# IN DEFENSE OF INTERNATIONAL COMITY

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*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 because 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. For instance, four cases decided in the Supreme Court's 2017 October Term raised international comity concerns and illustrate the Court's difficulty grappling with these issues.*

*This Article cuts against prevailing academic commentary (endorsed, to some extent, by the newly-minted Restatement (Fourth) of 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 on 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 based in part on historical practice from the Founding to the early twentieth century when federal courts frequently dealt with cases implicating foreign governmental interests with scant congressional or executive guidance, primarily in the*

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*maritime context. That old law is newly relevant. What is called for is forthright recognition of a federal common law doctrine of international comity that enables courts to exercise principled discretion in dealing with asserted foreign governmental interests and clears up conceptual confusion between prescriptive and adjudicative manifestations of international comity.*

TABLE OF CONTENTS



## INTRODUCTION

The pace and extent of cross-border transactions and interactions have 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

1. A classic formulation is found in *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895): International comity "is neither a matter of absolute obligation . . . nor of mere courtesy and good will." It involves "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." *Id*. at 164.

foreign parties with little obvious connection to U.S. interests but posing risk of significant 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, critics argue, when statutes and settled doctrines like act-of-state and *forum non conveniens* adequately enforce all U.S. interests implicated in international litigation, 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 the past couple decades.

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 federal judges are generally less experienced in foreign affairs issues today, and there are many 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) according *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

2. *See* Hartford Fire Ins. v. California, 509 U.S. 764, 800, 818 n.9 (1993) (Scalia, J., dissenting as to this part).

3. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).

4. Justice Breyer has been the most vocal member of the current Court about the need for U.S. judges to adhere to a more active vision of international comity. "Today [comity] means something more. In applying it, our Court has increasingly sought interpretations of domestic law that would allow it to work in harmony with related foreign laws, so that together they can more effectively achieve common objectives." STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 92 (2015).

nations—particularly the *reciprocal* practice of any nation directly implicated; (3) respecting applicable U.S. statutes or treaties indicating strong U.S. national interests in hearing the case or statutory authorization to ignore or displace foreign governmental acts or interests; and (4) assessing 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," the latter dealing with the question of which substantive law to apply—that is, whether a state has sufficiently strong interests in a controversy or connections 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 in which 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. It also describes the evolution of the presumption against extraterritoriality—a canon of statutory interpretation that has developed in close connection with the concept of international comity. Part III tells the long but largely 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 was the norm, not the exception, even in the face of statutes plainly extending subject-matter jurisdiction. 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 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 apply international comity in cases; 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 and informed by—but independent of—customary international law. Consider the following five modern examples of litigation in U.S. courts in which foreign governmental interests have been implicated and international comity invoked.

(1) 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." On review, the U.S. Supreme Court holds that the lower courts should have engaged in a more independent inquiry into whether the foreign law in fact required the price-fixing conduct.

(2) Plaintiffs bring state-law tort claims in a U.S. federal district court

5. *See generally* Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (involving deference owed to a foreign government's statement of its own law under Federal Rule of Civil Procedure 44.1); Jesner v. Arab Bank, 138 S. Ct. 1386 (2018) (involving the liability, under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, of a foreign bank alleged to have financed international terrorism); United States v. Microsoft Corp., 138 S. Ct. 1186 (2018) (per curiam) (involving the dismissal, due to supervening enactment of the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act"), Pub. L. 115-141 (2018), amending 18 U.S.C. § 2701 et seq., in a case regarding whether a U.S.-based cloud-computer service was bound to turn over data on a foreign server in potential violation of foreign privacy laws when subpoenaed by the U.S. government). International comity considerations were also implicit in another case that term in which the Court interpreted the Foreign Sovereign Immunities Act ("FSIA") to hold that Iranian artifacts at a U.S. museum were immune from attachment to satisfy a default judgment against Iran as a state sponsor of terrorism by victims of a Hamas bombing in Jerusalem. *See* Rubin v. Islamic Republic of Iran, 138 S. Ct. 816, 821–22 (2018).

6. *See Animal Science*, 138 S. Ct. at 1870.

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 aided and abetted the air attack. The U.S. Department of State files a Statement of Interest 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.

(3) 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 discounts on secondary markets. The U.S. Supreme Court had previously 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 awarded by the U.S. court; 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. On review, the Supreme Court holds that the FSIA does not immunize a foreign-sovereign judgment debtor from post-judgment discovery from its banks of information concerning its extraterritorial assets.[9]

(4) 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 forum where the underlying

7. *See* Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014).

8. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

9. *See* Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014).

10. *See* Simon v. Republic of Hungary, 911 F.3d 1172 (D.C. Cir. 2018); Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).

events giving rise to the claims occurred. The U.S. courts of appeals are divided over whether the FSIA precludes a requirement of exhaustion of local remedies.

(5) 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 that it has not violated. The U.S. court states that to give U.S. trademark law extraterritorial effect 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, that alternative forums are inadequate, and that statutes plainly extend subject-matter jurisdiction that courts should exercise in the absence of a statutory exception. How should the court apply international comity concerns in such cases absent clear on-point guidance?

To date, the lower courts have lacked a "clear analytical framework" for how best 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 in which it has subject-matter jurisdiction and prescriptive power to apply U.S. substantive law but the case also implicates important foreign governmental interests. One common move has been to construe applicable statutes, particularly the FSIA, as occupying the field and therefore precluding any independent judicial discretion to dismiss or stay proceedings.[14] Another reaction is to rely on settled, general-purpose judicial doctrines like personal jurisdiction or *forum non conveniens* as the doctrinal basis for all analysis

11. *See* Nintendo of Am. v. Aeropower Co., 34 F.3d 246 (4th Cir. 1994).

12. *See, e.g.*, *Mujica*, 771 F.3d at 612–15; *Simon*, 911 F.3d at 1182.

13. Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 51 (2010).

14. *See, e.g.*, *NML Capital*, 573 U.S. at 141–42 ("[A]ny sort of immunity defense made by a foreign sovereign in an American court must stand on the [FSIA's] text. Or it must fall.").

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. For example, the Ninth Circuit's formulation in *Timberlane Lumber Co. v. Bank of America*, an antitrust case, enumerates several factors to weigh: (1) "degree of conflict with foreign law or policy"; (2) "nationality or allegiance of the parties and the locations or principal places of businesses or corporations"; (3) "extent to which enforcement by either state can be expected to achieve compliance"; (4) "relative significance of effects on the United States as compared with those elsewhere"; (5) "extent to which there is explicit purpose to harm or affect American commerce"; (6) "foreseeability of such effect"; (7) "relative importance to the violations charged of conduct within the United States as compared with conduct abroad"; and (8) "whether in the face of [potential conflict], the contacts and interests of the United States are sufficient to support the exercise of . . . jurisdiction."[16] Courts following the *Timberlane* approach have also queried whether, if relief were granted, a party would be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; whether the court can make its order effective; whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and whether a treaty with the affected nations has addressed the issue.

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

No wonder, then, that commentators, following Justice Scalia's lead, have urged the restriction or retirement of international comity as an independent factor in U.S. legal analysis and judicial decisions. Michael

15. *See generally, e.g.*, Daimler AG v. Bauman, 571 U.S. 117 (2014) (reversing federal appellate court holding of "general" personal jurisdiction in California over German automobile manufacturer for human rights claims against an Argentine subsidiary).

16. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 614–15 (9th Cir. 1976).

Ramsey condemns it as "an unfortunate phrase best dismissed from the discourse"[17] that "confuse[s] . . . courts' analysis."[18] Pamela Bookman similarly observes that international comity "can mean practically anything or nothing."[19] Trey Childress proposes "resituating" international comity as traditional conflict-of-law analysis. William Dodge surveys all invocations of international comity by the U.S. Supreme Court and asserts that it is a cluster of doctrines—including both rules and standards—that counsel restraint of the judicial power in some instances and extending it in others.[20] He implies that there is no continuing need for a freestanding doctrine of international comity given the thicket of existing doctrines, which he seeks to organize and catalogue. Maggie Gardner, building upon domestic federalism abstention doctrines, advises limiting invocations of international comity as a ground for dismissal to cases in which parallel proceedings have already been initiated in a foreign forum or where a foreign sovereign has a "comprehensive remedial scheme[]" in place.[21] A concern that Gardner shares with Dodge is that a robust independent doctrine of international comity abstention would encourage federal courts to dismiss claims that have no real prospect of vindication in foreign forums. They fear, in other words, that shirking by U.S. courts under the doctrinal cover of international comity abstention when foreign governmental interests are alleged to be implicated will extinguish the underlying substantive claims, which are often compelling claims of international human rights violations.

## II. USAGES OF INTERNATIONAL COMITY AND THE PRESUMPTION AGAINST EXTRATERRITORIALITY

### A. USAGES OF INTERNATIONAL COMITY

Confusion among courts and commentators inheres in seemingly undifferentiated usage of the term "international comity" to refer to different, albeit related, doctrines and legal concepts. First, it is often used as an umbrella term for a range of settled laws and doctrines designed to give due respect to foreign sovereign acts and interests. For instance, the right of a foreign state to sue in U.S. courts was justified by international comity,[22] as

17. Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 893 (1998).

18. *Id.* at 897.

19. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1096 (2015).

20. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2077–78 (2015).

21. Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63, 73, 123 (2019).

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

was the right of a foreign state *not* to be sued in U.S. courts.[23] Dodge has penned an exhaustive *tour d'horizon* of Supreme Court case law invoking international comity, implying that there is no need for an independent doctrine permitting judicial abstention on the ground of international comity.[24] For Dodge, like Justice Scalia, judicial abstention is tantamount to abdication when justified on the basis of international comity independent of settled doctrines in a case over which the court has subject-matter jurisdiction.

Second, as alluded to above, "international comity" traditionally has been invoked in the prescriptive-comity context of analyzing how to manage overlapping substantive legal norms, historically the office of conflict of laws and bounded by customary international law. Childress, for example, focuses primarily on courts' confusion about international comity in the prescriptive comity sense, which is why he logically recommends folding it into traditional conflict-of-law analysis.[25]

We use the term international comity in this Article to mean "adjudicative comity," the judicial doctrine for declining to hear a case over which a court has subject-matter jurisdiction. Adjudicative comity, in turn, implicates a collection of statutes like the FSIA and settled doctrines—such as act-of-state, *forum non conveniens*, and personal jurisdiction—that collectively operate to constrain federal courts from hearing cases, even if prescriptive comity does not require displacing U.S. substantive law in favor of foreign law. Our basic claim is that these existing forms of adjudicative comity do not suffice to address fully all the diverse ways that foreign governmental interests are asserted and must be weighed in U.S. litigation today.

### B. THE PRESUMPTION AGAINST EXTRATERRITORIALITY AND INTERNATIONAL COMITY

The presumption against extraterritoriality—a canon of statutory interpretation—has also come to be viewed as a key means of addressing international comity (including adjudicative comity) concerns in U.S. law. But, as we hope to show below, that view is fundamentally mistaken. Although the presumption did indeed originate to implement international

23. *See* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 131–35 (1812). For the current law, see Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891.

24. *See* Dodge, *supra* note 20.

25. *See* Childress, *supra* note 13, at 15 ("I argue in this Article that U.S. courts can apply the doctrine of international comity more concretely in transnational cases if comity is resituated as a conflict of laws doctrine designed to mediate conflicts between sovereigns and their laws.").

comity in the *prescriptive* sense to decide whether U.S. law should be applied to a controversy, it has evolved away from that function over time. Moreover, as we shall see, the presumption is an awkward basis for obliquely dealing with problems of *adjudicative* comity, despite the Supreme Court's extension of the presumption to that context since 2013. The Supreme Court and the lower courts are, in a sense, resorting to the blunt tool of the presumption against extraterritoriality as a way to screen out lawsuits that risk friction with foreign governments, regardless of whose laws govern. This is an overbroad use of the presumption.

The presumption against extraterritoriality has been loosely defined as a means by which "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[26] In an influential dissenting opinion in *Hartford Fire Insurance v. California*, Justice Scalia asserted that international comity, when applied as a canon of statutory interpretation, consists of two parts: (1) a presumption against the extraterritorial application of U.S. law to respect foreign sovereign prerogatives; and, if the presumption is rebutted, (2) a mandate, informed by conflict-of-law principles, to construe U.S. law consistently with customary international law limitations on any sovereign state's power to legislate or regulate (often termed "prescriptive jurisdiction").[27] Judge Learned Hand described the second step in this way: "We are not to read general words [in a statute] without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'"[28] Because territoriality is one of the "limitations customarily observed by nations," particularly by common-law countries, the presumption against extraterritoriality itself can be viewed as a subset of this second canon, which Scalia rooted in Chief Justice Marshall's opinion in *Murray v. Schooner*

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

27. Hartford Fire Ins. v. California, 509 U.S. 764, 800, 814 (Scalia, J., dissenting). John Knox has argued that the presumption against extraterritoriality has become doctrinally incoherent and that courts should focus on the second prong: "the reach of federal statutes in the light of . . . the international law of legislative jurisdiction." John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 352 (2010). Maggie Gardner describes the Scalia two-step in *Morrison v. National Australia Bank Ltd*., 561 U.S. 247 (2010), as follows: "[First,] the judge determines whether the federal statute rebuts the presumption against extraterritoriality. . . . [If it] does . . . and many statutes do—then the judge has to determine to what extent the statute extends beyond U.S. borders. The outer limit of a statute's reach is informed by international law[] under the *Charming Betsy* canon[;] judges [are to] presume that Congress did not intend to exceed the scope of internationally recognized bases for prescriptive jurisdiction." Gardner, *supra* note 21, at 103 (footnotes omitted).

28. United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945), *superseded by statute*, Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (1994).

*Charming Betsy*.[29]

U.S. courts have tended to follow Justice Scalia's lead in separating into two steps the question whether the presumption against extraterritoriality applies and the subsequent *Charming Betsy* question whether, if the presumption does not apply or is rebutted, extraterritorial application of the statute would be consistent with customary international law limits on sovereign power to regulate. But, as we shall show, the presumption against extraterritoriality has extended beyond substantive laws and prescriptive jurisdiction, to adjudicative jurisdiction statutes and procedural rules.[30] By contrast, the role of the *Charming Betsy* canon as it applies to international comity analysis has been poorly understood and has receded into the background.[31] Indeed, both the Supreme Court and the lower federal courts, including Scalia himself in later opinions, have typically not proceeded to the second step of the analysis.

It is a "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States."[32] The principle had special significance to the United States as former colonies that had gained independence by a war against the mother country and its overreaching laws. "The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."[33] The political extension of the legal principle was the Monroe Doctrine, which the United States championed throughout much of the nineteenth century in support of newly independent

29. *Hartford Fire*, 509 U.S. at 814–15, 817 (Scalia, J., dissenting) (citing Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804)); *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 407–13 et seq. (AM. LAW INST. 2018) (setting forth United States practices regarding prescriptive jurisdiction); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 404 (AM. LAW INST. 1987). The Fourth Restatement purges the Third's assertion of a reasonableness requirement for extensions of prescriptive jurisdiction (§ 403), presumably to avoid case-by-case analysis by courts of the sort that we urge in this Article.

30. In his *Hartford Fire* dissent, Justice Scalia disagreed with the view prevalent in the lower courts that international comity could operate in addition to its function as an aid to the interpretation of substantive statutes by also supplying a reason for judicial abstention in a case over which the court had federal subject-matter jurisdiction. *See Hartford Fire*, 509 U.S. at 812 (Scalia, J., dissenting).

31. This may be in part a reaction against uses of the *Charming Betsy* canon, not to avoid friction with other sovereigns as we propose, but rather as an instrument to inject *substantive* norms of customary international law into the interpretation of U.S. domestic legal obligations. *See generally, e.g.*, Serra v. Lappin, 600 F.3d 1191 (9th Cir. 2010) (rejecting an invocation of the *Charming Betsy* canon to support U.S. law claim for higher wages by federal inmates by reference to the customary international law of human rights).

32. *Morrison*, 561 U.S. at 255 (internal citation marks omitted) (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)); *see also Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

33. The Apollon, 22 U.S. (9 Wheat.) 362, 370 (1824).

states in the Western Hemisphere as against the European powers.[34] Thus, in its earliest days, the presumption against extraterritoriality was a statement about American independence.

The justification for the presumption that a sovereign's laws applied only within its territory changed in the twentieth century, along with the world order and the growing prominence of the United States in it. Antitrust law was the primary sphere of action, as the growing trans-border features of the world economy engendered opportunities for firms to manipulate U.S. markets by offshore acts and conspiracies. *American Banana Co. v. United Fruit Co.* was a suit brought by one U.S. company against another alleging that the defendant had enlisted the Costa Rican government and military to seize the plaintiff's plantation and assets in that country.[35] The alleged acts had dramatic consequences for prices in the U.S. fruit markets given their reliance on Latin American imports. Accordingly, the U.S. plaintiff alleged that these foreign public acts by the U.S. defendant violated the Sherman Antitrust Act and sued for treble damages under the statute.

Justice Holmes rejected the contention that the Act applied extraterritorially to price-fixing activity abroad by a U.S. party with U.S. effects. He reasoned that "in case of doubt," the "construction of any statute" ought to be that it was "intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. All legislation is *prima facie* territorial."[36] For Holmes, the principle was not a statement about the territorial independence of a new nation detached from European empire. Rather, he saw it as an axiom drawn from the legal positivist view that law is the enforceable command of a sovereign. "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of the courts."[37] In this way, Holmes deployed the presumption in a way that made it difficult for the United States to regulate extraterritorial conduct that had anticompetitive effects on the U.S. economy.[38]

34. GEORGE C. HERRING, FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776, at 151–58 (2008).

35. American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

36. *Id.* at 357 (internal quotation marks and citations omitted).

37. *Id.* at 356–57.

38. Decades later, Congress enacted a statute to overrule Holmes's holding in *American Banana*. *See* Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (codified as amended at 15 U.S.C. § 6a (2018)).

In the mid-twentieth century, the character of the presumption against extraterritoriality moved yet further away from its genesis as an instrument of international comity, whether understood as a means for ensuring American independence or as a corollary of positivist jurisprudence. It evolved, rather, into a canon about fidelity to legislative intent or purpose: when Congress enacts substantive laws, it "is primarily concerned with domestic conditions."[39] The most commonly cited case for this view is a 1949 labor law decision, *Foley Bros. v. Filardo*.[40] Like *American Banana*, the suit was one exclusively among American litigants involving conduct in a foreign country. The U.S. citizen plaintiff in the case sought overtime wages under federal law.[41] Although the work at issue was on a construction project in Iran and Iraq, the claim to apply federal law seemed reasonable enough given that the work was done by a U.S. citizen for a U.S. employer pursuant to a U.S. government contract.[42]

But international comity was not entirely left out of the equation. The Supreme Court, while asserting that Congress primarily concerns itself with "domestic conditions," also relied on international comity as a basis for denying the statute extraterritorial effect:

> There is no language in the Eight Hour Law . . . that gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control. There is nothing brought to our attention indicating that the United States had been granted by the respective sovereignties any authority, legislative or otherwise, over the labor laws or customs of Iran or Iraq. We were on their territory by their leave, but without the transfer of any property rights to us.[43]

*Filardo* was typical of early-to-mid twentieth century presumption-against-extraterritoriality cases involving one or more U.S. parties regarding acts in foreign countries.[44] Given the U.S. nationality of all the parties

39. Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949).

40. *Id.*

41. *Id.* at 282–83 (citing The "Eight Hour Law," 27 Stat. 340, as amended, 40 U.S.C. §§ 321–26).

42. *Id.*

43. *Id.* at 285.

44. The facts in *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991), a more recent case often cited as support for the presumption against extraterritoriality, resembled *Filardo*. The question was whether the Title VII of the Civil Rights Act of 1964's bar on discrimination on the basis of race and national origin (among other things) applied to a naturalized U.S. citizen of Lebanese descent hired in the United States and employed by a U.S. company in Saudi Arabia. The Supreme Court concluded that "[p]etitioners . . . failed to present sufficient affirmative evidence that Congress intended Title VII to apply abroad." *Arabian Am. Oil*, 499 U.S. at 259. Congress responded to *Arabian American Oil* by enacting an express provision dealing with Title VII's extraterritorial application. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 109, § 2000e-1, 105 Stat. 1071, 1077 (1991).

involved in *Filardo,* it was natural to believe that U.S. law might be extended to define rights and obligations as among them even in a foreign land. But absent a treaty to that effect (such as the much maligned unequal treaties of the era of imperialism), the presumption against extraterritoriality precluded the operation of U.S. substantive law. The content of relevant foreign law did not matter in the Court's analysis, much less whether it actually conflicted with U.S. law (for example, why not pay the U.S. worker overtime wages, even if none were available under Iraqi or Iranian laws?). "The canon or presumption applies regardless of whether there is a risk of conflict between the American statute and a foreign law."[45] What mattered, rather, was the mere fact of displacement of foreign sovereignty by U.S. "legislative control."[46] In this sense, the presumption against extraterritoriality was understood both as a canon of U.S. legislative intent and as a means of implementing international comity, in other words, giving due respect for foreign sovereign power and interests.

Accordingly, in other early-to-mid twentieth century cases, the presumption was not applied—or viewed as implicitly rebutted—in instances where there was a strong U.S. governmental interest or where any perceived foreign governmental interests were minimal. For example, the Supreme Court held in *United States v. Bowman* that a federal criminal statute applied to a foreign-based scheme to defraud a steamship corporation in which the U.S. government was the sole stockholder.[47] The four defendants—three U.S. citizens and one British subject— falsified a fuel oil order from a ship at sea owned by the corporation and consummated the fraud in Rio de Janeiro, Brazil, where the fuel oil was delivered.[48] The three U.S. defendants were found in New York and charged; the British defendant remained at large in Rio de Janeiro.[49] The lower court concluded that the relevant U.S. criminal statute[50] could not be construed to apply "to acts committed on the high seas" or "in a foreign country."[51]

The Supreme Court in *Bowman*, a unanimous 1922 opinion authored by Chief Justice William Howard Taft, reversed. The Court pointed out that the three American defendants were found in New York and were U.S. citizens. As such, they were "certainly subject to such laws as [the United States]

45. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).
46. *Filardo*, 336 U.S. at 285.
47. United States v. Bowman, 260 U.S. 94, 95–96, 102–03 (1922).
48. *Id.* at 95–96.
49. *Id.* at 95.
50. 40 Stat. 1015, 18 U.S.C. § 35 (amended 1918).
51. *Bowman*, 260 U.S. at 97.

might pass to protect itself and its property."[52] Taft continued: "Clearly it is no offense to the dignity or right of sovereignty of Brazil to hold them for this crime against the government to which they owe allegiance."[53] Again, respect for foreign governmental interests (which were adjudged to be minimal) informed the Court's decision to extend the U.S. statute extraterritorially in *Bowman* and the limits of that decision. The Court tellingly reserved the question of whether the U.S. criminal statute might be applied to the British subject in Rio de Janeiro should he be captured and brought to justice before a U.S. court.[54]

With the expansion of global trade, communications, and transportation networks in the second half of the twentieth century, the types of cases implicating international comity and the presumption against extraterritoriality similarly evolved. While cases like *Filardo* and *Bowman* involved U.S. nationals, later cases entailed diminished U.S. contacts, and suits were increasingly brought by foreign plaintiffs. *McCulloch v. Sociedad Nacional de Marineros de Honduras*, for example, involved an attempt by foreign crew members aboard foreign-flagged vessels owned by the foreign subsidiary of a U.S. corporation to form a union under the U.S. National Labor Relations Act ("NLRA").[55] The National Labor Relations Board held that the NLRA applied and ordered representation elections. The Supreme Court reversed, concluding that "the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen."[56] In so doing, it noted the potential for conflict with the labor laws of Honduras (the flag of the ship) and the possibility of "retaliatory action from other nations as well as Honduras."[57]

The foreign complexion of the facts in *McCullough* foreshadowed the key presumption-against-extraterritoriality cases of the twenty-first century. Whereas the presumption against extraterritoriality had typically operated in earlier cases to deny U.S. law claims to U.S. litigants, these newer cases have increasingly involved foreign litigants. In *F. Hoffman-La Roche v. Empagran S.A.*, for example, the Supreme Court dismissed the antitrust

52. *Id.* at 102.

53. *Id.*

54. *See id.* at 102–03 ("He has never been apprehended, and it will be time enough to consider what, if any, jurisdiction the District Court below has to punish him when he is brought to trial.").

55. McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 12 (1963).

56. *Id.* at 13.

57. *Id.* at 21. The Court did not explicitly invoke the presumption against extraterritoriality, but it did conclude that "neither we nor the parties" could find a "clear expression" of congressional intent to regulate. *Id.* at 22. It also cited *Charming Betsy* and "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *Id.* at 21.

claims of foreign plaintiffs in a class action against vitamin manufacturers because the claims arose from the foreign—not U.S. domestic—effects of foreign anticompetitive conduct.[58] At the same time, the Court clarified that the Sherman Act, in light of the Foreign Trade Antitrust Improvements Act of 1982,[59] did apply extraterritorially to price-fixing or other anticompetitive conduct that affects imports into the United States.[60]

In *Morrison v. National Australia Bank Ltd.*, the Court applied the presumption against extraterritoriality to dismiss a putative class action by foreign investors against an Australian bank publicly listed on the Australian Stock Exchange for securities fraud in violation of section 10(b) of the Securities Exchange Act of 1934.[61] The alleged misrepresentation concerned a U.S. mortgage service company that the Australian bank had bought; the American company and its officers were also co-defendants. Although Justice Scalia wrote the majority opinion in *Morrison*, his framework for extraterritoriality analysis differed from what he had outlined in his *Hartford Fire* dissent. Specifically, he did not have reason to speculate as to what analysis was required if the presumption had been rebutted, because the Court held that it had not been rebutted. Instead, since the presumption applied, the *Morrison* Court considered whether it might be possible to apply the statute in any event if Congress's "focus" in section 10(b) of the Securities Exchange Act included acts committed abroad as well as domestically. The Court concluded, however, that the Act exhibited a dominantly domestic focus; "Section 10(b) does not punish deceptive conduct" generally (lies to investors in Australia) "but only deceptive conduct 'in connection with the purchase or sale of any security registered on a [U.S.] securities exchange or any security not so registered'" in the United States, not Australia.[62]

As *Filardo*, *Empagran*, and *Morrison* illustrate, the presumption against extraterritoriality is usually applied to *substantive* laws enacted by the legislature, to implement prescriptive comity. In the twenty-first century, however, the presumption has been applied not only to substantive statutes but also to procedural laws, such as jurisdictional statutes or doctrines and the Federal Rules of Civil Procedure. The upshot has been an inevitable

58. F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 159 (2004).

59. Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, tit. IV, 96 Stat. 1246 (codified as amended at 15 U.S.C. § 6a (2018)).

60. *Hoffman-La Roche*, 542 U.S. at 161.

61. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 287–88 (2010).

62. *Id.* at 266 (citation omitted).

blurring of the line between prescriptive and adjudicative comity.[63]

The leading example of this migration of the presumption against extraterritoriality from the prescriptive comity to adjudicative comity contexts is the Court's application of the presumption to the Alien Tort Statute ("ATS")[64] in *Kiobel v. Royal Dutch Petroleum Co.*[65] The ATS was a part of the Judiciary Act of 1789 and provides that an alien may sue for a tort only "committed in violation of the law of nations or a treaty of the United States."[66] In *Sosa v. Alvarez-Machain*, the Court held that foreign plaintiffs could bring suit under the ATS for violations of specific and obligatory norms of customary international law comparable to the eighteenth century paradigm offenses of piracy, ambassadorial infringements, and violations of safe conduct. Many ATS suits, as in *Kiobel* itself, were so-called "foreign-cubed" suits: foreign plaintiffs suing foreign defendants over events occurring in a foreign land. The *Kiobel* Court acknowledged that the presumption against extraterritoriality usually applied to statutes "regulating conduct," but concluded that it should "similarly constrain courts considering causes of action that may be brought under the ATS."[67] The Court went on to require that any suit actionable under ATS must "touch and concern" the territory of the United States and "must do so with sufficient force to displace the presumption against extraterritorial application."[68]

The Court's application of the presumption against extraterritoriality to the ATS in *Kiobel* was a significant and underappreciated break from prior precedents that had treated the presumption as exclusively an instrument of prescriptive comity. Furthermore, it was a surprising application of the presumption to a statute that seemed to be designed to have at least some extraterritorial effect. Besides the fact that the ATS is a jurisdictional statute (part of the Judiciary Act of 1789), it is explicitly reserved only for foreign plaintiffs. Moreover, its specification of torts "in violation of the law of nations or a treaty" strongly indicates a foreign focus, or at least a legislative intent to provide a remedy for certain tort claims of foreigners. Finally, a careful study of the history of the ATS's enactment indicates that it was

63. That line, however, was never clear in the Anglo-American common law context, where judges are understood to have the power to make law (within limits), not just to enforce the law that legislatures have made. With specific respect to U.S. federal courts, the historical heartland of such lawmaking power was in the context of the admiralty and maritime jurisdictions. *See* Thomas H. Lee, *The Law of Nations and the Judicial Branch*, 106 GEO. L.J. 1707, 1733–34 (2018).

64. 28 U.S.C. § 1350 (2018).

65. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

66. 28 U.S.C. § 1350.

67. *Kiobel*, 569 U.S. at 116.

68. *Id.* at 124–25.

adopted to enable federal courts to provide a damages remedy—akin to reparations—to aliens who suffered injuries to person or property for which the sovereign United States were deemed responsible under the contemporaneous law of nations.[69] The ultimate aim was to preserve international peace by mollifying foreign governments whose citizens or subjects might have suffered injury in the United States or possibly at the hands of Americans outside of the United States.

*Kiobel*'s narrowing of the potential reach of ATS suits under *Sosa* reflects the Court's sensitivity to international litigation in U.S. courts having little connection to U.S. interests but posing significant risk of conflict with other countries. The real problem was that ATS suits had evolved away from the original U.S. national security function to enable foreign-cubed suits with no connection to U.S. governmental responsibility. And federal courts, by entertaining such suits, risked disrupting foreign relations rather than ameliorating them. *Kiobel'*s invocation of the presumption against extraterritoriality provided a useful but blunt doctrinal tool to avoid overruling *Sosa* while constraining lower courts from deploying the ATS as a U.S. jurisdictional hook for vindicating customary international law human rights claims unrelated to U.S. sovereign acts or omissions. In other words, the Court in *Kiobel* used the presumption against extraterritoriality—a general interpretive canon with prescriptive comity origins—instead of adjudicative comity, introducing confusion and ambiguity about future applications of the presumption in other contexts.

The latest Supreme Court pronouncement on the extraterritoriality presumption is *RJR Nabisco, Inc. v. European Community*, a suit brought by the European Community against a U.S. tobacco company and related entities alleging that the defendants had participated in a global drugs-for-cigarettes money laundering scheme in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[70] The Court held that the presumption had been rebutted with respect to "[some] foreign racketeering activity—but only to the extent that the [predicate offenses] themselves apply extraterritorially."[71]

The Court engaged in a separate extraterritoriality analysis regarding whether section 1964(c) of RICO, which provided a private right of action, was available for RICO claims based on predicate offenses involving acts or

69. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900–01 (2006).

70. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2098 (2016) (discussing 18 U.S.C. §§ 1961–68 (2012)).

71. *Id*. at 2102.

omissions occurring abroad. Justice Alito's opinion[72] concluded that § 1964(c) did not overcome the presumption against extraterritoriality. The Court rejected the view implicit in pre-*Kiobel* cases that the presumption was limited to substantive law statutes, which dictate what conduct was lawful or not, since *Kiobel* itself had involved a jurisdictional statute. "The same logic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."[73] In the Court's view, "[n]othing in § 1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States."[74] As a result of this ruling, only the U.S. Department of Justice could sue for the RICO claims with foreign predicate offenses.

The irony, of course, is that the European Community had brought the suit against RJR Nabisco in the first place. The whole point of the original presumption against extraterritoriality was to respect the sovereignty of foreign nations. Here, the relevant foreign government itself was seeking to apply U.S. law in a U.S. court. In fact, the Supreme Court has repeatedly held that allowing a foreign state to sue in U.S. court is itself compelled by comity. "Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States."[75]

*RJR Nabisco* suggests a dramatic unmooring of the presumption against extraterritoriality from its international comity roots. Is it explainable as an instance of *prescriptive* comity where the Court agreed that the presumption had been overcome by RICO's substantive prohibitions and yet Congress did not authorize a private cause of action for foreign predicate offenses? To that extent, the holding is unsurprising and consistent with the present Supreme Court's reluctance to recognize private causes of action absent express statutory authorization. But the holding is hard to square as a matter of adjudicative comity in the absence of any evidence that enforcing U.S. law would interfere with foreign governmental interests. Quite to the contrary, there was direct evidence that the implicated foreign sovereigns not only did not mind, they affirmatively wanted to apply U.S. law—they had brought the

72. Justice Alito wrote for a 4-3 majority in this part IV of the opinion; Justices Ginsburg, Breyer, and Kagan dissented from this part. Justice Sotomayor did not take part in the decision. The Court had only eight Justices at the time.

73. *Id.* at 2106.

74. *Id.* at 2108.

75. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964).

suit, after all. The Court's rejoinder to this evidence was terse and enigmatic: "We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign."[76] The reasons against such a case-by-case inquiry were not fully explained by the Court, and, as we shall see in Part III, the Court for more than a century routinely engaged in case-by-case international comity inquiries to ensure proper respect for foreign governmental interests.

The *RJR Nabisco* Court's desire for rule-like fixity is understandable. It is based in part on the modern conventional view that federal judges are ill-equipped for diplomacy and for making foreign policy calls. Trying to confine international comity considerations to a generally applicable canon of statutory interpretation like the presumption against extraterritoriality makes plausible sense—statutory interpretation lies in the heartland of modern federal judicial functions; foreign policy does not. Indeed, some commentators believe that the Constitution practically requires the judicial branch to defer in nearly all foreign relations cases to the political branches on foreign policy.[77] But, as we shall demonstrate in Part IV, the view that federal courts have no business engaging in a case-by-case analysis of whether sensitive foreign governmental interests counsel dismissal or denial of jurisdiction is mistaken as an original matter. By contrast, Article III and the Judiciary Act of 1789 contemplate a significant role for the Judicial Branch in foreign relations on a case-by-case basis, and the Supreme Court and lower courts in fact managed international comity with very little congressional guidance from the Founding to the early twentieth century. As such, they developed a federal common law framework that can be usefully

76. *RJR Nabisco*, 136 S. Ct. at 2108. We disagree with Professors Dodge and Stephan who read this language from *RJR Nabisco* as "reject[ing] a case-by-case approach to determine the geographic scope" of federal statutes. Brief for Professors William S. Dodge and Paul B. Stephan as Amicus Curiae Supporting Petitioners at 10, Animal Sci. Prod., Inc. v. Hebei Welcome Pharm., 138 S. Ct. 1865 (2018) (No. 16-1220), 2017 U.S. S. Ct. Briefs LEXIS 1491, at *15–16. There is no question that the Court is troubled by the lower courts' multi-factored "methodology of balancing interests," Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 259 (2010), as conducive of inconsistent applications and legal uncertainty. But a case-by-case approach is inevitable in any sound analysis of whether a particular statute overcomes the presumption against extraterritoriality and, if it does, whether it implicates international comity concerns. The *RJR Nabisco* language, we believe, should be read more narrowly as an expression of the Court's reluctance to adjust its interpretation of a U.S. federal statute simply because foreign sovereign suitors urge a different interpretation.

77. *See* ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 270 (2017) ("[B]y giving the political branches exclusive authority over the accepted means of pursuing redress against foreign nations, the Constitution authorized the political branches exclusively to decide whether, when, and how the United States would pursue redress against foreign nations for their misconduct.").

applied to present circumstances to guide international comity abstention.

## III. INTERNATIONAL COMITY AND HISTORICAL PRACTICE

A good deal of academic disquiet with international comity as an independent doctrine of judicial abstention stems from the view that the federal courts should not shirk their duty to hear cases over which Congress has plainly conferred jurisdiction.[78] In Chief Justice Marshall's ringing words in *Cohens v. Virginia*: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution."[79] The controversy is a longstanding and important one.[80] On the one hand, if federal judges have too much latitude to choose the cases they want to hear, they might cherry pick cases for the outcomes they want or neglect to hear cases they deem insignificant, uninteresting, or contrary to their political instincts. (This is a particularly acute problem for the Supreme Court today, given that most of its current appellate jurisdiction requires a petition for a writ of certiorari.) On the other hand, Marshall's dictum is plainly overstated; there are many good reasons why a federal court may want to abstain from deciding a case. It may pose tricky and unsettled questions of state law,[81] or a constitutional political question the judiciary is ill-equipped to answer,[82] or interfere with parallel state court proceedings.[83] The key to striking a balance is to craft rules of engagement permitting federal courts discretion not to exercise

78. *See, e.g.*, Gardner, *supra* note 21, at 70; *see also* RICHARD H. FALLON JR. ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1094–1192 (7th ed. 2015).

79. *See* Cohens v. Virginia, 19 U.S. 264, 404 (1821).

80. *Compare* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) (asserting that judicial abstention violates constitutional separation of powers when it is not clearly authorized by statute), *with* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 544–45 (1985) ("[J]udicial discretion in matters of jurisdiction . . . is much more pervasive than is generally realized, and . . . it has ancient and honorable roots at common law as well as in equity.").

81. La. Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 28 (1959); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941).

82. *See* Baker v. Carr, 369 U.S. 186, 209 (1962) (holding that constitutional challenges to state legislature districting do not raise a political question); Coleman v. Miller, 307 U.S. 433, 450 (1939) (holding that the process of amending the Constitution is largely a political question); Luther v. Borden, 48 U.S. (7 How.) 1, 26 (1849) (explaining that the meaning of Article IV's "guarantee to every State in this Union a republican form of government" is a political question); *see generally* Marbury v. Madison, 5 U.S. 137, 166 (1803) (raising the concepts of "political question" and nonjusticiablity).

83. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 807 (1976). *Colorado River* is more commonly quoted for its reference to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id*. at 817. However, Justice Brennan's opinion for the Court in fact upheld federal court abstention despite the lack of clear statutory guidance. As such, the holding in *Colorado River* supports our argument for principled judicial discretion, albeit in the context of domestic as opposed to international harmony.

jurisdiction that is grounded in principle, not whim or fancy. As David Shapiro reminds us: "A refusal to exercise jurisdiction for reasons within the sound, principled discretion of the court is not the kind of ad hoc refusal to entertain an action that flirts with treason to the Constitution."[84]

These generic concerns about judicial discretion are not unimportant. However, they obscure truths about the nature of the federal judicial power that the plain words of Article III of the Constitution prescribe. Nor do they capture the way the Supreme Court and the lower federal courts operated in foreign-relations cases at the Founding and in the first hundred and fifty years of the Republic. Specifically, the judicial branch was an important national government actor in foreign relations, especially in the international maritime context. And federal judges invoked and implemented international comity on a routine basis with minimal guidance from Congress or the executive branch. Of course, the infant United States, as a militarily weak state, was hypersensitive to the interests of the European powers, and the federal judiciary as an institution was more fluent in foreign affairs than it is today. Our aim in describing the early history and parsing the words of the Constitution carefully is not to make an originalist argument that we should go back to the original design and practice. The federal judiciary is now a dramatically different institution; the United States is a dramatically different nation. And there is a great deal more targeted congressional guidance in statutes like the FSIA, the Sherman Antitrust Act, and the CLOUD Act. Rather, our aim is to reframe the terms of the debate: judicial discretion to manage international comity as a federal common law matter was the original position and historical practice for centuries, not an aberration or a new development. In the sphere of balancing national and foreign governmental interests in cases or controversies in the U.S. courts, it is congressional action—not judicial decisions—that are *arriviste*. In other words, what critics deride as "international comity abstention" that avoids seemingly mandatory subject-matter jurisdiction was the norm, not the exception.

Article III of the Constitution and its implementation in the Judiciary Act of 1789 lodged vast potential subject-matter jurisdiction over cases implicating foreign governmental interests, particularly through admiralty and maritime jurisdiction in the ages of sail and steam. At the same time, with one exception, they did not provide guidance to courts as to how such subject-matter jurisdiction should be exercised in cases and controversies implicating foreign governmental interests. Rather, the federal courts, led

84. Shapiro, *supra* note 80, at 574.

by the Supreme Court, routinely and expertly dismissed or declined to hear sensitive cases implicating foreign governmental interests, despite the explicit statutory grants of subject-matter jurisdiction. Over time, the domestic functions of the Supreme Court and the lower federal courts overshadowed their foreign affairs functions, and the political branches came to dominate U.S. foreign policy, particularly the President.[85] The federal courts today are no longer institutions staffed by Secretaries of State, a former President, treaty negotiators, and international maritime law experts in an age of sail. Consequently, statutes and established doctrines are now the principal tools by which today's federal judges do and should manage international comity calls when they arise in cases before them. But the historical practice generated by the Court when it had a more robust foreign affairs role still serves as a valuable resource and federal common law legacy, as well as a marker of what the Constitution permits in terms of the federal judicial power over foreign affairs. And the diversity and complexity of international cases on modern federal court dockets means that many cases in U.S. courts in which foreign sovereign parties and interests are implicated do not fall neatly within the bounds of settled law, calling for an independent weighing of international comity concerns.

Originalism has been absent in discussions of international comity, which is surprising given the constitutional separation-of-powers implications and rationales for limiting judicial discretion. The text of the Constitution has also been largely ignored in discussions of international comity. Article III is the constitutional provision that deals with the judicial power of the United States. It authorizes judicial power over several subject matters directly implicating foreign relations, including: "[A]ll Cases affecting Ambassadors, other public Ministers and Consuls"; "all Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[86] By the explicit terms of this last Article III grant, the national judicial power extends to "controversies" between "foreign states" and a U.S. state or its citizens. And yet, courts and commentators today hardly notice or remark upon the plain language specification that foreign states may sue or be sued in federal courts, at least where a state or state citizen is an adverse party.

In the First Judiciary Act of 1789, Congress created lower federal courts and implemented many of these Article III foreign relations grants by

85. *See, e.g.*, BELLIA & CLARK, *supra* note 77, at 269; CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 145 (6th ed. 2017).

86. U.S. CONST. art. III, § 2.

conferring jurisdiction on the Supreme Court and the lower courts.[87] For example, the Act gave the Supreme Court "exclusive jurisdiction of all controversies of a civil nature, where a state is a party,"[88] presumably including suits between a state and a foreign state.[89] Indeed, it is plausible that the Article III specification of cases "in which a State shall be a Party" which the Act implemented included a foreign "State," as the original Senate bill version of the statute stated: "the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where any of the United States or a foreign state is a party . . . ."[90]

At the same time, Congress gave scant guidance to federal judges as to how to exercise their statutory grants of judicial power to avoid friction with the European powers. The one instance where Congress did explicitly direct federal courts in how to exercise their foreign affairs jurisdiction is found in section 13 of the Judiciary Act, which sets forth the original and appellate jurisdiction of the U.S. Supreme Court. It provides that the Supreme Court "shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, *as a court of law can have or exercise consistently with the law of nations*."[91] The First Congress's prescription manifests the important connection between the exercise of federal judicial power and the law of nations, which corresponds roughly with modern customary international law. The upshot is that the constitutional text of Article III and the Founding-era framework statute evince a clear original meaning of vesting federal judges with considerable discretion to manage foreign relations cases.

Although Article III's specification of Supreme Court original jurisdiction and its implementation in the First Judiciary Act suggest an original view that cases affecting foreign ambassadors or other officials and where foreign states were parties would be prominent on the Supreme Court's docket, they were exceedingly rare. Furthermore, most cases involving foreign representatives involved consuls, who were quasi-diplomatic commercial agents and often citizens of the United States

87. *See id.*

88. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

89. *See* Thomas H. Lee, *The Supreme Court as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction Over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1784–95 (2004).

90. Judiciary Act of 1789, S. 1, 1st Cong., at 6 (Thomas Greenleaf printed version) (on file with authors); *see also* Lee, *supra* note 89, at 1792.

91. Judiciary Act of 1789 § 13 (emphasis added).

designated to act on behalf of a foreign country.[92] As such, they did not implicate foreign governmental interests nearly to the same degree as suits involving foreign public ministers or ambassadors.

Rather, it was the law of maritime captures and prizes—the branch of the law of nations governing the validity of captures and transfers of title to foreign ships and cargos seized during hostilities at sea—that formed the crucible in which the early U.S. Supreme Court repeatedly navigated highly sensitive issues of international comity. It becomes obvious upon reflection that ships and cargoes were the primary factual contexts in which foreign governmental interests were implicated in U.S. federal courts in the age of sail. Moreover, the geographic position of the new United States along the western Atlantic seaboard meant that U.S. ports were ideally situated to serve as bases to raid shipping lanes to European colonies in the West Indies. Between 1794 and 1827, the Supreme Court rendered 120 published opinions in prize cases—the single largest subject matter it adjudicated in its first three decades.[93] This included not only cases in which the U.S. Navy or American-origin privateers had made captures, for instance, during the Quasi-War with France or the War of 1812, but also cases involving contested captures between foreign parties regarding ships or cargoes that had been sailed into U.S. ports in which federal district courts could potentially exercise *in rem* jurisdiction.

Thus, from the very start, the Supreme Court and lower courts dealt with cases and controversies implicating international comity over which they had subject-matter jurisdiction, pursuant to blanket constitutional and statutory grants of admiralty and maritime jurisdiction. In those early years, there were no congressional statutes providing explicit guidance on how to manage sensitive foreign policy cases. The federal courts, taking their lead from the Supreme Court, borrowed heavily from the ambient law of nations to craft a native international comity jurisprudence that would protect U.S. sovereign interests and national security while respecting foreign governmental interests consistently with the law of nations. In many cases, this entailed deliberate, reasoned decisions to refrain from exercising jurisdiction, even though the Constitution and jurisdictional statutes plainly vested it. Contrary to the assumption that the Judiciary Branch has a

92. *See, e.g.*, United States v. Ravara, 27 F. Cas. 713, 714 (C.C.D. Pa. 1793) (involving a criminal prosecution of a Genoese consul in Philadelphia for sending threatening letters to officials, including President George Washington and the British minister to the United States).

93. For a compilation of these cases, see generally 1–3 PRIZE CASES DECIDED IN THE UNITED STATES SUPREME COURT, 1789–1918 (James Brown Scott ed. 1923).

"virtually unflagging obligation"[94] to exercise jurisdiction that Congress has given it,[95] the truth is that, at least when it came to foreign relations cases, judicial discretion—often resulting in abstention—was quite commonplace in the early American republic. In practical terms, this pattern of carefully calibrated judicial discretion to refrain from exercising statutory jurisdiction was a matter of vital importance for the militarily weak Republic.

Chief Justice John Marshall's iconic decision for the Supreme Court in the *Schooner Exchange v. McFaddon*[96] is powerfully illustrative of the Judiciary Branch's early prominence in foreign relations and a paradigm case study of how the federal courts managed international comity. The case originated when a vessel, alleged to be a French warship, sailed into Philadelphia for safe harbor during a storm. Two American citizens filed a libel (the equivalent to a complaint in a maritime action) in federal district court, claiming that they were the rightful owners of the ship. They asserted that their ship had been "violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French."[97] They further alleged that the ship had never been taken to a French port for condemnation of title after capture as required under the law of maritime captures and prizes, an assertion the U.S. Supreme Court did not challenge. The Americans pled jurisdiction under section 9 of the Judiciary Act of 1789, which provided simply that the district courts "shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."[98]

No one timely appeared to challenge the U.S. libellants' claim of good title to the ship. Instead, the U.S. Attorney for the District of Pennsylvania appeared to make a "suggestion" to the effect that the ship was a "public vessel" of the French Emperor that had taken shelter in Philadelphia due to foul weather.[99] The U.S. Attorney offered self-serving affidavits from the local French consul and ship's captain in support of his suggestion.[100] The U.S. Attorney presented no evidence that the ship had been lawfully condemned as prize by a French prize court with valid jurisdiction under the law of nations.

Chief Justice Marshall, writing for a unanimous Court, held that public

94. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976).
95. *See* Redish, *supra* note 80.
96. The Schooner Exch. v. McFaddon, 11 U.S. 116, 135 (1812).
97. *Id*. at 117 (statement of facts).
98. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.
99. *Schooner Exch.*, 11 U.S. at 117–18.
100. *Id*. at 119.

vessels "entering the port of a friendly power . . . are to be considered as exempted by the consent of that power from its jurisdiction."[101] The Court thus adopted the U.S. Attorney's "suggestion" that the *Exchange* was in fact a French warship—the crucial fact in the case. This despite the explicit statement of the libellants to the contrary and the absence of any statement by the U.S. Attorney rebutting the libellants' factual assertion that the ship had not been condemned by a lawful French prize court. Absent such a condemnation proceeding, title plainly would not have passed to the French government under international maritime law.

But what about the plain and clear specification of subject matter jurisdiction over "all civil causes of admiralty and maritime jurisdiction" in section 9 of the 1789 Act? Didn't it suffice to extend *in rem* jurisdiction over a ship found in Philadelphia as a matter of U.S. law, at least with respect to the validity of title to it? Marshall explained:

> Without doubt, the sovereign of the place is capable of destroying this [exemption from its jurisdiction by] implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country, in which it is found, ought not, in the opinion of this Court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to wa[i]ve its jurisdiction.[102]

Marshall reasoned, in short, that a clear statement rule was necessary in interpreting a broadly worded "ordinary jurisdiction" statute, given the sensitive foreign governmental interests implicated. In other words, Marshall underscored the need for adjudicative comity in the exercise of the U.S. admiralty court's exercise of *in rem* jurisdiction.[103] In so doing, he provided

101. *Id.* at 145–46.

102. *Id.* at 146.

103. Marshall's move bears more than a passing resemblance to his more famous interpretation of a different provision of the Judiciary Act in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The outcome of the case—Marbury did not get the Court to grant a writ of mandamus ordering Madison to deliver his commission— has been characterized by some as a result preordained by the domestic political reality of the federal judiciary's weakness vis-à-vis the Executive Branch, and yet the Court was able to secure the larger principle of judicial review. Similarly, the outcome in *Schooner Exchange*—Napoleon's warship was not condemned by the federal court—might be construed as a result attuned to the

a perfect historical illustration of our argument in defense of international comity in this Article. Our plain and simple argument is that federal judges should continue to do what Marshall did in *Schooner Exchange* in exercising discretion to decline jurisdiction when important foreign governmental interests are at stake.

Starting in the late nineteenth century, the Court's focus and function turned increasingly domestic. At the same time, the role of the political branches eclipsed the judiciary in foreign affairs, with the rise of American power and influence in the world order and the advent of technologies that quickened the pace of foreign relations and ended the age of sail. By the last quarter of the twentieth century, the supremacy of the political branches in foreign affairs was accepted as if it had been the natural order of things all along. The enactment of the FSIA in 1976 signaled a high-water mark of congressional control of what had formerly been a judicial responsibility. The statute codified rules based on contemporaneous customary international law of foreign state immunity. But for the first century of the Republic starting with Marshall's ruling in *Schooner Exchange*, the Supreme Court had taken the lead in fashioning this body of law with some deference to the Executive Branch, before ceding it virtually wholesale to the Executive in the mid-twentieth century, leading to a period of Executive Branch ad hoc-ery that resulted in the passage of the FSIA. But the international comity framework the Court ordained during this earlier era remains a serviceable one, as we shall see in Part IV.

## IV. AN ANALYTIC FRAMEWORK FOR INTERNATIONAL COMITY

Chief Justice Marshall's landmark opinion in *Schooner Exchange* may be the first and most prominent example of Supreme Court decisions demonstrating masterful deployment of international comity in cases implicating foreign governmental interests. But subsequent historical practice reveals many other significant examples. In this part, we distill that practice into a coherent federal common law doctrine of international comity.

### A. CENTRAL ELEMENTS OF THE FEDERAL COMMON LAW FRAMEWORK

The federal common law framework for deciding whether a court should abstain on international comity grounds has four central elements:

(1) Deference to a specific, well-considered Executive Branch Statement of Interest filed before a court regarding whether it should exercise

international political reality of American military weakness vis-à-vis France and its European great-power rivals, and yet it provided a means to affirm the larger principle of American territorial integrity.

its clear statutory jurisdiction in a particular case, as demonstrated by the Court in its acceptance of the U.S. Attorney's statement that the ship at issue was a French public ship in *Schooner Exchange*.

(2) Consideration of the general practice of other nations—particularly the *reciprocal* practice of any nation directly implicated. Reciprocity was the touchstone of the Court's analysis of whether to recognize a foreign judgment in *Hilton v. Guyot*,[104] a landmark precedent of international comity doctrine.

(3) Respecting applicable U.S. statutes or treaties indicating a strong U.S. sovereign interest or authorization to ignore or displace foreign sovereign acts or interests. The amendments to the Sherman Act extending U.S. antitrust liability to foreign acts that affect U.S. domestic trade or commerce discussed in *F. Hoffman-La Roche v. Empagran S.A.* are a leading example.[105] The statute essentially overruled Justice Holmes' holding in *American Banana*.

(4) Assessing whether parallel proceedings have been commenced or concluded in alternative foreign forums, analogized from domestic abstention cases.

1. Deference to the Well-Considered Views of the Executive Branch

In deciding whether a case poses foreign relations consequences warranting an extension of international comity, courts should pay appropriate deference to the well-considered views of the Executive Branch. This is particularly true regarding assertions of foreign state or official immunity that cannot plausibly be characterized as statutory interpretation of the FSIA. As illustrated by *Schooner Exchange*, one very important factor in deciding whether a U.S. court should dismiss (or stay) a case implicating foreign governmental interests is the position of the Executive Branch in the matter.

Such deference is not automatic and not always conclusive, however. Within the Executive Branch, the State Department represents the central repeat player in matters affecting this country's foreign affairs. It is the expert agency in identifying and addressing the potential for friction in foreign relations.[106] At the same time, the Department is susceptible to

104. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

105. *See* F. Hoffman-La Roche v. Empagran S.A., 542 U.S. 155, 161–63 (2004).

106. Others have emphasized the need for executive deference in matters of international comity. Eric Posner and Cass Sunstein have asserted that "there are strong reasons, rooted in constitutional

political influence from the more powerful foreign nations and their U.S. trading partners and lobbyists.[107] Consequently, courts should accord significant deference but not abdicate their independent judgment in cases over which they have jurisdiction.

The Ninth Circuit's decision *Mujica v. AirScan Inc.*[108] provides an illuminating case study for understanding what would constitute a well-considered Statement of Interest ("SOI") by the Executive Branch today. This case, one of the five examples set forth in Part I, involved a lawsuit against U.S. corporations allegedly involved in a Colombian air force bombing that killed civilians in Colombia. No allegation was made about any planning or other acts related to the bombing occurring in the United States. The plaintiffs pled violations of international human rights law; the court acknowledged that "the United States has an interest in upholding international human rights norms."[109]

The appellate court concluded that this general assertion of a U.S. interest in international human rights was not enough because of a supplemental Statement of Interest that the U.S. State Department filed. It explained:

> The United States . . . however, has spoken directly on the question of its interests in this case. The district court particularly credited the State Department's Supplemental SOI . . . dated December 23, 2004, [which] articulated several reasons why "the State Department believes that the adjudication of this case will have an adverse impact on the foreign policy interests of the United States." First, it referenced the related actions which were then ongoing in Colombia against the Colombian government and military personnel regarding the incident. It noted that the American companies that are the subject of the instant suit were not then subject to the suits in the Colombian courts, but it added that Occidental [one of the U.S. corporate defendants] had stipulated to service and consented to jurisdiction in Colombia.
>
> Second, the State Department wrote that it "believe[d] that foreign courts generally should resolve disputes arising in foreign countries, where such courts reasonably have jurisdiction and are capable of resolving them

understandings and institutional competence, to allow the executive branch to resolve issues of international comity." Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1177 (2007). As developed in Part II, we disagree with the view that there is a constitutional basis for such deference, but the point of institutional competence remains valid.

107. The legislative history of the Foreign Sovereign Immunities Act indicates, for instance, that a key reason for its enactment was to insulate the State Department from foreign country demands for immunity which often resulted in outcomes dependent on the power and influence of the relevant foreign country. *See* S. REP. No. 94-1310, at 9 (1976).

108. Mujica v. AirScan Inc., 771 F.3d 580 (9th Cir. 2014).

109. *Id.* at 609.

> fairly. An important part of our foreign policy is to encourage other countries to establish responsible legal mechanisms for addressing and resolving alleged human rights abuses." It warned that the instant case could give the impression that the U.S. government "does not recognize the legitimacy of Colombian judicial institutions" and that those "perceptions could potentially have negative consequences for our bilateral relationship with the Colombian government." The State Department praised Colombia as one of the United States' "closest allies in this hemisphere," and it warned that lawsuits like this one "have the potential for deterring present and future U.S. investment in Colombia." Finally, the letter explained that "reduced U.S. investment in Colombia's oil industry" might, in turn, "detract from the vital U.S. policy goal of expanding and diversifying our sources of imported oil."[110]

The State Department's Statement of Interest in *Mujica*, which the United States referenced extensively in an amicus brief it filed on appeal, articulated specific reasons why the case should be dismissed from a U.S. foreign-policy perspective. Colombia is a close ally—only the Executive Branch has the knowledge to judge the quality and importance of the United States' relationship with a foreign country. The State Department also attested that Colombia had a fair judicial system to which one of the U.S. companies had consented. Its amicus brief further pointed out that plaintiffs had received a favorable verdict against the Colombian government that was affirmed on appeal. The outcome suggests not only the neutrality of the Colombian courts but also the possibility that the plaintiffs might prevail in Colombia against other defendants as well, in other words, that resort to Colombian courts would not be futile. The State Department, as the Executive Branch organ entrusted with the conduct of the nation's diplomacy, seems better situated than a federal judge to assess the fairness of a foreign judicial system, as well as the importance of the United States' alliance with the country from a national security perspective. Perhaps most important is the fact that the State Department felt it necessary to file an SOI and an amicus brief in the first place, which it does not do in many cases in which foreign sovereign interests are implicated. At the same time, a court should subject generic, abstract statements of national interest to careful scrutiny.

2. General Practice of Nations—Particularly the Reciprocal Practice of Affected Foreign States

A second important consideration in whether a federal court should abstain on the ground of international comity is an assessment of the general

110. *Id.*

practice of other nations, particularly the reciprocal practice of affected foreign states. Reference to the practice of other states resonates with the customary international law focus of the *Charming Betsy* canon, which, as we have seen in Part I, has relevance in the prescriptive comity context for courts to decide whether to apply U.S. law when the presumption against extraterritoriality has been rebutted. The fundamental point is that the position of U.S. courts regarding respect for the public acts and interests of foreign states should mirror the practice of other nations. When one specific nation's public acts are at issue in a case in a U.S. court, the practice of that nation in particular is an important determinant of what the U.S. court should do in the absence of an established general practice or rule of customary international law. Mutual reciprocity in this sense is not just a tit-for-tat tactic but reflects and promotes a strategic, long-term goal of ensuring maximum mutual respect and restraint.

Indeed, the question of reciprocal treatment by the foreign state was the *single* determinative factor in *Hilton v. Guyot*,[111] perhaps the Supreme Court's most famous international comity decision. The *Hilton* majority, per Justice Horace Gray, refused to accord a French judicial decision conclusive deference when the U.S. loser sought a second bite at the apple through relitigation in a U.S. court. The four dissenters in *Hilton*, by contrast, wanted to treat the French judgment just like a U.S. judgment, entitled to full *res judicata* effect so long as it was fully and fairly litigated. But, Justice Gray, after a characteristically encyclopedic survey of the laws of other countries, concluded that the nearly uniform state practice among nations was that foreign judgments were not conclusive in forum state proceedings unless forum judgments were reciprocally respected in the relevant foreign state. The majority then held this to be the law of the United States on the matter, as well as a rule of customary international law.

> In holding such a judgment, for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation . . . but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and *by the comity of our own country, which it is our judicial duty to know and to declare*, the judgment is not entitled to be considered conclusive.[112]

The Court continued:

> By our law, at the time of the adoption of the Constitution, a foreign judgment was considered as prima facie evidence, and not conclusive.

111. Hilton v. Guyot, 159 U.S. 113 (1895).

112. *Id.* at 228 (emphasis added).

> There is no statute of the United States, and no treaty of the United States with France, or with any other nation, which has changed that law, or has made any provision upon the subject. . . . In the absence of statute or treaty, it appears to us equally unwarrantable to assume that the comity of the United States requires anything more.[113]

The question of what countries are doing on the relevant issue, especially whether reciprocity is afforded, should be a key element in all judge-made international comity calls under U.S. law. In cases where a foreign state's public act or actor is implicated, the federal courts should ask the following question: "We have jurisdiction to decide this case, but does our exercise of authority to do so accord the level of respect to the foreign state, its public acts, or actors that we currently receive and would expect in return from that and other countries?" Several Supreme Court justices asked a version of that question in oral arguments in the *Animal Science* case regarding the proper deference owed to the Chinese government's statement of its own law in an action brought in U.S. court. Justice Kagan, for example, queried: "[H]ow can you say that the only thing that shows respect to foreign governments is to do something that we don't know that any other foreign nation does?"[114]

Another benefit of stressing reciprocity in international comity analysis is that it properly emphasizes the importance of deterring opportunism in forum selection. If reciprocity is the touchstone, then it encourages foreign countries with courts that are potential alternatives to provide a reasonably fair forum for litigants—their own citizens as well as U.S. parties. Without the restraint of international comity, the choice to sue in U.S. courts may be driven more by tactical litigation advantages such as the availability of a civil jury trial (rarely found anywhere else) or broad discovery to pressure defendants into settlement, rather than any sense that U.S. courts are the best forums from an overall perspective, giving due weight to all affected interests.

### 3. Giving Way to a Conflicting Statute or Treaty

International comity is a species of federal common law that must give way to conflicting statutes or self-executing treaties on point, as Justice Gray unequivocally asserted in *Hilton v. Guyot*—"[i]n the absence of statute or

113. *Id.*

114. Transcript of Oral Argument at 55, Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865 (2018) (No. 16-1220), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1220_4hd5.pdf [https://perma.cc/C4Y9-GXQ5].

treaty."[115] When Congress enacts a statute such as the FSIA or the President ratifies a treaty with Senatorial advice and consent such as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), the resultant positive law suspends the reciprocity analysis on international comity calls unless it explicitly provides a carve-out for it.[116] The question of the level of respect for foreign acts and actors becomes a question of statutory or treaty interpretation. For instance, the New York Convention, as implemented in amendments to the Federal Arbitration Act,[117] prescribes the exclusive grounds on which foreign arbitral agreements and awards are to be enforced in U.S. courts. In theory, the relevant statutes or treaties can do away with consideration of reciprocity altogether, as the New York Convention does to a limited extent: U.S. courts must enforce arbitral awards made in a foreign country that has ratified the Convention, without regard to whether or how a court in the foreign country would enforce an arbitral award made in the United States.[118]

The principle that comity must give way to a statute or treaty on point may have consequences in many cases where foreign sovereign acts or interests are implicated. For instance, the issue of whether compulsion under foreign law absolves Chinese companies of Sherman Antitrust Act liability was not reached in the *Animal Science* case the Supreme Court decided in 2018 and remanded to the Second Circuit. We question the assumption of the Second Circuit in that case that if the Chinese government authorities in fact required price-fixing by Chinese companies exporting vitamin C to the United States, such foreign compulsion would provide a complete defense to U.S. antitrust liability. It may be that a complete defense is required as a

115. *Hilton*, 159 U.S. at 228.

116. Under current U.S. law, the enforcement of foreign judgments is a matter of state law. *Hilton*'s federal common law rule of strict reciprocity has been relaxed under the Uniform Recognition of Foreign Judgments Act and the relevant statutes of most of the states that have adopted a version of it, including New York. *See infra* note 118.

117. 9 U.S.C §§ 201-208 (2018).

118. Article I(3) of the New York Convention allows States to make reservations:

> When . . . acceding to this Convention . . . any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (entered into force Dec. 29, 1970). The FSIA is an example of a statute that does not require reciprocity. Note also that we no longer have "unequal" treaties, such as that with China in the nineteenth century, that give U.S. laws extraterritorial force and applicability in China. But if such a treaty did exist (there is no international law norm against unequal treaties *per se*), then it would naturally preempt any federal common law analysis of what international comity would entail.

matter of sound interpretation of the Sherman Act, but it is not required as a matter of international comity, which is a federal common law doctrine and cannot override a conflicting federal statute. The only question, accordingly, is what the Sherman Act requires.[119] International comity had a greater role to play *before* the statute was amended to expressly deal with foreign conduct that directly affects imports in the United States, but in the face of that amendment, there seems to be no plausible basis for a U.S. court to subordinate the U.S. regulatory interest.[120]

In this respect, international comity analysis has a clear answer for a case in which a "true conflict" cannot be resolved.[121] If a U.S. statute unambiguously extends extraterritoriality or a statute is found to defeat the presumption against extraterritoriality and its reach is consistent with customary international law limitations on extraterritorial regulation (meaning that the statute passes *Charming Betsy* strictures), then the federal court *must* apply the U.S. law as against a foreign statute that commands a contradictory duty to a litigant. Nor can foreign legal compulsion generate a valid complete defense.

At the same time, courts should not assume that the mere presence of a statute like the FSIA obviates all independent judicial weighing of international comity. For example, the Supreme Court's decision in

119. Sometimes the legislative materials indicate whether the federal statute preempts consideration of international comity. Section 402 of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") amended the Sherman Act not to reach "conduct involving trade or commerce . . . with foreign nations unless [] such conduct has a direct, substantial, and reasonably foreseeable effect [] on trade or commerce which is not trade or commerce with foreign nations, or on import trade." Foreign Trade Antitrust Improvements Act of 1982, Pub. L. No. 97-290, sec. 402, § 6a, 96 Stat. 1246, 1246 (amending 15 U.S.C. § 6a). The legislative history of the FTAIA explicitly acknowledges that these amendments to federal antitrust laws "would have no effect on the courts' ability to employ notions of comity." H.R. REP. No. 97-686, at 13 (1982).

120. We thus disagree with the approach taken in section 403(3) of the Restatement (Third) of Foreign Relations Law: "When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the proscriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors"; and "a state should defer to the other state if that state's interest is clearly greater." In our view, if there is a "true conflict"—in other words, foreign law requires conduct that U.S. law forbids, even after applying the presumption against extraterritoriality, the *Charming Betsy* canon, and international comity considerations—a U.S court should apply the U.S. law. We note the reference to not disturbing "the court's ability to employ notions of comity" in the House report on the FTAIA amendments, but this reference is not reflected in the text of the amendments themselves, and does not state in so many words that notions of comity can override clear statutory language. *See supra* note 119.

121. *See* Hartford Fire Ins. v. California, 509 U.S. 764, 798–99 (1993) (citation omitted) (holding that there is no true conflict between British law and the Sherman Act and hence "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity").

*Samantar v. Yousuf* construed the statute not to cover foreign state officials.[122] Accordingly, the federal courts must decide as a matter of federal common law whether a foreign official or ex-official defendant is entitled to immunity in U.S. court. And, again under *Charming Betsy*, customary international law norms are relevant in this judicial determination but not determinative. The touchstone of the inquiry, rather, is the federal common law framework for international comity analysis sketched out here.

4. Parallel Proceedings in Alternative Forums

In considering whether to stay, abstain, or dismiss a case pending in a U.S. court, judges should also inquire whether there is an adequate alternative forum and, if so, whether there are prior or parallel proceedings in the other country. The comity inquiry is similar to, but also different from, the usual *forum non conveniens* ("FNC") analysis, which looks primarily at issues of litigation convenience (for example, fairness to the parties in litigating in a distant forum, the presence of key evidence, the place where central events or accidents occurred).[123] An FNC dismissal is unlikely, for instance, where U.S. parties are involved or the case's outcome is likely to turn on evidence based in the United States. Abstention on international comity grounds, by contrast, focuses on weighing the strength of the U.S. government's interests as opposed to the foreign governmental interests in providing a forum for the litigation. For this reason, long-settled federal judicial doctrines of abstention may be natural and more instructive reference points than FNC doctrine.[124]

The Ninth Circuit's *Mujica* decision again provides a good illustration of the point. The case involved the bombing of a Colombian village by the Colombian air force engaged in counter-guerrilla operations. Even if, as alleged, U.S. companies were complicit in some way in the bombing, any litigation regarding the bombing should occur in Colombian courts, absent some compelling showing that those courts are inadequate or incapable of affording complete justice. Imagine, for instance, how the U.S. government would react if the tables were turned and a foreign victim of a counter-terror operation in the United States were to sue private government contractors involved in the operation in his or her home country. The U.S. State

122. Samantar v. Yousuf, 560 U.S. 305, 319–25 (2010).

123. *See generally* Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (describing the test for determining whether a federal court should dismiss a case under the common law doctrine of *forum non conveniens*). As the *Piper* Court noted, the FNC doctrine shares the initial step of requiring the court to determine if there is a suitable alternative foreign forum: "At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum." *Id*. at 254 n.22.

124. For a generally critical view, see Gardner, *supra* note 21.

Department's Statement of Interest and amicus brief in *Mujica* attested to the fairness of Colombian courts which had in fact accorded relief to the victims on claims against the Colombian government. Federal court abstention on international comity grounds seems strongly justified under these circumstances.

Indeed, the strength of a foreign government's interests in redressing claims with a center of gravity within its borders may even justify a U.S. court's *preemptive* dismissal or stay before proceedings in the alternative forum have been initiated, subject to verification of the fundamental fairness of that forum. Such a requirement of exhaustion of local remedies is a hallmark of federal court-state court relations,[125] just like the abstention doctrines detailed above. For this reason, some lower courts have already endorsed doctrines of "prudential exhaustion" requiring foreign plaintiffs "to exhaust their local remedies in accordance with the principle of international comity" so long as there is an adequate foreign forum.[126] The courts that have done so have typically and sensibly dismissed without prejudice so that if plaintiffs litigating in the foreign forum "are blocked arbitrarily or unreasonably, United States courts could once again be open to [their] claims."[127]

### B. THE DISTORTIVE CONSEQUENCES OF AVOIDING THE INTERNATIONAL COMITY INQUIRY

The basic debate about international comity is whether it is truly a coherent, independent legal doctrine or rather a theme or a dodge to support a decision to dismiss a case reached on other, inchoate grounds. This Article so far has presented the case that international comity can be formulated as a principled federal common law framework that meaningfully guides and constrains federal courts' decisions to dismiss or stay cases in which foreign governmental interests are implicated. One final consideration that favors our conclusion is the potential for distortion of general doctrines when international comity concerns are only obliquely addressed through more general doctrinal approaches.

125. For example, a person convicted of a crime by a state court and in custody who claims his or her trial was infected by federal constitutional violations must first litigate those claims in state court before raising them in collateral proceedings in federal court. *See* 28 U.S.C. § 2254(b)–(c) (2018).

126. Sarei v. Rio Tinto, PLC, 550 F.3d. 822, 831 (9th Cir. 2008) (en banc); *see generally* Fischer v. Magyar Allamvasutak Zrt., 777 F.3d 847 (7th Cir. 2015) (considering whether claims of Holocaust survivors against the Hungarian national bank and national railway could be heard notwithstanding failure to exhaust local remedies and holding that an exhaustion requirement is not foreclosed by the FSIA).

127. *Fischer*, 777 F.3d at 865–66.

The Supreme Court's decision in *Daimler AG v. Bauman*[128] regarding longstanding doctrines of general jurisdiction is a good example. That suit involved the 1970s human rights claims of Argentine workers against Daimler, a German corporation, based on the acts of its Argentine subsidiary. It was brought in U.S. court in California where Daimler's U.S. subsidiary conducted business.[129] The Ninth Circuit held that Daimler was subject to all-purpose, dispute-blind general jurisdiction in California because of its subsidiary's contacts with the state. The *Bauman* Court was plainly troubled by the Ninth Circuit's failure to pay "heed to the risks to international comity posed by its expansive view of general jurisdiction posed."[130] It noted that "[o]ther nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case."[131] The Court also flagged the U.S. Government's report that "foreign governments' objections to some domestic courts' expansive views of general jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments."[132] These are all good reasons favoring comity-based abstention in an easy case—a disposition that would have avoided a constitutional holding on general (all-purpose) personal jurisdiction with potential far-reaching consequences for wholly domestic litigation. Similarly, in *Jesner v. Arab Bank*, the Court may have unreasonably narrowed the substantive reach of the ATS by excluding all foreign corporate liability because of concerns over interfering with foreign state regulation of their banks and other corporations, when direct invocation of international comity would have been a more precise response to those concerns.[133]

### C. CASE STUDY: *REPUBLIC OF ARGENTINA V. NML CAPITAL*[134]

Having described the federal common law framework for international comity analysis, it may be instructive to give a detailed case study of how that analysis might be done in a case implicating significant foreign sovereign interests. We focus upon a long-lasting, multi-court litigation in the U.S. courts regarding defaulted foreign sovereign bonds. The litigation implicates almost every aspect of our discussion so far. The outcome

128. Daimler AG v. Bauman, 571 U.S. 117 (2014).

129. The subsidiary was incorporated in Delaware and had its principal place of business in New Jersey. *Id.* at 121.

130. *Id.* at 141.

131. *Id.*

132. *Id.* at 141–42 (citation omitted).

133. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018).

134. Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134 (2014).

illuminates the problems that this Article seeks to address and help to resolve.

In the past few decades, the U.S. federal courts have become a prime arena for international litigation between sovereign debtor states and out-of-state private creditors. The most high-profile litigation of this type concerns Argentina, which stopped payments on its foreign currency debt obligations (then valued at more than 80 billion U.S. dollars) the day after Christmas 2001.[135] The country negotiated debt swaps in 2005 and 2010 pursuant to which it resumed payments to about 93 percent of its creditors. These creditors agreed to surrender their outstanding bonds in return for exchange bonds priced at between 25 and 29 cents to the U.S. dollar vis-à-vis the face value of the original bonds. The remaining 7 percent of creditors refused to take such "haircuts" and held out for full value.

Some of the holdout creditors were distressed-bond investors that had bought Argentine bonds on secondary markets at large discounts from face value, in some cases below the price of the exchange bonds. These holdout creditors, led by U.S. and foreign-based hedge funds managed by Harvard-educated lawyer Paul Singer, were effectively investing in the potential that costly litigation on the sovereign debt obligations, primarily in U.S. federal courts, would eventually force Argentina to pay them something closer to full value. This result would allow the funds to realize high rates of return on their investment in the bonds even after deducting significant litigation costs.

The hedge-fund holdout creditors launched a take-no-prisoners campaign in the U.S. federal courts throughout the country.[136] The main battles were fought in the courtroom of the late U.S. Senior District Judge Thomas Griesa in the Southern District of New York.[137] The holdouts' case against Argentina was very strong for two reasons—one grounded in contracts law and the other in the U.S. law of foreign state immunity. First, the underlying contracts contained several manifestations of mutual intent to submit any related sovereign debt controversies to the U.S. courts—

135. NML Capital, Ltd., v. Republic of Argentina, 699 F.3d 246, 249–51 (2d Cir. 2012).

136. *See generally, e.g.*, NML Capital, Ltd. v. Space Exploration Techs. Corp., No. 14-02262 SVW, 2015 U.S. Dist. LEXIS 42502 (C.D. Cal. Mar. 6, 2015) (seeking to satisfy judgment by attaching payments made by Argentina pursuant to a contract with defendant Space Exploration Technologies to launch satellites from Vandenberg Air Force Base in California in 2015 and 2016); NML Capital, Ltd. v. Republic of Argentina, No. 2:14-cv-492-RFB-VCF, 2014 U.S. Dist. LEXIS 110625 (D. Nev. Aug. 11, 2014) (granting NML's motion to compel discovery to aid execution of judgment against 123 Nevada corporations alleged to have laundered $65 million of embezzled Argentine government funds).

137. Starting in 2003, Singer's funds filed eleven suits against Argentina in the Southern District of New York to collect on the defaulted funds it held. *See* EM Ltd. v. Republic of Argentina, 695 F.3d 201, 203 (2d Cir. 2012); s*ee generally* NML Capital, Ltd. v. Republic of Argentina, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 009 Civ. 1708 (TPG), 2012 U.S. Dist. LEXIS 167272 (S.D.N.Y. Nov. 21, 2012).

specifically in New York City— for resolution. The bond contracts provided that (1) payments were to be made in U.S. dollars, (2) New York law would govern, and (3) jurisdiction was proper in "any state or federal court in The City of New York."[138] Most importantly, the contracts waived Argentina's immunity to suit in explicit, robust terms:

> To the extent [Argentina] or any of its revenues, assets or properties shall be entitled . . . to any immunity from suit, . . . from attachment prior to judgment, . . . from execution of a judgment or remedy, . . . [Argentina] has irrevocably agreed not to claim and has irrevocably waived such immunity to the fullest extent permitted by the laws of such jurisdiction (and consents generally for the purposes of the Foreign Sovereign Immunities Act to the giving of any relief or the issue of any process in connection with any Related Proceeding or Related Judgment) . . . .[139]

Such sweeping concessions are standard in debt instruments for cash-strapped developing countries eager to access capital markets, although they are not common in the debt instruments of developed countries, "whose debt often either contains no express reference to any dispute resolution procedure or limits litigation to the courts of the debtor country itself."[140]

The second reason why the holdouts' chances were good was the favorable status of current U.S. law on foreign state immunity. That law is the FSIA. In its 1992 decision in *Republic of Argentina v. Weltover*,[141] the Supreme Court held that the FSIA did *not* immunize Argentina from a suit in U.S. federal court seeking to enforce a prior batch of U.S. dollar-denominated Argentine bond obligations.[142] The Court unanimously concluded that the offering of sovereign bonds to U.S. markets was "commercial activity" with a "direct effect" in the United States.[143] And commercial activity is an explicit exception from the FSIA default rule of immunity.

Argentina lost in the U.S. Federal District Court for the Southern District of New York in large part because of the sweeping concessions it had made in the terms of its debt instruments to attract foreign investors. Judge Griesa entered several money judgments in favor of the holdout

138. *NML Capital*, 699 F.3d at 254 (citation omitted).

139. *EM Ltd.*, 695 F.3d at 203 n.1 (citation omitted).

140. Michael Waibel, *Out of Thin Air?: Tracing the Origins of the UNCTAD Principles in Customary International Law*, *in* SOVEREIGN FINANCING AND INTERNATIONAL LAW 87, 94 (Carlos Espósito et al. eds., 2013).

141. Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992).

142. Because of the holding in *Weltover*, the contractual waiver of immunity in the newer Argentine bonds was a redundant protection.

143. *Weltover*, 504 U.S. at 607 (construing 28 U.S.C. § 1605(a)(2)).

creditors led by NML Capital ("NML"), one of Singer's funds. The court relied on the sovereign immunity waivers in the underlying debt agreements to reject the threshold argument that it lacked jurisdiction to decide the merits under the FSIA.[144] Nor, the court held, could Argentina pay off the creditors who had accepted the restructuring but not the holdouts. It could not do this because of *pari passu* clauses in the relevant debt instruments, which the holdout creditors convinced the district judge meant that Argentina could not pay some creditors and not others who held debt of equal rank, even if those other creditors comprised a small group of restructuring holdouts.[145] The aggregate amount of the judgments the court held was owed to NML was 2.5 billon U.S. dollars, comprising the face value of the bonds plus interest.[146] At the holdouts' request, Judge Griesa granted injunctions against both the debtor Argentina from making payments and the restructured creditors from receiving them.

Argentina dug in its heels and refused to pay on the U.S. court judgments, and so the litigation moved to a new phase. The holdout creditors scoured the world for Argentine public assets such as planes, ships (the *Libertad*, an Argentine naval training ship in Ghana), and bank accounts (embassy and individual bank accounts in the United States and the United Kingdom)[147] that might be attached, nominally in partial satisfaction of the U.S. and other favorable third-country judgments, but, as a practical matter, for their nuisance value in forcing Argentina to negotiate a settlement. To aid in hunting down assets upon which to execute its favorable judgments, NML requested subpoenas from the U.S. court in New York ordering discovery against the Bank of America and Banco de la Nacion Argentina ("BNA"), an Argentine bank with a New York branch. Specifically, NML sought discovery of documents regarding any accounts maintained by or on behalf of Argentina, including its "agencies, ministries, instrumentalities, political subdivisions [and] employees." It sought discovery not just with respect to Argentina's assets in the United States, but all around the world,

144. 28 U.S.C. §§ 1330, 1602 et seq. (2018).

145. *See* NML Capital v. Republic of Argentina, Nos. 08 Civ. 6978 (TPG), 09 Civ. 1707 (TPG), 009 Civ. 1708 (TPG), 2012 U.S. Dist. LEXIS 167272, at *12–15 (S.D.N.Y. Nov. 21, 2012). As Molly Ryan has pointed out, this outcome "would effectively end consensual sovereign debt restructuring because it would incentivize holding out for full repayment." Molly Ryan, *Sovereign Bankruptcy: Why Now and Why Not in the IMF*, 82 FORDHAM L. REV. 2473, 2494 (2014).

146. Republic of Argentina v. NML Capital, Ltd., 573 U.S. 134, 136 (2014).

147. *See, e.g.*, The "ARA Libertad" Case (Argentina v. Ghana), Case. No. 20, Order of Dec. 15, 2012, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.20/published/C20_Order_151212.pdf [https://perma.cc/DD9N-C7AX] (Order from the International Tribunal for the Law of the Sea) (directing release of Argentine navy training frigate that NML Capital had successfully moved a Ghanaian court to enjoin from departure to satisfy its outstanding judgments against Argentina).

ostensibly to gain insight into Argentina's "financial circulatory system."[148]

Argentina, joined by the banks, moved to quash the subpoenas. The district court held a hearing and approved the subpoenas, determining that discovery to aid execution of its judgments, even with respect to Argentina's assets outside of the United States, did not infringe upon its sovereign immunity as set forth in the FSIA. The district judge explained that the court "intended to serve as a 'clearinghouse for information' in NML's efforts to find and attach Argentina's assets."[149]

Argentina appealed the district court's discovery order, but the U.S. Court of Appeals for the Second Circuit affirmed. The appeals court ruled that the FSIA did not shield Argentina from discovery to seek foreign assets to execute a judgment. It held, alternatively, that Argentina's sovereign immunity was not implicated by the lower court's discovery order because it was directed at the banks, not Argentina. Argentina filed a petition for a writ of certiorari to the U.S. Supreme Court, which was granted.[150]

Argentina became a two-time loser before the U.S. Supreme Court when the Court decided in favor of the holdout creditors on the discovery issue in *Republic of Argentina v. NML*.[151] (The same day, the Court denied certiorari on the question presented by the Second Circuit's affirmance in large part due to the district court's interpretation of the *pari passu* clauses in Argentina's debt instruments as precluding full payments on its restructured debt if it did not make full payment to the holdout creditors holding debt of equal rank.[152]) The Court interpreted the FSIA as not foreclosing a U.S. court from ordering discovery of any Argentine assets within and outside of the United States in aid of execution of judgments against it. Writing for a 7-1 majority,[153] Justice Scalia, who also penned *Weltover*, started off by underscoring that the FSIA was a "*comprehensive*"

148. EM Ltd. v. Republic of Argentina, 695 F.3d 201, 203 (2d Cir. 2012) (alteration in original) (citation omitted).

149. *Id*. at 204 (citation omitted).

150. This was likely because there was a circuit split on the narrow issue of whether the FSIA precluded discovery in aid of attachment against a sovereign with respect to assets that may or may not be immune from attachment under the express terms of that statute. Under the FSIA, certain noncommercial assets are immune from attachment and such immunity is nonwaivable.

151. *NML Capital*, 573 U.S. at 145–46.

152. Exch. Bondholder Group v. NML Capital, 134 S. Ct. 2819 (2014). The denial of certiorari was not a surprise, since the question was formally one of New York contract law, not U.S. federal law, and the U.S. Supreme Court is not the final arbiter of the law of the several states.

153. Justice Sonia Sotomayor was recused, presumably because she had heard one or more of the cases as an appellate judge.

enactment.[154] "Thus, any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall."[155]

On this view, the case was an easy call because the FSIA does not say anything about post-judgment immunity from *discovery* regarding assets—even assets of a foreign state outside the United States—to satisfy a judgment; it only talks about immunity from liability and attachment or execution on certain categories of assets. Judge Griesa could therefore order Argentina and its banks to turn over information about sovereign assets anywhere in the world to execute judgments against it, subject to the guidance of the Federal Rule of Civil Procedure regulating attachments.[156] What about assets, like military property, for which a foreign state might assert absolute, nonwaivable immunity from execution of judgments under the FSIA? The Court reasoned that a U.S. court should still have the power to order discovery even on something Argentina asserted was immune from attachment in order to ensure that Argentina's "self-serving legal assertion will not automatically prevail."[157] Thus, according to the Court, a U.S. federal district judge—not Argentina, the U.S. President, or a U.S. executive branch official whether of the State Department, the military or the intelligence agencies—has the final say on whether something was Argentina's "military property" or not, even if the property is located outside of the United States. From the U.S. perspective, the potential reciprocity consequences of this view are dire, given that the United States has far more military property in other countries than any other country in the world.

To summarize, the hedge funds in *NML v. Argentina* effectively leveraged the U.S. federal court system to force Argentina to pay them considerable premiums on their investment in its debt. And Argentina, after a change of government, ultimately paid. If there were ever a dispute that should have been handled by negotiation and diplomacy among the sovereign debtor and lenders and original debtholders, this was it. The entire episode caused a great deal of antagonism between Argentina and the United

154. *NML Capital*, 573 U.S. at 141. The original source of the characterization was the Court's decision in Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) ("[T]he Act contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.").

155. *NML Capital*, 573 U.S. at 141–42.

156. FED. R. CIV. P. 69. Rule 69(a)(2) provides that: "[i]n aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located."

157. *NML Capital*, 573 U.S. at 145.

States and consumed untold amounts of scarce U.S. taxpayer-funded federal court resources not just in New York but in many other U.S. courts where NML filed suits to find and attach assets held by wealthy Argentine nationals on the suspicion that they were associated with the Argentine government. To be sure, the forum-selection and sovereign-waiver provisions in the underlying debt instruments provided ironclad legal rationales for U.S. jurisdiction, and the subpoenas were addressed to its banks, not Argentina. And it is also settled law that a U.S. district court has the power to subpoena a party over which it has personal jurisdiction to provide records located abroad under its control.[158]

But Justice Scalia's opinion for the majority in *NML Capital* affirming the district court's power to order discovery regarding a foreign state's foreign assets goes too far. First, his assertion that "any sort of immunity defense made by a foreign sovereign in an American court must stand [or fall] on the [FSIA's] text"[159] is problematic. It presumes, without basis, that the FSIA is a super-comprehensive enactment with no room at all for judicial discretion once the threshold determination that the party invoking the statute is a foreign state is met.[160] There is nothing in the text of the FSIA or its legislative history that supports such a broadly preemptive reading of the statute. According to one of the principal drafters of the FSIA:

> A deliberate decision was made to allow the law to develop on a case-by-case basis within a framework of general principles laid down by statute. Thus, the [FSIA] is more like a constitution than a tax code. The basic rules are there, but the application is left to the development of a federal common law of sovereign immunity.[161]

The view of the FSIA that it meant to answer every issue of foreign sovereign immunity disserves the important interests in harmony and keeping U.S. law

158. *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968); *see generally* Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157 (2016) (surveying international comity in the context of discovery).

159. *NML Capital*, 573 U.S. at 141–42.

160. The only case in the past decade in which the Supreme Court did not consider the FSIA to have the final say on questions related to foreign official immunity is *Samantar v. Yousuf*, 560 U.S. 305 (2010). The issue in that case, as noted above, was whether a foreign official was an "instrumentality" of a state such that the FSIA would provide him immunity (assuming one of the statutory exceptions did not apply). *Id.* at 313–15. Construing the statute not to apply, the Court indicated that questions about the immunity of foreign states officials and ex-officials were to be decided by federal courts according to federal common law. *Id.* at 325–26. We believe that *Samantar*, not *NML Capital*, is the better way to deal with the larger class of cases in which foreign governmental interests are interposed in suits in U.S. courts in ways not directly addressed by the FSIA.

161. Mark B. Feldman, *The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View*, 35 INT'L & COMP. L.Q. 302, 311 (1986) (footnote omitted).

in line with international standards that is central to international comity analysis.

Second, Justice Scalia's ominous dictum—Argentina's "self-serving legal assertion will not automatically prevail," even with respect to what counts as nonwaivable military property—is, as we have pointed out, deeply troubling from the perspective of reciprocity. As the U.S. Government asserted in its brief to the Court, a ruling for NML promised to "[u]ndermin[e] international comity," provoke "reciprocal adverse treatment of the United States in foreign courts," and "threaten harm to the United States' foreign relations more generally."[162] Nor, as Justice Ginsburg pointed out in her dissent, did the Court give any consideration to the general practice of other countries and specifically whether they would allow attachment of Argentine property to satisfy the U.S. judgment.

> A court in the United States has no warrant to indulge the assumption that, outside our country, the sky may be the limit for attaching a foreign sovereign's property in order to execute a U.S. judgment against the foreign sovereign. Without proof of any kind that other nations broadly expose a foreign sovereign's property to arrest, attachment, or execution, a more modest assumption is in order.[163]

### D. EXHAUSTION AND THE FSIA

The view that the FSIA is a comprehensive enactment precluding any judicial discretion to stay or dismiss actions in which foreign governmental interests are alleged unless explicitly authorized by the statute has been the subject of conflict among the circuits. The most prominent issue on which such confusion persists concerns whether federal courts may require plaintiffs bringing Holocaust-era claims of expropriation of property to attempt to exhaust remedies in the countries where the claims arose before they resort to U.S. courts. The D.C. Circuit, like the Supreme Court in *Weltover* and *NML Capital*, has held that the FSIA precludes a requirement to exhaust because of international comity. The Seventh Circuit, by contrast, has held that the FSIA does not address the question and therefore does not foreclose an exhaustion requirement.[164] Given the prominence of the issue and the crystalline nature of the circuit split, the Supreme Court is virtually certain to grant certiorari on this specific issue soon.

At a higher level, the fundamental question is whether the federal courts

162. *NML Capital*, 573 U.S. at 146 (alterations in original) (citation omitted).

163. *Id*. at 147–48 (Ginsburg, J., dissenting).

164. *Compare* Simon v. Republic of Hungary, 911 F.3d 1172, 1181 (D.C. Cir. 2018), *with* Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661, 679–85 (7th Cir. 2012).

should retain discretion to be sensitive to foreign governmental interests in deciding whether to exercise their power to decide a case, regardless of which body of substantive law applies. The question is an important one that cuts across ideological lines. *NML Capital* involved hedge-fund plaintiffs seeking access to the federal courts to bludgeon a foreign sovereign to pay full value on renegotiated sovereign bonds; the FSIA exhaustion cases involve human-rights victims seeking reparations for Holocaust claims. It is our view that although the federal common law of international comity does of necessity bend to statutes clearly on point, the Supreme Court's decisions in *Weltover* and *NML Capital* represent exaggerations of what deference to statutes or treaties entails, in addition to misreading the specific scope of the FSIA. The complicated nature of modern international relations requires a more finely tuned judicial sensibility regarding international comity considerations, even when there are statutes in the field.

## CONCLUSION

The *Bauman* and *NML Capital* cases illustrate not only the ways that a failure to consider the foreign affairs implications of exercising jurisdiction in federal courts may distort generally applicable doctrines but also the complexity of cases in the U.S. federal courts implicating foreign governmental interests today. Statutes like the FSIA, canons of statutory interpretation like the presumption against extraterritoriality, and judicial doctrines like *forum non conveniens* go a long way in guiding judges in how to deal with such cases. But they cannot cover all the myriad forms in which foreign governmental interests are implicated. At the same time, the multi-factor tests the lower courts have framed to dismiss or stay cases because of international comity are too capacious to generate meaningful constraints on judicial discretion. Greater clarity is needed; in particular, adjudicative comity must be cleanly and conceptually distinguished from prescriptive comity. Historical practice provides a serviceable federal common law framework with four elements to guide judicial discretion: (1) measured executive deference; (2) scrutiny of reciprocal treatment; (3) guidance and occasionally instruction from relevant statutes and treaties; and (4) findings regarding foreign parallel proceedings. When the United States was a new and then growing republic, federal judges understood that making case-by-case international comity calls was an important part of their judicial duty. The world today is very different, but the judicial duty endures and remains as important as ever.