper, the court can require that defendant to produce the “foreign” evidence in its possession, a requirement made less burdensome by “the prevalence of electronic documents and current technology.”83 In contrast, when U.S. defendants like General Electric assert the need for transnational discovery, the evidence is less likely to be in the control of a party and thus will appear more burdensome to the court.84

But the two district courts also applied the public interest factors differently, even though the public interests should have been similar in the two cases. The problem is the test: Gulf Oil’s list of public interest factors were not entirely clear in their original context and were not formulated with transnational litigation in mind. They thus require a fair amount of adaption to fit today’s cases, leading to variation among lower courts. The factors break down into three sets of considerations: administrative difficulties, choice of law, and local interest.85 Taking those considerations in turn, Imamura applied the administrative diffculties factors fairly literally, focusing on “court congestion and burden” and finding that the proposed transnational class action would impose a “heavy burden” on the U.S. court.86 Cooper instead found these factors to be “neutral” in part because it took a more comparative approach, noting that “litigating in Japan would [likewise] impose significant costs on the Japanese judicial system.”87

## NEG: Counterplans

### Reciprocity CP

#### The US should pursue a reciprocal system in which enforcement is carried out by the host country—avoids offending foreign states.

Singal 9—(JD Candidate at UC Hastings College of the Law). Vishali Singal. 2009. “Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments”. Hastings Law Journal Volume 59. <https://repository.uchastings.edu/cgi/viewcontent.cgi?article=3689&context=hastings_law_journal>.

The image exemplifying the way in which globalization has swept the twenty-first century is familiar-a businessman sitting helplessly on his cell phone staring at his laptop screen in his San Francisco apartment while he listens to the Indian accent of a computer whiz in a Bangalore, India call center on the other end of the line and watches her mouse navigate its way on his laptop through an Internet connection to fix the problem. Given the magnitude of interaction between countries, either through private commerce, foreign relations between governments, or the treatment of one nation's citizens by another nation, the world's legal systems have become interconnected as well. Whether the laws of one nation dispense justice in accordance with that nation's standards is now, in many circumstances, dependent upon whether the laws of another nation will recognize and enforce foreign judgments. As such, the strength of the American legal system is predicated in part upon the world's receptivity to American judgments, which in turn is influenced by America's receptivity to foreign judgments.

American case law presents a compelling picture of the interactions between nations in this era of globalization and the resulting interconnectedness of the world's legal systems. The following cases illustrate this interconnectedness. In 1973, Jack Kough, a minority shareholder of British Columbian corporation Arvee Cedar Mills, Ltd. ("Arvee"), and Merlin William Thompson, entered into an agreement with the Bank of Montreal ("the Bank"), requiring the Bank to continue engaging in business transactions with Arvee in exchange for Kough and Thompson's promise to repay $718,000 in debt, plus interest from the date the Bank demanded payment.' In 1975, the Bank brought suit against Kough for breach of contract in the Supreme Court of British Columbia, the "province's superior trial court,"' alleging that Kough and Thompson were jointly and severally liable for $842,000 under the contract.3 Kough failed to appear in the British Columbian action after the Bank served him personally with notice in California.' Consequently, the Supreme Court of British Columbia rendered a default judgment against Kough' After the Bank sought recognition and enforcement of the Canadian judgment i9i the United States, the U.S. District Court for the Northern District of California held that the Canadian judgment would be recognized "in the absence of any of the other grounds for nonrecognition" listed in the California Code of Civil Procedure.6

The Ninth Circuit affirmed the trial court's recognition of the Canadian judgment, rejecting Kough's reliance upon a reciprocity defense that "British Columbia would refuse to recognize a default judgment rendered against one of its citizens in the United States under similar circumstances.. . ." In so doing, the Ninth Circuit noted that the drafters of the Uniform Foreign Money-Judgments Recognition Act of 1962, incorporated into the California Code of Civil Procedure, had purposefully omitted reciprocity as a defense to the recognition of a foreign money judgment "on the ground that the due process concepts embodied in the [Recognition] Act were an adequate safeguard for the rights of citizens sued on judgments obtained abroad., 8

Ten years after the Ninth Circuit decided Bank of Montreal, the Fifth Circuit Court of Appeals affirmed a decision by the U.S. District Court for the Northern District of Texas not to recognize a foreign money judgment stemming from an overdraft agreement.9 A French bank ("the French Bank"), operating a branch office in Abu Dhabi, had brought suit against Hanna Elias Khreich, who formerly resided in Abu Dhabi but became a naturalized American citizen and a Texas resident." The French Bank sought to recover 200,000 dirhams that Khreich allegedly owed to it, filing suit in U.S. district court." Meanwhile, Khreich sued the French Bank in Abu Dhabi for the Bank's alleged breach of an agreement with Khreich, and filed a motion to dismiss the French Bank's lawsuit in district court. After the Abu Dhabi court returned a judgment in the Bank's favor, the Bank sought to enforce the Abu Dhabi judgment in district court as precluding Khreich's motion to dismiss." The district court refused to recognize the Abu Dhabi judgment on two grounds: Abu Dhabi did not recognize U.S. or Texas judgments, and Abu Dhabi lacked "procedures compatible with due process of law."'

On appeal, the Fifth Circuit affirmed the decision, finding that the district court did not abuse its discretion in refiusing to recognize the Abu Dhabi judgment. 4 Applying Texas law to determine whether the district court properly refused to recognize the Abu Dhabi judgment, the Fifth Circuit noted that the Texas Recognition Act treats non-reciprocity as a discretionary ground for non-recognition.'5 Specifically, the Texas Recognition Act states:

A foreign country judgment need not be recognized if . . . it is established that the foreign country in which the judgment was rendered does not recognize judgments rendered in this state that, but for the fact that they are rendered in this state, conform to the definition of "foreign country judgment." 6

The Fifth Circuit determined that the district court properly treated an affidavit by an American attorney practicing in Abu Dhabi, stating that he and other members of his firm were "unaware of any Abu Dhabi courts enforcing United States' judgments," as sufficient evidence of non-reciprocity.'7 Although Abu Dhabi law permits the recognition of foreign judgments in the court's discretion and although the American attorney was "unaware of any actual attempts to enforce such judgments" in Abu Dhabi, the attorney expressed concern as to whether Abu Dhabi courts would choose to recognize an American judgment." Accordingly, the Fifth Circuit held that the district court did not abuse its discretion in refusing to recognize the Abu Dhabi judgment.'9

Together these cases provide a small glimpse into the globalization phenomenon that has swept the world as early as the 1970s-as subtle as an American citizen engaging in business transactions with neighboring country Canada and as complex as a contract and lawsuit involving entities and persons from three different regions of the world, such as a European bank, a North American citizen, and a Middle Eastern court. As modern technologies in transportation and communication create opportunities for individuals, businesses, and government entities to cross paths throughout the world at a rate higher than the world has ever experienced, the law has naturally been evolving to keep up. The law is only a catalyst for achieving justice if courts' judgments can be enforced against an individual, entity, or assets. As such, litigants throughout the world cannot always rest easy after winning favorable judgments. Instead, they must ensure that the judgments are enforced in those countries in which the judgment debtor, the losing party, resides or in which the judgment debtor's assets sit. Moreover, other circumstances might prompt a judgment creditor, the winning party, to initiate an enforcement proceeding in a country different from where the judgment was rendered. Such circumstances are illustrated in Khreich, where the French bank sought to enforce the Abu Dhabi judgment to preclude Khreich's claim against it in a U.S. court.

In theory, a nation's recognition and enforcement law has the power to influence whether private parties will receive remedies for the harms they have suffered. When nations refuse to recognize and enforce judgments of other nations, private parties face the grueling task of relitigating the case in a new jurisdiction if the party, as plaintiff, chooses to continue pursuing a remedy or if the party, as defendant, is subject to a new lawsuit in the new jurisdiction. Private parties' success in a subsequent lawsuit hinges partly, if not significantly, on the availability of time and money. Additionally, the treatment one nation affords to judgments rendered in other nations may impact how its own judgments are treated.

As exemplified by Bank of Montreal and Khreich, the United States lacks a unified approach to the recognition and enforcement of foreign judgments, creating complexities (and confusion) for a foreign plaintiff attempting to collect on a foreign judgment in the United States. While the district court easily recognized the Canadian judgment in Bank of Montreal by applying California's liberal recognition and enforcement law, the district court in Khreich just as easily refused to recognize the Abu Dhabi judgment by applying Texas' more conservative law. In the United States, recognition and enforcement law has been reserved as an issue of state law. While the majority of states have adopted the Uniform Foreign Money-Judgments Recognition Act ("the Recognition Act") since its original drafting in 1962, some have not and many others have adopted laws that deviate slightly, but significantly, from the Recognition Act. In 1998, the American Law Institute Council (AL) undertook the task of nationalizing the recognition and enforcement of foreign judgments by proposing a federal statute to govern the issue. In 2006, the ALl released its proposed federal statute ("the Proposed Act") which includes a reciprocity defense." Under the ALI's Proposed Act, if a judgment debtor raises a reciprocity defense, a U.S. federal or state court may only recognize a foreign judgment if the foreign country rendering the judgment would recognize comparable U.S. judgments. The Proposed Act was approved at the ALI's 2005 Annual Meeting."

This Note will analyze the ALI's Proposed Act, stemming from its Recognition and Enforcement of Foreign Judgments Project, 3 in the context of the reciprocity debate. Part I of this Note will detail the critical historical developments in American recognition and enforcement practice. Part II will compare American jurisprudence on recognition and enforcement to international recognition and enforcement practices. Part III will provide an analysis of the ALI's Proposed Act, focusing specifically on the effectiveness of its reciprocity defense in encouraging foreign countries to recognize and enforce American judgments. Finally, Part IV will present an argument for modifying the Proposed Act by eliminating the reciprocity defense for causes of action to enforce a foreign judgment and retaining its modified bright-line reciprocal agreement requirement in regards to the registration of foreign judgments. Such a modification would preserve justice for private litigants while encouraging foreign nations to recognize and enforce U.S. judgments.

#### This is also sometimes referred to as ‘positive comity’.

Gerber ND—(Distinguished Professor of Law at Chicago-Kent College of Law, Illinois Institute of Technology). David Gerber. Comity, Global Dictionary of Competition Law, Concurrences, Art. N° 12200. <https://www.concurrences.com/en/dictionary/Comity>

DEFINITION

The term “comity” is used in public and private international law to urge or demand that the institutions of one jurisdiction take the interests of one or more other jurisdictions into consideration in making legal decisions. Two levels of meaning may be relevant to competition law. One uses comity as a general concept to inform decisions. In this use it is not an element of enforceable law. In some countries, however, the concept has a second level of meaning in which it is an element of enforceable law that requires legal decision makers to take foreign interests into account in specific ways in specific situations.

COMMENTARY

The distinction between these two uses of the term often goes unrecognized, but it can be highly significant.

As a general concept: The comity concept is often overlooked or dismissed where it is not an element of enforceable law and therefore does not have a defined effect on specific legal decisions. It can, however, play important roles in understanding transborder dimensions of competition law. There are two such roles.

First, the idea of giving weight to the interests of foreign laws and institutions often influences relationships among competition law institutions. Respect for the interests of other jurisdiction is typically necessary where these institutions seek transnational cooperation - for example, where a competition authority in one state seeks information from a foreign competition authority. Some institutions pay significantly more attention to this concept than others, and there is often value in recognizing the weight given to comity considerations by the participants. For example, it can identify factors that are likely to influence the success or shape of negotiations regarding cooperation. Sometimes comity-based cooperation principles are embodied in agreements among the governments involved or between the relevant competition authorities themselves. For example, the competition authorities of the US and the EU are obligated by an international agreement to cooperate in specified ways in the sharing of particular types of information. Uses of this general concept by diverse states can also structure issues related to global competition law convergence and cooperation. This, in turn, will shape the future of competition law in the global economy.

Second, as discussed below, comity is often a conceptual basis for specific doctrines and rules in areas such as international private law (known in the US as conflicts of law) and the transborder jurisdictional reach of national laws. The concept may not be mentioned, but awareness of its content and roles often helps interpret and predict the application of specific rules.

As an element of applicable law: The general comity concept described above is an element of applied law in several contexts relevant to competition law.

- Jurisdictional reach of antitrust laws It has been particularly prominent in shaping the jurisdictional reach of US antitrust law. For several decades after the Second World War its role was central in applying US antitrust law beyond US territorial borders. Its role has diminished significantly since then, but decisions from that period still influence outcomes in US courts. Moreover, its influence has molded thinking in many countries about the role of the US in the global antitrust law arena.

The basics of this story are necessary for grasping the role of comity in the US antitrust context. Near the end of World War II US courts claimed jurisdiction over conduct outside the United States that caused harm either within the US or to certain US interests. The claim extended the reach of US antitrust laws beyond what had previously been accepted as legitimate under international law. As a result, many states rejected the legitimacy of the jurisdictional claim, and some protested vigorously that it represented an attempt by the US to force other countries to accept “US capitalism”. Nevertheless, the US government vigorously promoted antitrust law as a means of protecting competition and thereby averting concentrations of economic power that were thought to have led to the disasters of the first half of the 20th century.

Responses to US jurisdictional claims led US courts to turn to the concept of comity to limit the reach of US claims. In this context, it played a central role from the 1960s into the 1990s. The courts applied a balancing of interests test in which they were expected to weigh the potential harm to a foreign state from application of US law against the interests of the US in applying the law. In 1994 the US Supreme Court curtailed the role of the comity concept, holding that it would not curtail US jurisdiction unless its application would create a “true conflict” with the law of another jurisdiction. Courts have differed in assessing the current status of the comity principle. In a 2018 case the US Supreme Court declared that US courts should give “respectful consideration” to a foreign jurisdiction’s interpretation of its own laws, but that they are not bound by that interpretation. The courts have also referred to the comity principle in considering the extent to which US pretrial discovery procedures can demand presentation of foreign materials in US courts.

Comity concerns were incorporated into a Federal statute in 1982, and this legislation remains the primary basis for determining the reach of US antitrust law. The US also has agreements with some foreign countries that include a role for the comity principle.

Jurisdictions outside the US seldom refer to the comity concept in determining the reach of application of their competition laws. They typically rely on statutes to delimit the range of jurisdictional competence of their courts. The comity concept is, however, often implicit in the relevant statutes.

There are many reasons for the differences between principles of extraterritorial application of the antitrust laws in the US and in most other countries. Two factors are prominent: 1) The concept of “jurisdiction” in the US legal system is exceptionally broad, and it provides courts with the authority to impose obligations on litigants for failure to comply with a court’s dictates. Few other jurisdictions provide courts with such extensive authority and discretion in applying their laws extraterritorially, and 2) US courts are authorized to “make law” in ways that are seldom found outside the US - i.e., their decisions regarding jurisdiction are understood as law and evaluated accordingly.

- Private international law (conflicts of law) In numerous countries, the comity principle is a component of the laws and principles governing the application of foreign law in their courts. These laws specify situations in which domestic courts must apply the law of a foreign jurisdiction or may not do so. In some jurisdictions the comity-based rules are specific, while in others they involve interest balancing by the domestic court. These principles are sometimes relevant to the application of competition laws.

- Positive comity agreements In addition to the basic concept of comity discussed above, there is a concept referred to as “positive comity” which occurs in a limited number of international agreements, typically bilateral agreements. Such provisions provide that on request of one party another party should apply its law to punish a violation of the requesting party’s competition law. Positive comity provisions are seldom applied.

### International Body/Multilat/Bilat CP

#### Coordination via formal international bodies is an alternative to the AFF

Vibert 21—(Associate of the Centre for the Analysis of Risk and Regulation at the London School of Economics, Graduate of Oxford University). Frank Vibert. 2021. “Comity: Multilateralism in the New Cold War”. Edward Elgar Publishing. https://doi.org/10.4337/9781800889354.

4• Comity and light institutionalisation

Like-minded groups organise along distinctive lines and follow distinctive processes. The overarching organisational characteristic of like-minded groups is one of light institutionalisation. Light institutionalisation is often seen as i a reflection of weakness ininternational groups — soft arrangements leading to soft agreements with soft enforcement. It is seen to reflect a simple preference for international agreements that are easier to reach, less formal, less burden-some in their implications for members and less dependent on third-party enforcement. The discussion in this chapter shows in what ways this characterisation of weakness is mistaken. A diagnosis of softness overlooks the significance of professional and normative ties. Like-mindedness means that such groups are qualitatively different from other international groups. A different lens is needed to judge the way they institutionalise.

LIGHT INSTITUTIONALISATION IN THE WORLD OF INTERNATIONAL INSTITUTIONS

There are about 80 official international bodies in the world based on member-ship of governments. Individual countries belong to an average of about 50. The number of bodies rises to about 300 if various types of international reg-ulatory and professional bodies with membership from, or closely connected to, the official world are included. When the massive number of private-sector associations with a global or more geographically limited international voca-tion is added, the total rises to over 40,000.' Together, it is estimated they have given rise to over 70,000 legal and policy instruments.'

The imprecision about numbers reflects a situation where there is no agreed definition of 'international organisation'.3 Counting and classifications vary because of the different ways the tasks, or vocations, of international bodies can be defined and because of variations in membership. Some have global tasks but less than fully international memberships. Others have more geo-graphically limited tasks but fully international memberships. Some have nar-rowly defined tasks and limited memberships. Memberships may be composed of governments or official bodies such as central banks or regulatory agencies, or be drawn from the private sector.

Organising Principles

Underneath the seeming incoherence of this crowded world there are different organising principles to be found. The classic organising principle stands for the importance of global engagement on matters such as the rules for world trade, or measures to prevent food shortages. The increasing need to address narrowly focused expert agendas, such as accounting standards or banking supervision, provides an alternative principle. There is also an important group of bodies organised around the promotion of more self-centred or regional interests of members.' Bodies such as the Group of 20 (G20) major economies are intended to give strategic guidance to the whole.

What the presence of the OEEC/OECD model and groups such as the G7 demonstrate is the continuing importance of like-mindedness among the organ-ising principles.' With bodies comprising fully international memberships only rarely able to overcome the sources of their divisions and disagreements, the institutional model followed by like-minded groups has taken on a special relevance. Restricting groups to the like-minded can be defined as a simplify.. ing strategy that makes use of the way the basic expectations of members of a group are aligned around shared values in order to help them to pursue policy goals in an incremental way.6 The simplification provides a pathway through disagreement because it removes disagreements about what values are appli-cable and registers a need for comparable processes for the validation of rules. The group members can move ahead themselves with international rulemaking and provide incentives for others to join later.

### States CP

#### States can do extraterritorial stuff.

Manassa 21—(JD from University of Miami School of Law). Romney Manassa. 5/14/21. “Federalism in the Era of Globalization: The Exercise Foreign Affairs Powers by Subnational Entities”. University of Miami Inter-American Law Review, Volume 52, Number 2, Article 6.

Subnational Foreign Relations is exploding across the world for the same reason there exist over 200,000 international treaties and agreements:296 The world is changing rapidly and becoming ever more complex, and there is a myriad of issues on which communities at all levels must work together. Many of these problems are too large for one nation to handle—such as climate change, water scarcity, terrorism, and economic instability—and they subsequently impact subnational polities of all sizes, regardless of what the national government does (or does not) do.

Thus, although international law recognizes that state X has a legal personality, this in itself is not sufficient to demonstrate that it is the only entity to do so within its territory. In other words, the international status of the whole of a Federation does not in itself preclude its federated states from also having a form of international legal personality. Indeed, international law does not preclude federations from being composed of multiple overlapping legal personalities. Therefore, even if a Federation’s constitution was bound by internal rules to respect international law, in no way does international law force such Federation to possess only one single international personality for all possible purposes (emphasis added).297

In response to the rapidly changing paradigm of international law, some advocate for a “new sovereignty” to replace the antiquated Westphalian model.298 This can take many forms, from “transnational networks of government officials” to judges citing “precedents from other countries and international tribunals.”299 Echoing Justice Louis Brandeis’ exaltation of states as laboratories of “novel social and economic experiments without risk to the rest of the country,” subnational entities of all shapes and sizes could serve a similar purpose with respect to international law and political issues.300

This Note argues that Subnational Foreign Relations is yet another rendition of this new twenty-first century sovereignty, one that recognizes the fact that globalization means “we live in a time when the walls of sovereignty are no protection against the movements of capital, labor, information, and ideas.”301 Nor does sovereignty protect against threats and challenges too big, disparate, and complex for national governments to handle on their own—or too important to leave at the whim of rancorous national electoral politics.302

SFR is not only consistent with international law, but also with the U.S. Constitution’s conception of, and relationship with, international law.303 The American Revolution was in many respects a revolt against the Westphalian model of sovereignty vested in a singular monarch or government.304 The U.S. Declaration of Independence asserted that government power comes from “the Consent of the Governed,” which the people could change, abolish, or replace altogether.305 This idea of “popular sovereignty,” once ahead of its time, is now a foundational element for the vast majority of the world’s nation-states (at least in principle, if not in practice). Concurrent with the expansion of democratic principles worldwide, it may be time to broaden this pillar of human governance to encompass our burgeoning global community: “Popular sovereignty assumes that sovereign powers can be shared, divided, and limited without giving up on the entire system” of international law.306 SFR allows the people—through their cities, states, and even civil society groups—to exercise their constitutional right to self-expression (adopting international human rights standards or declaring solidarity and amity with a foreign people) and to self-governance (managing local concerns such as water and electricity in concert with foreign neighbors), albeit within the reasonable confines of the Constitution previously articulated above.

As Henkin observes, states inevitably “touch foreign affairs even in minding their proper business,” since federalism gives states co-jurisdiction over the lives and activities of foreign nationals.307 This unavoidably influences U.S. foreign relations, as first tested by Virginia’s inadvertent venture into foreign affairs in Ware v. Hylton. 308 But even the routine laws, policies, and regulations of a state impact foreign nationals and entities, who must engage with state offices and courts to reside, do business, or seek legal remedies within the state. Hence, despite the Constitution’s ambivalent and ambiguous demarcation of state-federal domains in foreign affairs, it is practically impossible to separate subnational influence from the national government’s foreign relations—especially in an era characterized by increasing movement of capital, people, and goods between the U.S. and the world.

In short, international law offers no restrictions on Subnational Foreign Relations, which is consistent with the foundational American principle of popular sovereignty, and which “nudge the nation back to federalism’s early days …. in which the states played a much larger role internationally.”309 Ostensibly, even skeptics and critics of international law could find merit in this originalist approach to state and local power abroad.

VII. CONCLUSION

Justice Michael Kirby of the High Court of Australia once observed that while “[o]nce we saw issues and problems through the prism of a village or nation-state …. [n]ow we see the challenges of our time through the world’s eye.”310 Though he was referring to lawyers and judges, his statement could just as well apply to humanity as a whole. Even in the most authoritarian, nationalistic, or isolationist countries, the common person living in provinces, counties, cities, and even rural villages is more interconnected than ever.311 The world is on the cusp of developing into a truly global civilization, with a shared human identity that transcends the traditional confines of culture, religion, ethnicity, and political identity.

Far from idealistic or Utopian, this development reflects the sober reality that, whatever our multitude of differences, our species shares common existential problems and concerns that well exceed the structural or legal frameworks of whatever country they happen to be born in. Aside from the more familiar and emblematic example of climate change, these concerns include the basics of human wellbeing and survival: Access to food, water, healthcare, economic resources, and more. All these issues and more are subject to an ever-growing array of nonbinding, informal, or otherwise extraconstitutional agreements, concluded not only by nation states, but by international organizations, nongovernment organizations, civil society groups, and subnational units of varying shapes, sizes, and labels.

The U.S. Constitution, which has endured longer than the written constitution of any other nation, has long benefited from its versatility and ability to “respond to developing circumstances.”312 As this Note has hopefully demonstrated, the Constitution is adaptable to the challenges and realities of this rapidly globalizing century, namely the burgeoning relationships between Americans and their foreign counterparts, which are no longer constrained by the barriers of old—not even the federal government. After two centuries of courts never striking down SFR—and not for lack of opportunity—and an equally long period of both congressional and executive acquiescence, federal administrations should conform to constitutional language, state practice, and consistent judicial rulings allowing states broad discretion to engage in the international realm.

Not only would such conformity be legally and politically sound, but it also would reap a range of practical and moral benefits: The United States could reclaim its standing as a responsible and engaged member of the international community; the people would have an outlet to express views and values otherwise unattainable through the comparatively more distant mechanisms of the federal government; and some of the most pressing problems facing the nation and the world can be addressed through hundreds of thousands more flexible, responsive, and bolder “laboratories” that make up the U.S. and almost 200 other nations.

## NEG: Ks

### Biopower

#### Extraterritoriality extends the reach of biopower.

Falcon 21—(Department of Global and Sociocultural Studies, Florida International University). Joshua Falcon. 2021. “Consciousness as a domain of extraterritoriality”. Culture, Theory and Critique. 10.1080/14735784.2021.1908904.

In fact, to approach extraterritoriality in a non-traditional manner is contingent upon expanding on the concepts of territory and territoriality themselves in a way that goes beyond their conventional juridico-legal framing. In turning to critical social theory as a guide, human geographers have shown that modernist approaches to the concept of territory often refer to notions of the territorial state. The territorial state itself, however, is ‘a highly specific historical entity’ that emerged during the end of religious wars in Europe and therefore does not capture how practices of territoriality have arisen in particular sociohistorical configurations (Gregory et al. 2009: 746; see also Elden 2010a). As Agnew (1994) has further argued, theoretical discussions on territory are rife with modernist assumptions, such as the idea that the state has always been territorially bound. Moving beyond a modernist understanding, territory can be understood as both a practice and an effect which expresses a ‘certain relationship with a world’ through organising social relations and shaping forms of identity (Brighenti 2010: 64). As a practice and an effect which includes managing subject-formation and social relations, territoriality also refers to a process which works to make individuals subjects through their psychic attachments to various social and environmental phenomena. Territoriality therefore denotes ongoing practices, or territorialising schemes, that seize human capacities to form social relations while also channeling these relations and capacities in certain ways rather than others (Hardt and Negri 2000).

To further illuminate just how territoriality, and extraterritoriality by extension, can be understood as a process and practice that involves capturing and managing new domains of governance, I turn to critical social theorists who have demonstrated how state control is extended onto the human body and its manifold forms of expression (Foucault 2007; Butler 1990). Not only have feminist geopolitical theorists stressed the political importance of the human body in terms of the encroachment of state power, but they have also shown how the body can be considered a territory its own right (Hyndman 2003; Gilmartin and Kofman 2004; Dowler and Sharp 2010). In addition, critical thinkers drawing on Foucauldian biopolitical theory have argued that both disciplinary and biopolitical technologies have worked their way into the most intimate areas of human life, including human physiology, genetic makeup, subjectivity, and capacity to form relations with other material bodies (Rose 2001; Braun 2007; Coleman and Grove 2009; Anderson 2012). By regarding territoriality as a process and a practice which centripetally works across myriad domains of life through biopower and other means, extraterritoriality can therefore be conceived of as the process through which new domains not previously territorialised become objects of governance.

### Orientalism

#### Extraterritorial application is historically a smokescreen for colonization of legal systems deemed ‘lesser’.

Ruskola 10 – (Professor of Law at Emory University, JD from Yale University). Teemu Ruskola. 2010. “Raping Like a State”. 57 UCLA Law Review 1477. Pages 1519-1531. https://www.uclalawreview.org/pdf/57-5-9.pdf. Accessed 4-20-2022.

While international legal discourse provided a symbolic logic and a vocabulary for turning China into a lawbreaker, its ultimate fate was not full territorial conquest (although the colonization of Hong Kong and Macao were far from inconsequential events, and it is noteworthy that American diplomats in China pressed at one point for the U.S. colonization of Taiwan183). Evidently, the rights and duties enjoyed by China as an international legal person were part of a larger global colonial script, yet the dominant strains of international legal rhetoric did not call for full-scale occupation of China but for a kind of nonterritorial imperialism instead, which subsequently made China and other similarly gendered and racialized states in Asia increasingly penetrable by other means as well. Indeed, the so-called Treaties of Trade, Peace, and Amity that were forced on China were only the first step in the progressive penetration of China. As J.A. Hobson put it, “the use of imperial force to compel ‘lower races’ to engage in trade is commonly a first stage of Imperialism,” and he insisted that in this regard China was “the classic instance of modern times.”184

In addition to opening new ports for Western trade, China’s post–Opium War treaties provided for the privilege of extraterritoriality: Subjects of Treaty Powers were thereby exempted from Chinese laws—a remarkable privilege that the citizens of the United States, for example, enjoyed for a century. By the magic of a legal fiction, even while in China, the beneficiaries of extraterritoriality were treated as if they remained in the sovereign territory of their home states.185 Various other forms of concessions and privileges that were secured by subsequent treaties were enabled, and facilitated, in important ways by extraterritoriality.

The practice of extraterritoriality was not invented in the West’s encounter with China. It had a long prior history as consular jurisdiction in early modern Europe, although it was re-invented in a more draconian form and with new justifications in China. Before the consolidation of exclusive territorial jurisdiction as the modern norm, foreign consuls had performed judicial functions among their own communities. A form of consular jurisdiction facilitated also European trade in the Levant where European merchants’ civil disputes were likewise typically adjudicated by European consuls. To be sure, over time Europeans demanded increasingly significant exemptions from local law, but at least in principle their rights of extraterritoriality were limited to civil matters and the same rights were extended reciprocally to Levantine traders in Europe.186

However, in nineteenth-century Asia the practice of extraterritorial jurisdiction underwent a qualitative transformation.187 It became strictly unilateral, and it came to encompass criminal as well civil disputes.188 Moreover, the express condition for its elimination was judicial reform on the EuroAmerican model. (For example, the United States’ treaty with Korea in 1882 stated that the United States would not surrender its extraterritorial jurisdiction until Korea adopted laws that “conform to those of the United States, in the judgment of the United States.”189) Evidently, China’s first treaties with the West did not constitute it as a member of the Family of Nations. Rather than establishing community, they were premised on its very opposite—immunity, the West’s exemption from Chinese law.190 With an intensified practice of extraterritoriality, the post–Opium War treaties with China inaugurated a century of unequal exchange and provided a legal technology that made possible what was, effectively, a colonialism without colonies—a nonterritorial form of legal imperialism.191

With extraterritoriality in place, each Western individual in China became effectively a floating island of sovereignty, an inviolable ambassador-at-large for his civilization. Yet toward the end of the nineteenth century, simple extraterritoriality no longer satisfied the Treaty Powers, as they devised new forms of legal, financial, and technological penetration. Territorial leases and railroad concessions stand out among such innovations. After 1895, during the Scramble for Concessions, there was genuine fear that China might in fact be divided up among competing territorial powers. This scramble was precipitated by a new legal form, the so-called public international law lease. This “mutant creature” was a ~~queer~~ legal innovation in itself.192 It was founded evidently on the private law analogy, but it had no clear historical precedent and it defied publicists’ attempts at precise definition. Remarkably, the British lease for the New Territories of Hong Kong, for example, did not include an obligation to pay any rent193—a feature that was squarely inconsistent with the private law definition of a lease. Although it fell short of a formal cession of territory, the public international law lease was in fact a form of direct territorial control, on the model of outright colonialism.194 Indeed, Germany referred to its lease in Kiaochow formally as a Schutzgebiet, a protectorate, and it treated Kiaochow the same way as its recently established protectorates in Africa—the preeminent form of colonial control on that continent.195 The public international law leases in China typically entailed concessions for railroads, among other things. The Kiaochow lease, for example, provided for a right to construct a railroad outside the German leasehold, along with a right to establish mines within a fifteen-kilometer-wide zone on each side of the railway line (in addition to securing a fifty-five mile buffer zone outside the leasehold that was to be patrolled by German troops).196 In time, the proliferating foreign railroad concessions both inside and outside of leaseholds came to constitute yet another mutant form of territorial control. The emerging “railroad sovereignty”—for lack of a better term to describe what ultimately became a form of sovereignty in its own right—was epitomized by the South Manchuria Railway Company, chartered by Japan in 1906 to operate its railroad concession in Manchuria. Officially a commercial operation, the Company became an extension of the Japanese state itself in China, as it established militarized company towns as well as agricultural settlements along its extensive railroad zone.197

Around the time of the Scramble for Concessions, Western colonial powers flirted seriously with the idea of taking most, if not all, of China by outright force. Even though a full-fledged colonial rape never took place, the fact that it could be seriously entertained reflected an epistemological conquest of China that was accomplished in the second half of the nineteenth century. Increasingly, fin-de-siècle international legal rhetoric degraded the formerly high status of Chinese civilization.198 One way in which it did so was by pushing China out of Asia and into Africa. The British at first used to liken China to India, the foundation of their colonial empire in Asia. The diplomat Lord Elgin once proclaimed arrogantly, “We might annex the Chinese Empire if we were in the humor to take a second India in hand,”199 yet by the turn of the century European colonial discourse tended to reduce the “Chinaman” into the generic “native” on the African model, as George Steinmetz has illustrated.200

 Indeed, it was hardly an accident that the Scramble for Concessions in China was contemporaneous with the Scramble for Africa and that both events became known by the same term—“Scramble.”201 Although there were differences in the predominant legal forms—protectorates in Africa, leaseholds in China—their underlying logic was increasingly similar. Moreover, China’s problems came to be attributed less and less to an excess of civilization than to a lack of it. Rather than hypercivilized, China was described by diplomats and international lawyers increasingly as “semi-civilized” and “barbaric,” even “savage.” What had once been an ancient civilization—however ~~queer~~ and past its glory—now became reduced to a race. 202 The scholar-statesman Kang Youwei complained that before its defeat by Japan in 1895, China had been regarded as at least “half-civilized,” but thereafter the Chinese were treated as if they were “on the same level as the ~~Negro~~ races in Africa.”203

Tellingly, Japan’s corresponding rise in legal status was accompanied by increasing rhetorical Europeanization, as attested by its “Leave Asia, Enter Europe” slogan,204 and most importantly by its success in abolishing Western extraterritorial jurisdiction.205 The tectonic shift in China’s discursive location was evident in the inflamed rhetoric surrounding the Boxer Rebellion in 1898– 1901. This violent reaction against foreign imperialism climaxed in the killing of the German ambassador and the siege of several hundred Westerners and Chinese Christians in the Legation Quarter in Beijing.206 The great hostage crisis was resolved by sending an unprecedented punitive expedition by the major Treaty Powers who charged China with “crimes unprecedented in human history, crimes against the law of nations, against the laws of humanity and against civilization.”207 A 1900 article indeed recommended that the West follow the course it had taken in Africa, by setting up an international administration in China on the model of the Congo!208 Even the Kaiser observed that China was treated “like a ~~Negro~~ state of secondary importance [wie einen Negerstaat zweiter Güte].”209 As

James Hevia describes the Allied troops’ ritual defilement of the imperial grounds during the Boxer Rebellion, it was calculated in part to transform the cosmologically unique Son of Heaven into simply one sovereign among others210—a mere international legal person with the proper name “China.” Yet this new international legal person was in fact not modeled on the legal person of the European variety. Until recently, China had been disparaged as “the Sick Man of Asia,” thus likening it to the Ottoman empire, “the Sick Man of Europe”: Together, they represented two Oriental civilizations in decline. Notably, extraterritoriality had been the main form of legal imperialism in both, indexing their intermediate status on the scale of civilizations. When the point of reference for China’s racial identity began shifting to Africa, not only was there a growing preference for territorial forms of control such as leases, but the West was also increasingly willing to resort to pure violence. For example, when merchants in China responded to the Chinese Exclusion laws in the United States by organizing a boycott of American goods in 1905, President Roosevelt entertained seriously the option of a military seizure of Canton with the support of approximately 15,000 troops.211

 The figurative transition from quasi-consensual commercial intercourse to colonial rape had in fact been marked symbolically at the time of the Boxer Rebellion. When the Allied Troops entered Beijing in 1900 to defeat the Boxers, they routed the troops to the capital through the imperial Qian gate. When they found the gate closed, they forced their way through the middle door of the gate—reserved for the emperor only—by blowing it up with guns.

E. Kowtow Redux

Given China’s international legal status in 1900, from the perspective of the Treaty Powers territorial conquest would in fact have been beside the point. It would have brought little gain, and, on the contrary, it would have entailed administrative responsibilities that were easily avoided by the extensive repertoire of legal strategies of informal empire. A dense network of old and new forms of foreign sovereignty had already been superimposed on China—ranging from simple extraterritoriality to Treaty Ports to concessions to forms of railroad sovereignty to foreign telegraph lines to foreign post offices to foreign-run customs collection agencies to leaseholds to formal colonies such as Hong Kong and Macao, and every conceivable gradation of intervention and domination in between.213 Even though the sovereignty of China as a whole was never formally challenged, it was rendered close to meaningless, as the West gained jurisdictional control of and access to major cities and rivers and the main lines of communication and transportation. Although the reticular structure of this colonial sovereignty fell short of actual occupation, it gave China jurisdiction and full control only over the spaces that mattered the least—the blank spaces that exist on modern maps between cities, railroads, and rivers. What was left was a shell of Chinese sovereignty, penetrated repeatedly from all sides so that its spatial representation looked increasingly like an elaborate latticework.

After the Boxer Rebellion and with the rhetorical Africanization of China, the apologies and indemnities that were demanded of it also reached a qualitatively new level. Perhaps most remarkably, Germany insisted that an imperial prince personally deliver the emperor’s apology for the Rebellion to the Kaiser in Berlin.214 In keeping with the history of Sino-European diplomatic exchanges, there was once again a dispute over protocol. Yet there was no longer even a pretense of claiming merely diplomatic equality between sovereigns but an open assertion of European superiority over China. Although China was made to give up its domestic diplomatic protocol along with the ritual kowtow, the Kaiser now

demanded just that: He requested that the Chinese prince, quite literally, kowtow before him in the German capital—thus offering himself over to German sovereignty on all fours, in total submission.215

 In the end, the Chinese prince (whom the German press described as a “girlish” young man and whom German officials referred to as “the Prince of Atonement” [Sühneprinz]) refused even to cross from Switzerland to Germany until this demand was given up.216 In Berlin, he was met with unprecedented rudeness. Upon his arrival, German guards ignored him, standing at ease and refusing even to salute him. At the audience, the Kaiser berated him loudly for crimes that were “unheard of among civilized peoples,” with a pointed emphasis on the word “civilized.” Remarkably, however, after enduring this unprecedented diplomatic humiliation, upon his return trip the Chinese prince was treated in accordance with his imperial status. The soldiers greeted him now,217 and he turned from a diplomatic non-entity into the representative of an international legal person.

The moral of the diplomatic parable is clear: China could become an “equal” sovereign only by enduring humiliation and acknowledging the West’s superiority. That superiority in turn was marked in racial, gendered, and sexual terms, by the delivery of an apology by a ~~queer~~ Chinese prince.

V. SCRIPTS OF SOVEREIGNTY

Rape does not happen to preconstituted victims; it momentarily makes victims.218 —Sharon Marcus

Throughout this Article, I have highlighted ways in which sexual, gendered, and racial metaphors have structured uneven global, legal, and political relations historically. I have analyzed specifically China’s rhetorical status as a political and economic subject within the imaginative structure of international law in the nineteenth century. I want to conclude by considering further the political and epistemological significance of this rhetoric.

One way to understand the rhetorical framework of nineteenth century international law is to analyze it as a set of global cultural scripts, in the sense suggested by Ryan Goodman and Derek Jinks’s sociological model of sovereignty.219 The model seeks to explain states’ increasing institutional isomorphism as a result of the global diffusion of cultural models. These models are not adopted either because of their utility—often, they are in fact dysfunctional—or simply because of mindless habitualization, but rather because they have come to occupy an orthodox status in global culture, Goodman and Jinks argue.

The model provides a powerful explanation for much of the institutional structure of contemporary global society. A historical analysis of international legal rhetoric supplements the model in important ways. It underscores the perhaps obvious but vitally important fact that today’s orthodox “world models” of state organization represent by and large the global diffusion of a historically specific North Atlantic political and legal culture. A historical examination of the constitutive limits of that culture helps us understand why even today it is easier for some actors than others to execute credibly the global scripts of sovereignty. Institutional organization of the state is one important element in making a successful claim for sovereignty, but it is not always enough; it also matters who is making the claim.

The point of a historical comparison is of course not to suggest that international law’s boundaries remain the same today as in the nineteenth century. This is evidently not the case. By overhauling their political institutions to simulate those of the sovereign states of the West, numerous extra-European states have attained various degrees of political and legal recognition. Nevertheless, just as an individual in a colonial dominion could never perfectly mimic his colonial master, so an extra-European international legal person is still doomed to at least some degree of mimetic failure. Hard as a non-Western state may try, even at best its institutions will be “almost the same but not quite,” to borrow Homi Bhabha’s oft-quoted formulation.220 To state a truism, the only perfect replica of a modern Western state is a modern Western state.

Consider the case of the kingdom of Hawaii. In the 1840’s, Hawaii expressed a great eagerness to join the Western interstate order (to preempt being colonized by it). The kingdom followed faithfully and quite literally the global script of sovereignty by setting up a constitution, a bicameral legislature,

and a supreme court, among other institutions.221 Nevertheless, even as sympathetic an observer as Mark Twain simply scoffed at “grown folk” “playing empire,”222 and Hawaiian sovereignty never seemed to pass the laughing test in the eyes of various American and European observers. China could not be dismissed as easily as Hawaii, to be sure. Yet, ironically, even though the Chinese state enacted a number of Western-style political reforms at the turn of the twentieth century, its claim to sovereignty became even less credible than before as it became increasingly associated with Africa.223 In effect, its changing racial identity rendered it more rapable and less sovereign.

As shorthand, we might refer to the normative model of state organization as the sovereignty script and to the sexualized and racialized structure of interstate violence analyzed in this Article as a rape script. The two are dialectically related: To be sovereign is not to be rapable, and to be rapable is not to be sovereign. The notion of a rape script in turn provides a way of assessing the significance of the rhetoric of sexual violation in international law. A socalled realist observer (whether a Legal Realist or a Realist International Relations scholar) might dismiss that rhetoric as little more than a hypocritical discourse whose main function is to provide a post hoc justification for violence that is ultimately determined by material factors. Obviously no serious analysis will deny that colonial and semi-colonial violence ordinarily serve powerful material interests, yet it is equally important to recognize that rhetoric is a form of power and hence one important source of sovereignty, not merely its secondary reflection. All violence takes place in discourse—in language, in narratives—and discourse plays a crucial role in determining not only who gets violated and how, but even what counts as a violation in the first place.

#### Comity jurisprudence has historically seen China as inferior, and used extraterritoriality as a tool for Westernization.

Heraclides 15 – (Professor of International Relations at the Panteion University of Social and Political Sciences). Alexis Heraclides and Ada Dialla. 2015. "Humanitarian Intervention in the Long Nineteenth Century". Manchester University Press. Pages 36-41. [https://www.jstor.org/stable/j.ctt1mf71b8. Accessed 4-20-2022](https://www.jstor.org/stable/j.ctt1mf71b8.%20Accessed%204-20-2022).

Robert Phillimore was the first major British jurist to write on international law, in the nineteenth century, a naturalist rather than a positivist, attached to Christian principles. He was a Member of Parliament, a High Court judge, held other influential posts, and was a close friend of William Gladstone, whom he influenced on matters of international politics, especially with regard to intervention on behalf of Christians in ‘Mohametan’ states like the Ottoman Empire.63 Writing in 185464 he argued that ‘International Comity, like International Law, can only exist in the lowest degree among Independent States; in its next degree among Independent Civilized States, and in its highest degree among Independent Christian States’.65 Christianity, according to Phillimore, was the highest form of civilization and Christian nations deserved a privileged position in international law.66 However, non-Christian nations should not be refused recognition as members of the international community.67

Similar views were held at the time by the Italian jurist Pasquale Fiore, of Cremona and Naples universities, whose work was highly acclaimed in Europe during his lifetime, and translated into French and English.68 Fiore, whose work anticipated the international law of human rights,69 was of the view that the ultimate source of international law was the juridical conscience of European peoples.70 Human society was ‘universal’ but only fully civilized states could be members of what he called the Magna civitas, the juridical community. He had doubts whether civilization could extend uniformly to all parts of the world.71 Beyond Europe there was a clear distinction between the somewhat civilized cultures of Asia (such as ‘Turkey’ and the ‘great Oriental Empires’) and the less civilized peoples, perhaps barbarians, of Asia and Africa, who did not possess a stable political organization.72

F. F. Martens, of the University of St Petersburg (an ethnic Estonian), legal adviser to the Russian Foreign Ministry and the most acclaimed Russian international lawyer of his time, held similar views. International law was based on common values and reciprocity, hence could not apply to relations with ‘noncivilized peoples’, as pointed out by John Stuart Mill (see chapter 5), despite commercial relations with such states or treaties. Relations with such entities were based only on natural law and morality. However, he reluctantly accepted that international law applied to non-Christian peoples if they are prepared to accept the rational aims of humanity as elaborated by the civilized European states.73

The eminent Swiss jurist Alphonse Rivier, of Brussels University, SecretaryGeneral of the Institut, argued (in the 1890s) that the sphere of international law extended to the family of nations that shared the Christian faith. He claimed that the law of nations could not function properly between Europeans and ‘inferior races’ for the gulf between them was similar to that between ancient Greeks and barbarians. However, the family was not closed but open, consisting of European nations as well as ‘Turkey’ (accepted in 1856). But other Asian states and Christian Abyssinia were excluded from the so-called ‘family of nations’.74

A decade later, John Westlake, one of the founders of the Revue, President of the Institut and third Whewell Professor of International Law at Cambridge University, held similar views. He argued that the international society comprises those states equipped with ‘European civilization’,75 that is, all the European and American states as well as ‘Turkey’ and Japan. Some backward Christian countries, such as Abyssinia or Liberia, could not contribute to the development and enforcement of international law.76 A country ‘with an old and stable order of its own’ might be considered ‘civilized’, as in the case of China or Japan, whose ‘leading minds’ were ‘able to appreciate the necessities of an order different from theirs’.77 He regarded Japan an equal member of the family of nations and Morocco, ‘Turkey’ Muscat, Persia, Siam and China as enjoying only parts of international law.78

Moving onto the fourth category (eventual acceptance by all), worth mentioning is the British jurist Thomas Erskine Holland, a pure positivist,79 who posited that international law need not be restricted to Christian nations, for this was a ‘question rather of Civilisation than Creed’.80 For him, ‘civilized states’ were those states that were well organized and effective,81 even if they were non-European.82 Participation in international conferences, such as the Hague Peace Conferences, did not automatically confer ‘civilized’ status but was a move forward, bringing China, Persia and Siam to the ‘outer courts of the charmed circle’.83 He accepted that Japan had become a full member of the family of nations.84

Lassa Oppenheim, Westlake’s successor at Cambridge University, one of the most authoritative international lawyers of his time and author of the most widely read international law treatise of the twentieth century (with nine editions up to 2005), defined international law as ‘the body of customary and conventional rules which are considered legally binding by civilized States in their intercourse with each other’.85 For a new member to be admitted ‘into the circle of the Family of Nations’, three conditions had to be met: (1) to be civilized and ‘in constant intercourse with members of the Family of Nations’, (2) expressly ‘or tacitly consent to be bound for its future international conduct by the rules of International Law’, and (3) states of ‘the Family of Nations must expressly or tacitly consent to the reception of the new member’.86 Following ‘the reception of Turkey’ in 1856, international law was no longer limited to Christian states, but the position of the Ottoman Empire remained ‘anomalous, because her civilization was deemed to fall short of that of the Western States’.

Contemporary criticism

Very few publicists questioned the overall distinction between civilized and uncivilized countries. The earliest dissenting voices did not question the distinction but rather forceful intervention in the name of civilization. Terenzio Mamiani, the father of the Italian school of international law and actively involved in Italian unification, warned (in 1859) that ‘to introduce civilization amongst barbarians, and to take them out of their savagery … at the point of the spear, and by force of arms, as the Romans chose to do, was an uncivilized and tyrannical proceeding’.88 His compatriot Giuseppe Carnazza Amari, of the University of Catania, pointed out that civilizing the barbarian peoples was an act of ‘high philanthropy’ but it should be accomplished by civilized means, as ‘imposing [civilization] by force is a barbarity greater than the one that we want to destroy’.89 Similarly, Bonfils was against intervening to educate barbarians and savages: ‘For if in the name of humanity we claim to have the right to mingle in the affairs of ~~Negro~~ kings of Africa how could we contest such occurrences in Europe, as in the case of those who intended to invade France in 1793?’90

David Dudley Field, a US legal reformer and one of the founding members of the Institut, argued that a lack of neither Christianity nor ‘civilization’ supplied a justification for exclusion from international law. Referring to China he made the following pertinent point: ‘Can it be justly claimed that a nation which has maintained a regularly administered government, over hundreds of millions of human beings, for thousands of years … is uncivilized?’ 91

The Swiss professor Joseph Hornung referred to acts of barbarity and inhumanity by various ‘civilized’ states (Russia, Britain, France, Spain, Portugal, Holland) against so-called ‘barbarian’ and ‘savage races’, and concluded that ‘all the Christian States have committed more or less the same crimes. In general they have proceeded towards other races by conquest, brutality and egoistical exploitation’.92

Another dissenting voice was that of Alexandre Mérignhac, of Toulouse University. As he put it: ‘on the basis of what sign can they recognize civilized States and distinguish them from those that are not? … seeing things from a higher level, if we do not limit civilization on the basis of this or the other criterion, which is more or less arbitrary we may arrive at the conclusion that perhaps these nations simply have a distinct civilization from our own, for in addition they, in turn, consider us barbarians’.93

It was only following the First World War, when the ‘civilized’ world clashed in the most uncivilized manner imaginable, that reference to ‘civilized states’ was largely abandoned. Now international lawyers and diplomats were ‘wary of the language of civilization’,94 although it did continue to crop up in various texts of the inter-war period.95 It found its echo in the trusteeship system of the League of Nations, with its notion of the ‘sacred trust of civilization’, and in the statute of the Permanent Court of International Justice of the inter-war period, and more embarrassingly in the statute of the International Court of Justice (1945), which still refers to ‘the general principles of law recognized by civilized nations’ (article 38, 1c).96

The reactions of the outsiders: China and Japan

But what was the reaction of those on the receiving end of the ‘standard of civilization’? These states, initially not accepted into the family of nations, were not participants in international conferences, were party to unequal treaties against their interests and suffered military interventions to boot. Three cases are well documented: China, Japan and the Ottoman Empire (the last is treated under its own heading in the next section of this chapter).

China

 China’s reaction and adaptation to the modern world were greatly delayed. In order to understand this inertia one must bear in mind that for thousands of years and well into the nineteenth century the Chinese held a Sinocentric concept of the world. They regarded their country as the centre of the world, the ‘Middle Kingdom’, the Celestial Empire under the ‘Son of Heaven’ (the Emperor) as a universal ruler, reigning over the entire world. The Middle Kingdom was the quintessential country of virtue, the embodiment of civilization, indeed the only civilized country, hence their sense of superiority, huge pride and utter contempt for foreigners, invariably regarded as ‘barbarians’ (akin to ‘dogs and sheep’). Barbarian entities, namely the various small states near China, were, at best, vassals in a tributary system, and then only provided they showed obedience and their representatives performed the famous kowtow ritual (three kneelings and nine prostrations) before the Son of Heaven. Some authors have called this a distinct ‘East Asian society’ or ‘family of nations’ with China as the centre, though it was hardly an international society in which some form of equality reigned, but was more like the Roman Empire and its relations with its neighbours. From the late eighteenth century onwards, with China’s first contacts (through trade) with Britain and other Western states, the ruling Chinese regarded Westerners as ‘Western barbarians’ and this remained the case past the mid-nineteenth century. The Son of Heaven ruled with the mandarins, officials trained in the Confucian classical tradition (in the famous Hanlin Academy), who knew almost nothing else, for all other knowledge or practical expertise was seen as being beneath their dignity. Trade and foreign affairs (called ‘barbarian affairs’, which included knowledge of other countries and peoples) were regarded as a waste of time, and demeaning.97

 This mentality and sense of superiority, together with China’s size, long history and self-sufficiency (intellectually and economically) and lack of knowledge or interest for the rest of the world, made China impervious to foreign influence and even to the much more intrusive Western influence until it was too late. The ‘immobile empire’ moved at tortoise pace when confronted with the West, which initially was not regarded for what it was, the greatest challenge and existential threat ever faced by China, which called for quick reactions and far-reaching reforms in education, government and foreign policy.98

In this tragic meeting, or rather clash, of civilizations, one can discern three stages on the part of the Chinese ruling elite:

(1) 1840–60. Following the Opium War of 1840–42, with Britain, China’s defeat and the ‘unequal’ Treaty of Nanking, China ceded Hong Kong and opened five ports to British residence and trade; it was also made to accept a ‘most favoured nation’ clause for Britain. The resultant trauma and humiliation led to a ‘closed-door foreign policy’ in what were two ‘lost decades’ for the Chinese Empire. The defeat by a much smaller army was seen as resulting merely from the superior fire-power of the ‘Western barbarians’ instead of being seen as pointing to the urgent need for radical change in the name of survival. Thus, acquiring Western weapons and manipulating the ‘Western barbarians’ through trade were regarded as the ways to manage the West, along with the age-old Confucian strategy towards ‘barbarians’, known as the ‘loose-rein policy’.

99 (2) 1860–80. After the 1857–60 War (with the invasion by Britain and France and huge shock of the burning of the Summer Palace in 1860), it dawned on the Chinese that the situation was unprecedented and ‘unalterable’.100 Thus the ‘self-strengthening’ policy was adopted, stressing knowledge of the West (‘Western learning’, though it made limited inroads). This new phase saw the formation of the equivalent of a foreign ministry (the Tsungli Yamen) under enlightened officials Prince Kung and Wen-hsiang, the formation of the Interpreters College (for learning foreign languages, again with limited inroads made), the sending of the first permanent diplomatic mission to London in 1877, under Kuo Sung-too (a Confucian scholar like the rest but forward-looking), followed by missions in Paris, Berlin, Madrid, St Petersburg, Washington and Tokyo, the translation of several international law treatises and the sending in the 1870s of the first student to study international law in Paris (Ma Chien-chung, who was to prove a valuable adviser on international affairs). China opened a new era in its relations with the West but continued to be torn between tradition and modernity.101 Western learning, the initiatives by Prince Kung and the positive appraisal of Britain by Kuo in his reports in London faced heavy criticism from traditionalists on Confucian grounds and on the grounds of Chinese superiority.

102 (3) 1880–1900. According to Sinologist Immanuel C. Y. Hsü, by ‘1880 China had belatedly taken her place in the family of nations’103 (this was not accepted by Western international lawyers, who placed the date later, at the turn of the century). What is more than clear is that Sinocentrism was now on the wane, the term ‘barbarians’ regarding the Westerners was dropped, ‘Western learning’ was now ‘new learning’, the Japanese Westernization example was seen in a positive light and by the 1890s ‘Western knowledge’ had entered the school curricula (previously it had been scanty to non-existent). The defeat in the war with Japan (1894–95), a lesser power, was a great shock and, with continued foreign expansion in the region (by Britain, France, Russia, as well as Germany), China felt threatened with dismemberment, with ‘being cut up like a melon’.104 Yet despite the urgency of the situation, there was backlash on the part of conservative officials, including the reactionary mother of the Emperor (the Empress Dowager), who ran the state given the weakness of her son. This period ended dramatically with a tug of war for China’s soul: on the one hand, there was the famous ‘hundred days’ when the Kuang-hsu Emperor asserted himself under the influence of the reformists, headed by scholar K’ang Yu-wa, who convinced him, for the good of the country and its survival, to take a series of major reforms, possibly including constitutional monarchy; and on the other, there was the Empress Dowager’s coup, which deposed her son and ushered in the reactionary Boxer Rising (with its call to ‘expel the barbarians’).

105 As regards international law, on the eve of the Opium War, in 1839, commissioner Lin Tse-hsu, in charge of abolishing the opium trade, had extracts from Vattel’s treatise (see chapter 2), on a state’s right to control foreign trade, translated into Chinese. He also sent two eloquent letters to Queen Victoria (which she never read), in which he pointed out that she would no doubt ‘be bitterly aroused’ if people from another country ‘carried opium to England and seduced your people into buying and smoking it’.

106 In the 1860s and 1870s, under the guidance of Kung, works of international law were translated into Chinese, starting with Wheaton’s treatise and followed by those of Woolsey, Martens, Bluntschli and Hall (all of them translated by W. A. P. Martin, who initially wanted to translate Vattel’s but found it too antiquated) as well as the Manuel de lois de la guerre of the Institut.107 Martin, an American missionary and member of the Institut who lived in China for sixty years, taught international law and tried to present it as compatible with Confucian tradition. But his translations and teachings had limited influence prior to the 1890s. No doubt China’s self-concept as the abode of civilization did not allow it to emulate Western-inspired international law, though it was obliged to do so in its relations with the Western powers. It was to incorporate international law and respect for the laws of war in its foreign behaviour mainly after the Sino-Japanese War of 1894–95.

### Racial Imperialism

#### Extraterritoriality perpetuates racial imperialism that can’t be separated from social struggles at the domestic level—the alternative is understanding law through a lens of cosmogonic causality.

Winter 15—(Professor Emerita in the Department of African and Afro- American Studies at Stanford, awarded the Order of Jamaica for services in the fields of education, history, and culture). Sylvia Winter. 2015. “Chapter 8: The Ceremony Found: Towards the Autopoetic Turn/Overturn, its Autonomy of Human Agency and Extraterritoriality of (Self-)Cognition”. *Black Knowledges/Black Struggles: Essays in Critical Epistemology*. Liverpool University Press.

Introduction

A little more than a quarter of a century ago, I wrote an essay titled “The Ceremony Must Be Found: After Humanism” (Wynter, 1984) for a special issue of boundary 2 titled On Humanism and the University, 1: The Discourse on Humanism, both edited and introduced by William Spanos. My essay, together with Spanos’s far-reaching Introduction (Spanos, 1984) as well as the essays of the other contributors, can be seen from hindsight to have been written in the lingering afterglow of what had been the dazzling, if brief, cognitively emancipatory hiatus that had emerged in the wake of the social uprisings of the 1950s and 1960s. These social movements – internal to the USA, but also to its fellow Euro-American and Western-European nation states – had been effected by the synergy of multiple forms of spontaneously erupting uprisings of “otherness,” as uprisings that were themselves part of the more comprehensive, planetarily extended series of anti-colonial struggles initiated before and gathering momentum in the wake of the Second World War. And it was in the dynamic context of the vast self-mobilizing processes of the Anti-Colonial Revolution (Westad, 2005) that a specific form of these multiple forms of “otherness” erupted in the late 1930s on my own island of Jamaica, cutting across my childhood and early adolescence. This local eruption would determine what was to be the imperative trajectory – if somewhat zig-zaggedly so – of my life and work.

Also marking an important moment within my intellectual/political trajectory was the Black American students’ Fifties/Sixties struggle for the establishment of Black Studies within the university system of the USA. This particular struggle led to my eventual invitation to teach within this newly incorporated field of knowledge, as one which provided a Black “gaze from below” (Gauchet, 1997)2 perspective of “otherness” from which to explore the issue to which we give the name of race, as the issue that the Black American intellectual W. E. B. Du Bois identified in 1903 in its more totalizing, more absolute form as the “Color Line” (Du Bois, 1903). And, due to its founding nineteenth-century role as the systemically institutionalized, status-organizing principle of the secular West (and as such prophetically predicted by Du Bois to become “the problem of the twentieth century”) this “Color Line” or Divide thereby had to be projected by Western and westernized academics/intellectuals as if it were a conceptually and institutionally unbreachable Line or Divide between members of the human species. In turn, and within the chartering biocentric cosmogonic-logic of this Line/ Divide, what Du Bois defined as its opposing “lighter” and “darker” sides had therefore to be conceptually and institutionally “unweddable.” Thus, as Aimé Césaire of the Francophone Caribbean pointed out in his letter of resignation from the French Communist Party in 1956, the “Color Line” – i.e., of race as the Western-bourgeois analogue of Latin-Christian MedievalEurope’s feudal principle of caste – was the issue whose historically-instituted singularity could not be made into a subset of any other issue. Instead, it had to be theoretically identified and fought in its own terms (Césaire, 2010).

The institutionalized perspective of Black Studies in its original Fifties/ Sixties intentionality – before its ethnicization in middle-class assimilationist terms as African-American Studies – in making my own exploration of “race” in its own specific Human Otherness terms possible, had also informed my contribution to the still memorable 1984 “Discourse on Humanism” volume. At the same time, the topic of that volume, as far-reachingly conceptualized by its editor William Spanos, provided a conceptual framework for the collection’s range of chapters as that of the critique of contemporary Academia’s centrally legitimating-discourse of “Humanism.” And, in my contribution, I had proposed that it was this discourse, beginning with its emancipatory and world transformative, secularizing Renaissance origins that had at the same time also given rise to what I have earlier identified as the first ratiocentric (i.e., reason-centered) form of what was later to become the full-fledged biocentric issue of “race.” This first formation had been effected by Renaissance Civic-humanism’s discursive negation of our co-humanity as a species on the basis of its “reasons-of-state” imperial scholars’ projection of the neo-Aristotelian concept of a by-Nature difference of rationality (Pagden, 1987) between its referent “Western humanity” (i.e., of Man(1) redefined as homo politicus) vis-à-vis all other humans now classified and subordinated as the West’s ostensible irrational Human Others (Pandian, 1985). This process of classification and subjugation began post-1492 with the conquered-cumterritorially expropriated peoples of the Caribbean Americas, all generically classified as Indians, then assigned to neo-serf (if politically, “free”) labor in the hierarchically stratified semi-periphery of the then emergent Western world-system (Wallerstein, 1974; Wallerstein, 1980). And this process was to be followed by the forced Middle Passage enslavement of “Black” Africans, themselves generically classified in commodified terms as Negroes, and thereby assigned as slave labor to the underside periphery vis-à-vis the “core” labor center of the world-system itself.

This first institutionalized form of “race” was to be followed by the reinvented, nineteenth-century version as that of Du Bois’s “Color Line,” as a now biocentric Line/Divide then projected as ostensibly the expression of a by-Evolution different (i.e., naturally selected/dys-selected, eugenic/dysgenic) form of co-human negation within the terms of the new Liberal-humanist variant (of Renaissance humanism’s Man(1)) legitimizing of the bourgeois reinvention of Man(2) as homo oeconomicus. In turn, the “Black” African and Afro-mixed descent peoples were now made into the iconic embodiment of this now extreme form of (racialized) Human Otherness (Pandian, 1985), as well as of the Western world-system’s later nineteenth-century, territorially expropriated, and now colonized neo-periphery category of native labor as, in Fanonian terms, Les Damnés de la terre (Fanon, 1961), meaning, literally, “the condemned of the Earth” (James, 1970).

The title of my 1984 essay – “The Ceremony Must Be Found: After Humanism”3 – had therefore enacted my contribution’s “fundamental [Sartrean] project” (Sartre, 1956) as the negation of the above two forms of co-human negation. For in that essay I had argued that the failure to “find a ceremony” to breach these two forms of negation has systemically functioned as the contradictory, Janus-faced underside of the post-medieval WesternEuropean Renaissance’s mutationally secularizing culture’s otherwise dazzling series of cognitively emancipatory achievements.These achievements include the Scientific Revolution of the sixteenth and seventeenth centuries vis-à-vis the physical world, as well as later the transformation of our knowledge of the living world spearheaded, if contradictorily so, in the late nineteenth century by the Darwinian Revolution. These revolutions, and the self-correcting (however eventually) cognitive openings made possible in their wake, were therefore to culminate, inter-alia, firstly with Western Man’s first footfall on the Moon and revelatory, extraterrestrial perspectival view of our planet Earth. Secondly (and more contradictorily so) by the splitting of the atom followed by that of the cracking of the DNA code of our human species’ genome. Yet pari passu with these dazzling natural and techno-scientific achievements stands the underside costs of the overall unquestionable “triumph” (Roberts, 1985)4 of the West’s now some 500 years’ process of global expansion, including its large-scale territorial expropriation and correlatedly unstoppable military conquests of the majority of the world’s peoples, as well as their/our subsequent racialized reduction to “native” labor roles in a now globally incorporated world-systemic division of labor. While concomitant with, and central to, these imposed processes of subjugation was the missionary evangelization, religious Christianization, and secular initiatory “epistemeologization” by the West of the peoples it conquered.5 For these latter processes functioned as mechanisms of both incorporation and initiation6 that were effected in the hierarchically dominant and subordinated imperializing terms of the West’s own educationally imposed image, as an image mimetically adopted by the ostensibly “native” peoples of the world/by us.

Given the Janus-faced nature of this overall process, the non-findability of a “ceremony” able to breach the “Color Line”’s divide – to “wed” its “lighter” and “darker” sides – is thus the expression of what can now be more precisely identified as the hitherto irresolvability of an aporia or inevitable and endemic contradiction. This aporia, I propose, is one specific to, because the price originally paid for, the West’s post-medieval transformative mutation7 effected by the discourse of Humanism in both its original Renaissance Civic-humanist and later (neo)Liberal-humanist configurations. This aporia I define as that of the secular – that is as one whose humanly emancipatory process on the one hand, and humanly subjugating processes on the other, are each nevertheless the lawlike condition of the enacting of the other.

The above problematic,therefore, is one thatI have been urgently struggling with since the 1984 special issue of boundary 2, as its editor William Spanos had himself identified in his Introduction. In that context, Spanos wrote that my essay had provided “a revisionary interpretation” which traced “the historical itinerary of the Studia Humanitatis from its profoundly disturbing origins in the Renaissance to its reconstitution as a disabling orthodoxy in the nineteenth and twentieth centuries.” Yet he further added that my essay had also put forth a proposal for what our “post-modern historical conjuncture” urgently required; and this proposal was that of the necessity of our collective retrieval of humanism’s original “heretical essence” (Spanos, 1984). If we add to the word postmodern (which is itself still an intra-Western conception) the word post-colonial (which is now necessarily an intra-human one), then my 1984 essay had indeed put forward some important insights with respect to that proposal summarized by Spanos.

However, in my attempt to re-enact Renaissance humanism’s original heresy as it had been effected in the situation specific to the peoples of late medieval Latin-Christian Europe – and specifically so enacted by their then Lay intelligentsia8 – my “heresy” had remained incomplete. For this Lay-humanist intelligentsia’s then new Studia Humanitatis order of knowledge had effectively initiated the invention of the concept of Man(1)-ashomo-politicus or primarily political agent of the this-worldly telos of the State (Wynter, 2003) by going back to Greco-Roman classical antiquity in order to seek “pagan”/non-Christian models for their now revalorizedly inverted concept of Man (Foucault, 1973) – doing so outside the post-Adamic “fallen human nature” prescriptive terms of post-Augustinian medieval Christianity, from which one had had behaviorally to redeem oneself through Christ, his Church, and its Celibate Clergy, post-baptismally in pursuit of Spiritual Salvation as the other-worldly telos of the Church (LeGoff, 1988). These Lay-humanist intellectuals had therefore initiated nothing less than – within the context of our species history from our origins in the Southwest region of the continent of Africa – a new secular (i.e., degodded, desupernaturalized)9 cosmogonically ratio-centric (Mirandola, 1951)10 rather than theocentric answer to the question of who-we-are. Nevertheless, this new secular answer was one that Lay-humanists intellectuals had dialectically projected over and against, and thereby in specific response to, the extreme fourteenth-century, High Scholastic version of medieval Latin-Christian Europe’s order-instituting and order-legitimating, theologically absolute answer to the same question (Blumenburg, 1983).

Thus, for me to re-enact the above heresy completely – yet doing so some five or so centuries later in the terms, instead, of our now contemporary, planetarily extended, intra-human species situation – would have therefore called for me to project an analogical yet entirely new answer to the question of who-we-are over and against our present globally hegemonic, (neo)Liberal-humanist cum monohumanist answer. In addition, the re-enactment of this heresy would have also required a correlated proposal with respect to a now ecumenically human order of knowledge – a New Studia – one itself able to come to grips with the ancillary question posed by the second part of the title of my 1984 essay “The Ceremony Must Be Found: After Humanism.” This ancillary question is, after Humanism, what?

The following manifesto sets out to retrieve that failure – the failure, that is, to “find a ceremony” able to re-enact Renaissance humanism’s original heresy within the Janus-faced context of our contemporary, planetarily extended, intra-human, secular Western situation – one whose collective underside costs Gerald O. Barney (after Aurelio Peccei) defined as a single interconnected “global problematique” (Barney, 1993).11 The manifesto will, however, do so by means of what is now to be the proposed Ceremony Found’s dialectically enacted heresy of, after Frantz Fanon, a profoundly “narcissistic” (Fanon, 1967)12 and revalorizingly new answer to the question of who-we-are as humans. This new answer necessarily moves beyond the West’s nineteenth-century, reinvented and transumptively inverted,13 yet still order-instituting and order-legitimating, biologically absolute answer, as one that alone makes possible “race” in its now second configuration as Du Bois’s “Color Line,” as well as its dually correlated (neo)Liberal-humanist Man(2)-as-homo-oeconomicus conception together with its “human science” episteme (Foucault, 1973).

The Ceremony Found’s new and ecumenically human response to the question of who-we-are, I propose, would effect such a mutation through its separation of the being of being human (in its hitherto innumerable genrespecific particularities) from being human in the purely biocentric terms14 of our present globally hegemonic, monohumanist and secular Western, yet no less genre-specific, now (neo)Liberal conception as Man(2). In so doing, this new answer necessarily elucidates and disenchants the rhetorico-discursive strategies by means of which the lexical concepts of Man and Human, because of their similarity of sound, are made to imply that their referent populations are also the same (Valesio, 1980).15 The end result of such an elucidation and disenchanting is that we as members of our contemporary, planetarily extended human community would be no longer able to be induced to take the West’s prototype member class of being human Man and its genre-specific, bio-cosmogonically chartered, and sociogenically encoded referent population of the trans-nationally incorporated, Western and westernized, middle and upper-class bourgeois We, as being isomorphic with the class of classes16 of what Jacques Derrida identifies as the veridical “we […] in the horizon of humanity” (Derrida, 1969). Instead, and on the basis of a proposed new and now meta-biocentric order of knowledge/episteme and its correlated emancipatory view of who-we-are as humans (themselves as ones that will together now make possible our collective turn towards what I shall define as our Second Emergence), we can become, for the first time in our species’ existence, now fully conscious agents in the autopoetic institution and reproduction of a new kind of planetarily extended cum “intercommunal” community (Huey Newton via Erikson, 1973). And this new kind of community would be one, therefore, that secures the “ends” no longer of biocentric (neo)Liberalmonohumanist ethno-class Man(2), nor indeed that of the religio-secular counter-ends of the contemporary westernized imperialist and/or fundamentalist forms of the three Abrahamic monotheisms,17 but instead superseding them all, inter alia, by that of the We-the-ecumenically-Human.18

Against this introductory background, I present the following manifesto of the Ceremony Found.

Part 1. On the Hybrid Mode of Living Being that is still Trans-Genredly We-the-Ecumenically Human

The manifesto will therefore take its point of departure from Frantz Fanon’s unique “gaze from below” perspective of “otherness,”19 as itself seminally reinforced however by Judith Butler’s illuminating insight put forward in 1990. And her insight is so put forward from two of the perspectives of “otherness” which had correlatedly erupted in the Fifties/Sixties US-based social uprisings. Writing against what she termed the “inherited discourse of the metaphysics of substance” of the nineteenth century West, Butler had proposed that the notion of gender roles/identities as the expression of abiding (or immutable, biological) substances – i.e., of man and woman as noun – should not be considered a transcultural, transhistorical, “universal” truth. Instead, these roles/identities should be rightfully viewed as “fictive constructions” that are themselves produced as “artificial effects” through the “compulsory ordering of [behavioral] attributes into coherent gender sequences.” Yet, if “not a noun,” Butler also insisted neither should gender be seen as constituted by “a set of free-floating attributes,” given that its “substantive effect” is “performatively produced and compelled by the regulatory practices of gender coherence” [emphasis added]. And because its existence depends on such a “performative enactment” within the terms of these “regulatory practices” – thereby “constituting the identity it is purported to be” – then “gender is always a doing, though not a doing by a subject who might be said to pre-exist the deed” [emphasis added] (Butler, 1990).

My own leap-frogging hypothesis here, as itself put forward within the hybrid terms of the Ceremony Found’s new Fanonian answer to the question of who-we-are as humans, is that Butler’s illuminating insight with respect to the “fictive construction” and “performative enactment” (pre-Fifties/Sixties) of gender substance is also true with respect to the range of the other also genre-specific, fictively constructed, and performatively enacted roles/identities of class substance (including rich/poor and, at the world-systemic level, developed/underdeveloped substance), of sexual orientation substance, and, of course (and centrally so), of race substance. Second, her insight is true only because of the larger truth that constitutes all such fictively constructed and performatively enacted roles/identities, together with their respective “coherences,” as mutually reinforcing functions – the truth, that is, of our being human as “always a doing,” of our being human as praxis (Wynter, 2008).

This proposed larger truth of the Ceremony Found further links to the (epigraph 5) quotation from David Leeming taken from his book Myth: A Biography of Belief. For if, as Leeming points out, we humans make use of cosmogonies or origin stories/myths in order to “tell the world” and ourselves “who we are” (Leeming, 2002), we are only enabled to do so, however, because it is by the very means of these genre-specific cosmogonies that we are enabled to fictively construct and performatively enact ourselves as the who of the We that we-are. Specifically, I propose that in our contemporary, planetarily extended, intra-human situation, our being human in the now globally homogenized, monohumanist terms of the secular West’s Man – specifically in the biologically absolute terms of the Western and westernized bourgeoisie’s (neo)Liberal-humanist, homo oeconomicus conception – is now itself a no less cosmogonically chartered and encoded and, thereby, fictively constructed and performatively enacted genre20 of being hybridly human. While it is only within the terms of this specific genre of being hybridly human, of therefore its genre’d coherence, that the peoples of African and Afro-mixed descent have been lawlikely fictively constructed as the “Negro”/“Colored”/ “Black”/“Nigger” embodiment of ultimate Human Otherness to Man(2), as a founding underside that is then performatively enacted and systemically produced by them/us collectively as subjects/initiates of our now planetarily extended, Western and westernized world-system.

This systemically – including epistemically – produced role of “otherness” is one that would lead to the existential experience documented by W. E. B. Du Bois in his 1903 classic The Souls of Black Folk. For here Du Bois recognized that – although being in class terms a proper Westernbourgeois self, because a highly educated professional academic/intellectual – in order to realize himself as fully American (and, therefore, ostensibly as fully human), he had had to at the same time also subjectively experience himself as a Negro, i.e., as a dissonant anomaly to being human to this “proper” normative Western-bourgeois self-conception. He had had to experience himself, thereby, as a Problem. This existential experience in turn required that he be normally reflexly subjectively aversive not only to his own phenotype/physiognomy, but also to the alternative autopoetic field (or “culture” in Western terminology) of his own people, including its quite other “sorrow songs” and lumpen poetics of the blues and of jazz. Seeing that it is this very alternative African-derived autopoetic field that he would have been induced to normally subjectively experience, in extreme Human Otherness terms, as the “underside reality” or chose maudite central to the instituting of the normalcy of his proper self on the genre-specific model of that of the Western bourgeoisie.

A parallel recognition was also effected by Frantz Fanon through his experience as a French imperial “native” subject growing up on the island of Martinique, who like all his peers also existentially experienced it as “normal to be anti-Negro.” (“Don’t behave like a nigger!,” his mother would admonish him.) But Fanon also uniquely experienced this anomaly of being human within the genre-specific terms of secular Western Man(2) while a psychiatrist at the beginning of his vocation. In this context, he was confronted in specific intellectual terms with the profound self-alienation of both his “Black” peers in Martinique, but also of other colonized “Colored” native patients in the specific case of a then still, settler-colonial French Algeria. Fanon’s experience of this anomaly was further reinforced by his reading of an ethnographic study of a group of Africans belonging to the so-called “Pygmy” population of Central Africa.21 And, as he observed, because this specific “group” of Africans had managed to remain auto-centered since their society had been closed off from the homogenizing “flood of [Western] civilization,” they had therefore grown up exactly like French bourgeois children – i.e., like normal children, normal humans, because at the center of a self-valorizing cosmogony and mythical charter. Thus although this group of Africans possessed the same bio-genetic phenotype that would have led to their being classified by the West as “Negro” or “Negroid,” they could have never subjectively experienced themselves as being the anomaly to being human that Fanon and his “Black”/“Colored” peers and patients were to be institutionally made to so experience themselves. For Fanon and his peers/patients had been incorporated into and, therefore, become human within the terms of the genre-specific, chartering cosmogonic-complex of secular Western Man(2) on the negatively marked side of its systemically imposed “Color Line.” This comparison then helped Fanon make a Copernican-like epistemological break in further proposing the following in 1952 in his Peau Noire, Masques Blancs, translated into English as Black Skin, White Masks (1967).

First, Fanon proposed that the self-alienation experienced by himself and his peers/patients classified and symbolically negated within the terms of the “Color Line” as “Black”/“Colored,” could in no way be “an individual problem.” Rather, and against both Freud’s and the human sciences’ purely biologically absolute answer to the question of who-we-are, Fanon instead proposed that being human empirically entailed that “besides phylogeny and ontogeny stands sociogeny” (Fanon, 1967). For he and his peers/patients had been instituted as subjects not (as is normally the case) in a self-valorizing mode of cosmogonically, mythically chartered, and thereby sociogenically encoded auto-institution, but in secular Western Man(2)’s genre-specific mode of sociogeny – in the contradictory terms, therefore, of what I shall further define here as that of the latter’s sociogenic replicator code of symbolic life and death. As a result, Fanon and his peers/patients had thereby come to be human by preconceptually experiencing and performatively enacting themselves in the mimetic terms of “White masks,” as Masks that were phenotypically normal only for the specific subset of human hereditary variations that are classified as of “White” European descent.

Yet, I propose here, this reflex subjective experience by Fanon and his peers/patients is one only made possible because of a larger and universally applicable phenomenon. This phenomenon is that all human Skins can only become human by also performatively enacting them/ourselves as human in the always-already, cosmogonically chartered terms of their/our symbolically encoded and fictively constructed genre-specific Masks, as themselves always-already programmed by their/our respective sociogenic replicator codes of symbolic life/death. This given that, unlike the Primate family to which we partly belong, humans are alone able to transcend the narrow, genetically determined limits of eusocial, inter-altruistic, kin-recognizing behaviors in order to instead attain to higher levels of cooperation and organization.22

While we are able to do so only by means of our ability – through the mutational co-evolution with the brain of the emergent properties of language and narrative/story-telling – autopoetically to institute ourselves as symbolically made-kin through the medium of our retroactively projected origin stories or cosmogonies. For it is only within the terms of each such origin story’s mandated and inscribed sociogenic replicator code of symbolic life/death, that we are “re-born” (i.e., initiated) as behaviorally eusocial, kin-recognizing, inter-altruistic members of a specific, in my words, fictive mode of human kind – i.e., as subjects who are of the same non-genetic, artificially speciated genre (or Mask) of being human.

On the Sociogenic Replicator Code of Our Secular Western-Bourgeois Genre of Being Hybridly Human Man(2)and the New Counter/Meta-Heuristics of Fanon, Du Bois, and Cleaver

In our above, planetarily extended, intra-human context, therefore, the overall regulatory-practices that together constitute the mode of auto-institution enacting of the second reinvented, purely secular genre of being human Man(2) – in the now biologically absolute terms of the Western bourgeoisie’s homo oeconomicus self-conception – are ones which necessarily call for the perfomatively enacted subset regulatory practices instituting of the ontologies of race, class, gender, and sexual orientation as substance. These genre-specific practices then function to enact bio-humanist Man(2)’s sociogenic replicator code of symbolic life/death as the code of naturally selected/naturally dysselected or eugenic/dysgenic humankind. Thus (to borrow from yet also extend Judith Butler), while being human is not a “noun,” neither can it be “a set of free-floating attributes” if the individual subject is to be made to experience her/himself in the genre-specific terms of each society’s mode of autopoetic institution. As such a subject, she/he thereby reflexly and normally desires to realize her/himself in the lawlike terms of the discursively positively marked code of symbolic life, while at the same time to be normally aversive to, and thereby detach her/himself from, all that is made to embody the negation of that sociogenic self. And this latter’s negatively marked conception of symbolic death, therefore functions as the “liminally deviant” (Legesse, 1973)23 embodiment of the normative self’s ostensible negation of being optimally/normally human. And this is so whether it be as (in Lévi-Straussian terms) the “raw” life to the former’s “cooked” life (Levi-Strauss, 1983); (in Aristotelian terms) as the zoe or “bare life” to the bios as the “good life” (Bull, 2007); or as (in our contemporary secular Western and westernized case) the (Ghetto/Thug) Nigger to the secular genre of being hybridly human of (Bourgeois) Man(2) (Wynter, 1992).

Within the cases of Fanon and Du Bois, as well as Eldridge Cleaver after both (Cleaver, 1968), they had all been therefore induced by the regulatory practices of genre (as opposed to merely gender) coherence to be optimally human in the terms of the secular West’s Man in its second bio-humanist phase. This desiring necessarily also led to their being induced to be reflexly aversive to their own geographically cum environmentally adequated (Arsuaga, 2002; Sala-Molins, 2006) “Black” skin color and “Bantu” physiognomy, as the negatively marked embodiment of symbolic death within the terms of the sociogenic replicator code that our present cosmogonically chartered and biologically absolute answer to the question of who-we-are dynamically enacts. And this bio-genetic phenotype was/is negatively marked, I propose, as lawlikely as the category of the non-celibate Laity had been made to embody – before the revolution of Renaissance humanism – the symbolic death of the Fallen Flesh to the symbolic life of the Redeemed Spirit incarnated in the category of the celibate Clergy (Le Goff, 1988), as formulated within the terms of the sociogenic replicator code of Latin-Christian Europe’s theologically absolute, cum theo-cosmogonically chartered, answer to the question of who-we-are. It is therefore with respect to the secular now biocentric answer to the question that Fanon and DuBois, as well as Cleaver, had initiated a new heuristics based on their recognition of these non-genetic, artificially induced yet reflexly subjectively experienced modes of desire and aversion. And this new heuristics is that of the systemic mistrust of their subjectively experienced, yet ostensibly instinctive, natural, and self-evident order of consciousness. In that within the terms of the specific genre of being hybridly human enacting of secular Western Man(2) in its now bourgeois configuration within which they had become human, they had not only found themselves desiring against, and thereby being aversive to their “Black” selves and/or population of origin, but had found themselves also doing so against their own deliberately willed intentionality.24

In this context, and by identifying the causal principle of this subjectively experienced existential contradiction as that of the objective functioning of the hitherto non-recognized phenomenon of artificially instituted sociogenic Masks that are defining of us as being hybridly human – with, I add, the systemic intentionality of its replicator code of symbolic life/death serving to structure our subjectively experienced orders of consciousness normally outside our conscious awareness – Fanon had thereby overturned one of the fundamentals of the West’s inherited philosophical/epistemic traditions. This fundamental is that of the ostensible indubitability and self-determined nature of consciousness as expressed by the Cartesian ego cogito. In that given that all such sociogenic codes or Masks are always-already inscribed in the terms of our chartering cosmogonies or origin narratives – as the indispensable condition of our being able autopoetically to institute ourselves as genre-specific, fictive modes of eusocial, inter-altruistic, kin-recognizing kind – the terms of our eusocial co-identification as humans can never pre-exist each society’s specific mode of autopoetic institution, together with its complex of origin-narratively encoded socio-technologies.25 This is so because it is by means of these processes alone that the I of each individual self is symbolically encoded to pre-conceptually experience and performatively enact itself in the same cloned, kin-recognizing terms as the I of all other members of its referent We. And, by extension, each such We or fictive mode of kind is thereby lawlikely induced to share in the same mode of “collective intentionality” (Searle, 2007), on behalf of whose actualization and stable reproduction they/we are prepared, where necessary, to sacrifice their/our biological lives26 – as lives, therefore, “born of the womb” (the bios) rather than hybridly of the womb and origin-story (i.e., of the bios/mythos).

To Emancipate Ourselves from the Biologically Absolute Terms of the Genre-Specific Sociogenic Replicator Code and Mode of Knowledge Production of Secular Western Man(2): To “Find a Ceremony” able to Resolve the Contradictions of Our Uniquely Human, Hybrid Level of Existence

Given the above uniquely human predicament, we as Western and westernized academics/intellectuals – working in the disciplinary fields of the “human sciences” (or Humanities and Social Sciences) – therefore now find ourselves inside what Clifford Geertz, paraphrasing Hans Weber, identified as “webs of significance” (Geertz, 1973) that we as humans spin for ourselves. Nevertheless, because normally doing so without any conscious awareness of the fact that we do so, the issue that we academics/intellectuals are therefore collectively confronted with is this. Given that such cosmogonically chartered “webs of significance” are at the same time the indispensable condition of our being able to performatively enact ourselves as being human in the genre-specific terms of an I and its referent We, how can we then come to know our social reality outside the terms of the eusocializing mode of auto-institution in whose web-spinning field alone we are recursively enabled performatively to enact ourselves in the genre-specific terms of our fictive modes of kind? That is to say, how can we come to know and/or constitute our social reality outside the terms of our present bio-humanist sociogenic replicator code of symbolic life/death, as the It (Beer, 1980) about which our social reality orders its hierarchies and role allocations and, thereby, organizes itself as an autopoetic, “languaging living system” (Maturana and Varela, 1992)? How, finally, can we know and constitute our social reality outside the necessarily circular and cognitively closed terms that are lawlikely indispensable to the existential enactment and stable replication of our own societal order as such a living system?

For the “human sciences” of our present order of knowledge, whose domain of inquiry is precisely that of the social reality of our present Western world-system and its nation state sub-units, have themselves to be lawlikely and rigorously elaborated in terms governed by the imperative of enabling the stable replication of our contemporary autopoetic and sociogenically encoded, Western-bourgeois world system (Wallerstein, 1974; Wallerstein, 1980), as the first planetarily extended such system in human history. This fact has thereby led to Louis Althusser’s insightful recognition that, as academics/intellectuals of our contemporary Western world-system, who are also its normative middle-class (i.e. bourgeois) subjects, we must necessarily function to elaborate the mode of knowledge production that is epistemologically indispensable to its replication as such a system (Althusser, 2001).27 Nevertheless, in spite of the above, Althusser continues to identify this overall system and its mode of autopoetic institution in the terms of only one of the indispensable, but necessarily proximate, conditions of its functioning. This condition he defines after Adam Smith/Karl Marx as the (teleologically determinant “base” or) “mode of economic production,” rather than from, I propose, the Ceremony Found’s ecumenically human perspective as that of each such societal order’s genre-specific mode of material provisioning, whose function is to provide for and secure the overall realization of a specific genre of being hybridly human, its lawlikely teleologically determinant mode of autopoetic institution and/or pseudo-speciation (Erickson, 1975).

However, this error by Althusser does not contradict his core thesis with respect to the lawlike correlation between our modes of knowledge production and the auto-institution of our social realities themselves, as a thesis which I extend here. And this is that our contemporary “human sciences” necessarily induce us to know our social reality overall and its third and hybrid level of existence in the same rigorously “abductive” (Bateson, 1969), “world in little” (Hocart, 1936), or “knowledge of categories” (MoraesFarias, 1980) terms in which both the physical and purely biological levels of reality had been millennially and lawlikely known from the origin of our species history. This is so given that the latter two levels had been put by humankind under the same rules of sociogenic/symbolically encoded description as those of our social realities, thereby forming a modality of a “mutually reinforcing system of presuppositions” (Bateson, 1979) which also served to legitimate each societal order’s hierarchical structures of dominance and subordination. In consequence – and as the indispensable condition of the formation and stable replication of each respective societal order, together with each order’s answer given to the question of who-we-are by its cosmogonically chartered sociogenic replicator codes – no ceremony could have been found that would normally have freed human knowledge of the physical and purely biological levels of reality from the order-stabilizing, order-legitimating codes of symbolic life/death about which these realities had autopoetically instituted themselves as genre-specific living systems.

The failure to “find a ceremony” able epistemologically to emancipate humankind’s knowledge of the physical and purely biological levels of reality from our order-stabilizing/legitimating symbolic codes had therefore been nowhere more evident than within the autopoetic field of medieval LatinChristian Europe. For the latter’s theo-cosmogonically chartered sociogenic replicator code of Redeemed Spirit and Fallen Flesh – as elaborated by its mainstream theologians – had been mapped onto the “space of otherness” (Godzich, 1987)28 complex of the then still hegemonic Ptolemaic astronomy of Classical Greco-Roman antiquity, if in its now Latin-Christianized variant. This “space of otherness,” therefore, had been mapped transumptively upon the latter as astronomy’s ostensibly unbreachable Line/Divide between, on the one hand, the supra-lunar (above the moon) but also including the moon region, and the sub-lunar (below the moon to the cosmic center of an allegedly non-moving Earth) region, respectively. The end result of this projection was the occult-like transformation of the physical universe into the ostensibly non-homogenous, incorruptible Celestial realm and corruptible Terrestrial realm.

Nor was this failure to “find a ceremony” any less so in the case of the pre Western-bourgeois order of the landed gentry of Great Britain, whose sociogenic replicator code of autonomous Rational human nature and subjected Irrational sensory brute nature had been also mapped onto the new “space of otherness” complex of the ostensible divinely determined but naturally implemented Chain of Being Line/Divide between Humans and Animals. This mapping then further gave rise to the correlated occult-like projection of a Line/Divide of perfectibility and degeneracy, respectively, between the “European” variety of Mankind – as the embodiment of phenotypically normal humanity – and the “non-European” phenotypically different varieties of Mankind as its abnormal Human Others (Sala-Molins, 2006).

Nevertheless, in the cases of both the physical and purely biological levels of reality, their respective “ceremonies” were eventually made “findable,” leading to the breaching of the Lines/Divides that had hitherto rendered such ceremonies opaque. First, with respect to physical reality, the “finding of a ceremony” had been supplied by the then new Civic-humanist answer that Renaissance humanism’s Lay intelligentsia were to give to the question of who-we-are by means of their revalorization and reinvention of LatinChristian Europe’s fallen Man as a sinful-by-nature creature. This Lay Civic-humanist revalorization (on the basis of their counter theo-nominalist (Blumenburg, 1983) poetics of the propter nos (Hallyn, 1993)) and reinvention of the human as rational (Western) Man(1), had thereby provided the perspective for the astronomer-priest Copernicus’ epochally new (1543) astronomy’s recognition that the “earth also moves” and is therefore, by implication, of the same physical substance (i.e., matter) as the so-called Celestial bodies, of which the Sun will now be the cosmos’s central body and the Earth no-longer necessarily degraded and fallen at the center of the universe as its dregs. And this recognition by Copernicus – through its full breaching of the projected Celestial/Terrestrial realm Divide, now postulated asrealms made of the same homogenoussubstance –will likewise make possible the then new post-Ptolemaic cum Latin-Christian astronomical perspective that was to be further developed by Galileo, others, and finally culminating in the exultation by Newton – on the basis of his laws of motion and law of universal gravitation – that it was now theoretically possible to extrapolate from that which is near to us in order to comprehend what that which is far from us must be (Funkenstein, 1986).29 Furthermore, the second “finding of a ceremony” – this time for the purely biological level of reality – was to be later supplied (in the empirical wake of the anti-monarchical US and French revolutions, as well as the anti-slavery Haitian revolution) by the then new, nineteenth-century, Liberal-humanist bourgeois answer to the question of who-we-are beginning with Adam Smith and other members of the Scottish school of the Enlightenment, followed by Thomas Malthus’s demographiccosmogonic trope of Natural Scarcity with its ostensible scientific “law of population” (Blumenburg, 1983). And the comprehensive breaching of the projected Human/Animal “space of otherness” Divide would be definitively effected by Charles Darwin’s “part science,” “part myth” (Isaacs, 1983) “law of Evolution” as a law as applicable to humans as it is to animals – if only, I propose, in our species-specific case with respect to the biological/neurophysiological implementing conditions of being human.

If, however, both of these levels of reality were (from these moments on) gradually freed, the first increasingly so, the second still only partly so, from having to be known in abductive order-stabilizing/legitimating terms, this was not to be the case with respect to our own hybridly human level of existence. Since given the existential imperative of our having to continue both post-Copernicus and post-Darwin to know our social reality in the “two cultures” (Snow, 1959) terms that we at present do, the interrelated questions with which we now find ourselves confronted are the following: How can we come to know our social reality – as distinct from the now cognitively open and, thereby, self-correcting natural-scientific domains of the physical and purely biological levels of reality – no longer in the terms of the abductive order-stabilizing/legitimating, “knowledge of categories” system of thought (Althusser’s Ideology) to which our present sociogenic replicator code lawlikely gives rise, but instead come to know this reality (and heretically so) in the terms of “knowledge of the world as it is” (MoraesFarias, 1980)? That is to say, how can we come to have knowledge of socio-human existence outside the terms of the answer that we at present give to the question of who-we-are as an alleged purely biological being, as one in whose genre-specific naturally selected/dysselected symbolic life/death terms we now performatively enact ourselves as secular and, thereby, necessarily Western and westernized bourgeois subjects – including us as academics/ intellectuals? Finally, how can we come to know our social reality in the same way that Western intellectuals from Renaissance Civic-humanism and its new Studia onwards have come to know, and brilliantly so, the physical and purely biological levels of reality in terms of the above-cited imperatively open-ended – because self-correcting – orders of knowledge/cognition that are the physical and biological sciences? As distinct, in both cases however, from their ongoing degradation as the now neo-Liberal, instrumentalist and market-oriented techno-sciences? Not to speak of the pseudo-science of the no less neo-Liberal distortions of sociobiology and its range of offshoots – i.e., “evolutionary ethics, evolutionary psychiatry and medicine, evolutionary aesthetics, evolutionary economics, evolutionary literary criticism” (Rose and Rose, 2010), and a host of others?

To answer these series of interrelated questions, and thereby to realize what had been the thrust of the originally emancipatory openings of the pre- and well as post-Second World War Anti-Colonial Revolution – together with the correlated “otherness” continuum of the social and intellectual movements of the Fifties/Sixties in both the US and elsewhere before aborted – I now turn to Part 2 of the manifesto of the Ceremony Found.

Part 2. On Cosmogonic/Sociogenic Causality and the Laws of Human Auto-Institution

The Autopoetic Turn/Overturn as the Praxis of Césaire’s New Science of the Word, of Fanon’s Revalorizing Re-definition of Who-We-Are: Towards a New Order of Knowledge/Cognition of Our Uniquely Human Third Level of Existence

The proposal of the Autopoetic Turn/Overturn is intended to resolve the intellectual predicament I have posed above. I have adapted the concept of Turn from, and as a further progression on, the earlier paradigm of the Linguistic Turn as put forward in the mid-twentieth century by Western academics/intellectuals. And I have likewise adapted the concept of the Overturn from the lexicon creatively generated by the “redemptive-prophetic intellectuals” (Bogues, 2003) of the now widely extended, transnational popular “planet of the slums” of the originally Jamaican, millenarian politico-religious Rastafari movement. Specifically, I have borrowed from this movement’s underlying counter-cosmogony in whose logic words are semantically turned upside down – e.g., such as the use by Rastafari of the inverted term downpression to define the existential perspective of their systemic oppression, this given their largely poor and/or jobless existence.

In this context, the term counter-cosmogony also requires additional explanation. For I use the term in the specific sense adapted from Conrad Hyers’s brilliant re-reading of the Priestly version (of chapter 1) of the Genesis narrative of the Hebrew Bible, as elaborated by the exiled Jewish priests who had been captive in Babylon at the heart of the then Babylonian empire in the wake of the latter’s 587 BCE conquest of the kingdom of Judah and destruction of Jerusalem. In his study, Hyers reveals how the then entirely new monotheistic cosmogony or origin story formulated by these priests functioned also as a counter-cosmogony whose narrative structures served to utterly de-legitimate the then polytheistic, politico-religious, cosmogonic and mythical-complex chartering of the Babylonian empire and its predatory imperial conquests (Hyers, 1984).

Not only is Hyers’s reading an example of the kind specifically proposed by the Autopoetic Turn/Overturn, as an approach which takes cosmogonies and their Geertz/Weberian-type “webs of significance” as the objects of our inquiry; but his reading also elucidates the formation of a counter-cosmogony projected from what Marcel Gauchet identifies as the exiled captive Jewish priests’ then uncompromising “gaze from below” perspective (Gauchet, 1997). This perspective led them to counter-cosmogonically project the invisible existence of a now all-powerful, single Creator God over and against the then hegemonically imperial, polytheistic cosmogony as peopled by the Babylonian pantheon of gods and goddesses, including the central hero-figure god Marduk. Yet this single Creator God for the first time in human history had now been placed entirely outside the cosmos. As such, He was made to assume the novel role of creator of the stars and planets not as the divine entities that they had been millennially and polytheistically held to be, but instead as merely created objects. Furthermore, this Creator God also assumed the role of being the creator of all humankind, thereby reducing the rulers of the mightiest empires to being themselves merely created beings. In this context, the Genesis counter-cosmogony as deployed by the sixth century BCE exiled Jewish priests thereby functioned as the source of an entirely new “paradigm of justice” (Williams, 1993),30 one able to transcend all the then existent imperial paradigms.

Both Hyers’s and Gauchet’s combined insights with respect to the Priestly version of Genesis thereby parallels inter alia the analogically also desperate “gaze from below” nature of the Rastafari movement’s own projected counter-cosmogony. For the Rastafari’s “redemptive-prophetic intellectuals” with regularity have taken over and adapted the biblical terminology of the exiled Jewish priests in Babylon – as, for example, the Reggae singer-prophet Bob Marley in the song lyrics “By the rivers of Babylon/where we sat down/ and yea he wept/when he remembered Zion,” as well as in other songs such as “Exodus.” An analogical reading of the Rastafari’s adapted countercosmogony therefore enables the identification of what the major elements of our present Western world-system’s chartering bio-cosmogonic and part natural-scientific mythical-complex must necessarily be. For these elements would be ones to which the new gaze from below, “liminally deviant” (Legesse, 1973) perspective of those exiled in a “new Babylon” – whose lived existence and aspirations as the iconic category of the systemically made jobless/homeless category of the Poor, as one that cannot be included within our present “paradigm of justice” – would have necessarily had to counterpose itself in its now dynamic contemporary quest for a quite other and superior order of justice, over and against the now purely secular (neo) Liberal-monohumanist one which mandates/legitimates by neo-Darwinian/ Malthusian “narrative necessity”31 their subordination within and exclusion from our present Western world-system’s ostensibly universally applicable and transumed abductive-conception of “human rights” (Williams, 1993).

The concept of the Autopoetic Turn/Overturn is also here put forward in its own terms. Specifically, it is put forth as the praxis of two proposals – that of Aimé Césaire’s 1945 proposed new and hybrid “science of the Word/ Nature” and Frantz Fanon’s 1952 epochal re-definition in correlatedly hybrid and, therefore, meta-Darwinian terms of who-we-are as humans. First Césaire, in his surrealist-cum-Negritude talk in Haiti titled “Poetry and Knowledge,” had argued that for all their dazzling achievements in knowing how “to utilize the world,” the natural sciences have nonetheless remained a “poor,” “half-starved,” and fundamentally an “impoverished knowledge.” This given that as the condition of making it possible for humankind to navigate the “forest of [physical and purely biological] phenomena,” the naturalscientific worldview had at the same time necessarily “depersonalized” and “deindividualized” humanity. And it continues to do so by sacrificing that about our species – i.e., what Césaire labeled as “desires,” “fears,” “feelings,” and “psychological complexes” – which cannot be purely explained within the natural sciences’ ostensibly empiricist and objectivist-oriented models of analysis. In turn, Césaire continued, whatever the natural science’s humanly emancipatory and far-reaching “wealth may have been” in aiding humankind, at its inception/formation and coterminous with its worldview “there [also] stands an impoverished humanity” (Césaire, 1996).

Nevertheless, Césaire maintained that in the midst of this “great silence,” a new form of knowledge – a new form of “science” of ourselves – is now possible, indeed necessary. Such a new “science,” he proposed, must be one that returns to the “very first days of humanity” – the “very first days of the species” on what is now natural-scientifically cum linguistically known to be the Southwest region of Africa – and thereby takes as its starting point the uniquely human capacity to convey meaning and symbols through language, i.e., through the Word. And it is “on the word,” Césaire wrote, that he – like the poet – “gambles all our possibilities [… as the] first and last chance” for humankind. For just “as the new Cartesian algebra permitted the construction of a theoretical physics,” he continued,” so too an original handling of the word can make possible at any moment a new theoretical and heedless science that poetry could already give an approximate notion of. Then the time will come again,” he concluded, “when the study of the word will condition the study of nature” (Césaire, 1996).

I propose that Césaire’s new science would necessarily have to be a new hybrid form, with “science” itself redefined beyond the limits of the natural sciences’ restrictedness to their specific domains of inquiry of the physical and purely biological levels of reality. This new order of cognition, as the basis of a new episteme, would have as its specific domain of inquiry that of our uniquely human third level of existence – dually biological and meta-biological – doing so, however, according to what can now be recognized as Laws of Human Auto-institution that are as specific to the functioning of this level of reality as purely biological laws are specific to the functioning of the second level. Consequently, the telos or aim of this proposed new episteme is therefore the same in this respect as that of the natural sciences. This telos is that of working towards a new and imperatively self-correcting (however eventually), open-ended, order of extra-territorial cognition (Gellner, 1974).

Such a drive necessarily entails the following proposition: that Césaire’s “science of the Word” – one based on the “study of nature” from its (the Word’s) now determinant perspective and, therefore, whose hybrid (bios/mythos) praxis is that of the Autopoetic Turn/Overturn – necessarily transgresses our present order of knowledge’s normally unbreachable “two cultures” (Snow, 1959) Line/Divide between, on the one hand, the physical and biological sciences (together with the range of now market cum homo oeconomicus technosciences to which they have given rise) and, on the other, the disciplines of the Humanities and the Social Sciences (or “human sciences”), the latter as ones that, as Foucault points out, although rigorously modeling themselves on the natural sciences, cannot themselves be sciences. Consequently, the transgression and/or heresy of Césaire’s hybridly proposed study of the Word/ of Nature is one that can be clearly seen to be isomorphic with the study of his fellow Martiniquan Frantz Fanon’s new object of knowledge as identified in 1952 within the existential context of the latter’s own then parallel redefinition of being human and answer to the question of who-we-are in the analogical terms also of our species-specific hybridity – i.e., its defining the “study of the word/the study of nature” as the study of sociogeny/ontogeny (Fanon, 1967).

Such a study, I further propose as an extension of Césaire and Fanon, is therefore necessarily that of the always-already, cosmogonically chartered sociogenic replicator code of symbolic life/death, in whose terms we can alone both reflexly subjectively experience and, thereby, performatively enact ourselves as the only auto-instituting species of hybrid living beings – that is to say, enact ourselves as humans. For the only life that we humans live is our prescriptive representations of what constitutes symbolic life (Winch, 1964), as well as what constitutes its Lack or mode of symbolic death. Consequently, because each such sociogenic replicator code of symbolic life/death functions in Gregory Bateson’s parallel terms as a “descriptive statement” at the level of the individual subject’s psyche or soul, as the lawlike complement of the genetically enacted and conserved descriptive statement of the individual subject’s biological body (Bateson, 1968), then the “study of the Word” as the study of the sociogenic code’s descriptive statement must necessarily not only correlate with but also determine the approach to the “study of nature.”

Within the terms of the Ceremony Found’s Autopoetic Turn/Overturn as the proposed praxis of Césaire’s new science and Fanon’s new answer to who-we-are, this lawlike complementarity would necessarily entail the study of the physiological/neurophysiological implementing conditions (rather than the basis) of our being able to lawlikely performatively-enact ourselves as being hybridly human. Central to the study of these bio-implementing conditions will be that of the co-functioning of each cosmogonically chartered, sociogenic replicator code’s system of positive/negative, symbolic life/death meanings with the biochemical or opiate reward/punishment (i.e., placebo/ nocebo) behavior motivating/demotivating system of the brain (Danielli, 1980; Goldstein, 1994; Stein, 2007). For this biochemical system of reward and punishment in our uniquely human case, as proposed by the above, is systemically activated by each such sociogenic code’s representation of symbolic life and death. This systemic activation thereby directly leads to our performative-enactment or behavioral-praxis as subjects in the alwaysalready, cosmogonically inscribed and mythically chartered, genre-specific terms of our fictive modes of kind. In turn, as the condition of the enacting of the code at both levels – that of the “Word” (or ordo verborum) and that of “nature” (or ordo naturae) – each level has lawlikely and intricately to cohere as a form of finely calibrated non-linear coherence. And they must cohere as such in order both to activate and together to implement the genre-specific supra-individual order of consciousness (or mode of mind) that integrates each human group’s specific fictive mode of kind, its I and its We.

With this imperatively lawlike coherence, a logical corollary follows. This corollary is that in each human societal order, as based on its cosmogonically chartered and genre-specific fictive mode of kind, both Althusser’s “modes of knowledge production” (its episteme), as well as its, so to speak, “aestheteme” – the latter as defined by the archaeologist McNeil as each society’s mode of “representational arts”32 – must necessarily be cognitively, epistemologically, aesthetically, and psycho-affectively closed. And they must remain so if the positively/negatively marked meanings of each fictive mode of kind’s sociogenic replicator code of symbolic life/death are to be stably and systemically synchronized with the neurological functioning of the biochemical or opiate reward/punishment system of the brain. Why? Because this synchronization itself functions as the condition of the subjects of each societal order both reflexly subjectively experiencing, as well as performatively enacting, themselves/ourselves as being hybridly human in the genre-specific terms of each such sociogenic codes’ positive/negative system of meanings. For “meaning,” as the physicist David Bohm insisted, “is being” (Briggs and Peat, 1987). And it is so, I propose, because of its ability directly to affect matter by means of its positively/negatively marked regulatory practices of genre’d coherence.

World as “Factuality”? Or World as “Narrative-Schema,” Its “Narrative Necessity”? On Our Genre-Specific Modes of Knowledge Production and the Cosmogonic/Sociogenic Origins of Woolf’s and Woodson’s Perspectives of “Otherness”

In the case of the Darwinian naturally selected/dysselected sociogenic replicator code of our secular Western, (neo)Liberal-monohumanist genre of being hybridly human Man(2), both VirginiaWoolf in 1929 and Carter G. Woodson in 1933 would come to parallel conclusions each from their respective relatively inferiorized and ostensibly genetically (and, therefore, natural dysselectedly cum dys-genically) determined perspectives of “otherness.” These parallel conclusions centered around the systemic nature of the socio-technologies of positive/negative representations of the specific order of knowledge which produced their respective perspectives of “otherness” as abnormal anomalies. Woolf would do so with respect to the gender anomaly she experienced vis-à-vis her British imperial ruling upper-class male peers, who had been discursively and empirically institutionalized as ostensibly the generic sex33 and, thereby, the normal gender.34 While Woodson would do so within the context of the racial anomaly in whose terms he was induced educationally to experience himself like the rest of his then apartheid-subordinated US “Black” population vis-à-vis the “White” Euro-American (optimally AngloAmerican) population. For the latter had been discursively and empirically institutionalized through the overall US-style apartheid system as ostensibly the generic human phenotype and, thereby, the incarnation of being both ostensibly normally American and normally human.35

While ifwe see these systemic positive/negativerepresentations asthemselves a central part of the “mutually reinforcing system of presuppositions” (Bateson, 1979) abductively enacting of the secular West’s Man(2) in its nineteenth century, biologically absolute, (neo)Liberal-humanist conception, then both Woolf’s and Woodson’s insights with respect to the role of knowledge in the ordering and legitimating of their respective and correlated subordinate roles, as roles instituting of their/our societies, opens up onto a universally applicable hypothesis. In that if as the earlier mentioned archaeologist McNeill has proposed, in all human societies from the smallest to the most extended, the role normally played by the “representational arts” or mode of aesthetic production has always been that of explaining the world not in terms of factuality, but instead in the terms of religious schemas of some mythology – that is, in the terms of their respective order-instituting cosmogonies and mythical charters – the above is no less true of our non-religious or secular Althusserian “modes of knowledge production.” And this is so not because our modes of knowledge production are ostensibly determined by Althusser’s adaptation of Adam Smith’s/Karl Marx’s “mode of economic production” concept. But rather it is so because of each such mode of knowledge production’s systemic, genre-specific role of explaining/ describing the world of its social reality in the lawlike terms necessary for the stable reproduction of that reality, including its role allocations and hierarchies. As a result, such modes of knowledge production explain/ describe the world not in the terms of factuality, but instead in the terms of a narrative-schema specific to the origin story or cosmogony chartering of each society’s fictive modes of kind, their/our respective referent We(s) and correlated genre of being hybridly human.

I propose, therefore, that within the terms of the new answer or response that the Ceremony Found gives to the question of who-we-are as that of a hybrid and uniquely auto-instituting mode of living being, we humans cannot pre-exist our cosmogonies or origin myths/stories/narratives anymore than a bee, at the purely biological level of life, can pre-exist its beehive. Seeing that if such cosmogonies function to enable us to “tell the world and ourselves who we are” (Leeming, 2002), they also function even more crucially to enable us autopoetically to institute ourselves as the genre-specific We or fictive mode of kind that each of us will from now on pre-conceptually experience and, therefore, performatively enact ourselves to be as an alwaysalready symbolically encoded and cloned I/We. Consequently, if as Sylvia Yaganisako and Carol Delaney propose, given the fact that such origin stories are, the world over, “the prime locus for a society’s notion of itself,” of “its identity […] worldview and social organization,” then the wide range of all such origin stories – including both the “now dominant [JudaeoChristian] origin story of Creation as narrated in Genesis,” as well as the secular origin story of Evolution – should all be treated “neither as false tales, nor as possible windows into the real true origins, but as representations of origin” (Yaganisako and Delaney, 1995). Therefore, the enactment of each such “representation of origin” – I propose here – must law likely function as the determinant of a hitherto non-recognized principle of Cosmogonic/ Sociogenic Causality. And this proposed principle of causality functions as the second and symbolically encoded set of instructions of the genre-specific, behavioral self-programming schema structuring of the normative order of consciousness of each such fictive mode of kind, whose “truth” is then circularly and empirically verified by the ensemble of individual behaviors which that consciousness serves to induce/motivate.

### Racial Legalism

#### Comity’s slippery, ill-defined legal canon ensures it can always be articulated in a way that harms black people—historically it perpetuated the slave trade.

Klein 7—(Associate Professor of Law at the University of La Verne College of Law, Ontario, California, JD from UCLA). Diane J. Klein. February 13, 2007. “PAYING ELIZA: Comity, Contracts, and Critical Race Theory or 19th Century Choice of Law Doctrine And The Validation of Antebellum Contracts For the Purchase and Sale of Human Beings”. bepress Legal Series Working Paper. https://law.bepress.com/cgi/viewcontent.cgi?article=9527&context=expresso

It may not shock the American conscience to learn that during slavery, courts in non-slave-holding states were sometimes called upon to enforce contracts for the purchase and sale of human beings (or contracts whose consideration otherwise consisted of human beings), and sometimes did so,1 for reasons arguably having more to do with inter-state contract law than with the “peculiar institution” itself.2 What may be more surprising, and more difficult to understand, is that some “Union” courts went on doing so even after the Civil War ended,3 when substantive changes of law, together with well established exceptions to general principles favoring out-of-state contract enforcement, made the contrary outcome at least equally available.4 Why? And what can we learn from it?

Accounting for these decisions requires more than simple charges of judicial racism or reactionary politics, even if well-founded. Prior and contemporaneous decisions sometimes took a more progressive, liberatory approach. We do better by seeking to uncover the intellectual and political pressure placed upon developing conflicts of law doctrine by the politics and the legal impedimenta of slavery. A more fine-grained approach reveals more, and (it is hoped) may contribute more, to the ongoing exploration not only of the conceptual and legal foundations of slavery, but also of reparations for slavery.

Explication of the legal doctrines some judges understood to stand in the way of total repudiation of slave contracts is not an apologia, but a caution. It is entirely too easy to dismiss these judges and their opinions of nearly a century and a half ago as anachronistic and irrelevant, racist, insensitive, and cynical, and congratulate ourselves on our greater enlightenment. This can unfortunately breed complacency, instead of turning a mirror on our own use and abuse of today’s legal concepts to frustrate, rather than further, goals of equality and anti-subordination, of “justice” however defined – what the French-Jewish philosopher Emmanuel Levinas called (in another context) “the danger of a premature good conscience.”5

This Article addresses both how (from a doctrinal point of view) and why (from a legal, moral, and jurisprudential point of view), these contracts went on being enforced, outside the former Confederacy, even after the Thirteenth Amendment to the United States Constitution, abolishing slavery, took effect in 1865.6 A significant part of the analysis will involve a close reading of selected Illinois Supreme Court cases, culminating in 1869’s Roundtree v. Baker, 7 which is intended to show that the legal treatment of slavery in the non-slave-holding states, before and after the Civil War, was neither consistent and thorough repudiation, nor hypocrisy, indifference, or sympathy; instead, moments of moral and legal clarity seem to cohabit with tortured exercises of abstract principle thinly disguising cowardice, self-interest, and equivocation. The most fair and useful history attempts to do justice to these contradictory tendencies, and I will offer some tentative suggestions in that direction. Finally, I will address the “road not taken,” in which a federal district court in the 1870 Arkansas case of Osborn v. Nicholson8 interpreted the Thirteenth Amendment to deny enforcement of the payment obligations on contracts for the purchase and sale of human beings,9 only to find itself reversed a year later by the U.S. Supreme Court,10 definitively rejecting this approach as an unconstitutional impairment of vested contract rights11 and abandoning denial of such contracts as a legal avenue for furthering anti-subordinatory ends.

I. Theory: Comity, Foreign Contracts, and the “Public Policy” Exception

There were two primary choice of law doctrines implicated during the antebellum period when a court in a non-slave-holding state adjudicated a lawsuit involving human beings as consideration for a contract. The first was that a contract valid in its place of making is valid everywhere, even if such a contract would be invalid in the forum in which enforcement is sought. The applicable law, in other words, was that of the place of making, lex loci contractus, and not the (potentially contrary) law of the state of enforcement (lex fori).12 Up until the 19th century, each state or nation’s agreement to uphold this principle was understood to be based on something called “comity.” Originating in Dutchman Ulrich Huber’s extremely influential 1689 essay “De conflictu legum diversarum in diversis imperiis,” “Comity was defined as something between mere courtesy and a legal duty, as derived from the tacit consent of nations and based on mutual forbearance and enlightened self-interest.”13

The U.S. Supreme Court described it this way:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.14

Comity in turn supports the general rule of contract validation. As James Kent, an early-19th century American scholar, put it, “a contract valid by the law of the place where it is made is valid everywhere jure gentium [by the law of nations]….If it were otherwise, the citizens of one nation could not contract or carry on commerce in the territories of another.”15 This concept of comity, developed to manage the legal relationships among sovereign European nations, was then applied in the local American inter-state context. Huber’s ideas entered American law primarily through Joseph Story’s 1834 work, Commentaries on the Conflict of Laws, Foreign and Domestic, “the first comprehensive conflicts treatise in English,”16 and took hold in the United States universally.17 “Comity” was thus understood as providing a basis for the enforcement of out-of-state agreements that would be invalid had they been contracted within the forum by forum domiciliaries.

Equally well-established, at least theoretically, was the most significant exception to this principle of contract validation, generally referred to as the “‘public policy’ exception.”18 This exception (related to the European ‘ordre public’ exception to the application of foreign law in a different nation’s courts19) permitted a court to refuse enforcement where such enforcement would conflict with the public policy of the forum. From the beginning, states reserved to themselves the power to decline enforcement of truly repugnant out-of-state agreements, reminding the world at large that the enforcing court exercised its power in support of the out-of-state (or “foreign”) contract as a matter of comity only, of something like self-interested and pragmatic friendliness between states,20 and not out of any felt or real sense of Constitutional or other legal obligation.21

As to foreign contracts specifically, Story stated in his Commentaries,

Contracts…which are in evasion or fraud of the laws of a country, or the rights and duties of its subjects, contracts against good morals, or religion, or public rights, and contracts opposed to the national policy or institutions, are deemed nullities in every country…although they may be valid by the laws of the place, where they are made.22

And Story gave specific examples of contracts “against good morals, or religion,

or public rights”:23

Such are contracts…for future illicit cohabitation and prostitution; contracts for the printing or circulation of irreligious and obscene publications; contracts to promote or reward the commission of crimes; contracts to corrupt or evade the due administration of justice; contracts to cheat public agents, or to defeat the public rights; and in short, all contracts which in their own nature are founded in moral turpitude, and are inconsistent with the good order and solid interests of society. All such contracts, even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or even of natural justice, are allowed to have their due force and influence.24

The contemporary (and oft-quoted) locus classicus for the standard is surely Judge Cardozo in Loucks v. Standard Oil Co. of New York (a tort case), where he stated that the public policy exception is not to be applied to deny enforcement of a right, unless enforcement in the forum “would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”25 As a more contemporary New York court put it, “Even if [a] contract is valid where made, it will not be enforced in another State if it is repugnant to positive statutory enactment and the public policy of that State.”26

At the same time, it should be noted that although it was (and is) robust

doctrinally, the public policy exception was not widely applied, at least during the period

with which we are concerned.27 According to a mid-twentieth century source,

Research into the case law establishes at least one solid fact: The reported cases in which foreign law, applicable under the usually appropriate conflicts rule, is not used solely because the law to be applied is ‘obnoxious’ or ‘repugnant’ to the public policy of the forum are few indeed….The argument that an entirely foreign claim should not be enforced because it is repugnant to the forum has undoubtedly been made most often in contract cases, but it has met with surprisingly little success.28

In addition, while even today the public policy exception is apparently wellestablished in American law,29 appearing in both the First and the Second Restatements of Conflict of Laws,30 it continues to be poorly understood even by commentators, who frequently confuse, or fail to differentiate, between the use of the public policy exception to ground a forum’s refusal to apply foreign law in general (when its own choice of law principles suggest or require that it should); a refusal to recognize a foreign claim or defense (when the forum typically does not (yet or any longer) recognize such a claim or defense);31 and our concern here, namely, a forum’s refusal to enforce a foreign contract. 32 The considerations appropriate to each employment of the exception are at least potentially distinct, and criticisms based on examples of one type do not necessarily apply to the others. Nevertheless, the existence and basic contours of the public policy exception have long been well-defined and widely accepted.33

II. Practice: Four Stories of Slavery and Law in 19th Century Illinois

A contract for the purchase and sale of human beings, for which enforcement is sought in a non-slave state, would seem to be tailor-made for the public policy exception.34 For jurists in a state that prohibits slavery, what sort of agreement could more profoundly conflict with “good morals…or public rights,” be more “pernicious and detestable,”35 more “repugnant to positive statutory enactment and the public policy of that State,”36 than a contract for a slave? What sort of contract could be “in [its] own nature” more deeply “founded in moral turpitude” than one purporting to traffic in human beings?37 In the modern era, a federal court in Illinois used the public policy exception to refuse enforcement of a New Jersey contract arising from a gambling debt.38 Surely slavery was more offensive to mid-nineteenth-century Illinois jurists, than gambling is today? And yet…

As part of the Northwest Territories, Illinois was and always had been a nonslave-holding state. The sixth article of the Northwest Ordinance of 1787, the founding legal document of Illinois, prohibited slavery and involuntary servitude except as a penal sanction.39 Illinois was admitted to the U.S. as a state on December 3, 1818,40 and the first section of the sixth article of the Illinois Constitution stated, “Neither slavery nor involuntary servitude shall hereafter be introduced into this state, otherwise than in the punishment of crimes whereof the party shall have been duly convicted.”41 The first section of the eighth article of the Illinois Constitution stated, “That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.”42

The Illinois cases wrestling with these issues culminate in Roundtree v. Baker, 44 in which the 1869 Illinois Supreme Court ordered payment on an antebellum Kentucky slavery contract. The rationale offered in Roundtree demonstrates how conventional modes of legal reasoning, even in jurists of otherwise apparently good conscience, may lead to missed opportunities to deploy existing legal technologies in ways that further liberatory, anti-subordination, and anti-racist policies and views.45 The goal of studying this case thus extends beyond coming to a clearer and more accurate picture of Illinois Reconstruction-era law, valuable and important as that is; it also contains lessons whose significance is not merely historical.46

### Settler Colonialism—Internal

#### Comity’s assumption of supremacy serves as a primary legal justification for settler-colonial states.

Irani 19—(https://doi.org/10.1177/1354066119869801). Freya Irani. 2019. “Beyond de jure and de facto boundaries: tracing the imperial geographies of US law”. European Journal of International Relations 1–22. <https://doi.org/10.1177/1354066119869801>.

In one sense, then, my argument is a very specific, empirical one about US extraterritoriality. I am not suggesting a similar rise in extraterritoriality elsewhere in the post World War Two period: rather, as I explain in the next section, I view postwar “economic” extraterritoriality as, until recently, a largely US practice, enabled primarily by and enabling of US economic preeminence. Yet my argument is also a broader one in its proposal of a particular approach to states’ boundaries, an approach which finds these shifting boundaries in the routine, seemingly-mundane jurisdictional assertions of states. I show that, by tracing these jurisdictional assertions, we can better capture the multiple ways in which legal authority is organized and authorized in the contemporary world— sometimes around and by the notion of territory, sometimes around and by the notion of the national economy, sometimes in still other ways.

In highlighting the multiple ways in which legal authority is organized in the contemporary world, this article does not suggest that the notion of territory is no longer important—quite the contrary. My concern is rather with the political productiveness of the very assumption of the territorial organization of jurisdiction, of the assumption that legal authority is both supreme and even within, and limited by, territorial boundaries. For example, in settler-colonial states, the assumption of supremacy and evenness of the settler government’s jurisdiction within its claimed territory works to obscure rival indigenous forms of authority and law (Pasternak, 2017). So too, this assumption serves to obscure, and so enable, ongoing violent processes through which such jurisdiction needs to continually be imposed on, and is continually resisted by, indigenous peoples (Pasternak, 2017). At the same time, and as this article shows, the assumption of the territorial limitedness of the US government’s jurisdiction works to obscure, and so to enable, the routine reach of US law “abroad.” At its core, then, this article aims to counter these assumptions of the territorial exclusiveness and limitedness of jurisdiction, and so to make possible the consideration and tracing of other contemporary geographies of law, and specifically, of the imperial geographies of law.

In the section “Centering jurisdiction”, drawing on work on jurisdiction and territory in IR and law (Dorsett, 2002; Dorsett and McVeigh, 2012; Elden, 2013; Kaushal, 2015; McVeigh, 2007; Pahuja, 2013; Ryngaert, 2016; Valverde, 2009), I detail my approach to jurisdiction, and describe how it diverges from conventional approaches to the same. In the sections “The emergence of effects-based extraterritoriality” and “Delineating the US economy”, I show that, since 1945, the jurisdictional boundaries of the United States have come to be organized around a construct called “national economy.” I do this in two steps. In the section “The emergence of effects-based extraterritoriality”, contrasting two cases decided 36 years apart, I demonstrate the importance of this construct, which was only at play in the latter case, in enabling the extraterritorial extension of US law. In the section “Delineating the US economy”, I detail the ways in which US judges continually construct the national economy through their decisions, by articulating some people and conduct to, and disarticulating other people and conduct from, that national economy. I suggest that, in doing so, these judges draw US jurisdictional boundaries in ways that include US corporations but exclude US workers employed abroad. The final section concludes.

### Settler Colonialism—Link

#### There are salient parallels between comity jurisprudence with foreign countries and tribal governments.

Leeds 2K—(JD from University of Tulsa College of Law). Stacy L. Leeds. 2000. "Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective," North Dakota Law Review: Vol. 76 : No. 2 , Article 2. <https://commons.und.edu/cgi/viewcontent.cgi?article=1625&context=ndlr>

The Supreme Court's initial attempt to define the relationship suggested a tribal existence within the federal union, yet simultaneously recognized elements of enduring tribal sovereignty. 27 Chief Justice John Marshall, in Cherokee Nation v. Georgia,28 attempted to clarify the relationship by defining Indian tribes as "domestic dependent nations." 29 The phrase placed tribes outside the scope of Article 111,30 thus denying tribes access to federal courts, yet contextually included tribes within the federal union by dispelling the notion that they were foreign nations. 31

[Begin Footnote 31]

31. It is interesting to note, for purposes of the tribal court recognition approaches discussed infra Part IV, that Cherokee Nation's dissenting Justices Thompson and Story chose to address the Indian question as a matter of foreign relations, concluding that Indian tribes were foreign governments. See 30 U.S. (5 Pet.) at 51 (Thompson, J., dissenting). This view is consistent with the current trend by federal courts to apply principles of international comity to tribal court review.

[End Footnote 31]

Justice Marshall's definition adapted well to the federal Indian policy emerging in the 1830s, and which would prevail toward the end of the nineteenth century, because it justified contemporaneous efforts to subject tribal governments to federal control. 32

#### More evidence.

St. John 12—(JD Candidate at University of Denver Sturm College of Law). Dan St. John. January 2012. “Recognizing Tribal Judgments in Federal Courts through the Lens of Comity”. Denver Law Review, Volume 89. <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1257&context=dlr>.

Part I frames how Indian tribes are treated in the United States. It briefly explores the history of legal relationships with Indian tribes, from equal treatment as sovereign states when Europeans first crossed the Atlantic, through a century of pulling tribes under the federal domain, to eventual federal legislative supremacy over Indian tribes. This Comment also analyzes the circuit split regarding the use of un-counseled tribal convictions to prove predicate offenses. Part II discusses United States v. Shavanaux'3 and summarizes Mr. Shavanaux's Fifth Amendment and Sixth Amendment claims. Part III explores the difference between a full faith and credit approach and a comity analysis of tribal judgments, and concludes by finding that international comity principles are more appropriate for Indian tribes. Part IV analyzes Shavanaux using the principles of international comity and explores whether the right to counsel is a fundamental due process requirement for the comity analysis.

I. BACKGROUND: THE TRIBAL-FEDERAL RELATIONSHIP

The foundation for understanding United States v. Shavanaux comes from understanding the relationship between the federal government and tribal governments. This story is a long and, at times, ugly one.14 From initial European contact with Native Americans, tribal sovereignty has been chipped away. In the early years of the United States, the federal government began to bring tribes within its administration and under its protection.'5 Now, tribes are neither part of the United States because they still retain many aspects of sovereignty nor are they foreign states because Congress retains ultimate authority over them. This state of limbo creates difficulties when American and tribal legal systems interact.

A. United States' Treatment of Indian Tribes

By the time the United States declared independence, there was a well-established framework for dealing with Native American tribes. Spanish theological jurists in the 1600s recognized the sovereignty of Indian tribes and treated them as they would other colonial powers-that is, as sovereign states.' 6 This sovereign equality, however, began to erode in the mid-1700s as the British took over some tribal administrative responsibilities.' 7 By 1781, the Articles of Confederation asserted that the national government had authority over Indian tribes.' 8 The Constitution, however, continued to recognize that Indian tribes are "distinct from the United States"' 9 in the express language of the Commerce Clause.20 Early American interactions with Indian tribes were made through treaties. 2 1 In 1784, George Washington recommended that a treaty resolving a territorial dispute with the Six Nations be submitted to the 22 same formal ratification process as a treaty with a foreign sovereign. Subsequent peace,23 trade, 2 4 and land acquisition25 treaties began to disfavor tribal interests as the United States pushed westward. Congress eventually ended the practice of making treaties with tribes, but it left tribal sovereignty intact.2 6

After the Constitution was ratified, the limits of tribal sovereignty were predominantly shaped by three Supreme Court decisions, referred to as the "Marshall Trilogy."2 7 These cases established that although tribes were not quite foreign states,28 they were certainly not part of the United States. 29 Chief Justice Marshall noted that because federal and state governments "plainly recognize the Cherokee nation as a [foreign] state . . . the courts are bound by those acts" affirming tribal sovereignty.30 However, recognizing Indian tribes "as distinct, independent political communities, retaining their original natural rights" does not mean tribal sovereignty is absolute. 3 ' Tribes are "domestic dependent nations ,,32 "distinct communit[ies] occupying [their] own territory."3 3 Although the Court did not determine that tribes are within the federal framework, the extent of tribal sovereignty depends on the will of the federal government. 3 4

Given that tribes retain a level of independence, the question becomes how does Congress justify its authority over tribes? The federal government justifies its control over Indian tribes as an inherent "plenary power,"35 which means that Congress has "full and complete power" to regulate tribal affairs. 3 6 The source of the plenary power stems 37 from the Indian Commerce Clause, 38 the Treaty Clause, 39 and a principle in international law granting conquerors sovereignty and ownership over conquered land.4 0 Although Congress abolished the power to make treaties with Indian tribes in 187141 and conquest has lost favor as an acceptable tool for advancing national interests, 42 the Commerce Clause remains as justification for federal supremacy over tribes.43 Regardless of the original justification, Congress's power is very broadly interpreted."

B. Effect of Congressional Power over Tribes

Until Congress acts to limit tribal authority, Indian nations have many of the powers of a sovereign state.45 By being brought within the administrative protection of the United States, "Indian tribes have not given up their full sovereignty."4 And because tribes are sovereign states that existed before the Constitution, they "have historically been regarded as unconstrained" by constitutional limitations. 4 7 Of particular importance to United States v. Shavanaux because of Mr. Shavanaux's uncounseled convictions, the Bill of Rights does not apply to Indian tribes.48 However, Congress's plenary powers allow legislative action to strip tribes of independent authority. 49 As the Court articulated in Talton v. Mayes,50 "all such rights are subject to the supreme legislative authority of the United States."

As an exercise of this plenary power, Congress passed the Indian Civil Rights Act of 1968 (ICRA).52 ICRA grants Bill of Rights-like protections to tribal members53 and gives federal courts broad authority to review and overrule tribal decisions that violate ICRA protections. 54 Imposing the Bill of Rights itself was not done because it would not take into account the unique needs of Indian tribes. 5 One right that was not fully exported was the right to counsel-ICRA only guarantees defendants the right to counsel at their own expense.56 Recognizing that requiring tribes to provide public defenders would impose "undue financial hardship," Congress acquiesced to tribal leaders. 7 Some tribes, however, provide counsel for indigent defense5 or, as Mr. Shavanaux's Ute Tribe does, allow non-lawyer "advocates" to represent defendants. 5 9 But because tribes are not subject to the Bill of Rights, any measures that are more protective than IRCA are left to the tribe's discretion.60

## Uncut URLs + Misc

#### FNC + COVID

Doria 21 - (Christina Doria, Partner @ Baker & McKenzie LLP; 8-16-2021, Kluwer Arbitration Blog, "Has Forum Non Conveniens Gone the Way of the VCR Player? Canadian Court finds the Doctrine Obsolete in Age of Virtual Hearings," doa: 4-18-2022) url: <http://arbitrationblog.kluwerarbitration.com/2021/08/16/has-forum-non-conveniens-gone-the-way-of-the-vcr-player-canadian-court-finds-the-doctrine-obsolete-in-age-of-virtual-hearings/>

#### Securities Law

Zhao 22—(JD Candidate at Georgetown). Freya Zhao. March 21, 2022. “Initial Coin Offerings and Extraterritorial Application of U.S. Securities Laws”. 139 Banking L. J. 174. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4059479>.

#### ET + IP Rights

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4017887>

#### ET Patent Advantage

<https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1452&context=jipl>

#### Animals

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/denilp49&div=3&id=&page=>

#### Title 9

<https://heinonline.org/HOL/LandingPage?handle=hein.journals/lewclr25&div=42&id=&page=>

#### Securities

https://heinonline.org/HOL/LandingPage?handle=hein.journals/geojlap17&div=16&id=&page=

#### ATS/RICO

https://scholar.smu.edu/law\_faculty/168/

#### ???

https://www.nortonrosefulbright.com/en/knowledge/publications/ae5cfa02/us-courts-retreat-from-applying-major-federal-statutes-to-extraterritorial-activity

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4017887>

#### PAT background.

Clopton 14—(Lecturer in Law and Public Law Fellow, University of Chicago Law School). Zachary D. Clopton. 2014. “Replacing the Presumption against Extraterritoriality”. 94 Boston University Law Review 1. <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=8052&context=journal_articles>.

I. THE PRESUMPTION AND ITS PURPOSES

The presumption against extraterritoriality is a judge-made rule of statutory interpretation. Over the years, courts and scholars have justified the presumption with respect to various interests and values.29 This Part addresses each of the purported justifications for this rule. Before doing so, though, it is helpful to supplement the Introduction's brief comments about the presumption's operation.

The presumption against extraterritoriality instructs courts that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."30 This rule is a tool of federal statutory interpretation. It is not a constitutional principle,3' and it does not govern the extraterritorial reach of the Constitution.32 It does not speak to the role of U.S. states in foreign affairs - it addresses only federal laws.33 Nor does it address legislative authority, as courts have placed virtually no limits on the power of Congress to legislate outside the borders of the United States. 34 And, at least until 2013, the presumption has not been applied to common law causes of actions, but instead has been a tool to construe statutes.35

Within these limits, courts apply the presumption to substantive federal statutes, both civil and criminal.36 Some statutes are expressly extraterritorial, making the interpretation question a nonissue. For example, if you were to operate a stateless submersible vessel on the high seas with the intent to evade detection, you may be prosecuted under 18 U.S.C. § 2285(a). 37 Less obscure examples are available, but this editorial choice is meant to suggest that express extraterritoriality is far from routine; most statutes do not include express language on territorial scope, leaving courts to decide the ambiguous statute's reach. The presumption against extraterritoriality tries to aid in this judgment.

Courts implement the presumption by addressing two questions. First, is there a "contrary intent" of Congress that would justify overcoming the presumption against extraterritoriality? At various times, judges have examined the text of statutes, related statutory provisions, the statutes' purposes, legislative history, and the governmental interest to determine whether Congress admitted any such contrary intent.38 Although the Supreme Court insists the presumption is not a clear statement rule,39 recent cases have approached this bright-line requirement. 40

A second interpretative issue is, in some sense, antecedent to the application of the presumption. The previous question asked whether Congress intended a statute to apply extraterritorially, but nothing in the canonical statement of the presumption tells courts what qualifies as an extraterritorial case. To put it another way, if a case has some connection to the United States and some connection to a foreign state, courts must determine whether the case is "extraterritorial" (and thus subject to the presumption) or not (thus rendering the presumption irrelevant).41 Justice Scalia colorfully wrote that the presumption against extraterritoriality is not a "craven watchdog ... retreat[ing] to its kennel whenever some domestic activity is involved in the case." 42 Not all extraterritorial connections, therefore, invoke the presumption, and not all domestic connections defeat it. Courts and scholars have offered manifold formulations of which connections are sufficient, and in many cases the answer is not entirely clear.43

Having briefly outlined the presumption against extraterritoriality, the remainder of this Part addresses its purported bases drawn from case law and scholarly treatments: international law, foreign law, congressional attention, separation of powers, and due process.

#### Full Dodge 15 Article.

Dodge 15—(John D. Ayer Chair in Business Law and Martin Luther King Jr. Professor of Law at UC Davis). William S. Dodge. February 1, 2015. “International Comity in American Law”. 115 Columbia Law Review 2071. <https://columbialawreview.org/content/international-comity-in-american-law/>.

INTRODUCTION

For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion. The doctrines of American law that mediate the relationship between the U.S. legal system and those of other nations are nearly all manifestations of international comity. Comity has long served as the basis for the conflict of laws1 and the enforcement of foreign judgments in the United States.2 Today, American courts also use international comity to restrain the reach of domestic law.3 The Supreme Court has repeatedly characterized foreign sovereign immunity as a “gesture of comity” 4 and, conversely, has used comity to explain why foreign governments should be allowed to bring suit as plaintiffs in American courts.5 The act of state doctrine was once said to rest on “the highest considerations of international comity and expediency.” 6 The Supreme Court has looked to international comity to reinforce constitutional due process limitations on personal jurisdiction.7 The Court has also told district courts to engage in a comity analysis when considering the discovery of evidence abroad for use in U.S. courts8 and the discovery of evidence in the United States for use in foreign courts.9 Lower federal courts have used “international comity” as an abstention doctrine to defer to parallel proceedings in foreign courts,10 and alternatively to decide whether to enjoin the parties from continuing such proceedings.11 American law is full of international comity doctrines.12

Yet courts and commentators repeatedly confess that they do not really understand what international comity means. Courts complain that comity “has never been well-defined.” 13 They frequently refer to it as “vague” 14 or “elusive.” 15 One court recently observed that “[a]lthough comity eludes a precise definition, its importance in our globalized economy cannot be overstated.” 16 Scholars echo these complaints.17 They also point out that “courts appear to have little understanding of what exactly comity consists,” 18 or at a minimum that courts are “not always clear or consistent.” 19 As Trey Childress has noted, because there is “no clear analytical framework” for exercising international comity, “courts have been left to cobble together their own approach.” 20

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

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

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

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

The supposedly indeterminate nature of comity has long made it an object of criticism. Judge Cardozo called comity a “misleading word” that “has been fertile in suggesting a discretion unregulated by general principles.” 32 Comity’s connection to foreign relations has led some to conclude that international comity determinations would be better made by the executive branch than by courts.33 Yet this suggestion raises problems of its own. Many judges resist the notion that the Executive should be able to dictate results in particular cases.34 And even the executive branch has concluded, in the context of foreign state immunity, that case-by-case discretion does not help U.S. foreign relations.35

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

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

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

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

This Article’s definition of international comity is based on a reading of all the U.S. Supreme Court cases that use the word “comity” 38 as well as a large number of lower court cases. This approach reflects the supposition that courts using the term have the sense, however inchoate, that a common principle lies behind certain doctrines. Once the doctrines that seem to rest at least in part on international comity were identified, it became clear that each involved deference to foreign lawmakers, to foreign courts, or to foreign governments as litigants. It also became clear that some doctrines worked to recognize foreign acts or actors and that some worked to restrain U.S. acts or actors.39 Based on this survey, this Article adopts a functional definition of international comity that captures its uses in American law today: International comity is deference to foreign government actors that is not required by international law but is incorporated in domestic law.

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

Beyond offering a definition of international comity, this Article catalogues and categorizes the uses of international comity in American law along two dimensions. Along one axis, it distinguishes the uses of international comity based on the foreign government actor to whom deference is given. Deference to foreign lawmakers constitutes “prescriptive comity,” 41 deference to foreign tribunals is termed “adjudicative comity,” 42 and deference to foreign governments as litigants is “sovereign party comity.” 43 Along the second axis, the Article distinguishes between the operation of comity as a “principle of recognition”—that is, as a means of recognizing foreign law, foreign judgments, and foreign sovereigns as litigants—and the operation of comity as a “principle of restraint”—that is, as a means of restraining the reach of American law, the jurisdiction of American courts, and, more specifically, the jurisdiction of American courts over foreign sovereign defendants. Each of the international comity doctrines may be placed in one of the resulting boxes.



Some of the doctrines included in the matrix above may not be recognized immediately as manifestations of international comity. But each fits this Article’s definition—deference to foreign government actors that is not required by international law but is incorporated in domestic law— and Part II defends the inclusion of each. It is also important to note that some of the international comity doctrines rest partly on comity and partly on other bases. The modern presumption against extraterritoriality, for example, has two rationales: (1) “[i]t serves to protect against unintended clashes between our laws and those of other nations which could result in international discord;” 44 and (2) it reflects the assumption that Congress is “‘primarily concerned with domestic conditions.’” 45 Only the first of these justifications reflects international comity. The discussion below will note when a doctrine rests on more than one rationale.

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

Categorizing the international comity doctrines in this way reveals how each of them fits into a larger picture. For example, many of the doctrines of adjudicative comity address the same basic question: When should a U.S. court defer to a foreign court’s resolution of a legal dispute? What changes is the time at which that question is asked—before a suit is filed in foreign court, while it is pending, or after the foreign court has rendered judgment. Categorizing the doctrines also facilitates comparisons within and across categories and raises new questions. Why, for example, has reciprocity been urged as a requirement for some of the comity doctrines but not for others?49 Why are some comity doctrines state law,50

others both state and nonpreemptive federal law,51 and still others preemptive federal law?52

This Article uses its categorization of international comity doctrines to challenge two enduring myths about comity: (1) that comity must be governed by standards rather than rules; and (2) that comity determinations are best left to the executive branch.53 The first myth goes back at least to the early nineteenth century. In his 1834 treatise on conflicts, Justice Joseph Story endorsed the view that “comity is, and ever must be uncertain” and “must necessarily depend on a variety of circumstances, which cannot be reduced to [sic] any certain rule.” 54 This discretionary aspect of international comity has been responsible for much of the criticism that the doctrine has attracted over the years.55 But examining the full range of comity doctrines reveals that international comity can be— and often is—expressed in the form of rules rather than standards.56 In the area of sovereign party comity, the Supreme Court has adopted a rule that any government recognized by the United States, and not at war with it, may bring suit in U.S. courts,57 while the Foreign Sovereign Immunities Act (FSIA) sets forth rules to determine when foreign states may be sued in federal and state courts.58 In the areas of prescriptive and adjudicative comity, one finds a mix of rules and standards. The act of state doctrine operates as a rule rather than a standard,59 and the Supreme Court has rejected a case-by-case approach for restraining the extraterritorial reach of federal statutes.60 The Restatement (Second) of Conflict of Laws adopts a “most significant relationship” standard,61 subject to a number of presumptive rules for recognizing foreign law.62 Adjudicative comity as a principle of recognition operates largely through nondiscretionary rules governing the enforcement of foreign judgments,63 as well as a discretionary statute authorizing judicial assistance to foreign tribunals.64 It is only when adjudicative comity operates as a principle of restraint through doctrines like forum non conveniens that international comity operates predominantly through standards rather than rules.65

The second myth challenged here is that the executive branch has greater institutional competence to apply the comity doctrines. Eric Posner and Cass Sunstein have argued that courts should defer to the Executive in applying international comity doctrines because “the executive branch is in a better position to understand the benefits of foreign reciprocation or the likelihood and costs of retaliation than the judiciary.” 66 Posner and Sunstein consider only a limited number of comity doctrines.67 When one considers the full range, one sees a number of doctrines under which deference to the Executive would seem utterly inappropriate: the conflict of laws, the enforcement of foreign judgments, forum non conveniens, antisuit injunctions, and questions of foreign discovery, to name a few.68 To be sure, the executive branch has authority to determine certain facts on which some of the comity doctrines turn. The President has unreviewable authority to recognize foreign governments, and recognition in turn entitles foreign governments to bring suit in U.S. courts.69 Executive branch agencies may also have authority to determine the geographic scope of statutes they administer.70 But as a general matter, the President does not have—and should not be given—authority to dispose of particular cases on foreign relations grounds. Such authority not only compromises judicial independence but also harms U.S. foreign relations by putting the Executive in the uncomfortable position of having to make decisions that may displease foreign governments.

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

I. A BRIEF HISTORY OF INTERNATIONAL COMITY

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

A. From Huber to Mansfield

 The history of international comity

(1) The laws of each state have force within the limits of that government and bind all subject to it, but not beyond.

(2) All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.

(3) Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects.74

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

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

B. American Beginnings

Comity came to America with the rest of English common law. Counsel cited Huber and courts relied on him. In 1797, Alexander Dallas even

published a translation of Huber in the U.S. Reports.81 Riding circuit two

years later, Justice Washington invoked Huber for the proposition that

“by the courtesy of nations, to be inferred from their tacit consent, the

laws which are executed within the limits of any government are permitted to operate everywhere, provided they do not produce injury to

the rights of such other government or its citizens.”

82 Justice Story, also

on circuit, wrote that Huber’s doctrine “has become incorporated into

the code of national law in all civilized countries.”

83

Story’s 1834 treatise Commentaries on the Conflict of Laws cemented comity into the foundations of American conflicts law. Echoing Huber, Story began with three maxims: (1) “that every nation possesses an exclusive sovereignty and jurisdiction within its own territory;” 84 (2) “that no state or nation can, by its laws, directly affect or bind property out of its own territory, or bind persons not resident therein;” 85 and (3) “that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulations of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.” 86 After paraphrasing and defending Huber, Story endorsed comity as the basis for enforcing foreign law. The “‘comity of nations,’” he wrote, “is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.” 87 Like Huber, Story justified comity on the basis of “mutual convenience and utility.” 88 Yet Story also thought that the territorial sovereign could trump other considerations and refuse to enforce foreign law: “No nation can . . . be required to sacrifice its own interests in favour of another; or to enforce doctrines which, in a moral or political view, are incompatible with its own safety or happiness, or conscientious regard to justice and duty.” 89 In England and America, this discretion was exercised in the first instance by courts but subject always to legislative control.90 This comity, Story emphasized, was “not the comity of the courts, but the comity of the nation.” 91

During the nineteenth century, American courts invoked comity repeatedly as the basis for enforcing foreign laws—from those governing contracts,92 to those respecting the ownership of personal property,93 to those organizing corporations.94 “It is needless to enumerate here,” Chief Justice Taney wrote in Bank of Augusta v. Earle, “the instances in which, by the general practice of civilized countries, the laws of the one, will, by the comity of nations, be recognised and executed in another, where the right of individuals are concerned.” 95 Comity also gave the states of the Union some room—though in the end not enough—to manage the issue of slavery.96 “By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions,” Justice Story wrote in Prigg v. Pennsylvania. 97 “If it does it, it is as a matter of comity, and not as a matter of international right.” 98

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

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . . 105

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

While comity was the basis for enforcing foreign laws and judgments in American courts during the nineteenth century, it also served to restrain the exercise of jurisdiction over foreign sovereigns. In The Schooner Exchange v. McFaddon, Chief Justice Marshall held that a French warship was immune from suit by its former owners to recover it.107 The Schooner Exchange is sometimes read as applying international law, but Marshall treated the international rules governing immunity as defeasible by the United States.108 “The jurisdiction of the nation within its own territory is necessarily exclusive and absolute,” Marshall wrote.109 Thus, any immunity of a foreign sovereign in the courts of the United States “must be traced up to the consent of the nation itself.” 110 For “mutual benefit,” 111 all nations had consented to treat the foreign sovereign himself, his foreign minister, and his military forces as immune from arrest or detention within their territories.112 But Marshall emphasized that the territorial sovereign was “capable of destroying this implication” and of “subjecting such vessels to the ordinary tribunals.” 113

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

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

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

C. New Roles

In most of the preceding examples, American courts used comity to address problems created by a strictly territorial view of sovereignty—how to explain the enforcement of a foreign law or judgment outside the foreign state’s territory, or the decision not to exercise jurisdiction over a foreign sovereign inside the United States’ territory. As this territorial view of sovereignty weakened, however, comity came to play new roles in American law. In American Banana Co. v. United Fruit Co., the Supreme Court had to decide whether the Sherman Act reached anticompetitive conduct in another country.123 In the past, it would have answered that question by relying on rules of international law.124 But international law’s strictly territorial view of jurisdiction had faded by 1909,125 and so Justice Holmes adopted a territorial approach using comity instead:

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

Despite American Banana, U.S. courts soon began to apply U.S. antitrust law extraterritorially on the basis of effects.127 Starting in the 1970s, some turned to comity—now expressed as a weighing of contacts and interests—as a way of limiting the Sherman Act’s reach.128 The question, the Ninth Circuit wrote in Timberlane, was “whether American authority should be asserted in a given case as a matter of international comity and fairness.” 129 Section 403 of the Restatement (Third) of Foreign Relations Law adopted Timberlane’s interest balancing approach.130 But when the geographic scope of the Sherman Act again reached the Supreme Court in Hartford Fire Insurance Co. v. California, the Court refused to consider dismissal on grounds of “international comity” unless the conduct prohibited by U.S. law was required by foreign law.131 This provoked a strong dissent from Justice Scalia, who thought the case should have been dismissed on the basis of “‘prescriptive comity’: the respect sovereign nations afford each other by limiting the reach of their laws.” 132 Although Hartford was considered “a near death blow” for comity,133 just a decade later the Court looked to “principles of prescriptive comity” to limit the extraterritorial reach of American antitrust law in F. Hoffmann-La Roche Ltd. v. Empagran S.A.134

Developments in the area of adjudicative jurisdiction mirrored those in the area of prescriptive jurisdiction as America moved from the nineteenth century to the twentieth. The Supreme Court had applied a strictly territorial approach to personal jurisdiction in Pennoyer v. Neff. 135 But in the first half of the twentieth century, this territorial approach gave way to the more flexible framework of International Shoe Co. v. Washington, which required only “certain minimum contacts with [the forum] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” 136 The expansion of personal jurisdiction created more opportunities for parallel proceedings, which American courts developed new tools to manage, like the doctrine of forum non conveniens137 and (more questionably) the doctrines of prudential exhaustion138 and international comity abstention,139 each of which allows a district court to stay or dismiss a case over which it has personal jurisdiction.140 U.S. courts have also looked to comity when considering whether to enjoin parallel proceedings in a foreign court.141 Recently, the Supreme Court has relied on “international comity” to reinforce limits on personal jurisdiction under the Due Process Clause itself.142 And finally, even when a U.S. court takes jurisdiction, comity has been deemed relevant to how that jurisdiction is exercised with respect to matters such as the discovery of evidence abroad under the Hague Evidence Convention.143

D. New Justifications

The changing role of international comity—attributable to international law’s movement away from strict territoriality—led in turn to a shift in the justifications for comity. Until the turn of the twentieth century, a private rationale for comity predominated, most often expressed as commercial convenience. With the increased use of comity as a principle of restraint, however, more public rationales like respect for foreign sovereignty and the fostering of friendly relations took over.144 The original reason for international comity was commercial convenience. Huber wrote that “nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on account of a difference in the law.” 145 Public interests found expression only as a justification for not extending comity to foreign laws, because under Huber’s third maxim, one nation would enforce the laws of another only insofar “as they do not cause prejudice to the power or rights of such government or of its subjects.” 146

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

Public interests began to play a larger role around the turn of the twentieth century. It was easy to justify comity as a principle of recognition on grounds of convenience because both parties to a contract had an interest in having it be enforceable and, by extension, in the enforce ability of judgments based on the contract. But comity as a principle of restraint was more difficult to explain in convenience terms. Exemption from extraterritorial legislation or adjudicative jurisdiction might be convenient for the defendant, but hardly so for the plaintiff. Respect for foreign sovereignty seemed a more natural fit. Thus, Justice Holmes in American Banana explained that to apply the Sherman Act extraterritorially “not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.” 152 Since the start of the twentieth century, American courts have invoked the public interest rationale for comity in other areas of law too. In Oetjen v. Central Leather Co., the Supreme Court said that the act of state doctrine rests “upon the highest considerations of international comity and expediency” and that to question the validity of a foreign act of state “would very certainly ‘imperil the amicable relations between governments and vex the peace of nations.’” 153 In sovereign party cases too, the interest in preserving relations with other nations and respecting foreign sovereignty came to the fore.154 The exception to this trend has been adjudicative jurisdiction, where courts seem to have moved away from respect for sovereignty155 towards greater consideration of private interests.156

The shift from private to public rationales for comity—from convenience to sovereignty—had a number of consequences. First, it bolstered the use of comity as a principle of restraint. Commercial convenience could explain why a foreign contract or judgment should be enforced, but it did not explain why a nation should restrict its prescriptive or adjudicative jurisdiction. As noted above,157 the notion that another nation might have an interest in seeing a particular dispute resolved under its law or in its courts, which American courts should respect out of comity, seemed a better fit for judges seeking to justify restraint.

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

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

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

II. THE FACES OF COMITY

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

A. Prescriptive Comity

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

The label “prescriptive comity” also fits Huber’s and Story’s conception of comity as the recognition of foreign law.165 The word “prescriptive” refers to “jurisdiction to prescribe”—that is, “to make [a state’s] law applicable to the activities, relations, or status of persons, or the interests of persons in things.” 166 When one nation applies the laws of another in its courts, it recognizes that the other nation has jurisdiction to prescribe rules for the transaction or event. If that recognition occurs as a matter of comity, as has traditionally been the case with the conflict of laws in the United States, it may properly be deemed an exercise of “prescriptive comity.”

Some writers have preferred “legislative comity,” 167 but that phrase could describe either comity to legislatures or comity by legislatures. Prescriptive comity is comity to lawmakers—often legislatures, but sometimes courts or executive branch officials.168 Furthermore, prescriptive comity is exercised by courts. It is true that courts sometimes justify the extension of comity through assumptions about what the legislature would want.169 It is also true that legislatures sometimes speak directly to the recognition of foreign law170 or the extraterritorial reach of domestic law.171 But it is ultimately courts that interpret and apply these rules, sometimes relying on background principles of “prescriptive comity” to do so.172

1. As a Principle of Recognition. — As a principle of recognition, prescriptive comity operates in American law today through state-law rules on the conflict of laws, the federal act of state doctrine, and the practice of some courts to recognize extraterritorial acts of state on the basis of comity. States in the United States have adopted a variety of methodologies for choosing the law to apply in a case that touches more than one jurisdiction.173 In a few states, conflicts rules are codified by statute,174 but in most they are judge-made common law. American courts generally apply the same choice-of-law rules in interstate and international cases.175 In deciding conflicts cases today, U.S. courts rarely invoke comity directly. Instead, they simply apply the choice-of-law rules of the state in which they sit.176 But the origin of these rules in comity is clearly seen in the widespread adoption of a public policy exception.177 This exception is a direct descendant of Huber’s third maxim that a government should enforce foreign laws “so far as they do not cause prejudice to the power or rights of such government or of its subjects.” 178

The act of state doctrine provides another example of prescriptive comity operating as a principle of recognition. The doctrine is a rule of federal common law under which both federal and state courts must not question the validity of a foreign sovereign’s official act fully performed within its own territory.179 In an early case, the Supreme Court characterized the doctrine as resting on “the highest considerations of international comity and expediency.” 180 In contrast to state-law rules on the conflict of laws, the act of state doctrine has no public policy exception. A U.S. court must recognize as valid a foreign act to which the doctrine applies, “[h]owever offensive to the public policy of this country and its constituent States [the act] may be.” 181 This aspect of the doctrine has perhaps obscured its foundation in comity. In modern cases, the Supreme Court has said that the act of state doctrine “arises out of the basic relationships between branches of government in a system of separation of powers.” 182 One might characterize the act of state doctrine as one that rests in part on a basis other than comity.183 But in fact, the separation-ofpowers rationale for the act of state doctrine has international comity at its heart, for it rests on the perceived need for respect to foreign governments.184 Both by function and by rationale, therefore, the act of state doctrine is properly considered a manifestation of international comity.185

In summary, prescriptive comity operates as a principle of recognition in American law through state conflicts rules and the federal act of

state doctrine. Both doctrines defer to foreign lawmakers by recognizing

their authority to prescribe rules to govern a case before a U.S. court.

2. As a Principle of Restraint. — Prescriptive comity operates as a principle of restraint in American law today mainly through the presumption against extraterritoriality. As noted above, the modern presumption against extraterritoriality rests on two rationales: (1) “[i]t serves to protect against unintended clashes between our laws and those of other nations which could result in international discord;” 186 and (2) it reflects the assumption that Congress is “‘primarily concerned with domestic conditions.’” 187 Only the first rationale reflects international comity. As previously noted, Justice Holmes turned to international comity to support the presumption against extraterritoriality in American Banana, reasoning that application of U.S. law to foreign conduct “would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent.” 188 The second rationale—that Congress is primarily concerned with domestic conditions—first appeared in the Supreme Court’s 1949 decision in Foley Brothers as a reasonable assumption about the focus of congressional concern in most cases.189 In recent cases, the “domestic conditions” rationale has predominated,190 but the Court leaned heavily on comity in Kiobel v. Royal Dutch Petroleum Co. to limit the federal-common-law cause of action for human rights violations under the Alien Tort Statute (ATS), emphasizing that the “presumption ‘serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.’” 191

U.S. courts have sometimes used other tools to restrain the reach of U.S. statutes. In Empagran, the Supreme Court invoked not the presumption against extraterritoriality but a principle of “constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” 192 which Justice Breyer characterized as a “principle of prescriptive comity.” 193 Lower courts have sometimes engaged in a caseby-case balancing of interests under section 403 of the Restatement (Third) of Foreign Relations Law. Although the Third Restatement took the position that such interest balancing was required by customary international law,194 lower courts adopting section 403 have generally characterized it as an exercise of comity.195 But the Supreme Court has specifically rejected a case-by-case approach to extraterritoriality.196 Going forward, it seems likely that prescriptive comity will continue to operate as a principle of restraint in American law, but primarily through the presumption against extraterritoriality, which the Supreme Court in Morrison instructed lower courts to apply “in all cases.” 197

Occasionally, conduct prohibited by U.S. law may be required by foreign law, in which case compliance with U.S. law may be excused under the doctrine of foreign state compulsion.198 In Hartford Fire Insurance Co. v. California, the Supreme Court acknowledged the possibility of declining jurisdiction “under the principle of international comity” if the conduct prohibited by U.S. antitrust law were required by the law of another nation, although the Court found no such conflict in Hartford. 199 Lower courts applying the doctrine of foreign state compulsion in antitrust cases have noted its basis in comity.200 Lower courts have also required a comity analysis before ordering compliance with an injunction that would require violating foreign law.201 Sometimes, Congress itself writes a foreign state compulsion defense into the text of a statute. In 1991, for example, Congress created an exception to Title VII of the 1964 Civil Rights Act for “a workplace in a foreign country if compliance with [Title VII] would cause such employer . . . to violate the law of the foreign country in which such workplace is located.” 202 Properly understood, the foreign state compulsion defense rests on the expressed or presumed intent of the legislature, and its availability depends on the interpretation of the particular statute or rule at issue.203 Although recognition of foreign law is a prerequisite for foreign state compulsion, the doctrine operates as a principle of restraint because its effect is to limit the application of U.S. law that would otherwise govern.

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

B. Adjudicative Comity

Prescriptive comity has an adjudicative counterpart—here called “adjudicative comity” 204—which may be defined as deference to foreign courts.205 As a principle of recognition, adjudicative comity operates in American law through the rules for recognizing foreign judgments and through judicial assistance to foreign courts with the discovery of evidence under 28 U.S.C. § 1782.206 As a principle of restraint, adjudicative comity operates through a multitude of doctrines that limit the exercise of U.S. courts’ jurisdiction, often with the aim of avoiding multiple proceedings.

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

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

Some responsibility for the terminological confusion must be laid at Justice Scalia’s door. In his Hartford dissent, Scalia referred to Justice Story’s distinction between the “comity of courts” and the “comity of nations.” 210 The “comity of courts,” Scalia said, referred to doctrines “whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere.” 211 By contrast, the “comity of nations” (which Scalia equated with prescriptive comity) was “exercised by legislatures when they enact laws.” 212 In fact, Justice Story meant nothing of the kind. In Story’s day, U.S. courts did not have authority to decline jurisdiction in favor of another tribunal.213 Story’s reference to the “comity of courts” was simply a rhetorical flourish to emphasize that courts exercise comity not on behalf of themselves but on behalf of their sovereign.214 For Story, there was no separate category called the “comity of courts.” All comity was the “comity of nations,” and all of it was exercised by courts.

1. As a Principle of Recognition. — U.S. courts exercise adjudicative comity as a principle of recognition when they give effect to foreign judgments. U.S. courts have long invoked a “spirit of comity” to recognize foreign judgments at common law.215 Before Erie, 216 the rules for recognizing foreign judgments were considered rules of general common law.217 After Erie, it was generally assumed that the recognition of foreign judgments was governed by state rather than federal law.218 In a majority of states, these rules are codified for money judgments in two uniform acts.219 These acts generally follow the rules set forth by the U.S. Supreme Court in Hilton (minus the reciprocity requirement). As with the recognition of foreign law,220 Huber’s influence appears most clearly in the public policy exception, which permits a U.S. court to refuse recognition if the foreign judgment “is repugnant to the public policy of this state or of the United States.” 221 State courts consider the uniform acts to be codifications of international comity,222 and they continue to recognize foreign judgments not covered by the acts as a matter of comity.223

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

In short, adjudicative comity operates as a principle of recognition in American law through state law providing for the recognition of foreign judgments and a federal statute authorizing district courts to help foreign courts with the discovery of evidence in the United States. Under these laws, U.S. courts defer to foreign courts by assisting in their resolution of cases or by recognizing their judgments.

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

Just two years after International Shoe, in Gulf Oil Corp. v. Gilbert, 229 the Supreme Court recognized the authority of a federal court to dismiss a suit over which it had jurisdiction on grounds of forum non conveniens. Under this doctrine, a court will first look to see if an adequate alternative forum exists.230 If so, the court will weigh the private and public interests231 to see if they are sufficient to overcome the “strong presumption in favor of the plaintiff’s choice of forum.” 232 Although an early Supreme Court case applying the doctrine in admiralty had referred to “motives of convenience or international comity,” 233 forum non conveniens generally has not been considered a comity doctrine.234 In fact, the Court has distinguished forum non conveniens from comity in a domestic context on the ground that comity gives “deference to the paramount interests of another sovereign,” while forum non conveniens reflects a broader range of considerations like “convenience to the parties.” 235 Historically, however, comity had as much to do with private interests in convenience as with the public interests of other sovereigns.236 Because the doctrine of forum non conveniens allows U.S. courts to restrain their exercise of jurisdiction in deference to foreign courts, it is properly considered a doctrine of international comity.237

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

Nevertheless, lower courts have developed other comity doctrines to restrain adjudicative jurisdiction in international cases. The Seventh and Ninth Circuits have adopted a doctrine of “prudential exhaustion” for international law claims, requiring plaintiffs “to exhaust their local remedies in accordance with the principle of international comity.” 243 The Ninth Circuit developed this doctrine in the context of human rights litigation under the Alien Tort Statute.244 Inspired by a footnote in the Supreme Court’s Sosa decision,245 the Ninth Circuit held “that in ATS cases where the United States ‘nexus’ is weak, courts should carefully consider the question of exhaustion, particularly—but not exclusively—with respect to claims that do not involve matters of ‘universal concern.’” 246 A panel of the Ninth Circuit later applied the doctrine to an expropriation claim brought under the FSIA, though that decision was later vacated when the case was reheard en banc.247 The Seventh Circuit took up the prudential exhaustion baton in another FSIA expropriation case, basing its exhaustion requirement on “the comity between sovereign nations that lies close to the heart of most international law.” 248 On appeal from the district court’s decision upon remand, the Seventh Circuit clarified that exhaustion was required not as a substantive requirement of the international law on expropriation but as a procedural limitation on where international law claims could be brought.249

A larger number of circuits have recognized a doctrine of abstention based on “international comity.” 250 In most circuits, international comity abstention is simply an application to foreign proceedings of the federal– state abstention doctrine articulated in Colorado River, 251 which requires a showing of “exceptional” circumstances after consideration of several factors.252 The circuits following Colorado River have held that international comity abstention is appropriate only where parallel foreign proceed ings are pending,253 and then only upon a showing of “exceptional” circumstances.254

The Eleventh Circuit, however, has articulated a broader version of the doctrine, which—contrary to Colorado River—does not require a showing of exceptional circumstances but instead considers: “(1) a proper level of respect for the acts of our fellow sovereign nations—a rather vague concept referred to in American jurisprudence as international comity; (2) fairness to litigants; and (3) efficient use of scarce judicial resources.” 255 In Ungaro-Benages v. Dresdner Bank AG, the Eleventh Circuit went further and upheld abstention on international comity grounds, despite the absence of parallel foreign proceedings, to support a foundation established by the United States and Germany to hear claims brought by victims of the Nazi regime.256 Most recently, in Mujica v. AirScan Inc., a divided panel of the Ninth Circuit dismissed state-law claims in a human rights suit filed against two U.S. corporations on grounds of international comity despite the absence of parallel foreign proceedings.257 The court applied the Eleventh Circuit’s test from Ungaro-Benages, engrafting onto it the reasonableness factors for prescriptive comity articulated in section 403 of Restatement (Third) of the Foreign Relations Law and giving significant weight to the view of the U.S. executive branch that the case should be dismissed.258

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

International comity has even influenced some of the Supreme Court’s rulings on personal jurisdiction under the Due Process Clause. As a general matter, “[d]ue process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant.” 260 But the Court has recently relied expressly on “international comity” to support limits on general jurisdiction. In Daimler AG v. Bauman, the Supreme Court limited general jurisdiction to instances in which the defendant’s contacts with the forum state are so continuous and systematic as to render it “‘essentially at home’” there.261 But the Court also faulted the Ninth Circuit for ignoring “the risks to international comity its expansive view of general jurisdiction posed.” 262 Justice Ginsburg noted that general jurisdiction under the Brussels I Regulation is limited to the place where the defendant is “domiciled” and that expansive U.S. views of general jurisdiction had impeded the negotiation of international agreements on jurisdiction and judgments.263 In light of all this, the Court concluded: “Considerations of international rapport thus reinforce our determination that subjecting Daimler to the general jurisdiction of courts in California would not accord with the ‘fair play and substantial justice’ due process demands.” 264 The Supreme Court has also looked to international comity to limit the exercise of specific jurisdiction under the heading of “reasonableness.” When determining whether an exercise of personal jurisdiction is “reasonable” under the Due Process Clause, the Supreme Court has expressly required lower courts “to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction.” 265

Finally, even when American courts have personal jurisdiction and decide to exercise it, they sometimes employ adjudicative comity as a principle of restraint to moderate that exercise. In the Aérospatiale case, for example, the Supreme Court had to decide whether to require first resort to the Hague Evidence Convention for the gathering of evidence abroad.266 The majority held that “the concept of international comity requires . . . particularized analysis of the respective interests of the foreign nation and the requesting nation.” 267

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

C. Sovereign Party Comity

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

1. As a Principle of Recognition. — The Supreme Court has held that “[u]nder principles of comity governing this country’s relations with other nations, sovereign states are allowed to sue in the courts of the United States.” 270 The Court has recognized exceptions for countries at war with the United States or not recognized by the United States.271 But neither the existence of unfriendly relations nor even the severing of diplomatic relations will be sufficient to deny this privilege.272 As the Court restated the rule most recently, “governments recognized by the United States and at peace with us are entitled to access to our courts.” 273

2. As a Principle of Restraint. — Sovereign party comity operates as a principle of restraint in American law through the doctrines of foreign state immunity and foreign official immunity, both of which fall under the more general heading of foreign sovereign immunity.274 The Supreme Court has consistently characterized foreign sovereign immunity as a matter of comity.275 The United States has codified the rules governing foreign state immunity in the FSIA, which provides that foreign states, as well as their agencies and instrumentalities, are immune from suit in both federal and state courts unless an exception to that immunity applies.276 One might think of the FSIA as an exercise of international comity by Congress, but it is meant to be applied by the courts. Indeed, one of the principal reasons for the FSIA was to shift determinations of foreign state immunity from the executive branch to the courts.277 In this sense, the FSIA is no different from state statutes governing the recognition of foreign judgments, which similarly codify rules of international comity for courts to apply.278

The FSIA did not codify the immunities of foreign officials.279 Rules for the immunities of diplomatic agents and consuls are set forth in the Vienna Convention on Diplomatic Relations280 and the Vienna Convention on Consular Relations.281 But the immunities of other foreign government officials from suit in U.S. courts are otherwise governed by federal common law.282 Some foreign officials are immune from suit based on their status. Sitting heads of state, heads of government, and foreign ministers are entitled to status-based immunity from suits based on any act— official or unofficial—but only while they hold those offices.283 Other foreign officials, as well as former foreign officials, may be entitled to conduct-based immunity. Conduct-based immunity differs from statusbased immunity in two respects: (1) it extends only to suits based on official acts; and (2) it lasts even after the foreign official leaves office.284 Since the Supreme Court’s 2010 decision in Samantar, the executive branch has claimed authority to make determinations with respect to official immunity that are binding on the courts.285

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

D. Summary

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

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

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

to consider comity’s relationship with international law.

III. INTERNATIONAL COMITY AND INTERNATIONAL LAW

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

International law binds the United States on the international plane,289 and the United States is responsible to other states for violating it.290 On the domestic plane, it is generally accepted today that Congress may pass statutes that violate customary international law or U.S. treaty obligations.291 But international law may bind the courts292 and the President.293 International comity, on the other hand, does not bind the United States on the international plane or give rise to international responsibility. The courts and Congress are free to fashion rules of international comity as they wish, and—assuming those rules give the executive branch discretion—the President is free to deny international comity in a particular case.

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

In some areas of foreign relations law, rules of international comity are layered on top of rules of international law. Under customary international law, for example, the United States may apply its law extraterritorially only if it has a basis for jurisdiction to prescribe.298 But courts often restrain the geographic scope of U.S. law beyond what international law requires by applying a presumption against extraterritoriality—a canon of interpretation based in part on international comity and not required by international law.299 The same is true for questions of foreign state immunity and foreign official immunity. International law requires some immunities,300 but domestic law is free to go beyond these minimum requirements and extend greater immunity as a matter of comity.301 In these areas it makes sense to think of an international law “core” and a comity “penumbra.” 302

In other areas, there is no international law core, and the rules mediating the relationship of the U.S. legal system with other countries are

entirely rules of international comity.303 No rule of customary international law requires the recognition of foreign law,304 the act of state doctrine,305 or foreign state compulsion.306 Customary international law does

not require the recognition and enforcement of foreign judgments.307

Many states exercise jurisdiction to adjudicate on bases that other states

find exorbitant,308 but no customary international law rule prohibiting the

exercise of such jurisdictional bases has emerged.309 And no rule of international law requires one country to allow the government of another

country to bring suit in its courts.310

It is worth noting that the boundaries between international law and international comity may shift over time. The Supreme Court recognized in The Paquete Habana that “what originally may have rested in custom or comity, courtesy or concession” may “grow, by the general assent of civilized nations, into a settled rule of international law.” 311 Some rules of foreign sovereign immunity may fit that description.312 It is also possible for international law to shrink and leave gaps for comity to fill. This is what happened with jurisdiction to prescribe. As the old, territorial conception of jurisdiction under international law receded, a comity-based presumption against extraterritoriality came forward to limit the territorial reach of American law.313

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

IV. TWO MYTHS OF INTERNATIONAL COMITY

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

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

With respect to the second myth, it is important to recognize that the proper role of the Executive depends on the comity doctrine at issue. No one would assert that the executive branch, rather than a court, should decide whether a foreign judgment should be recognized or whether a particular case should be dismissed on grounds of forum non conveniens. On the other hand, the President clearly has constitutional authority to determine particular facts—like recognition of a foreign government—on which some comity doctrines turn. Agency interpretations of the geographic scope of statutes should also be entitled to Chevron deference. Most problematic are international comity doctrines that would allow the Executive to dictate the outcome of particular cases, like the Bernstein exception to the act of state doctrine or the authority that the executive branch currently claims to make binding determinations with respect to the conduct-based immunity of foreign officials. Posner and Sunstein favor such deference, while this Article argues that it not only compromises judicial independence but also harms U.S. foreign relations by putting the Executive in the uncomfortable position of having to make decisions that may displease foreign governments.

A. Rules and Standards

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

Whether any particular legal doctrine should take the form of a rule

or a standard is a perennial question.322 Rules bind a court to decide a

case in a particular way based upon a limited number of triggering facts,

while standards invite a court to apply the background policy directly after considering the full range of facts. The distinction between rules and

standards is a continuum, not a divide, and many doctrines combine aspects of rules and standards.323 But reviewing the doctrines of international comity shows that many of them are more rule-like than standardlike.

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

The doctrine of foreign state immunity, codified in the FSIA, is also quite rule-like. The FSIA provides that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States” unless an enumerated exception to immunity applies.326 There are exceptions for express waivers of immunity, suits based on a commercial activity, expropriation in violation of international law, property in the United States, torts in the United States, agreements to arbitrate, and maritime liens,327 as well as for state-sponsored terrorism328 and counterclaims.329 Each directs the court to determine particular relevant facts. A court has no discretion to decide on a case-by-case basis whether the purposes of foreign state immunity would be served by its application. The same is largely true of foreign official immunity. Under the doctrine of head-ofstate immunity, immunity from suit follows automatically from the executive branch’s recognition of a particular person as a foreign head of state, head of government, or foreign minister.330 Conduct-based immunity is more complicated and still developing, but the courts of appeals have so far adopted rule-like approaches, with the Fourth Circuit holding that violations of jus cogens norms can never be “official acts,” 331 and the Second Circuit holding that the only fact that matters is the State Department’s determination of immunity.332

In the area of prescriptive comity, one finds both rules and standards. Conflicts methodologies vary from state to state. Those that follow the first Restatement of Conflicts are fairly rule-like, while those that follow the Restatement (Second) partake more of standards.333 Although the Restatement (Second) adopts a “most significant relationship” standard,334 it also articulates a number of presumptions that give the application of that standard a more rule-like quality. Thus, in personal injury suits, “the local law of the state where the injury occurred” generally applies,335 while in contract suits, “[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of that state will usually be applied.” 336 The discretion afforded under the public policy exception may also make conflicts approaches seem like standards, but this discretion is cabined by the requirement that the forum’s public policy be a “strong” one.337 In sum, the conflict of laws in the United States today is governed by a mix of rules and standards. The federal act of state doctrine, on the other hand, is quite rule-like. In Kirkpatrick, the Supreme Court expressly rejected a standard of embarrassment to foreign governments and instead adopted a rule requiring courts not to question the validity as a rule of decision of a foreign sovereign’s official acts fully performed within its own territory.338

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

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

Judicial assistance to foreign tribunals under § 1782, on the other hand, is clearly discretionary. The statute expressly says that a district court “may order” a person within its district to provide evidence.349 In Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court refused to impose a rule limiting assistance to information that would be discoverable under the foreign tribunal’s rules350 and instead articulated a number of “factors” to guide the district court’s discretion.351

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

There is nothing inherent in this category of comity doctrines, however, that precludes the adoption of rules. Certainly there is a rule-like quality to Daimler’s limitation of general jurisdiction to a forum where the defendant is “at home,” which generally means an individual’s domicile or a corporation’s place of incorporation or principal place of business.354 In Aérospatiale, Justice Blackmun argued in favor of a rule requiring first resort to the procedures of the Hague Evidence Convention, noting that “nothing inherent in the comity principle . . . requires caseby-case analysis.” 355 And other countries moderate the jurisdiction of their courts with a doctrine of lis pendens that defers in rule-like fashion to the first court seized with jurisdiction.356 Simply put, the notion that comity “must necessarily depend on a variety of circumstances, which cannot be reduced to [sic] any certain rule,” 357 is a myth.

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

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

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

But in the private-interest context there may be other factors that cut in favor of standards. Courts may be more concerned with achieving fairness in cases that involve private parties. Rules may also be more easily gamed, and courts may therefore prefer standards that allow them to police abusive litigation tactics. It is perhaps for such reasons that one sees standards dominating adjudicative comity as a principle of restraint (e.g., forum non conveniens), while rules dominate in the area of sovereign party comity.360

B. The Role of the Executive Branch

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

With other comity doctrines, the question is more complicated, and it may be useful to draw some distinctions. As Curtis Bradley notes, “[s]ome forms of deference may be more defensible than others.” 366 On the one hand, the executive branch plainly has authority to make some decisions that affect the application of international comity doctrines. The President may recognize a foreign government, for example, or an agency may interpret the geographic scope of a statute it administers. Such decisions tend to be made categorically, outside the context of litigation. On the other hand, one should be skeptical of doctrines that allow the executive branch to dictate the outcomes of particular cases on foreign policy grounds. Such discretion invades the province of the judiciary and may harm, rather than advance, U.S. foreign relations.367

Least problematic is the Executive’s authority to determine particular facts on which some comity doctrines turn. For example, the President has unreviewable authority to recognize foreign governments.368 The act of state doctrine applies only to “the public acts [of] a recognized foreign sovereign power,” 369 and the recognition of a foreign government by the Executive will bring its previous acts within the scope of that doctrine.370 Recognition automatically confers the privilege of bringing suit in U.S. courts as a matter of comity, at least in the absence of a state of war with the United States.371 A strong case can be made that the President’s recognition should also control a foreign state’s entitlement to immunity under the FSIA. Lower courts have generally applied international law to decide if a defendant is a “foreign state” under the Act,372 but as the First Circuit has pointed out, this may not be the best approach.373 Under the FSIA, Congress has also given the State Department express authority to permit terrorism suits against foreign states by designating them “state sponsor[s] of terrorism.” 374 There is also nothing inappropriate about having doctrines of status-based foreign official immunity—like diplomatic immunity and head-of-state immunity—turn on the President’s recognition of a foreign official’s status.375 In a sense, all of these doctrines defer to the executive branch. But they do so by attaching legal consequences to an exercise of executive authority made outside the context of litigation, rather than by deferring to the Executive’s judgment about whether any particular case should be dismissed. The Supreme Court captured the distinction in its 1938 Guaranty Trust decision.376 The Executive’s “action in recognizing a foreign government and in receiving its diplomatic representatives is conclusive on all domestic courts,” the Court noted.377 But the courts “are free to draw for themselves its legal consequences in litigations pending before them.” 378

Another common exercise of executive branch authority is for an agency to interpret a statute it administers.379 Posner and Sunstein correctly argue that courts should defer to agency interpretations of the geographic scope of federal statutes.380 The reasons for this are the ordinary reasons for Chevron deference—that an ambiguous statute should generally be read as a delegation of interpretative authority to an agency that administers it and that administrative agencies have special expertise with respect to statutory goals and how best to achieve them. But it is critical to emphasize that Chevron deference is deference to the interpretation of a statute to be applied across a whole range of cases, and not deference with respect to how any particular case should be resolved.

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

With respect to foreign official immunity, the executive branch has claimed authority to make binding determinations since the Supreme Court’s 2010 decision in Samantar. 382 For status-based immunities, this authority derives from the President’s recognition power and is uncontroversial, but there is no “equivalent constitutional basis” for determinations of status-based immunity.383 Nevertheless, the Fourth Circuit gives State Department determinations of conduct-based immunity “substantial weight,” 384 while the Second Circuit considers them absolutely binding.385

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

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

Posner and Sunstein do not discuss any of these examples in detail,393 but they come down firmly on the side of case-specific deference to the executive branch. Even outside the Chevron context, they argue, courts should defer “if the executive branch argues that the court should dismiss the case rather than reach the merits.” 394 “[T]he argument for deference to the executive is that it has more expertise than the courts in foreign relations and that the executive’s accountability for foreign relations is more important than the courts’ independence from political pressure.” 395 But Posner and Sunstein elide some key distinctions between Chevron deference and case-specific deference and fail to respond to the two main normative arguments against a case-specific role for the executive branch in administering the doctrines of international comity.

First, as Justice Kennedy pointed out in his Altmann dissent, “judicial independence” is compromised when the Executive has the power to make “case-by-case, selective determinations” that dictate the outcome of cases.396 Justice Douglas once made the point more colorfully in an actof-state case, writing that such discretion makes the court “a mere errand boy for the Executive Branch which may choose to pick some people’s chestnuts from the fire, but not others’.” 397 Testifying before Congress in favor of the proposed FSIA, State Department Legal Adviser Monroe Leigh said that the State Department’s “consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.” 398 Deferring to an agency’s interpretation of the geographic scope of a statute under Chevron respects the established roles of Congress, the executive branch, and the courts.399 Allowing the Executive to tell courts which cases to dismiss does not. Thus, the Supreme Court properly rejected the U.S. government’s argument in Kirkpatrick that the act of state doctrine should bar adjudication whenever the Executive determined that a case would cause too much embarrassment to a foreign government.400 “The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.” 401

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

This was the U.S. experience with respect to foreign state immunity from the 1940s, when the Supreme Court adopted a rule of deferring to determinations of immunity by the State Department,404 until Congress passed the FSIA in 1976.405 As State Department Acting Legal Adviser Charles Brower testified, “We at the Department of State are now persuaded . . . that the foreign relations interests of the United States . . . would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.” 406 The problem was that “some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations” and that these states were “inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision.” 407 In their letter of transmittal to Congress, the Department of Justice and the Department of State explained:

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

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

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

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

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

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

CONCLUSION

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

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

Distinguishing between international and domestic law does not denigrate the important role of international law in mediating among national legal systems. In areas like foreign sovereign immunity and prescriptive jurisdiction, doctrines of international comity are layered on top of rules of international law, creating a comity penumbra that surrounds an international law core.414 But the distinction clarifies the respective roles of international comity and international law. It also underlines the point that courts and legislatures may shape the international comity doctrines, as rules of domestic law, to achieve an appropriate level of deference to foreign lawmakers, foreign courts, and foreign governments as litigants.

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