
Comity as Conflict: Resituating International Comity as Conflict of Laws

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*This Article seeks to resituate international comity as a conflict of laws doctrine. Among other things, international comity encourages U.S. courts to apply foreign law in appropriate cases or to limit domestic assertions of jurisdiction in order to respect the sovereignty of foreign states and their courts. Comity is important to U.S. courts in transnational cases, and its importance will continue to grow as more international issues creep into domestic litigation. Recognizing this, the Article evaluates the recent invocation of the comity doctrine in the *In re South African Apartheid Litigation*, filed for alleged violations of the Alien Tort Statute and currently pending before the United States Court of Appeals for the Second Circuit. By evaluating that case and others, the Article shows that courts use the comity doctrine in many circumstances without considering its historical position as a conflict of laws doctrine. In so doing, courts gloss over the doctrine's foundation in conflicts jurisprudence and, thus, give short shrift to the doctrine's main historical purpose, which was to mediate the conflict between sovereigns and their laws. This nonconflicts approach leads courts to give only cursory consideration to governmental interests and obscures the ultimate question in transnational cases where a conflict*

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of sovereign power is presented: is there a conflict between sovereigns that counsels in favor of judicial deference through comity? Resituating comity within the conflict of laws tradition provides a more principled basis for applying the doctrine by bringing sovereign interests to light. Applying comity in this way also exposes the complex political and international concerns at stake in many transnational cases.

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INTRODUCTION

The doctrine of international comity is one of the most important, and yet least understood, international law canons¹ employed by U.S. courts² in transnational cases. While a precise definition may be elusive,³ comity has been explained as “the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another.”⁴ Comity thus serves as not only a theoretical but also a legal justification for the resolution of conflict of laws problems — a court in one country may apply the laws of another country by virtue of comity.⁵ The Supreme Court described

¹ By “international law canons,” I mean background principles of construction used by courts in resolving transnational cases. An incomplete list of such canons would be the *Charming Betsy* canon, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Congress does not intend to violate international law), and the territoriality presumption, *EEOC v. Aramco*, 499 U.S. 244, 248 (1991) (federal legislation will not be interpreted to apply beyond U.S. territory absent express language of Congress). Perhaps the most important of these canons is international comity insofar as it animates the other canons through its concern with encouraging amicable working relationships between nations. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 614-19 (4th ed. 2007); see also Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1179-82 (2007) (explaining these and other canons as “comity” and “anti-comity” doctrines in context of foreign relations law).

² International comity is, of course, applied by courts throughout the world in various fashions. See Lawrence Collins, *Comity in Modern Private International Law*, in REFORM AND DEVELOPMENT OF PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF SIR PETER NORTH 89, 89 (James Fawcett ed., 2002); see also Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 40-44 (1991) [hereinafter Paul, *Comity in Int'l Law*] (reviewing comity's use in foreign legal systems). This Article is limited to the U.S. experience with the doctrine.

³ See, e.g., *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982)) (“The doctrine has never been well-defined, leading one scholar to pronounce it ‘an amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith.’”); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) (describing comity as “a complex and elusive concept”); see also Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 893 (1999) (describing comity as “an expression of unexplained authority, imprecise meaning and uncertain application,” use of which “confuses inquiries that ought to be clear and distinct, and submerges issues that should be carefully and forthrightly considered”).

⁴ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38 (1883).

⁵ E.g., Hessel N. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966). Such invocations of the comity doctrine are largely directed at questions of private law —

comity in its most-cited case on the subject as “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”⁶ Here comity serves as a judicial canon encouraging a court’s deference to a foreign sovereign — a court is empowered to balance various public, private, and international factors when determining if comity is due in cases involving legislative, executive, and judicial proclamations.⁷ Between legal justification and judicial recognition lies a fertile ground for comity as a jurisprudential concept that encourages courts to “apply foreign law or limit domestic jurisdiction out of respect for foreign sovereignty.”⁸ A court’s use of the comity doctrine, however, raises practical and theoretical difficulties.

The fact that courts apply foreign law and defer to foreign sovereigns and their courts is at one level uncontroversial. Many transnational cases place courts in the awkward situation of adjudicating the interstices of law — narrow fields created when legal acts or omissions occur across borders and implicate various sovereign interests. When courts are placed in this gap, comity bridges the chasm by encouraging them to take account of the sovereign interests that the exercise of judicial power would implicate.⁹ In this way, state sovereignty is respected, and a conflict between sovereigns is either avoided or ameliorated, thereby respecting and encouraging international relations.¹⁰ In that comity helps maintain amicable working relationships between nations, it facilitates the transnational exchange of peoples, services, and goods, and supports private and international interests.

that is, questions of whether foreign contract, tort, or property law should be applied in a domestic forum.

⁶ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895); Paul, *Comity in Int’l Law*, *supra* note 2, at 8-9 (noting that *Hilton* “is the most commonly cited statement of comity in U.S. law”).

⁷ As will be discussed *infra* in Parts II and III, many of these uses of the comity doctrine, such as in the Alien Tort Statute context, have important ramifications for public law.

⁸ Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 19 (2008) [hereinafter Paul, *Transformation*].

⁹ See Paul, *Comity in Int’l Law*, *supra* note 2, at 5-7 (explaining idea of comity as “bridge”).

¹⁰ See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 281 (1982).

Comity is at another level highly controversial.¹¹ The primary concern is that the vague definition of comity itself “suggest[s] a [judicial] discretion unregulated by general principles”¹² permitting courts to mask complex political decisions implicating sovereign interests and the international community in the nomenclature of law. This facade threatens the separation of powers in the United States and places courts in areas generally believed to be outside of judicial competence, such as foreign affairs.¹³ As Samuel Livermore (one of the very first American opponents of comity) succinctly explained, the comity doctrine “has not always been harmless in its effects, for I have not unfrequently seen it inspire judges with so great confidence in their own authority [to] arrogat[e] to themselves sovereign power.”¹⁴ This concern is presently important and justifies further scholarly study, especially considering the federal courts’ increased use of the comity doctrine in the last few years.¹⁵ Indeed, a brief review of recent case law confirms that comity is at the vanguard of international litigation in “today’s highly interdependent commercial world.”¹⁶ In light of this increased usage, it is appropriate to ask what role comity presently serves and should serve in U.S. law and judicial administration.

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. By way of preview, let me suggest that comity’s elusiveness is partly due to the fact that modern comity analysis is untethered from the doctrine’s historical grounding in conflict of laws, an area itself concerned with the same questions as comity — namely, sovereignty and deference. The first task of this Article, therefore, is to reclaim comity as a conflict of laws doctrine. While commentators have lamented the fact that comity is an amorphous concept that lends itself to balancing approaches

¹¹ See, e.g., Ramsey, *supra* note 3, at 893 (exploring limits of comity doctrine); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991) (same).

¹² *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201-02 (N.Y. 1918) (Cardozo, J.).

¹³ See, e.g., *Chicago & So. Air Lines v. Waterman*, 333 U.S. 103, 111 (1948) (foreign affairs questions are “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power”).

¹⁴ SAMUEL LIVERMORE, *DISSERTATIONS ON THE QUESTIONS WHICH ARISE FROM THE CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS* 27 (1828).

¹⁵ See *infra* Part II.

¹⁶ See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004). For a more detailed discussion of recent cases, see *infra* Part III.

generally,¹⁷ comity, if reconsidered as conflict, can point the way to an approach for undertaking an analysis of conflicts between sovereigns and their laws and, in such a form, can provide concrete direction for courts to exercise the doctrine in principled ways. It is important to state up front that this Article does not address many cases where comity might be implicated.¹⁸ Rather, the Article takes one strand of the comity doctrine, the so-called “comity of courts,”¹⁹ and explores its use in a currently pending case. Besides brevity, the reason for this limitation is that adjudicatory comity is perhaps the most robust use of the comity doctrine in transnational litigation.²⁰ By analyzing the federal courts’ current use of comity in the adjudicatory context, the Article gleans standards for comity’s application in future cases.

This Article proceeds in three parts. Part I explains the original U.S. understanding of international comity as developed by Justice Joseph Story in 1834. It next considers the advancement of comity in federal courts as a conflict of laws doctrine leading up to the Supreme Court’s 1895 decision in *Hilton v. Guyot*, which codified the general doctrine of international comity as a matter of federal law in cases concerning the recognition and enforcement of foreign judgments.²¹ Part I then details comity’s disaggregation from conflict of laws jurisprudence. Part II explicates the modern understanding of the comity doctrine in U.S. case law and examines the flaws with that approach. Part III then argues for a new approach based on Brainerd Currie’s governmental interest analysis. Part III shows that reconfiguring comity as a conflict of laws doctrine places sovereign concerns squarely at the center of the comity analysis. Part III concludes with a series of proposals encouraging domestic courts to exercise comity in narrow circumstances and only after giving greater concern to the precise domestic and international comity interests at stake in any particular

¹⁷ See Ramsey, *supra* note 3, at 893.

¹⁸ As will be explained in further detail below, the focus of this Article is limited to comity’s invocation as a doctrine of abstention in transnational cases. See *infra* Part II. Cases in the choice-of-law context and in other contexts also raise comity concerns. In the interest of brevity, this Article examines one species of comity in hopes of providing a framework for further studies of the comity doctrine.

¹⁹ The “comity of courts” enables U.S. courts to defer judgment in cases where the court determines that a case is best adjudicated elsewhere in whole or in part. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (distinguishing “prescriptive comity” from “comity of courts” and defining latter to refer to principles “whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere”).

²⁰ See, e.g., BORN & RUTLEDGE, *supra* note 1, at 541-43, 551-52, 765 (providing explanation of comity in adjudicatory context); see also *infra* Part II.

²¹ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

proceeding, as those interests are explained by the sovereigns implicated by a court's adjudication. After considering the question of deference to sovereign viewpoints, I conclude by arguing that a comity doctrine grounded in conflict of laws is more attuned to the direct sovereign interests at stake and, thus, more workable as a mediating principle for courts to use in transnational cases because it has important democracy-enhancing outcomes.

I. THE ORIGINAL UNDERSTANDING OF INTERNATIONAL COMITY IN THE UNITED STATES

This Part seeks to resituate international comity as a conflict of laws doctrine. After first describing the historical development and original understanding of comity, this Part explores comity's jurisprudential drift away from conflict of laws thought. That drift provides a precursor for understanding the nebulous nature of the comity doctrine federal courts presently apply and presents important insights for further study of the doctrine in Part II.

A. *From Ulrich Huber to Justice Joseph Story*

While international comity may have its earliest reference in Roman law,²² the doctrine as we know it was born in the seventeenth century at the same time nation-states emerged in Europe.²³ The birth of nation-states begat the more completely conceptualized view that a sovereign's laws were limited to its territorial boundaries.²⁴ Under this account of sovereignty and law, a sovereign enjoyed absolute legal control over all things, persons, and transactions within its territory.²⁵ The logical extension of the claim that a sovereign's power was absolute in its own territory was that its influence through law could not, based on principles of sovereign equality, be extended beyond the sovereign's borders into other sovereignties.²⁶ This was a necessary

²² See, e.g., Yntema, *supra* note 5, at 9 (tracing early history of comity); Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws — One Hundred Years After*, 48 HARV. L. REV. 15 (1934) [hereinafter Lorenzen, *Story's Commentaries*] (same). It is important to note that Roman law did not necessarily use comity or *comitas* in the same way its later proponents did. See Paul, *Comity in Int'l Law*, *supra* note 2, at 12.

²³ For a useful discussion of the Westphalian legal order, see Leo Gross, *The Peace of Westphalia: 1648-1948*, 42 AM. J. INT'L L. 20, 20-41 (1948).

²⁴ See Alex Mills, *The Private History of International Law*, 55 INT'L & COMP. L.Q. 1, 18-26 (2006) [hereinafter Mills, *Private History*].

²⁵ Yntema, *supra* note 5, at 20.

²⁶ See, e.g., EMER DE Vattel, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* 149 (Joseph

corollary to absolute territorial sovereignty because, as Hugo Grotius and others explained, sovereignty was “not subject to the controul of any other power, so as to be annulled at the pleasure of any other human will.”²⁷

The rise of nation-states and emphasis on absolute territorial sovereignty completed a fracturing of law into subunits based on territory and undermined claims of universal law or the authority of Canon or Roman law to resolve transnational cases.²⁸ This fragmentation brought about the conflict of laws between sovereigns.²⁹ Without an overarching law or sovereign to provide a rule of decision in cases crossing national boundaries, an “accounting of why courts should not always just apply their own law” in transnational cases became necessary,³⁰ and conflict of laws jurisprudence arose to resolve the disagreement between laws.³¹

The conflict between sovereignty and multistate transactions exemplifies “the basic dilemma of conflicts law in modern times.”³² That dilemma can be stated in the most general and simple terms as follows: in cases where parties before a forum court have relevant connections with various states, which law should a forum court apply — that of the forum state where the issue is raised or that of a foreign state?³³ That dilemma and the resolution the comity doctrine provided

Chitty trans., 1883) (“[N]ature has established a perfect equality of rights among independent Nations. Consequently, none can naturally lay claim to any superior prerogative.”); see also JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.3 (1916) [hereinafter BEALE, 1916 TREATISE].

²⁷ HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 62 (A. C. Campbell trans., Hyperion Reprint ed. 1993); see also JEAN BODIN, ON SOVEREIGNTY 35 (Julian H. Franklin ed., 1992) (explaining state’s right to monopolize power over its territory and citizenry).

²⁸ Mills, *Private History*, *supra* note 24, at 15; Paul, *Transformation*, *supra* note 8, at 22; see also PAUL J. BERMAN, LAW AND REVOLUTION 85-120 (1983) (detailing this movement even earlier); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 455 (2002) (detailing historical rise of Westphalian nation-state).

²⁹ ERNEST G. LORENZEN, *Huber’s De Conflictu Legum*, in SELECTED ARTICLES ON THE CONFLICTS OF LAWS 162, 163-65 (1947) [hereinafter Lorenzen, *De Conflictu Legum*] (“[A]fter the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of different nations disagree in many respects.”); see also STORY, *supra* note 4, § 3.

³⁰ DAVID P. CURRIE ET AL., CONFLICT OF LAWS 3 (7th ed. 2006).

³¹ See Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 154 (1983) [hereinafter Juenger, *General Course*].

³² Yntema, *supra* note 5, at 9.

³³ See ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS 1 (1992) (“Conflict of laws is that part of a state’s law which deals with situations in which relevant facts

to it were most forcefully developed in Ulrich Huber's three axioms of conflict of laws, which he expounded in the first chapter of his 1689 dissertation entitled "*De Conflictu Legum Diversarum in Diversis Imperiis*."³⁴ That dissertation greatly influenced the development of the entire field of conflict of laws in England and the United States.³⁵ Thus, the history of U.S. conflicts law and comity theory begins there.³⁶

1. Ulrich Huber

Huber wrote at a time when the Netherlands, then organized as independent provinces, developed as a major trading nation.³⁷ This commercial advance created conflicts problems as trade occurred between provinces because the independent provinces had differing laws. Huber sought to resolve these conflicts through three axioms of international law.³⁸

As was the case for Grotius, Huber's first recourse was to the principle of territorial sovereignty.³⁹ In his first axiom, Huber explained that "[t]he laws of each state have force within the limits of that government, and bind all subject to it, but not beyond."⁴⁰ Continuing the emphasis on territorial sovereignty, Huber's second

have a connection with another legal system — situations, consequently, which raise problems as to which law is to be applied, that of the territory in which the issue is raised, or that of the other jurisdiction."); see also LORENZEN, *De Conflictu Legum*, *supra* note 29, at 163-65 (translating Huber as follows: "It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place."). In the context of jurisdiction, this can be stated another way: in cases where parties before a forum court have relevant connections with various states, should the forum court exercise jurisdiction or defer in favor of a foreign jurisdiction?

³⁴ LORENZEN, *De Conflictu Legum*, *supra* note 29, at 162 (meaning "Of the Conflict of Diverse Laws in Diverse Governments").

³⁵ *Id.* at 136.

³⁶ See Harold G. Maier, *Resolving Extraterritorial Conflicts, or "There and Back Again,"* 25 VA. J. INT'L L. 1, 14 (1984) ("The comity principle became the basis for common law conflict-of-laws doctrine and was received in to the United States in that form, achieving its greatest influence through the writings of Joseph Story."). Huber was not the only person writing about comity at the time. See Yntema, *supra* note 5, at 9. But his writings primarily influenced conflicts theory in the United States and, thus, I discuss his thought at length. *E.g.*, STORY, *supra* note 4, § 20; Maier, *supra*, at 14.

³⁷ See FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 19 (2005) [hereinafter JUENGER, CHOICE OF LAW].

³⁸ See LORENZEN, *De Conflictu Legum*, *supra* note 29, at 136-39.

³⁹ See LEA BRILMAYER, CONFLICT OF LAWS 14 (2d ed. 1995) [hereinafter BRILMAYER, CONFLICT] ("Ulrich Huber . . . built a [conflict of laws theory] based on earlier writers such as Grotius who discussed state sovereignty.").

⁴⁰ LORENZEN, *De Conflictu Legum*, *supra* note 29, at 164.

axiom detailed that “[t]hose people are held to be subject to a sovereign authority who are found within its boundaries, whether they are there permanently or temporarily.”⁴¹

As the first two axioms show, Huber based his conflict of laws system on territorial sovereignty (axiom one) and, in so doing, made not only a sovereign’s subjects but also those within the sovereign’s territory, even temporarily, subject to the absolute power of the sovereign (axiom two). In describing sovereign authority and law in this way, Huber disavowed claims by the statistists that laws should be classified as personal, real, and mixed, and that people carried rights between borders.⁴² In situating the legal basis of the conflict of laws on the territoriality of law instead of on the statistists’ system of classifications and disavowing the personality of some laws, “Huber went beyond any of his predecessors”⁴³ and established conflict of laws as a discipline concerned with sovereign interests. As Huber put it:

[I]t is not by reason of the immediate force and operation of a foreign law, but in consequence of the sanction of the supreme power of the other state, that effect is given to foreign laws exercised upon the property within its territory, out of respect for the mutual convenience of the nations, provided, *however, that no prejudice is occasioned to a sovereignty or to the rights of its citizens, which is the foundation of the whole subject.*⁴⁴

Huber “seems to be stating unmistakably that the basic objective of the law of conflict of laws is to advance the governmental interests of the forum.”⁴⁵ Furthermore, in denoting the field as the “conflict of laws” (*conflictus legum*), Huber emphasized by the very terminology itself that choice-of-law problems implicated a clash of sovereign commands.⁴⁶

⁴¹ *Id.*

⁴² JUENGER, CHOICE OF LAW, *supra* note 37, at 20. Generally speaking, the statistists divided laws into categories and applied various choice-of-law rules depending on the category. For instance, real or procedural statutes were strictly territorial, whereas personal or substantive statutes might be applied anywhere in that they traveled with the person. See Juenger, *General Course*, *supra* note 31, at 139-44.

⁴³ LORENZEN, *De Conflictu Legum*, *supra* note 29, at 137.

⁴⁴ *Id.* at 173-74 (emphasis added).

⁴⁵ Alfred Hill, *Governmental Interest and the Conflict of Laws — A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 482 (1960). I note that this is not the only way to view Huber’s comity theory. See, e.g., WATSON, *supra* note 33, at 7-17 (noting that Huber’s theory is more transnational rule of law than one concerned with sovereign interests). But as will be discussed next in the main text, this appears to be the gloss that Justice Story gives it. *Id.* at 18-26 (noting that comity is “imperfect” obligation that does not impose any duties to give effect to foreign law).

⁴⁶ JUENGER, CHOICE OF LAW, *supra* note 37, at 11.

Huber's system brought into sharp relief the chief intellectual problem of conflict of laws thought: explaining the application of foreign law in a domestic forum if law is only territorial. Huber's view of absolute sovereignty suggested that the only law that a forum court could apply was the law of the forum sovereign. Huber's focus on absolute territorial sovereignty created the following dilemma for his conflicts system: how can the court of one sovereign apply the law of another sovereign when law has no force beyond each sovereign's territory? Put more precisely in the context of the problem to be solved at the time: how can a forum court ever apply foreign law given that the extension of one sovereign's will into the territory of another sovereign through the application of its law in conflicts cases would threaten the idea that a state should be able to govern its territory without outside interference?⁴⁷

Huber solved this dilemma through his third axiom, which permitted the courts of one sovereign state to recognize and enforce the laws of another sovereign state out of comity, subject to the exception that the forum sovereign (the sovereign's courts) could not extend the law of the foreign state in such a way so as to prejudice the forum's sovereignty or citizens.⁴⁸ As Huber explained, "Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the power or rights of such government or of its subjects."⁴⁹ Huber's comity doctrine thus reconciled claims of absolute territorial sovereignty with the concomitant rise of multistate transactions by enabling courts to apply foreign law.⁵⁰

For Huber, then, law was territorially limited, but foreign law was to be applied in a domestic forum out of comity. The reasons he gave are as follows:

⁴⁷ See Berman, *supra* note 28, at 455.

⁴⁸ I note that there is significant scholarly debate as to the extent and obligatory nature of Huber's comity theory. Compare WATSON, *supra* note 33, at 10-15 (illustrating obligatory nature of comity for Huber), with JUENGER, CHOICE OF LAW, *supra* note 37, at 21 (noting that Huber "did not believe that the obligation to apply foreign law is absolute"), and LORENZEN, *De Conflictu Legum*, *supra* note 29, at 138-39 (noting that for Huber comity was not "the result of binding obligation or duty" and that "Huber conceived of comity as a *political* concession which might be granted or withheld arbitrarily by the sovereign"). For my purposes here, there is no need to take a side in this debate. All that need be said at present is that Justice Story's interpretation of Huber's doctrine was quite permissive and vested courts with significant discretion in its application. This understanding will be discussed in further detail in the pages that follow.

⁴⁹ LORENZEN, *De Conflictu Legum*, *supra* note 29, at 164.

⁵⁰ See Paul, *Comity in Int'l Law*, *supra* note 2, at 13-14; Yntema, *supra* note 5, at 9.

Although the laws of one nation can have no force directly with another, yet nothing could be more inconvenient to commerce and to international usage than that transactions valid by the law of one place should be rendered of no effect elsewhere on the account of a difference in the law.⁵¹

By accepting the application of the laws of another country by consent and not compulsion, a sovereign would support international commerce while preserving sovereignty. As foreign law was *voluntarily binding* out of comity through tacit consent, there was no conflict for Huber between a domestic forum's application of foreign law and the doctrine of absolute territorial sovereignty.⁵² In this way, the comity doctrine resolved the international problems Huber's idea presented of absolute territorial sovereignty by the general requirement of tacit consent to the application of foreign law. Through this "admirably skillful sleight-of-hand," Huber gave the field of conflict of laws a legal basis in comity and "private international law transnational force."⁵³

In sum, Huber's three axioms recognize the sovereignty of states over their subjects and territory while also recognizing that the movement of goods and people will, at times, bring sovereignties and their laws into conflict with each other, creating the need for a mediating principle of law to prevent international discord and encourage commerce.⁵⁴ Comity provided that mediating principle for Huber by making the application of foreign law by a forum court an exercise in a sovereign's tacit consent, thereby preserving the forum's sovereignty and yet also enabling international relations. Comity also encouraged courts to reconcile competing sovereign claims of authority by providing a legal rule to justify such accommodation in cases before the courts. These ideas were quite influential in a developing United States.⁵⁵

⁵¹ Lorenzen, *De Conflictu Legum*, *supra* note 29, at 164-65.

⁵² WATSON, *supra* note 33, at 8.

⁵³ *Id.* at 7.

⁵⁴ See Paul, *Comity in Int'l Law*, *supra* note 2, at 24 ("For Huber, comity was designed to justify territorial sovereignty at the exclusion of alien influences, as well as to facilitate relations among the barely unified trading provinces that formed the Dutch Republic.").

⁵⁵ See JUENGER, *CHOICE OF LAW*, *supra* note 37, at 28-30; see also DAVID F. CAVERS, *THE CHOICE OF LAW PROCESS* 4 (1965) (noting that "like many American and English jurists of the day, he [Story] was influenced substantially in his thinking by . . . Huber").

2. Justice Joseph Story

While not the first American writer on the subject,⁵⁶ Supreme Court Justice Joseph Story is credited with introducing the comity doctrine to American jurisprudence in his seminal *Commentaries on the Conflict of Laws*.⁵⁷ Like Huber, Story viewed comity as a means of reconciling notions of absolute territorial sovereignty and, thus, of laws within a nation's territory, on the one hand, and the conflict of laws, on the other, brought about through travel and commerce between the several states.⁵⁸ This was an acute problem in the United States, as the country had been created through the unification of different states with each having different laws.⁵⁹ As Story described:

To no part of the world is it [the jurisprudence of the conflict of laws] of more interest and importance than to the United States, since the union of a national government with already that of twenty-six distinct states, and in some respects independent states, necessarily creates very complicated private relations and rights between the citizens of those states.⁶⁰

Just as Huber looked to international law for his conflicts theory, Story similarly searched for “extra-municipal principles”⁶¹ to explain

⁵⁶ E.g., LIVERMORE, *supra* note 14, at 26; 2 KENT, COMMENTARIES ON AMERICAN LAW 78, 89, 101, 329 (1827); see also Kurt H. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 231-33 (1961).

⁵⁷ See Maier, *supra* note 10, at 283-84.

⁵⁸ Huber's axioms were published in 1797 in the United States Supreme Court Reports in the case of *Emory v. Grenough*, 3 U.S. (3 Dall.) 370 n.* (1797), being known in the United States through Lord Mansfield's opinion in *Robinson v. Bland*, (1760) 96 Eng. Rep. 717 (K.B.). See KURT NADELMANN, CONFLICT OF LAWS: INTERNATIONAL AND INTERSTATE 3-5 (1972). Likewise, Chancellor Kent discussed comity in his COMMENTARIES ON AMERICAN LAW, principally in volume 2. See 2 KENT, *supra* note 56. The very first American writer on the subject appears to be Samuel Livermore in his *Dissertations*. See LIVERMORE, *supra* note 14, at 26. Justice Story's treatment is believed to be the most lasting and influential and, thus, I treat it at length. See, e.g., BEALE, 1916 TREATISE, *supra* note 26, § 39 (“The focal point in the history of the Conflict of Laws is the work of Joseph Story.”).

⁵⁹ See Ronald H. Graveson, *Principles of the Conflict of Laws*, 1960-I RECUEIL DES COURS 25, 31 (“So far as the conflict of laws is concerned, the problem in America in the early years was not of international, but of intercolonial dimensions.”).

⁶⁰ STORY, *supra* note 4, §§ 9-10.

⁶¹ On the subject of whether Story's interpretation of Huber was correct, see WATSON, *supra* note 33. In a nutshell, Watson argues that Story converts Huber's legal requirement of comity into a discretionary doctrine. Watson then proceeds to explore whether the issue of slavery can account for this misstatement or reinterpretation of Huber. *Id.* For the purposes of this Article, it is not necessary to resolve this quandary.

and justify his conflict of laws positions. In search of these principles, Story adopted Huber's three axioms. Story likewise erected his conflict of laws system on sovereignty and comity.⁶² Story's reason for adopting Huber's conflicts doctrine can be explained by the fact that Huber's theory was based so clearly on state sovereignty,⁶³ which was in accord with prevailing Anglo-American notions of law at the time.⁶⁴

It has been argued that Story was the first American scholar "to develop and consistently hold the doctrine of the complete territorial jurisdiction of law."⁶⁵ As with Huber, this territorial conception of law had important outcomes for Story's conflicts theory.⁶⁶ Like Huber, Story detailed that:

[A]n essential attribute of every sovereignty [is] that it has no admitted superior[] and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield, and it cannot be commanded by another to yield it as a matter of right.⁶⁷

Story also echoed Huber by stating that "[w]hatever extra-territorial force [laws] are to have, is the result not of any original power to extend them abroad," which would violate Huber's first and second

As discussed in the main text, it is clear that Justice Story's comity doctrine was a permissive doctrine and not obligatory. *See, e.g.*, STORY, *supra* note 4, § 7 ("Whatever extra-territorial force they [the laws of another country] are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them . . .").

⁶² *See* Matthias Lehmann, *Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 399 (2008) ("Joseph Story . . . made 'sovereignty' of the state over a territory the premise of his conflicts theory.").

⁶³ Elliott E. Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361, 376 (1945) (noting that Story "referred to the conception of sovereignty as the basic and guiding factor of conflict of laws").

⁶⁴ ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 16 (1943). For an interesting discussion of Huber's influence in the United States, see Friedrich Juenger, *A Page of History*, 35 MERCER L. REV. 419, 444-45 (1984).

⁶⁵ BEALE, 1916 TREATISE, *supra* note 26, § 72.

⁶⁶ Indeed, U.S. courts consistently invoked the territoriality presumption throughout the nineteenth and into the early twentieth century. *See, e.g.*, N.Y. Cent. R.R. v. Chisholm, 268 U.S. 29, 31 (1925) (citations omitted) ("[L]egislation is presumptively territorial."); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909) ("in case of doubt" statute should be construed "as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power"); *The Apollon*, 22 U.S. (9 Wheat.) 362, 370-71 (1824) (noting territoriality presumption in context of seizing vessels).

⁶⁷ STORY, *supra* note 4, § 8.

axioms as well as the doctrine of absolute territorial sovereignty, “but of that respect, which from motives of public policy other nations are disposed to yield to them,”⁶⁸ which was Story’s version of axiom three. Such “respect” is offered through the comity doctrine as an “imperfect” as opposed to “absolute” obligation to apply foreign law.⁶⁹

For Story, the comity doctrine derived from the following “general maxims” of international jurisprudence, which he explicitly received from Huber.⁷⁰

The first and most general maxim or proposition is that, which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are residents within it, whether natural born subjects or aliens, and also all contracts made and acts done within it.⁷¹

Second, “another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born subjects or others.”⁷² And third:

From these two maxims or propositions there flows a third . . . that whatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.⁷³

Commenting on Huber, Story maintained that:

[The] first two maxims will in the present day scarcely be disputed by any one; and the last seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws, and to refuse its aid to

⁶⁸ *Id.* § 7.

⁶⁹ *Id.* § 33.

⁷⁰ *Id.* at ch. II. Justice Story not only paraphrased Huber’s three axioms, but also quoted them directly in Latin in a footnote. *Id.* § 30.

⁷¹ *Id.* § 18.

⁷² *Id.* § 20.

⁷³ *Id.* § 23.

carry into effect any foreign laws, which are repugnant to its own interests and polity.⁷⁴

For our purposes here, Story's next paragraphs specifically regarding comity are critical to appreciating his understanding of comity as a discretionary doctrine designed to mediate sovereign conflicts, which is the point for Story of conflicts theory.

It is difficult to perceive, upon what ground a claim can be rested, to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations, or to those of their subjects. It would at once annihilate the sovereignty and equality of every nation which should be called upon to recognize and enforce them; or compel it to desert its own proper interest and duty in favor of strangers, who were regardless of both. A claim so naked of any principle or just authority to support it, is wholly inadmissible. . . .⁷⁵

. . .

Every nation must be the final judge for itself, what is its true duty in the administration of justice. It is not to be taken for granted, that the rule of a foreign nation is right, and that its own is wrong. . . .⁷⁶

. . .

[W]hatever force and obligation the laws of one country have in another depend solely upon the laws and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent.⁷⁷

These statements hardly require commentary to develop the idea that comity was a discretionary or imperfect (not obligatory) mediating principle that resolves the conflict of laws through tacit sovereign

⁷⁴ *Id.* § 31.

⁷⁵ *Id.* § 32.

⁷⁶ *Id.* § 34.

⁷⁷ *Id.* § 23. The doctrine was incredibly important in Story's time for it helped mediate the competing laws of free and slave states with respect to fugitive slaves by allowing each state a way to accommodate (and, if necessary, avoid) the law of the others. See generally WATSON, *supra* note 33 (providing detailed historical overview of Story's use of comity doctrine).

consent.⁷⁸ What is perhaps less pellucid is the critical idea that comity and, thus, Story's conflicts theory generally, rests on a foundation of sovereign interests.⁷⁹ For Story, "the doctrine owes its origin and authority to the voluntary adoption and consent of nations. It is, therefore, in the strictest sense a matter of the comity of nations."⁸⁰ In grounding comity and conflict of laws doctrine in state sovereignty and sovereign interests, the role of the courts in applying the doctrine was to effectuate the sovereign's will through the ascertainment of those interests.⁸¹ Story could not be clearer on this point:

A state may prohibit the operation of all foreign laws, and the rights growing out of them, within its own territories. It may prohibit some foreign laws, and it may admit the operation of others. It may recognize and modify and qualify some foreign laws; it may enlarge or give universal effect to others. It may interdict the administration of some foreign laws; it may favor the introduction of others.⁸²

Under this conception, the courts do not exercise comity; rather, a sovereign exercises comity and it is the role of the courts to effectuate the sovereign's will because "[i]t is not the comity of the courts but the comity of the nation which is administered and ascertained."⁸³

The comity doctrine Justice Story proposed was that the court of one sovereign *might* apply the laws of another sovereign due to the "mutual interest and utility" of the sovereign interests at issue in the conflict.⁸⁴ This decision was for each sovereign to make on its own terms, although mutual interest "presupposes that the interest of all nations is consulted, and not that of only one."⁸⁵ But, in so doing, a court was not to disregard its own sovereign's interests.

⁷⁸ Comity was such a discretionary doctrine for Justice Story that it required the adoption of a constitutional clause to escape its permissiveness in the context of U.S. conflict of laws through the Full Faith and Credit Clause. U.S. CONST. art. IV, § 1.

⁷⁹ R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 296-97 (1985) ("[N]ational comity [] rested on the foundation of the nation-state and state sovereignty."); *id.* at 297 ("[T]he principle of comity [] was rooted in state sovereignty . . .").

⁸⁰ STORY, *supra* note 4, § 38.

⁸¹ See Paul, *Comity in Int'l Law*, *supra* note 2, at 23 ("As the instrument of the sovereign, the court's function was to interpret and apply the sovereign's will, not to decide when to recognize foreign interests.").

⁸² STORY, *supra* note 4, § 23.

⁸³ *Id.* § 38; see also BEALE, 1916 TREATISE, *supra* note 26, § 71.

⁸⁴ STORY, *supra* note 4, § 35; see also Paul, *Comity in Int'l Law*, *supra* note 2, at 20 (noting that for Story "comity did not obligate courts to apply foreign law").

⁸⁵ STORY, *supra* note 4, § 35.

That a nation ought not to make its own jurisprudence an instrument of injustice to other nations, or to their subjects, may be admitted. But in a vast variety of cases which may be put, the rejection of the laws of a foreign nation may work less injustice than the enforcement of them will remedy. And here again every nation must judge for itself what is its true duty in the administration of justice in its domestic tribunals.⁸⁶

Story's comity doctrine contained within it the notion "that the rules of the conflict of laws have their foundation, not in considerations of law and justice but of self-interest and courtesy to other states."⁸⁷ As such, comity for Story was ultimately concerned with forum sovereign interests.⁸⁸

Looming behind both Huber and Story's invocation of the comity doctrine is a key unanswered question: *how* is a court to go about determining when comity is due? Neither Huber nor Story provided an answer to this question. For Huber, the answer was perhaps intimated by the specific rules he developed in his dissertation. Because comity was a generally binding legal requirement, there was no need to determine when it applied (and to determine the sovereign interests behind it) because it should be applied generally, absent forum prejudice, in the interest of international usage and convenience.⁸⁹ As Alan Watson has explained, "[F]or Huber the courts had no discretion whether to recognize the foreign law or not. A clinching argument for this proposition, if one were needed, is that nowhere in his discussion does Huber indicate a situation where a court might have a choice."⁹⁰

⁸⁶ *Id.*

⁸⁷ Lorenzen, *Story's Commentaries*, *supra* note 22, at 35.

⁸⁸ See Ralf Michaels, *German Views on Global Issues*, 4 J. PRIVATE INT'L L. 121, 127 (2008); see also Paul, *Comity in Int'l Law*, *supra* note 2, at 24 (noting that Story was committed to "protect[ing] and affirm[ing] forum law").

⁸⁹ Lorenzen, *Story's Commentaries*, *supra* note 22, at 16-17.

⁹⁰ WATSON, *supra* note 33, at 15. To be clear, Huber did state that a sovereign need not extend comity to the prejudice of its own citizens. However, as Alan Watson has demonstrated, Huber provides only the following examples as exceptions:

(1) local law will be applied if there has been a deliberate attempt to evade local jurisdiction by one subject to it, (2) local law will be applied where there is more than one act or transaction, one of which occurred locally, and where superiority of transaction depends on which law is applied. In addition, an act valid where it was made (or a status valid by the domicile), but void by the law of nations, is void elsewhere.

Id. at 14.

Story's less obligatory statement of comity, however, was subject only to the cautionary and amorphous phrase that comity should be granted in cases of mutual interest and utility.⁹¹ Story presumed that generally a forum sovereign would tacitly adopt comity, absent a rule of law to the contrary and unless it would be "repugnant to its policy, or prejudicial to its interests."⁹² But what would those cases look like?⁹³ While Story detailed rules in his *Commentaries* for various conflicts situations, such as judicial jurisdiction, choice of law, and recognition and enforcement of foreign judgments, it is not totally clear what role comity played in formulating these rules.⁹⁴ Furthermore, Story did not provide criteria by which a court might be able to determine whether a foreign law was repugnant or prejudicial to a forum sovereign's interests. Story also raised questions as to comity's scope by noting that it is not the "comity of the courts" but the "comity of nations" that is to be ascertained and administered.⁹⁵ Story presumably meant that "the courts do not exercise comity," but rather that courts should determine whether the forum sovereign has "enabl[ed]" them to exercise comity on the sovereign's behalf.⁹⁶ But such statements do not tell courts what they should be doing in specific cases.⁹⁷

Story's comity doctrine left the following questions unresolved: should a court seek to balance sovereign interests in *any* case that *might* present a conflict of laws?⁹⁸ Or should a court only balance sovereign interests when there is a *direct conflict* between the laws of different sovereigns? Indeed, should a court balance interests at all? Furthermore, *how* was a court to go about determining a sovereign's interests in any case implicating comity? Should a court be concerned only with the forum sovereign's interests or with *both* the forum and

⁹¹ See STORY, *supra* note 4, § 8.

⁹² *Id.* § 38.

⁹³ Cf. Cheatham, *supra* note 63, at 375 ("Since in Story's meaning the term [comity] indicates only freedom from compulsion, it does not show the affirmative reasons for the use of foreign law and these reasons must be found elsewhere.").

⁹⁴ See *id.* at 373 (noting that comity "does not . . . purport to be a guide in a new situation but only a juristic explanation after the event").

⁹⁵ See STORY, *supra* note 4, § 38.

⁹⁶ BEALE, 1916 TREATISE, *supra* note 26, § 71.

⁹⁷ Interestingly, Story offered the same criticism of Huber by noting that "[t]he doctrine of Huber would seem therefore, to stand upon just principles . . . [but] from its generality, it leaves behind many grave questions as to its application." STORY, *supra* note 4, § 38.

⁹⁸ See Gerhard Kegel, *The Crisis of Conflict of Laws*, 112 RECUEIL DES COURS 95, 105 (1964) ("The *comitas* doctrine only tells us *why*, and not *when*, foreign law is to be applied.").

foreign sovereigns' interests? Should a court be concerned with the interests of the international community?⁹⁹ Finally, and perhaps most importantly, *where* was a court to look to determine what the sovereign interests at stake might in fact be and *how* was it to go about balancing these concerns?¹⁰⁰

As shown below, Story's failure to define precisely how courts would apply the comity doctrine partially accounts for the discarding of comity as a ground for conflict of laws theory in U.S. jurisprudence. But before reaching that point, it is useful to provide a brief overview of comity's development in U.S. case law immediately following Story.

3. U.S. Reception

Story's comity doctrine was well received by U.S. courts.¹⁰¹ The Supreme Court expressly adopted Story's views first in *Bank of Augusta v. Earle*¹⁰² in 1839 and has applied the doctrine, as have the lower federal courts, in various forms ever since.¹⁰³ What makes comity's application by U.S. courts as it proceeded from Story interesting is that little attention was explicitly paid in case law to the idea of sovereign interests, especially the forum sovereign interests that historically animated the doctrine. Instead, courts generally focused on the idea of comity as deference to foreign sovereigns.

⁹⁹ Story vacillates in this regard, in some circumstances noting that a nation's own policies and sense of justice should prevail, and in other situations relying on the convenience and necessities of nations to justify a result. Compare STORY, *supra* note 4, § 73 ("Each nation may well adopt for itself such modifications of the general doctrine as it deems most convenient . . ."), with *id.* § 242 ("The rule is founded, not merely in the convenience [of nations], but in the necessities of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other.").

¹⁰⁰ Such questions were perhaps never considered by Huber or Story because the idea of interest analysis had not yet been formulated. See *infra* Part I.C (discussing jurisprudential shift to interest analysis). I thank Ralf Michaels for bringing this point to my attention.

¹⁰¹ EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 19 (4th ed. 2004).

¹⁰² *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 589 (1839) (citing Story for proposition that comity, as "part of the voluntary law of nations," "promote[s] justice between individuals [and] a friendly intercourse between the sovereignties to which they belong" but is "inadmissible when contrary to [the forum state's] policy, or prejudicial to its interests").

¹⁰³ See, e.g., *Walworth v. Harris*, 129 U.S. 355, 364-66 (1889) (referencing comity doctrine); *Canada S. Ry. Co. v. Gebhard*, 109 U.S. 527, 545-46 (1883) (same); *Townsend v. Jemison*, 50 U.S. (9 How.) 407, 416 (1850) (same); *Vaughan v. Northrup*, 40 U.S. (15 Pet.) 1, 5 (1841) (same); see also *infra* Part II.A.

For instance, when the Supreme Court saw fit to restate the comity doctrine in the seminal case of *Hilton v. Guyot*,¹⁰⁴ many a nod was given to the role of forum or foreign sovereignty. Instead, the Court focused on the idea of deference to foreign sovereigns wrapped in reciprocity. The *Hilton* Court's decision stands as a watershed moment in the history of international comity in U.S. case law because the Court not only articulated a doctrine of comity broader than that which had been explained previously, but also set the stage for the doctrine to be unmoored from its original grounding in conflict of laws theory.¹⁰⁵ That decision remains important today as it is the case U.S. courts generally cite when discussing comity.¹⁰⁶

In *Hilton*, the Supreme Court considered the question of what effect a U.S. court should give the judgment of a foreign court. A French court had issued a decision against Hilton and others, which they unsuccessfully appealed in France. During the French litigation, Hilton and others, who were U.S. nationals residing in New York and who ran a business in New York, removed their assets from France. Guyot sought to enforce the French judgment against them in the United States by filing an action in a New York federal district court. The district court permitted enforcement on the ground that absent fraud foreign judgments should be given the same weight as domestic judgments,¹⁰⁷ and an appeal to the Supreme Court followed.¹⁰⁸

In resolving the issue, the Court discussed Story's comity doctrine as well as various domestic and international legal materials¹⁰⁹ and restated comity as follows:

¹⁰⁴ 159 U.S. 113, 163-64 (1894).

¹⁰⁵ Justice Oliver Wendell Holmes, Jr. can be credited with providing the complete break with a traditional private law version of comity, especially in the public law context, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned might justly resent.").

¹⁰⁶ Paul, *Comity in Int'l Law*, *supra* note 2, at 8-9 (noting that *Hilton* "is the most commonly cited statement of comity in U.S. law").

¹⁰⁷ *Hilton v. Guyot*, 42 F. 249, 252 (S.D.N.Y. 1890).

¹⁰⁸ *Hilton*, 159 U.S. at 122, 163.

¹⁰⁹ The Court looked to a blend of common law, comparative law, and international law, including the laws of England, Russia, France, Holland, Belgium, the United States, Denmark, Germany, Switzerland, Poland, Romania, Bulgaria, Austria, Italy, Monaco, Spain, Portugal, Greece, Egypt, Cuba, Puerto Rico, Mexico, Peru, Chile, Brazil, Argentina, and Norway. *Id.* at 206-27.

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws.¹¹⁰

After stating this principle, the Court went on to detail the various types of judgments that should be generally entitled to recognition and enforcement in other jurisdictions — judgments in rem adjudicating the title to a ship or other movable property within the custody of the court and judgments affecting the status of persons (as in divorce), where the parties are both subject to the jurisdiction or the decree is not contrary to the public policy of the jurisdiction. The Court then dealt with the issue presented by the parties — the effect to be given in the United States to a judgment rendered by the court of another country on the question of a contract between nationals of different countries.¹¹¹

Relying on comity, the Court announced the following rule governing enforcement of foreign judgments:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.¹¹²

¹¹⁰ *Id.* at 163-64. This has become the dominant description of the doctrine in U.S. case law.

¹¹¹ *Id.* at 170.

¹¹² *Id.* at 202-03.

However, notwithstanding this rule, which would have seemingly required the recognition and enforcement of the judgment against Hilton, the Court held 5–4 that under international comity “the judgment rendered in a foreign country is allowed the same effect *only* as the courts of that country allow to the judgments of the country in which the judgment in question is sought to be executed.”¹¹³ Given that a French court would not have enforced a similar U.S. judgment in France, the Court refused to enforce the French judgment in the United States.¹¹⁴ Comity provided a rule but not the result in this case because the Court saw fit to wrap comity in reciprocity. The Court did not feel required to give nonreciprocal recognition to a foreign judgment; it did not see a need to analyze the sovereign interests at stake. In not analyzing those interests at all, the Court unmoored comity from historical considerations of sovereign interests.¹¹⁵

At bottom, Story’s idea that comity was concerned with sovereign interests was ultimately replaced in *Hilton* with a notion of comity as generally requiring the application of foreign law *without the consideration* of sovereign interests, subject to the requirement of reciprocity in the area of recognition and enforcement of foreign judgments.¹¹⁶ In the whole of the Court’s opinion, there is no reference to sovereign interests — the interests of the United States or France in having the case decided in a certain way. Rather, the Court’s understanding of comity was that it was an “imperfect obligation requiring courts to defer to foreign sovereigns” and their courts’ judgments.¹¹⁷ This is in marked contrast to Story, who did not posit any restraints on the domestic sovereign’s “inquiry into the nature of the foreign law or whether that foreign law would be unjust or offend the values of the domestic forum.”¹¹⁸ Furthermore, as to the comity analysis, the Court stated that “it is *our judicial duty* to [know] and to

¹¹³ *Id.* at 228 (emphasis added).

¹¹⁴ *Id.*

¹¹⁵ One possible reason for this failure to analyze sovereign interests is that Huber and Story never explicitly considered them. As such, it might not be surprising that the Court did not consider them. I thank Bill Dodge for bringing this point to my attention.

¹¹⁶ Paul, *Comity in Int’l Law*, *supra* note 2, at 25.

¹¹⁷ *Id.* at 26.

¹¹⁸ N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 630 (2006). It is certainly possible to argue that the Court’s language of “any other special reason why the comity of this nation should not allow full effect,” *Hilton*, 159 U.S. at 203, enables a court to inquire into the forum’s interest. However, the fact that the Court did not make such an inquiry shows how little concern was given to those interests.

declare” the “comity of our own country.”¹¹⁹ This statement likewise differs from Story’s remonstrance that “[i]t is not the comity of the courts but the comity of the nation which is administered and ascertained.”¹²⁰ The Court’s statement of comity in *Hilton* is thus woefully inadequate because it does not provide courts with concrete direction in applying the doctrine. In other words, it sidesteps the key issue in comity cases: is there a conflict between sovereigns that counsels in favor of applying the doctrine?

The reason for this subtle shift in comity’s focus may be elusive, but several considerations offer some explanation for this. First, in that Story did not precisely define *how* a court was to determine when comity was due, he left its development in the hands of common law judges. In their hands, the concern for sovereign interests perhaps became less important as the United States developed as a nation and then as a global power. As the United States transitioned into a global power, judges were perhaps more concerned with securing the U.S. judiciary’s place as an upright member of the international legal community. Indeed, it might be the case that the *Hilton* Court was still operating under a *Swift v. Tyson*¹²¹ view of comity. Under such a *Swiftian* view, it was the duty of the court to determine what the law is as opposed to determining more positivistically what a sovereign itself says its law is.¹²²

Second, by downplaying sovereign interests, courts understandably sought to develop workable and uniform rules that accentuated other standards important to courts, such as respect for court proceedings through deference.¹²³ Comity became in *Hilton* a “doctrine of judicial deference” as well as a “doctrine of deference to foreign states,”¹²⁴ as opposed to a doctrine designed to ameliorate sovereign conflict through attention to the precise sovereign interests at stake in the case at bar.¹²⁵

¹¹⁹ *Hilton*, 159 U.S. at 168 (emphasis added).

¹²⁰ STORY, *supra* note 4, § 38 (emphasis added); see also BEALE, 1916 TREATISE, *supra* note 26, § 71.

¹²¹ 41 U.S. (16 Pet.) 1 (1842). Such a view made it the responsibility of the court “to express [its] own opinion of the true result of commercial law.” *Id.* at 18-19.

¹²² See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938). I discuss the impact that positivism had on comity in the next section. See *infra* Part I.B.

¹²³ See NEWMYER, *supra* note 79, at 300; Calamita, *supra* note 118, at 630-31.

¹²⁴ Paul, *Comity in Int’l Law*, *supra* note 2, at 25.

¹²⁵ Again, this looks remarkably *Swiftian*. Cf. Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 77-78 (2009) (“In the pre-*Erie* era, federal courts . . . simply followed the law of nations in cases where it applied and typically saw no need to explain the precise source of such law.”).

That transition roughly coincides with a larger move in conflicts jurisprudence away from Story's comity theory to Joseph Beale's "vested rights" approach. That shift, discussed in the next section, further illustrates the unmooring of international comity from general principles of conflict of laws and from historical concerns with sovereign interests.

B. *Comity Unmoored: From Comity to Vested Rights*

Even though comity as a judicial canon of construction developed largely uncriticized by federal courts, it fell out of favor in American conflicts theory at about the time of its hundredth birthday.¹²⁶

By the end of the nineteenth century, the conception of comity and later proposals to establish an international basis for conflicts law, looking 'towards the establishment of a general system of international jurisprudence' . . . had been eclipsed by positivism, importing an exclusive and nationalistic emphasis upon the law as it is.¹²⁷

Starting with Joseph Beale, who interestingly dedicated his conflict of laws treatise to Story,¹²⁸ comity was replaced as the cornerstone of American conflicts theory by the doctrine of "vested rights."¹²⁹ In so doing, Beale explicitly attacked Story's comity doctrine.

Beale's primary assault was that comity's "error . . . lies in the supposition that the courts are accepting the doctrines of Conflict of Laws by comity rather than the legislative power of the state."¹³⁰ Comity's value was limited for Beale because "as law-giving is a function of sovereignty, this amounts to fixing the limits of

¹²⁶ The American Law Institute's *Restatement* was published in 1934 and was followed the next year by Beale's treatise.

¹²⁷ Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297, 307 (1953) (footnote omitted).

¹²⁸ JOSEPH H. BEALE, *Dedication to TREATISE ON THE CONFLICT OF LAWS* (1935) [hereinafter BEALE, 1935 TREATISE] ("TO JOSEPH STORY a grateful memorial of the Centenary of the publication of Story's *Treatise on the Conflict of Laws*").

¹²⁹ While this Article focuses on American conflicts theory, it is interesting to note that just as Story received the comity doctrine from Europe so too did Beale inherit the vested rights approach from abroad. See SCOLES ET AL., *supra* note 101, at 20 (noting doctrine's European precursors and proponents, especially Dicey in English law). Indeed, it might be argued that while Beale discarded comity as the ground for his theory, he in fact needed Huber's comity theory to provide a territorial ground for his vested rights theory. Cf. BRILMAYER, *CONFLICT*, *supra* note 39, at 22.

¹³⁰ BEALE, 1916 TREATISE, *supra* note 26, § 6.1; see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

jurisdiction.”¹³¹ The first question in any conflicts case for Beale, therefore, was to determine the jurisdiction of nations, and determining such jurisdiction did not require recourse to international or extra-municipal principles like comity.¹³² This was so because Beale viewed law as fundamentally territorial and, thus, no law had effect outside of its own territory.¹³³

This understanding of the legislative and adjudicatory powers of states may be clear when a forum court is confronted with purely domestic legal problems, but its simplicity breaks down when applied to transnational transactions. As Kermit Roosevelt has articulated, in transnational cases, Beale’s “territoriality might seem at war with itself: If courts can apply only local law, but foreign law must determine the consequences of acts in foreign states, how are parties ever to obtain relief in courts of other jurisdictions?”¹³⁴ Beale escapes this dilemma through the doctrine of vested rights.

In Beale’s view, the forum court should give effect to any right that had “vested” within the territory of a foreign sovereign. “[T]he chief task of the Conflict of Laws [is] to determine the place where a right arose and the law that created [the creation of a right].”¹³⁵ In so arguing, Beale clearly abandoned Story’s comity doctrine and “rejected the role of the forum as ultimate policymaker in private international cases.”¹³⁶ Instead of looking to comity, a cause of action recognized in another forum (a vested right) would be enforced in a domestic forum “[i]f the law of the place where the defendant’s act took effect created as a result of the act a right of action . . . unless to enforce the right is against public policy of the forum.”¹³⁷ In recognizing and enforcing these vested rights, courts would not apply foreign law as such, but would simply recognize and give redress to a property right that had vested in another country.¹³⁸ As Beale explained, “[i]t is quite obvious that since the only law that can be applicable in a state is the law of

¹³¹ BEALE, 1916 TREATISE, *supra* note 26, § 1.6.

¹³² *Id.* §§ 1.18, 1.19.

¹³³ *See id.* §§ 4.12, 5.4; Cheatham, *supra* note 63, at 367-68. It is important to reiterate that both comity and vested rights are based on the territoriality principle. Although, as discussed above in the main text, how they go about resolving the tension created when there are overlapping territorial claims is quite different.

¹³⁴ Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2456 (1998) [hereinafter Roosevelt, *Rethinking Conflicts*].

¹³⁵ BEALE, 1935 TREATISE, *supra* note 128, § 8A.8.

¹³⁶ Maier, *supra* note 10, at 284-85.

¹³⁷ BEALE, 1935 TREATISE, *supra* note 128, § 378.3.

¹³⁸ *See id.* § 3.4 (noting that “[p]arties are bound, not by the law, but by obligations created by the law”).

that state, no law of a foreign state can have there the force of law. . . . The foreign law is a fact in the transaction.”¹³⁹

With this territorial and positivistic understanding of law and conflicts theory, Beale obviously had little use for an “extra-municipal” doctrine like comity.¹⁴⁰

The doctrine [of comity] seems really to mean only that in certain cases the sovereign is not prevented by any principle of international law, but only by his own choice, from establishing any rule he pleases for the conflict of laws. In other words, it is an enabling principle rather than one which in any particular case would determine the actual rule of law.¹⁴¹

Through this turn from comity to vested rights, Beale completely discarded comity as a ground for conflicts theory,¹⁴² thus marking the point where comity became unmoored from conflicts theory in American conflicts jurisprudence.

There are several important outcomes of this jurisprudential shift. To begin with, Beale replaced the international and “extra-municipal” views of Huber and Story with a territorial and positivistic conception of the conflict of laws. Such a move might have led Beale to conclude that a forum court could only apply forum law.¹⁴³ Yet in seeking to create a theory that accurately described what courts in fact did when they applied foreign law, Beale made the curious argument that courts are not *applying* foreign law in as much as they are *recognizing* it as a

¹³⁹ *Id.* § 5.4.

¹⁴⁰ *See id.* § 5.1 (noting that international law is not source of his rules).

¹⁴¹ *Id.* § 71.

¹⁴² *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 111 (1998) (noting that under Beale’s theory, “foreign law was not given effect as a matter of comity, as Story had argued, but rather as a matter of fact”).

¹⁴³ Indeed, many scholars following Beale did just that. *See, e.g.*, WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942) (explaining “local law theory” whereby court always applies forum law in conflicts case). *But cf.* DAVID CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS, 1933-1983*, at 46-47 (1985) [hereinafter CAVERS, *CHOICE OF LAW*] (responding to local law theory and noting that “[t]heories that explain how it is that a foreign rule isn’t a foreign law when it is used in deciding a case in another country might seem more useful if I could forget the way in which my son resolved a like problem when, at the age of four, he encountered tuna fish salad. ‘Isn’t that chicken?’ he inquired[, and upon being told no] he restored his world to order . . . by remarking to himself, ‘Fish made of chicken’”). Of course, a state through its legislative process might direct a court to apply foreign law. In such a way, foreign law might be applied positivistically. That was, however, not the case when Beale wrote, and it has not been the case since.

fact in the transaction. This is a subtle but important turn from comity. To be clear, Huber and Story in their comity doctrine explicitly recognized that courts would apply foreign law. Indeed, it is because courts *apply* foreign law that the whole doctrine of comity is necessary. Courts apply foreign law without violating forum sovereignty by the tacit consent of the forum sovereign enabling a court to apply foreign law. Put another way, the reason why Huber and Story needed comity was to preserve absolute sovereign authority.

Beale preserved sovereign authority by dismissing this very problem of territorial sovereignty and arguing that courts are not in fact applying foreign law as foreign law.¹⁴⁴ “The laws of different sovereigns do not contend with one another for the mastery. Each one keeps within its sphere of operation, and only asserts its power in a foreign country when the law of that country commands or permits it. In practice a conflict is impossible.”¹⁴⁵ Given that Beale’s task was not to justify the application of foreign law in the forum, but to describe how a court should go about recognizing a vested right, Beale removed any consideration of sovereign interests from the conflict of laws analysis and subsumed sovereign interests in favor of jurisdiction-selecting rules.¹⁴⁶ A doctrine preserving sovereignty was not needed because sovereignty was not questioned in Beale’s analysis. “Since the power of a state is supreme within its own territory, no other state can exercise power there.”¹⁴⁷ The point of Beale’s rules “was to discover the place, whether the forum or some other regime, whose law governed the set of facts at issue in an adjudication.”¹⁴⁸ The court’s role under this approach was merely to identify which law creates the parties’ rights, duties, and obligations, and *not* to negotiate questions of sovereignty because “[t]he laws of different sovereigns do not contend with one another for the mastery” of legal issues.¹⁴⁹

This theoretical clarity concerning the task of conflicts theory was purchased without due regard for the practical outcomes the

¹⁴⁴ See Cheatham, *supra* note 63, at 380 (“The theory is an expression of the aversion common-law lawyers ordinarily have to the view that foreign law operates in the forum, a result which might seem to derogate from territorial sovereignty.”).

¹⁴⁵ BEALE, 1935 TREATISE, *supra* note 128, § 1.16.

¹⁴⁶ Roosevelt, *Rethinking Conflicts*, *supra* note 134, at 2463. I note, however, that Beale did make some reference to state interests, although sparingly. See BEALE, 1935 TREATISE, *supra* note 128, §§ 121.2, 129.4, 130.1 (alluding to state “interests” and other policy concerns).

¹⁴⁷ BEALE, 1935 TREATISE, *supra* note 128, § 61.1.

¹⁴⁸ Perry Dane, *Vested Rights, “Vestedness,” and Choice of Law*, 96 YALE L.J. 1194, 1205 (1987).

¹⁴⁹ BEALE, 1935 TREATISE, *supra* note 128, § 1.16.

approach engendered.¹⁵⁰ Beale's conflicts system would come under substantial attack.

C. *Comity Reconfigured: From Vested Rights to Interest Analysis*

As has been explained in great detail elsewhere, Beale's vested rights approach was undermined in the United States by the legal realists.¹⁵¹ The legal realists argued that Beale's approach substituted an artificial, metaphysical theory of vested rights as a cover for what the courts actually did in cases.¹⁵² His vested rights theory also fell into disfavor as the possibility of characterization and other escape devices defeated the primary benefit of the doctrine, which was consistency of application.¹⁵³ According to Lea Brilmayer, "[e]ven if Beale were correct in his focus on territorial sovereignty and the location of events, his insistence that a single state had a right to regulate seemed unduly rigid."¹⁵⁴ In cases "[w]here various states were connected to the dispute, it seemed rather arbitrary to recognize and respect the territorial sovereignty of one but not the others. Judges were unsurprisingly motivated to search for reasons to apply the law of the forum, creating disuniformity."¹⁵⁵

Perhaps the most ringing critique of Beale's approach was that courts could avoid effectuating sovereign interests through the discourse of vested rights. As Brainerd Currie forcefully argued:

[D]espite the camouflage of discourse, [Beale's] rules do operate to nullify state interests. . . . Trouble enough comes from the mere fact that interests are defeated. The courts simply will not remain always oblivious to the true operation of a system that, though speaking the language of metaphysics,

¹⁵⁰ BRILMAYER, CONFLICT, *supra* note 39, at 27-30.

¹⁵¹ See, e.g., *id.* at 11-46 (detailing demise of vested rights approach); SCOLES ET AL., *supra* note 101, at 22-25 (same).

¹⁵² See COOK, *supra* note 143, at 337; see, e.g., David Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173 (1933) [hereinafter Cavers, *Critique*] (challenging vested rights approach); Ernest G. Lorenzen, *Territoriality, Public Policy, and the Conflict of Laws*, 33 YALE L.J. 736 (1924) (same).

¹⁵³ See, e.g., COOK, *supra* note 143, at 214-25, 301-10.

¹⁵⁴ BRILMAYER, CONFLICT, *supra* note 39, at 26.

¹⁵⁵ *Id.*; see also Cheatham, *supra* note 63, at 382 (noting that "the forum will use its own conflict of laws based on its own considerations of policy to determine the law to be employed and the claim to be enforced").

strikes down the legitimate application of the policy of a state, especially when that state is the forum.¹⁵⁶

This was so because “the territorial orientation of the vested-rights theory assigned greater weight to foreign than to local law, in effect giving the foreign law extraterritorial force over the local law which was the source of the courts’ authority.”¹⁵⁷ The stage was set for a more comprehensive theory of conflict of laws, and Currie would provide an answer.¹⁵⁸

Currie’s answer to the question of what law should be applied in conflicts cases was that first and foremost a court must *analyze* the laws contending for application. In this way, Currie returned American conflicts theory to its concern with sovereign interests.¹⁵⁹ Currie viewed the basic flaw of Beale’s approach to be that it “subordinated state interests willy nilly, without even considering them.”¹⁶⁰ Harkening back to Story, Currie defined “the central problem of conflict of laws” as “that of determining the appropriate rule of decision when the interests of two or more states are in conflict — in other words, of determining which interest shall yield.”¹⁶¹ Currie also resuscitated the idea that conflicts cases are about “clashes between sovereigns.”¹⁶² Echoing Story, Currie explained that “[s]o long[] as we have a diversity of laws, we shall have conflicts of interest among states.”¹⁶³ Currie’s governmental interest analysis sought to recognize that clash and resolve it through attention to sovereign interests.¹⁶⁴

¹⁵⁶ BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 180-81 (1963).

¹⁵⁷ SCOLES ET AL., *supra* note 101, at 22.

¹⁵⁸ For clarity, I note that Currie was in many respects not a legal realist. See Dane, *supra* note 148, at 1201; Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1588 n.6 (1985).

¹⁵⁹ Cf. Dane, *supra* note 148, at 1201 (noting that for Currie “[t]here might be policies justifying a forum’s reference to foreign law, but those policies had to pass muster in light of the totality of the forum’s law, and not the other way around”). As will be discussed in further detail below, such sovereign interests were to be analyzed and articulated through a court’s determination of the actual or constructive intent of the legislature. See generally Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980) [hereinafter Brilmayer, *Myth of Legislative Intent*] (examining role of legislative intent in interest analysis).

¹⁶⁰ BRILMAYER, *CONFLICT*, *supra* note 39, at 45.

¹⁶¹ CURRIE, *supra* note 156, at 178.

¹⁶² Roosevelt, *Rethinking Conflicts*, *supra* note 134, at 2463.

¹⁶³ CURRIE, *supra* note 156, at 179.

¹⁶⁴ Unlike Huber and Story, Currie did not look to international law for direction, but instead looked to general principles of statutory construction and legislative intent. See *id.* at 110, 293, 377, 379, 383, 605-06.

After resituating sovereign interests as the concern of conflicts theory, Currie put forth the following method for analyzing cases involving foreign elements. A court should normally be expected to “look to the law of the forum as the source of the rule of decision.”¹⁶⁵ In cases where it is argued that the law of a foreign state should provide the rule of decision, “the court should first of all determine the governmental policy . . . that is expressed by the law of the forum.”¹⁶⁶ The court should next ask “whether the relationship of the forum state to the case at bar — that is, to the parties, to the transaction, to the subject matter, to the litigation — is such as to bring the case within the scope of the state’s governmental concern.”¹⁶⁷ The court should similarly assess the foreign state’s governmental interests and relationship to the case.¹⁶⁸ After assessing both interests, “[i]f the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.”¹⁶⁹ Likewise, if it finds that the forum has an interest and the foreign state does not, it should apply forum law.¹⁷⁰ Cases such as these where only one state has an interest are known as “false problems.”¹⁷¹

In cases where both states have an interest, a “true conflict,” a court should likewise apply forum law, “even though the foreign state also has such an interest.”¹⁷² This was because Currie believed that courts were ill-equipped to balance the interests of one forum against another. “[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.”¹⁷³

¹⁶⁵ *Id.* at 188.

¹⁶⁶ *Id.* at 189.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* Currie also referenced the so-called “unprovided-for” case in which no state has an interest. Currie’s default rule for such cases was that forum law should be applied. *Id.* at 189 n.3. It should be noted that Currie later moderated his position on the applicability of forum law in “true conflict” cases by recognizing that courts might balance governmental interests. See Herma Hill Kay, *A Defense of Brainerd Currie’s Interest Analysis*, 215 RECUEIL DES COURS 9, 68-71 (1989).

¹⁷³ CURRIE, *supra* note 156, at 182.

Therefore, a “court need never hold the interest of the foreign state inferior; it can simply apply its own law as such.”¹⁷⁴

As should be plain from the foregoing, governmental interest analysis takes as its starting point the idea that sovereign interests are the key questions in conflicts theory, which was the exact same point Story made in his *Commentaries*. Unlike Story, Currie provided a definition for what it meant to ascertain a sovereign’s interest: “An ‘interest’ as I use the term is the product of (a) a governmental policy and (b) the concurrent existence of an appropriate relationship between the state having the policy and the transaction, the parties, or the litigation.”¹⁷⁵ As Currie’s student and co-author Herma Hill Kay explained, the following elements are necessary to create an interest: “[f]irst, a factual relationship must exist between the state and the transaction, the parties, or the litigation; second, the factual relationship must implicate the governmental policy; and third, the relationship must be an ‘appropriate’ one,” in other words, one that comports with due process.¹⁷⁶ It became the task of the courts to discover these interests through the normal processes of statutory construction and interpretation,¹⁷⁷ and vague statements of governmental interests by governments were not enough to justify the application of a sovereign’s law.¹⁷⁸

The monumental leap back taken by Currie was to resituate conflicts theory within an American tradition that was concerned with sovereignty and sovereign interests. The monumental improvement Currie made to Story’s conflicts theory was to provide courts with concrete direction through governmental interest analysis in determining whether the application of foreign law was due in a given case. It would have been easy, therefore, for Currie to ground his conflicts approach on comity, as had Story, given comity’s concern with sovereign interests. But because Beale had replaced comity with vested rights as the operative foundation for conflicts theory, and because Story’s comity doctrine lacked concrete rules for its

¹⁷⁴ *Id.* at 181-82. Currie later modified this position somewhat, arguing that courts might accommodate the conflicting interests of other states. *See id.* at 592-93; *see also* Kay, *supra* note 172, at 76 (detailing this shift in Currie’s thought).

¹⁷⁵ CURRIE, *supra* note 156, at 621.

¹⁷⁶ Kay, *supra* note 172, at 54.

¹⁷⁷ CURRIE, *supra* note 156, at 183-84. I note that there is some debate as to what it means to have an “interest.” *See* Brilmayer, *Myth of Legislative Intent*, *supra* note 159, at 392. At a minimum, it connotes statutory interpretation. *See* Kermit Roosevelt III, *Resolving Renvoi: The Bewitchment of Our Intelligence by Means of Language*, 80 NOTRE DAME L. REV. 1821, 1853 & n.108 (2005).

¹⁷⁸ CURRIE, *supra* note 156, at 184.

application, there was little interest in returning to it as a ground for conflicts theory, especially given its metaphysical notions. As Perry Dane has emphasized, “Currie recognized that, in addition to party-directed interests, states might have more systemic interests, including . . . comity with other states [Currie] argued, however, that those interests were too remote and speculative to excuse a forum facing a true conflict from applying its own law.”¹⁷⁹ To the extent Currie and others ushered in a “conflicts revolution,” it was a return to Story’s original idea of sovereign interests, and it is that connection which makes a reconsideration of comity in the context of governmental interest analysis fruitful.¹⁸⁰

D. Recapitulation

The early American reception of Huber’s comity doctrine was due in large part to the precise conception of conflict of laws that Huber articulated. That conception was that conflicts questions were ultimately concerned with conflicts between sovereigns and their laws. Such sovereign conflicts raised a host of questions. First and foremost, *why* should a forum court ever apply foreign law given that courts are instrumentalities of the forum sovereign? Huber’s response to that important question was that a sovereign would tacitly consent to the application of foreign law in hopes of supporting international convenience, especially in commercial matters.¹⁸¹ Huber, however, did not articulate *how* a court was to go about resolving the sovereign interests at stake in transnational cases. Comity provided a theoretical justification for how a court could apply foreign law without impugning domestic sovereignty. But comity did not provide courts with concrete direction in so doing.

Huber’s comity theory resonated with Story as he sought to mediate the conflict of laws brought about by the unification of separate and distinct colonies. For Story, comity did not obligate a court to apply

¹⁷⁹ Perry Dane, *Conflict of Laws*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 197, 206 (Dennis Patterson ed., 2010).

¹⁸⁰ Conflicts scholarship has, of course, continued since the time of Currie’s writings. From Ehrenzweig’s *lex fori* approach, to von Mehren and Trautman’s functional analyses, to Leflar’s better law approach, and others, there is a rich tableau of conflicts scholarship coming after Currie. See generally SCOLES ET AL., *supra* note 101, at 25-58 (providing overview of choice-of-law thought). For my purposes, I suspend the historical consideration of conflicts theory at Currie because it can fairly be said that his analysis “still controls the academic conflicts agenda.” Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 4 (1984).

¹⁸¹ See *supra* Part I.A.1.

foreign law.¹⁸² While comity might encourage courts to consider other state interests and policies when facing transnational questions, the role of the courts was to promote forum sovereign interests.¹⁸³ The question that remained unanswered by Story was as follows: when and under what circumstances should a forum court offer comity? Because Story did not answer that question, courts were left to develop the doctrine through a common law process of interpretation.

At least in the context of the recognition and enforcement of foreign judgments, the Supreme Court in *Hilton* provided the language from which modern incantations of comity have grown. In enunciating a rule generally requiring the recognition and enforcement of foreign judgments in cases where a foreign sovereign would reciprocally recognize and enforce a U.S. judgment abroad, the Court placed deference to foreign sovereigns above forum sovereign interests. In other words, because the Court chose not to analyze sovereign interests at all, it unmoored comity from historical considerations of sovereign interests. *Hilton's* approach to comity has continued in U.S. case law, and *Hilton* accounts in part for U.S. courts' robust utilization of the doctrine, as will be discussed in Part II. It should not be surprising, therefore, that courts applying the comity doctrine do not generally seek to ascertain sovereign interests, for the Supreme Court has not directed them to do that in resolving comity questions, except obliquely in cases of statutory construction.¹⁸⁴

Interestingly, while comity charted a path of deference in U.S. case law that has continued unabated, it was discarded as the central premise in American conflicts theory.¹⁸⁵ Because comity did not answer the question of *how* a forum court could apply foreign law if law is seen as merely territorial, Beale discarded comity as the ground for his conflicts theory. In its place, he articulated the idea of vested rights. The benefit of the vested rights approach in the abstract was that it provided clear "jurisdiction-selecting rules,"¹⁸⁶ affording parties and courts guidance on what law to apply in a transnational case. The disadvantage of the approach at the practical level was that it

¹⁸² See *supra* Part I.A.2.

¹⁸³ See *id.*

¹⁸⁴ See *infra* Part II. As will be discussed below, even in those cases the articulated approach is far from satisfactory. *Id.*

¹⁸⁵ See *supra* Part I.A.2.

¹⁸⁶ Cavers, *Critique*, *supra* note 152, at 194; see also CAVERS, CHOICE OF LAW, *supra* note 143, at 9 (describing such rules as "indicating the source of the law to be applied without regard to the law's content" and criticizing such rules by noting that "[w]ithout taking the content of the conflicting laws into account, how could one know what would satisfy the demands of justice or the requirements of policy?").

subordinated sovereign interests in favor of jurisdiction-selecting rules. Recognizing this, courts sought to reassert state interests through the guise of characterization and escape devices, and this led to unpredictability in the law and calls for another approach to conflicts theory.¹⁸⁷

Currie answered that call. Currie's major contribution lies in resituating sovereign interests at the heart of a court's conflict of laws analysis.¹⁸⁸ In forthrightly acknowledging that at the heart of conflicts decisions are governmental interests, Currie showed that courts are charged with "consistently advancing the policy of [their] own states[s]."¹⁸⁹ Sovereign interests are implicated in conflicts and comity cases because the exercise of judicial power itself furthers policy goals.¹⁹⁰ The question thus becomes: whose sovereign goals should be advanced? Currie answered that question in favor generally of the forum state. As such, his rules of application may be subject to substantial criticism for their forum-centric focus.¹⁹¹ But in precisely delineating what the role of the court was — namely, to ascertain and effectuate sovereign interests — Currie brought to the forefront of a court's conflicts analysis the important governmental interests at stake in transnational cases. Currie resituated conflicts theory within the system of sovereign interests occupied originally by Story's comity doctrine. Currie chose not to rearticulate a theory of comity, however, perhaps because of its abstractness.¹⁹² To the extent U.S. courts have failed to take account of these developments in conflict of laws jurisprudence, comity's application has suffered from a lack of focus on governmental interests. Irrespective of these scholarly developments, courts have continued to apply the doctrine.

The problem with Currie's analysis is that it resituated conflict of laws in such a way as to empower courts to determine the sovereign interests at stake in conflicts cases through recourse to ordinary principles of statutory construction.¹⁹³ While Currie sought to resituate conflicts doctrine as concerned with sovereign interests,

¹⁸⁷ See CURRIE, *supra* note 156, at 181.

¹⁸⁸ See *supra* Part I.B.

¹⁸⁹ CURRIE, *supra* note 156, at 119.

¹⁹⁰ Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 158 (1988).

¹⁹¹ See, e.g., Juenger, *General Course*, *supra* note 31, at 218 ("In contrast to the urbane neutrality of the First Restatement, Currie's approach is unabashedly parochial.").

¹⁹² Cf. CURRIE, *supra* note 156, at 627 (seeking recourse to common law method as opposed to comity).

¹⁹³ *Id.*

Currie's body of work never asks a fundamental question: what is the sovereign's viewpoint?¹⁹⁴ As will be discussed in further detail below, Currie believed that courts could ascertain and evaluate the sovereign interests at stake through the submissions of the private parties before the courts and through general principles of statutory construction as to legislative intent.¹⁹⁵ Yet such a view hardly gives respect and recognition to the actual views of the sovereignties implicated in a choice-of-law scenario, especially in cases where the exercise of judicial power touches upon important executive as opposed to legislative concerns.

As this Part has shown, the history of comity in the United States has taken a strange turn. American conflicts scholars starting with Beale discarded the doctrine as a ground for choice of law. It is surprising, therefore, to see that U.S. courts facing transnational questions frequently embrace comity.¹⁹⁶ While American scholars have discarded comity as a ground for conflicts theory, Currie has articulated a view of conflict of laws that harkens back to the very governmental interests with which Story's doctrine was concerned. In articulating governmental interest analysis as the purpose for conflict of laws, Currie returned to the original conception of comity as concerned with sovereign interests. But Currie's conception was largely unconcerned with the precise sovereign viewpoints at stake in transnational cases. We are left with a strange amalgam of comity ideas — a muddled comity applied by courts and yet rejected by conflicts scholars due to its untidy nature.

By way of preview, Part III will argue that courts should look to conflict of laws scholarship when employing comity. But before putting forward that argument, it is useful to describe in the next Part the modern understanding of international comity by U.S. courts.

¹⁹⁴ For further details of this problem in the context of determining legislative intent, see Brilmayer, *Myth of Legislative Intent*, *supra* note 159, at 78; Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 233-43 (1991) [hereinafter Brilmayer, *Other State's Interests*].

¹⁹⁵ See *supra* Part II.B.

¹⁹⁶ As the next Part will show, this comity bears little resemblance to the comity articulated by Story — a doctrine concerned with sovereign interests.

II. THE MODERN UNDERSTANDING OF INTERNATIONAL COMITY IN THE UNITED STATES

As noted in the previous Part, U.S. case law frequently invokes the doctrine of international comity,¹⁹⁷ notwithstanding the profound academic criticisms that have been levied against it. As this Part shows, the modern comity doctrine is a mess because the Supreme Court has not provided concrete guidance for its application. This failure means that conflict analysis, to the extent it is applied by courts, has not been rigidly invoked as part of the comity analysis. This Part illustrates the importance of that focus.

A. Modern Comity

Modern comity analysis generally takes three forms. In cases of statutory interpretation, legislative or prescriptive comity permits domestic courts to limit the extraterritorial reach of federal statutes.¹⁹⁸ In cases involving foreign sovereigns, executive comity provides the basis for courts to invoke principles of deference to foreign sovereignty, as in cases involving the Foreign Sovereign Immunities Act (“FSIA”) and act of state doctrine.¹⁹⁹ These applications of international comity differ from the so-called “comity of courts,” which enables a court to defer judgment in cases where the court determines that a case is best adjudicated elsewhere in whole or in part,²⁰⁰ in at least three contexts. First, domestic courts may decide to

¹⁹⁷ See, e.g., *Reino de España v. ABSG Consulting, Inc.*, Nos. 08-0579-CV(L), 08-0754-CV(XAP), 2009 WL 1636122, at *1 (2d Cir. June 12, 2009) (encouraging district court on remand to consider whether international comity “support[s] a discretionary decision not to exercise jurisdiction”).

¹⁹⁸ See *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537-39 (8th Cir. 2007).

¹⁹⁹ See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602, 1611) (2006)); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-89 (1983) (regarding history of foreign sovereign immunity doctrine in United States); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964) (regarding act of state doctrine); see, e.g., *The Schooner Exch. v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812) (regarding foreign sovereign immunity).

²⁰⁰ See *Hartford Fire Ins. Co.*, 509 U.S. at 817 (Scalia, J., dissenting) (distinguishing “prescriptive comity” from “comity of courts” and defining latter to refer to principles “whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere”); see also STORY, *supra* note 4, § 38; Ramsey, *supra* note 3, at 897 (describing judicial comity as “the idea that U.S. courts will under certain circumstances defer to the rulings of foreign courts”). But see Dodge, *supra* note 142, at 138-43 (challenging this characterization).

stay, under *lis alibi pendens*,²⁰¹ or dismiss, under *forum non conveniens*,²⁰² proceedings properly within their jurisdiction in favor of a foreign forum.²⁰³ Second, domestic courts may defer to judgments rendered by foreign courts when considering recognition and enforcement of judgment questions.²⁰⁴ Third, domestic courts may rely on the comity doctrine when called upon to determine the preclusive effect, if any, of foreign court adjudications as to a case or particular issue litigated in a foreign forum.²⁰⁵

As this short overview shows, U.S. courts apply comity in many different contexts.²⁰⁶ The multiplicity of comity's applications has led to much confusion because the Supreme Court has not articulated a precise test for applying comity, except in cases involving the extraterritorial reach of federal statutes.²⁰⁷ In such cases of legislative or prescriptive comity, the Court has described the comity evaluation as redolent of a conflict of laws analysis by employing a "true conflicts" phraseology similar but not identical to Currie's interest analysis.²⁰⁸ The Court articulated this focus on true conflicts in *Hartford Fire Insurance Company v. California*.²⁰⁹ It is useful to begin

²⁰¹ *Lis alibi pendens* permits a domestic court to stay proceedings before it in favor of a foreign forum. BORN & RUTLEDGE, *supra* note 1, at 522.

²⁰² *Forum non conveniens* permits a domestic court "to decline to exercise judicial jurisdiction if an alternative forum would be substantially more convenient or appropriate." *Id.* at 347.

²⁰³ See *Voda v. Cordis Corp.*, 476 F.3d 887, 898 (Fed. Cir. 2007); *Windt v. Qwest Comm'n Int'l, Inc.*, 544 F. Supp. 2d 409, 432-33 (D.N.J. 2008); *Graf von Spee v. Graf von Spee*, 514 F. Supp. 2d 302, 317 (D. Conn. 2007).

²⁰⁴ See *Raddison Design Mgmt. v. Cummins*, No. 07-92, 2008 WL 55998, at *2-3 (W.D. Pa. Jan. 3, 2008).

²⁰⁵ See *Argo Fund Ltd. v. Bd. of Dirs. of Telecom Arg., S.A.* 528 F.3d 162, 165 (2d. Cir. 2008); *Belize Telecom, Ltd. v. Gov't of Belize*, 528 F.3d 1298, 1305-06 (11th Cir. 2008).

²⁰⁶ An additional context that should be noted but does not appear much in U.S. case law is regulatory comity. See, e.g., Dodge, *supra* note 142, at 122. As noted above, comity also provides the legal rationale for applying general conflict of laws rules. Discussion of comity's role in that area is beyond the scope of this Article, although it is certainly true that comity's relevance in that area is similarly unsatisfactory. As Symeon Symeonides has recently advocated, such questions should perhaps be addressed by a new Restatement. See Symeon Symeonides, *A New Conflicts Restatement: Why Not?*, 5 J. PRIVATE INT'L L. 1, 1 (2009).

²⁰⁷ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 764 (1993) (regarding extraterritorial application of Sherman Act). As will be noted in the Article, *Hartford Fire* provides conflicting directions.

²⁰⁸ Cf. Dodge, *supra* note 142, at 136 (exploring difference between Currie's and Court's usage).

²⁰⁹ See *Hartford Fire*, 509 U.S. at 798.

the discussion of modern comity with that case given that it is the Supreme Court's most recent extended treatment of the doctrine.

Hartford Fire presented the question of whether international comity permitted a federal district court to exercise jurisdiction over Sherman Act antitrust claims filed against a group of London reinsurers.²¹⁰ Regarding comity, the Court framed the only "substantial question" as "whether there is in fact a true conflict between domestic and foreign law."²¹¹ The defendants, joined by the British Government as *amicus curiae*, argued that "applying the Act to their conduct would conflict significantly with British law" because the British Parliament had "established a comprehensive regulatory regime . . . and . . . the conduct alleged here was perfectly consistent with British law and policy."²¹² However, the Court held that "this is not to state a conflict."²¹³ In the Court's view, the "fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct."²¹⁴ The Court further explained: "No conflict exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both."²¹⁵ In the Court's view, "[s]ince the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States, or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law."²¹⁶

In *Hartford Fire*, the Court explained that comity was only implicated in cases of a "true conflict" between laws of different sovereigns, that is to say that only in cases where a defendant must comply with two conflicting legislative acts would comity be applicable.²¹⁷ In so stating the rule, "the Court never attempted to consider how the interests of England compared to those of the United States."²¹⁸ Finding in that case that the defendants were not *required* to comply with both foreign

²¹⁰ *Id.* at 778-79.

²¹¹ *Id.* at 798 (quoting *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part)).

²¹² *Id.* at 798-99.

²¹³ *Id.* at 799.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 798-99.

²¹⁸ KERMIT ROOSEVELT III, *CONFLICT OF LAWS 226* (2010) [hereinafter ROOSEVELT, *CONFLICT*].

and domestic law — and, thus, finding no true conflict between the laws — the Court refused to apply the doctrine to limit the extraterritorial reach of a U.S. statute.²¹⁹ After finding it was possible “[to] comply with the laws of both [the United States and Britain],” the Court refused to deliberate further on the comity issue and stated that “[w]e have 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.”²²⁰

Due to the Court’s failure “to address other considerations” bearing on comity,²²¹ federal courts have struggled to apply this rule in various comity contexts. As to legislative or prescriptive comity, *Hartford Fire* seemingly requires a true conflicts analysis, although the precise parameters of comity’s application in that context are less than clear.²²² As to executive comity, issues of comity’s reach have largely been dealt with by statutes such as the FSIA and by Supreme Court case law developing the act of state doctrine.²²³ But the comity doctrine is gaining importance in cases interpreting the FSIA and concerning head-of-state immunity.²²⁴ Unfortunately, these cases do not forthrightly engage in a *Hartford Fire* comity-as-true-conflicts analysis. Rather, these cases use comity as background principle of construction to justify deference to foreign sovereigns or executive pronouncements, or as a background principle of construction in cases interpreting the FSIA.²²⁵

²¹⁹ *Hartford Fire*, 509 U.S. at 799.

²²⁰ *Id.*

²²¹ See HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 78 (2008) (noting that “the Court failed to clarify whether and to what extent comity is an appropriate factor in deciding whether to exercise antitrust jurisdiction”). I note that some debate remains as to the continuing effect of *Hartford Fire*’s comity analysis. This is so because the Supreme Court in *F. Hoffman-LaRoche, Ltd. v. Empagran, SA*, 542 U.S. 155, 165-66 (2004), appeared to refuse to consider a case-by-case analysis of particular comity concerns. BORN & RUTLEDGE, *supra* note 1, at 672. While there is academic debate on this point, federal courts have continued to look to *Hartford Fire* for guidance and, thus, that case remains relevant for this Article. See *infra* Part II.

²²² See Koh, *supra* note 221, at 80 (“[T]he Court left unclear whether it was saying that the only relevant comity factor *in that case* was conflict with foreign law . . . or whether the Court was more broadly rejecting balancing of comity interests in *any* case where there is not true conflict.”).

²²³ See Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2006)); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 409 (1964).

²²⁴ See *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 627 (7th Cir. 2004).

²²⁵ However, as discussed in the main text, issues of international comity akin to international abstention frequently raise important comity concerns.

Adjudicatory comity is much murkier, given the lack of legislative enactments or Supreme Court case law on the subject. The only extended discussion of the subject was in *Hilton*. *Hilton*'s rule has largely been replaced by the Uniform Foreign Money Judgments Recognition Act, which applies in most states.²²⁶ *Hilton* is of limited utility in adjudicatory conflicts analysis both because of this development and because of the opaque analysis the Court conducted. Another contemporary discussion in Supreme Court majority opinions is the recent case of *Sosa v. Alvarez-Machain*.²²⁷ But that case hardly offered clear guidance for lower courts applying the doctrine, except for the vague notion of "case-specific deference" articulated therein.²²⁸ The most notable dissenting opinion addressing the subject was Justice Scalia's in *Hartford Fire*. Justice Scalia's differentiation between prescriptive comity and the comity of courts was curious, for his point was that there was a difference between comity in construing statutes and in determining jurisdiction.²²⁹ In any event, these references to international comity provide no clear analytical framework for its exercise, and, thus, courts have been left to cobble together their own approach to the issue.

For instance, the Ninth Circuit has interpreted *Hartford Fire*'s true conflict language as requiring a true conflict test for *all* comity analyses, not just those involving the extraterritorial application of federal law.²³⁰ Under that approach, it is a "predicate requirement" in *any* comity analysis that there be a "true conflict" between domestic and foreign law for the comity doctrine to be applicable.²³¹ The Third Circuit has similarly articulated the *Hartford Fire* standard broadly and has applied it in cases beyond statutory construction. According to that court, "[a]bsent true conflicts, a judgment from a foreign court, or

²²⁶ UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 149 (1986).

²²⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760 (2004) (Breyer, J., concurring in part and concurring in the judgment).

²²⁸ *Id.* at 733 n.21 (noting that there is "strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

²²⁹ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

²³⁰ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1211-12 (9th Cir. 2007); see also *Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009) (adopting "actual conflict" language in context of determining whether Salvadoran amnesty law should be applied in United States).

²³¹ See *Sarei*, 487 F.3d at 1211-12; see also *In re Simon*, 153 F.3d 991, 999 (9th Cir. 1999) (internal quotation marks omitted) (confirming that "general principles of international comity" are "limited to cases in which there is in fact a true conflict between domestic and foreign law").

parallel proceedings in a foreign forum, rarely have United States courts abstained from deciding the merits of a case on international comity grounds.”²³²

In contrast, the Eleventh Circuit has not focused on conflicts principles in its adjudicatory comity analysis. Conflating adjudicatory comity with federal abstention case law, the court described comity in a recent case as a doctrine that can be applied either “retrospectively” or “prospectively.”²³³

When applied retrospectively, domestic courts consider whether to respect the judgment of a foreign tribunal or to defer to parallel foreign proceedings. When applied prospectively, domestic courts consider whether to dismiss or stay a domestic action based on the interests of our government, the foreign government, and the international community in resolving the dispute in a foreign forum.²³⁴

In that case, the court did not focus on whether there was a conflict, but instead “appeared to expand a conflict principle into a broader abstention doctrine, and delineated the factors it would consider in a prospective application: the interests of the United States government, those of the foreign government, and those of the international community in resolving the dispute in a foreign forum.”²³⁵

Similarly, the Second Circuit has stated that comity describes two different doctrines. Describing *Hartford Fire*-like cases, it detailed one form of comity as “a canon of construction [that] might shorten the reach of a statute.”²³⁶ While these cases are governed by “true conflicts” analysis, the Second Circuit has left open whether a second form of comity that “may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state”²³⁷ is similarly governed by conflicts analysis. For these types of cases, the court has described the test as “whether adjudication of this case by a United States court would offend

²³² *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 393 (3d Cir. 2006).

²³³ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004) (citations omitted).

²³⁴ *Id.*

²³⁵ *Gross*, 456 F.3d at 393-94. The Third Circuit went on to note: “We remain skeptical of this broad application of the international comity doctrine, noting our ‘virtually unflagging obligation’ to exercise the jurisdiction granted to us, which is not diminished simply because foreign relations might be involved.” *Id.* (citations omitted).

²³⁶ *In re Maxwell Comm’n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996).

²³⁷ *Id.*

‘amicable working relationships’” with a foreign country.²³⁸ But such a test is not a clear conflicts test and the court has provided little specificity as to what an offense to “amicable working relationships” with a foreign court or government might actually be. Accordingly, courts in that circuit have taken various views on the question.²³⁹

In post-*Hartford Fire* cases, federal courts have not rigidly invoked conflicts analysis to preclude consideration of the full range of principles relating to legislative, executive, and adjudicatory comity. Rather, the courts most often apply conflict analysis when comity principles intersect with issues of statutory construction.²⁴⁰ Although some circuits like the Third and Ninth have focused on conflict analysis in all types of comity cases, the split between the circuits on the bounds of the doctrine remains active.²⁴¹ We are left with a situation where comity is being applied in many different situations, but *how* it is to be applied is unclear.

B. Modern Comity in Practice

To make clear the muddled space occupied by comity in U.S. case law, it is useful to consider the ongoing case of *Khulumani v. Barclay National Bank*.²⁴² In *Khulumani*, a large class of South African plaintiffs asserted that several multinational corporations aided and abetted torts in violation of customary international law by working with the South African government in maintaining the repressive apartheid regime, which they argued violates the Alien Tort Statute (“ATS”).²⁴³ Significant motions practice in the district court led to a dismissal on

²³⁸ *Bigio v. Coca-Cola Co.*, 448 F.3d 176, 178 (2d Cir. 2006).

²³⁹ Compare *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 285-86 (S.D.N.Y. 2009) (applying true conflict analysis to nonstatutory case), with *Freund v. Republic of France*, 592 F. Supp. 2d 540, 574 (S.D.N.Y. 2008) (“In a case such as this one, where comity principles must be applied to broad issues not directly involving statutory interpretation, the existence of a true conflict does not bar the Court from applying the doctrine and considering other legitimate concerns implicated by United States courts exercising jurisdiction over a foreign sovereign.”), and *In re Air Cargo Shipping Serv. Antitrust Litig.*, No. MD 06-1775(JG)(VVP), 2008 WL 5958061, at *4 (E.D.N.Y. Sept. 26, 2008) (same).

²⁴⁰ These cases do not uniformly address the issue.

²⁴¹ I note that this split is presently active in executive comity cases regarding the FSIA and head of state immunity. See *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 620 (7th Cir. 2004). Such cases do not, however, approach the issue through a conflicts analysis. They are thus of limited utility to my analysis, although they do confirm the present importance of the question.

²⁴² *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 228.

²⁴³ *Id.* at 241; see also 28 U.S.C. § 1350 (2006).

the ground that aiding and abetting liability is not sufficiently established under customary international law to state a violation of the ATS. The Second Circuit, in a per curiam opinion filed with three lengthy concurring opinions with diverging approaches as to the appropriate ATS analysis, held that a plaintiff may plead such a theory under the ATS and, thus, remanded the case for further consideration.²⁴⁴ After an unsuccessful attempt to have the Supreme Court review that judgment, due to the inability of the Court to constitute a quorum, the case was returned to the district court.²⁴⁵ On remand, defendants once again filed a motion to dismiss and among other grounds argued that international comity required dismissal of the complaint.²⁴⁶ The defendants argued that the South African government and the Executive Branch of the United States had “expressed their support for dismissal of the case in various formal statements of interest and other pronouncements, including amicus briefs, resolutions, press releases, and even floor statements in the South African Parliament.”²⁴⁷ On account of these statements, the defendants urged the court to dismiss the case on international comity grounds.

Viewing that question as turning on a conflict of laws inquiry,²⁴⁸ the district court concluded that the litigation does not conflict with South African law.²⁴⁹ After restating the *Hilton* standard and *Hartford Fire*’s true conflicts analysis, the district court held that comity did not

²⁴⁴ *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 261 (2d Cir. 2007) (per curiam). The Second Circuit has subsequently held that “*Sosa* and our precedents send us to international law to find the standard for accessorial liability.” *Presbyterian Church of the Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). Interpreting international law, the Second Circuit held that “the *mens rea* standard for aiding and abetting liability in ATS actions is purpose rather than knowledge.” *Id.* At defendants’ request and without “intimating any view,” the Second Circuit remanded the case to the district court for the limited purpose of allowing defendants to move for certification of an interlocutory appeal on the corporate liability issue. *In re S. African Apartheid Litig.*, Nos. 02 MDL 1499(SAS), 02 Civ. 4712(SAS), 02 Civ. 6218(SAS), 03 Civ. 1024(SAS), 03 Civ. 4524(SAS), 2009 WL 5177981, at *1 (S.D.N.Y. Dec. 31, 2009). The Second Circuit “retained the assignment of all other aspects of [the] appeal.” *Id.* That motion was denied by the district court on December 31, 2009. *Id.* at *2. Since that denial, the Second Circuit decided the case of *Kiobel v. Royal Dutch Petroleum Co.*, Nos. 06-4800-cv, 06-4876-cv, 2010 WL 3611392 (2d Cir. Sept. 17, 2010), holding that corporations are not subject to suit under the ATS.

²⁴⁵ *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008); see 28 U.S.C. § 2109 (2006) (providing for nonprecedential affirmance when Supreme Court lacks quorum).

²⁴⁶ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 284-85.

²⁴⁷ *Id.* at 276.

²⁴⁸ *Id.* at 283.

²⁴⁹ *Id.* at 285-86.

require dismissal because there was “an absence of conflict between this litigation and the [Truth and Reconciliation Commission] process.”²⁵⁰ The court reached this conclusion in a case where both the U.S. and South African governments asserted “the potential for this lawsuit to deter further investment in South Africa.”²⁵¹ According to the South African government, “the issues raised in these proceedings are political in nature. They should be and are being resolved through South Africa’s own democratic processes. We submit, with respect, that another country’s courts should not determine how ongoing political processes in South Africa should be resolved.”²⁵² In the view of the United States:

It would be extraordinary to give U.S. law an extraterritorial effect in [these] circumstances to regulate [the] conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power. Yet plaintiffs would have this Court do exactly that by rendering private defendants liable for the sovereign acts of the apartheid government in South Africa.²⁵³

Notwithstanding these arguments, the district court refused to dismiss the case on comity grounds and also refused to resolicit governmental views on the matter.²⁵⁴

The district court’s treatment of the comity question exposes many of the problems with present applications of comity by U.S. courts. First and as noted above, it is not clear under Supreme Court case law (or even Second Circuit case law) whether courts should employ the *Hartford Fire* analysis beyond statutory comity cases.²⁵⁵ Second, assuming that it does apply to other comity cases (as the district court did), the Court has not provided specific guidance as to *how* the *Hartford Fire* conflicts analysis should be applied in specific cases and what factors should be included as part of that analysis.²⁵⁶ Should

²⁵⁰ *Id.* at 285.

²⁵¹ *Id.* at 286.

²⁵² Brief for Republic of South Africa as Amicus Curiae in Support of Affirmance at app. ¶ 4, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2005) (No. 05-2141).

²⁵³ Brief for United States of America as Amicus Curiae Supporting Defendant-Appellees at 21, *Khulumani v. Barclay National Bank, Ltd.*, 504 F.3d 245 (2d Cir. 2007) (Nos. 05-2141-CV, 05-2326-CV).

²⁵⁴ *Id.*

²⁵⁵ It is not clear in statutory construction cases how a court should approach the issue.

²⁵⁶ See generally Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT’L L.

courts focus on whether there is a conflict between precise laws as did the court in *Hartford Fire*? Should courts focus on whether there is a conflict between administrative, regulatory, or adjudicatory proceedings? Or should courts focus on whether there is a conflict between sovereign policies either articulated by the sovereigns or implicit in their laws and proceedings? The outcome of this, as the district court in *Khulumani* demonstrated, is that it is unclear *what conflict* the district court was to focus on to determine whether a true conflict counseled in favor of comity. Thus, courts have significant leeway to characterize the conflicts analysis in ways perhaps most favorable to judicial inclinations as to the appropriateness of a case going forward.²⁵⁷

Faced with this lacuna, the district court in *Khulumani* focused on whether there would be a conflict in adjudicatory processes between the United States and South Africa. The district court found that “[t]he absence of conflict between this litigation and the [Truth and Reconciliation Commission (“TRC”)] process is fatal to the argument that international comity requires dismissal.”²⁵⁸ This was so because “the purposes of the TRC and this lawsuit are closely aligned: both aim to uncover the truth about past crimes and to confront their perpetrators.”²⁵⁹ But the district court’s focus on a conflict between processes, and its assessment as to the purposes of the processes is most certainly not the conflicts analysis the court commended in *Hartford Fire*. The Court’s usage there “seems to come from the Solicitor General’s amicus brief.”²⁶⁰ According to that brief, “a conflict for comity purposes exists if (1) a foreign government has directed the defendants to engage in the disputed conduct, or (2) the defendants could not have avoided engaging in the disputed conduct without frustrating the clearly articulated policies of the foreign government.”²⁶¹ On the facts of *Hartford Fire*, the conflict analysis was

750, 754-56 (1995) (discussing various approaches to international comity after *Hartford Fire*). The same criticism can be offered in statutory cases. See KOH, *supra* note 221, at 80 (“[T]he Court left unclear whether it was saying that the only relevant comity factor *in that case* was conflict with foreign law . . . or whether the Court was more broadly rejecting balancing of comity interests in *any* case where there is not true conflict.”).

²⁵⁷ This is similar to the critique of the vested rights approach discussed above. See, e.g., CAVERS, CHOICE OF LAW, *supra* note 143 (noting that courts use ill-defined choice-of-law rules to choose their desired result).

²⁵⁸ *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 285 (S.D.N.Y. 2009).

²⁵⁹ *Id.*

²⁶⁰ Dodge, *supra* note 142, at 136 n.218.

²⁶¹ Brief for United States as Amicus Curiae Supporting Respondents at 27-28,

resolved under the Solicitor General's first example of comity given that there was no argument that the defendants had been directed to engage in conduct illegal under U.S. law. The Solicitor General's second notion of comity is akin to more historical notions of doctrine as a clash of sovereign commands. Under this understanding of *Hartford Fire's* true conflicts analysis, the district court should have sought to determine whether there would be a conflict between "articulated" sovereign policies that counseled deference.

Such a conflict analysis in *Khulumani* should have been easy. Both the United States and South Africa argued there was a conflict implicated by these cases. As the United States explained, "we can reasonably anticipate that adjudication of these cases will be an irritant in U.S.-South African relations . . . [and] will also be detrimental to U.S. foreign policy interests in promoting sustained economic growth in South Africa."²⁶² As South Africa explained, "these litigations interfere with [South Africa's] independence and sovereignty, including its sovereign right to determine, according to its internal political and constitutional order, how best to address apartheid's legacy."²⁶³ Such representations should have counseled in favor of dismissal given the agreement between the governments that a conflict was presented, although there are important questions of judicial deference in such cases that Part III will address below.

The whole point of the governmental statements of the United States and South Africa was to convey the belief that adjudication of this matter in a U.S. court would needlessly bring two governments into conflict. The district court did not address these questions, and at a minimum, that illustrates a problem with the comity doctrine in this case and similar cases. In other words, the fact that the modern comity doctrine affords courts the ability to balance sovereign viewpoints, without requiring explicit explanation of how that balancing is conducted, presents problems. At present, the case has become even more complicated from a comity standpoint.

On September 1, 2009, the current South African Justice Minister, J.T. Radebe, sent an unsolicited letter to the district court observing that the suit no longer conflicted with the interests of the South

Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993) (Nos. 91-1111, 91-1128).

²⁶² *In re S. African Apartheid Litig.*, 617 F. Supp. 2d at 277.

²⁶³ *Id.* at 278 n.296.

African government.²⁶⁴ On October 8, 2009, the Legal Adviser and Consul General of Germany's Embassy to the United States responded to the Second Circuit's invitation for his country's views on the litigation given that German defendants were involved in the case.²⁶⁵ That letter explained Germany's opposition to a U.S. court adjudicating a case involving parties who had no relationship to the United States concerning activities that occurred outside of the United States.²⁶⁶ According to the letter, a "substantive decision by a U.S. court would . . . unacceptably infringe on German state sovereignty and interfere in the jurisdiction of German courts, as well as in international trade."²⁶⁷ On November 30, 2009, the Republic of South Africa filed a notice with the Second Circuit stating that it had not determined whether to make a further submission regarding the case, but that it might do so in the future.²⁶⁸

At present, the United States has not submitted another statement of interest. The United States has, however, submitted an amicus curiae brief explaining its previous positions and arguing that the court should deny defendants' interlocutory appeal given that the U.S. government never "explicit[ly] requested [] dismissal on foreign policy grounds."²⁶⁹ According to the United States, "[i]n the absence of such an express request for dismissal [], it is our view that a foreign government's policy interests do not implicate the separation of powers in a manner that triggers an immediate right to review under the collateral order doctrine."²⁷⁰ The United States further argued that:

To the extent that a foreign government's policies are relevant to a district court's determination concerning dismissal on international comity grounds, courts in almost all situations should look to expressions of those policy views made by a foreign government or by the United States but not to any representations about a foreign government's policies made by

²⁶⁴ Letter from J.T. Radebe, Minister of Justice & Constitutional Dev., to Honorable Judge Shira A. Scheindlin, U.S. Dist. Court for the S. Dist. of N.Y. (Sept. 1, 2009) (on file with author).

²⁶⁵ Letter from Klaus Botzet, Legal Adviser & Consul Gen., Embassy of the F.R.G., to Catherine O'Haggan Wolfe, Clerk of Court, U.S. Court of Appeals for the Second Circuit (Oct. 8, 2009) (on file with author).

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See Brief of The Republic of South Africa as Amicus Curiae, *In re S. African Apartheid Litig.*, No. 09-2778-cv (2d Cir. Nov. 30, 2009).

²⁶⁹ Brief for United States as Amicus Curiae Supporting Appellees at 11, *In re S. African Apartheid Litig.*, No. 09-2778-cv (2d Cir. Nov. 20, 2009).

²⁷⁰ *Id.* at 22.

private parties. Absent extraordinary circumstances, governments should speak for themselves.²⁷¹

The Second Circuit heard oral argument on January 11, 2010, and the appeal remains pending.²⁷²

To review, the South African government has argued for dismissal, and yet a South African justice minister has argued that the case should go forward. Another country, Germany, has argued for dismissal. The U.S. government has effectively argued for a remand to the district court, while reserving judgment on the question of dismissal, even though it had previously supported, although perhaps not explicitly, the South African government's position in seeking to have the case dismissed under international comity.²⁷³ Furthermore, the United States has intimated that only governments can speak for themselves in comity matters, and yet the U.S. government has reserved judgment on what it will tell the district court in this case.

At bottom, the comity doctrine is a mess because courts do not know when it applies. Even when it does apply, courts have not been given concrete direction how to apply it, especially when faced with governmental submissions and conflicting governmental submissions. This counsels in favor of a reconsideration of the comity doctrine as presently applied, and such reconsideration should start with at least some accounting of the rationales that animate comity's exercise.

C. Comity's Rationales and the Conflict of Laws

What are the rationales for invoking international comity? Broadly speaking, comity serves two roles. First, comity is one of the traditional underlying legal justifications for why domestic courts "apply" foreign law in transnational cases.²⁷⁴ This justification provides the theoretical ground for a court in one country to apply the laws of another country, while at the same time respecting the territorial sovereignty of states. Second, comity provides courts with a legal rationale that empowers them to defer in some transnational

²⁷¹ *Id.* at 22 n.9 (citation omitted).

²⁷² *In re S. African Apartheid Litig.*, No. 09-2778-cv (2d Cir. argued Jan. 11, 2010).

²⁷³ See Brief for United States as Amicus Curiae Supporting Petitioners, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919); Brief for United States as Amicus Curiae in Support of Affirmance, *Khulumani v. Barclay National Bank, Ltd.* (2d Cir. 2005) (Nos. 05-2141-CV, 052326-CV).

²⁷⁴ RALEIGH C. MINOR, *CONFLICT OF LAWS, OR, PRIVATE INTERNATIONAL LAW* 5 (1901); FRANCIS WHARTON, *A TREATISE ON THE CONFLICT OF LAWS OR PRIVATE INTERNATIONAL LAW* 5 (3d ed. 1905).

cases to the executive, legislative, and judicial acts of foreign sovereigns.²⁷⁵ The comity doctrine is a set of ideas about sovereign-sovereign relations that courts can point to and take into account when adjudicating transnational disputes. These twin strands — territoriality (or sovereignty) and deference — provide, at the broadest level of generality, the opportunity to conceive of the doctrine as squarely within the conflict of laws tradition.²⁷⁶

What is the benefit of the comity doctrine? In both legislative and executive comity cases, for example, comity is necessary to avoid “the inconveniences which would result from a contrary doctrine.”²⁷⁷ Such “inconveniences,” created by a conflict of legislative enactments, sovereign interests, or both, threaten executive and legislative prerogatives as well as foreign policy concerns by placing the laws and executive actions of different sovereigns in direct opposition to each other.²⁷⁸ Such conflicts also needlessly create international discord and place courts in complex situations where they are required to adjudicate issues more appropriately reserved for other branches of government.²⁷⁹ A court’s reliance on the “comity of nations”²⁸⁰ encourages a “spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”²⁸¹ As Justice Breyer explained, “notions of comity [] lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.”²⁸² Such respect manifests itself by way of deference to domestic and foreign legislative and executive authority.

While legislative and executive comity seek to mediate conflicts between sovereigns, the comity of courts seemingly operates to “assure

²⁷⁵ KOH, *supra* note 221, at 19-20; see Paul, *Comity in Int’l Law*, *supra* note 2, at 1.

²⁷⁶ See STORY, *supra* note 4, §§ 29, 38.

²⁷⁷ *Id.* § 35.

²⁷⁸ See Posner & Sunstein, *supra* note 1, at 1183.

²⁷⁹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732, 733 n.21 (2004); *Christopher v. Harbury*, 536 U.S. 403, 417 (2002) (“Judicial enquiry [into conduct of foreign relations by the United States] . . . will raise concerns for the separation of powers in trenching on matters committed to the other branches.”); *Verlinden BV v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) (“Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.”).

²⁸⁰ STORY, *supra* note 4, § 38.

²⁸¹ See *Soci t  Nationale Industrielle A rospatiale v. U.S. District Court*, 482 U.S. 522, 544 n.27 (1987).

²⁸² See *Sosa*, 542 U.S. at 761 (Breyer, J., concurring).

judicial efficiency and to reflect abiding respect for other courts.”²⁸³ Judicial comity is, therefore, a distinct doctrine from the “comity of nations”²⁸⁴ because it involves a relation between courts and not between sovereigns as such. At its core, however, adjudicatory comity is likewise concerned with sovereignty and not simply judicial administration.²⁸⁵ As Justice Story explained, “[i]t is not the comity of the courts, but the comity of the nation which is administered.”²⁸⁶ Indeed, it is incorrect to think that court decisions do not implicate sovereign interests and international relations. As such, the primary justification for invoking the doctrine rests with the fact that there is a conflict between the laws of and the rights conferred by different sovereigns.

Each of these rationales encourages at least some consideration of the sovereign interests at stake in any case raising the comity doctrine. It is this realization that makes a return by courts to a comity doctrine conceived as squarely within the conflict of laws tradition fruitful.

D. Recapitulation

Comity is a conflict of laws doctrine. The narrow reed that unifies comity and conflict of laws, especially modern-day conflicts jurisprudence, is a concern with governmental interests.²⁸⁷ As shown above, the problem with building a bridge between modern comity and the comity doctrine Huber and Story explained is that neither Huber nor Story clearly articulated how a court was to go about determining when comity is due. Currie, on the other hand, has shown through interest analysis that courts in conflicts situations should be concerned with the precise governmental interests at stake when a court is called upon to mediate questions that touch on forum and foreign interests.²⁸⁸ By embracing Currie’s articulation of conflict of laws as concerned with sovereign interests and applying that insight to historical comity, it is possible to reconstruct a modern comity that

²⁸³ *Consumers Union of U.S., Inc. v. C.P.S.C.*, 590 F.2d 1209, 1219 (D.C. Cir. 1978), *rev’d on other grounds sub nom. GTE Sylvania, Inc. v. Consumers Union of U.S., Inc.*, 445 U.S. 375 (1980).

²⁸⁴ See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting); see also Anne-Marie Slaughter, *Court to Court*, 92 AM J. INT’L L. 708, 708 (1998).

²⁸⁵ See STORY, *supra* note 4, § 38.

²⁸⁶ *Id.*

²⁸⁷ ROOSEVELT, CONFLICT, *supra* note 218, at 40 (noting traditional understanding of conflict of laws is “as a means of allocating authority between co-equal sovereigns”).

²⁸⁸ See *supra* Part I.C.

addresses transnational problems in a more concrete and direct way. Seen in this light, comity is a conflict of laws doctrine that should be concerned explicitly with sovereign interests.

Comity analysis is particularly amenable to this resituation because the point of the choice-of-law process is to provide “rules to determine which law . . . shall be applied . . . to determine the rights and liabilities of the parties resulting from an occurrence involving foreign elements.”²⁸⁹ In that comity is concerned with the accommodation of sovereign interests brought about through a conflict of laws, a return to conflicts theory in comity analysis is necessary and appropriate.²⁹⁰ As the cases above show, however, the simple realization that important international and sovereign issues are at stake in any given case is of limited utility without precise parameters for the comity doctrine’s application being explained.

It is here that two of Currie’s basic premises regarding the task of conflicts law are most apt. First, Currie rearticulated the notion present in Story that states have an interest in applying their law and having courts apply their law in transnational cases, even private international law cases.²⁹¹ Second, Currie further explained that the choice-of-law process itself should take these interests into account in resolving conflicts. These two points — that states have interests in conflicts cases and that courts should consult those interests — serve as a fundamental starting point for conflicts theory and concomitantly comity theory. What is needed, therefore, is a resituating of the comity doctrine within such a framework. I take up this task in the next Part.

III. RESITUATING INTERNATIONAL COMITY AS CONFLICT OF LAWS

In this Part, I endeavor to resituate international comity as a conflict of laws doctrine focused on sovereign interests. I develop the idea that courts should focus on ascertaining sovereign interests when conducting a comity analysis. This Part does not attempt to provide explicit rules to resolve all questions regarding comity.²⁹² My more

²⁸⁹ See RESTATEMENT (SECOND) CONFLICT OF LAWS § 2 (1971).

²⁹⁰ See *Soci t  Nationale Industrielle A rospatiale v. U.S. District Court*, 482 U.S. 522, 555 (1987) (noting that comity and “the choice of law analysis” have been “from the very beginning [] linked”).

²⁹¹ See ALEX MILLS, *THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW* 262, 262-63 (2009) [hereinafter MILLS, *CONFLUENCE*].

²⁹² This is a subtle but important distinction. Jack Goldsmith has argued that precise rules should be favored over standards or approaches, as the latter vest too much discretion in courts. See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395 (1999). While this is true, the scope

modest goal is to provide courts with a coherent structure to analyze comity questions through a series of presumptions. Furthermore, the analysis that follows in this Part is consciously limited to one species of comity, adjudicatory comity, which most forthrightly shows the balance of factors that courts should undertake as part of the comity analysis. My goal in this Part is to resituate the comity analysis in the conflict of laws tradition and, thereby, provide a structured approach for analyzing comity issues in specific cases.²⁹³

A. Comity as Conflict of Laws

The use of comity by U.S. courts has grown dramatically in recent years, and its use will continue to grow as more international issues creep into domestic litigation. What is startling about this increased usage, and what makes a reappraisal justified, is that courts invoke the comity doctrine in many circumstances without considering its historical position as a conflict of laws doctrine.²⁹⁴ In doing so, courts gloss over the doctrine's foundation in conflicts jurisprudence and, thus, give short shrift to the doctrine's main historical purpose, which was to mediate the conflict between sovereigns and their laws. This nonconflicts approach leads courts to give only cursory consideration to governmental interests and obscures the ultimate question in any transnational case where a conflict of sovereign power is presented: is there a *conflict* between sovereigns that counsels in favor of judicial deference through comity? Resituating comity within the conflict of laws tradition, especially as that tradition was reinterpreted by Currie, provides a more principled basis for applying the doctrine in transnational cases by bringing sovereign interests to light. Applying

of comity (like the conflict of laws) counsels against concrete rules, for one size does not fit all comity decisions across legislative, executive, and adjudicatory dimensions. Cf. CURRIE, *supra* note 156, at 185. While Posner and Sunstein urge a *Chevronizing* of the comity doctrine in the case of foreign relations law, see *supra* note 1, it is not clear that such an approach to comity cases outside of those detailed therein would be appropriate. Adjudicatory comity cases are perhaps least amenable to rules given the complex issues at stake. Thus, I articulate an *approach* as opposed to a *rule* to be applied in comity cases to prevent needless contraction of comity's goals. The major benefit of such an approach, as will be discussed in the main text, is that it can "openly facilitate[] debate and thus improve[] the legal system." Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 320 (1990).

²⁹³ To be clear, further scholarly work remains to be done regarding comity's invocations in other contexts.

²⁹⁴ See SCOLES ET AL., *supra* note 101, at 18-20.

comity in this way also reveals the complex political and international concerns at stake in many transnational cases.²⁹⁵

It is no understatement to say that transnational litigation often involves complex conflicts between sovereigns. As discussed above, these conflicts present themselves in myriad cases of legislative, executive, and adjudicatory dimensions. Comity's historical position coupled with the Supreme Court's case law intimate that in such cases "[w]hen there is a conflict [between domestic and foreign law], a court should seek a reasonable accommodation . . . that considers the foreign interests, the interests of the United States, and the mutual interests of all nations in a smoothly functioning international legal regime."²⁹⁶ In cases where there are genuine conflicts, the need for comity is especially great, and courts should seek to accommodate it. In other cases without a clear conflict, the need for comity is muted. The question, of course, is how is a court to determine *when* comity is implicated, and how is a court to go about deciding *which* sovereign interests should govern in a given case? While recognizing that comity might be implicated is easy, determining the interests at stake is quite hard. This task is significantly more complicated in cases such as *Khulumani* because comity — a private law doctrine that saw its genesis in the conflict of laws tradition — presents different challenges when transported to public law matters, like the Alien Tort Statute.²⁹⁷

Modern comity analysis merely obscures the underlying interests at stake. Similar to the vested rights approach, "[w]e have invented an apparatus for the solution of problems of conflicting interests that obscures the real problems, deals with them blindly and badly, and creates problems of its own which, in their way, are as troublesome as the ones we originally set out to solve."²⁹⁸ Thus, there is a need to

²⁹⁵ See *infra* Part III.

²⁹⁶ *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

²⁹⁷ Cf., e.g., William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371 (2008) (examining separation between public and private law in conflict of laws thought). As explained by Morton Horwitz, "[o]ne of the central goals of nineteenth century legal thought was to create a clear separation between constitutional, criminal, and regulatory law — public law — and the law of private transactions — torts, contracts, property, and commercial law." Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982). The purpose of this division was to create "a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be the dangerous and unstable redistributive tendencies of democratic politics." *Id.* at 1425. As this Article illustrates, that distinction may be fading through the use of the comity doctrine. I note that further scholarly work remains to be done in this area.

²⁹⁸ CURRIE, *supra* note 156, at 185.

present a new framework for comity analysis that reveals the public interests at stake even in cases of private litigation.²⁹⁹

Currie's interest analysis provides a helpful approach to the issue.³⁰⁰ Currie's central criticism of the vested rights approach was that it permitted judges to escape its rules through characterization and escape devices.³⁰¹ Just as Currie sought to replace the disuniform application of the vested rights approach with an approach more explicitly attuned to sovereign interests, so too does Currie's approach aid the comity analysis. It does so by focusing the comity analysis on concrete problems of sovereign interests that are presented to courts. This approach is particularly appropriate for modern comity analysis because, much like the vested rights approach, comity can be avoided through characterization of the conflict question.

The *Khulumani* case again provides a useful example. As discussed above, the court, in applying a conflicts analysis, focused on the conflict between the litigation at bar and the TRC process. By so characterizing the conflict, the court was able to determine that no conflict existed and, therefore, no need for comity arose because the *goals* of the instant litigation and the TRC process were the same.³⁰² However, had the court characterized the conflicts analysis as a question of whether the case at bar would bring sovereignties into an articulated *conflict*, the result should have been different because both the United States and South Africa explicitly informed the court that the litigation would place them in conflict.³⁰³

Thus, the central problem in modern comity analysis emerges: courts do not know what conflict they should seek to ascertain and how they should go about ascertaining it, and once they find a conflict, there is even less guidance on how they should go about accounting for it. To escape this problem, a comity analysis explicitly concerned with sovereign interests is in order. Relying on Currie, I state the approach to be employed by courts as follows.³⁰⁴

²⁹⁹ See MILLS, CONFLUENCE, *supra* note 291, at 263.

³⁰⁰ I am by no means the first writer to see this connection. See, e.g., Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 2287, 2296 (1996) (noting that Currie provided most prominent analysis of "true conflict" concept). My approach takes this realization a step further to provide an analytical framework.

³⁰¹ See CURRIE, *supra* note 156, at 185; see also Cavers, *Critique*, *supra* note 152, at 9.

³⁰² *Khulumani v. Barclays Nat'l Bank, Ltd.*, 617 F. Supp. 2d 228, 285 (S.D.N.Y. 2009).

³⁰³ As noted above, this is complicated even further by the fact that the submissions of the governments in this case have perhaps changed. The approach in this section explains how to resolve that quandary.

³⁰⁴ See CURRIE, *supra* note 156, at 171-72. Besides Currie, support for such an approach can be found in Supreme Court case law developing the act of state doctrine.

First, until the Supreme Court answers the question of comity's reach both inside and outside the statutory context, the default presumption should be that which was recognized explicitly by the Third and Ninth Circuits, that a conflict analysis should apply in all comity cases.³⁰⁵ This is so because comity is a conflict of laws doctrine and conflicts jurisprudence is therefore a logical starting point for its application. As a conflicts doctrine, comity analysis should be concerned with the precise sovereign interests at stake in any case at bar.

To be clear, it is not apparent what *Hartford Fire's* true conflicts analysis should look like. Indeed, as Part II illustrated, the Supreme Court left little guidance as to the bounds of the doctrine. Until the Court speaks again on the subject, a reliance on Currie's approach provides a clear framework for application. I note that my recourse to Currie's analysis differs in significant ways from his approach. For instance, and as noted above, Currie urged courts to engage in the standard process of statutory construction to resolve conflicts problems.³⁰⁶ For reasons I explain below, such an approach is poorly suited to international conflicts questions arising in public law cases like the ATS. Therefore, I modify Currie's approach to fit that situation, choosing to rely on governmental statements of interest as opposed to the representations of private parties and legislatures, especially in cases of legislative silence.³⁰⁷

Second, there should be a strong presumption that courts will apply forum law and exercise jurisdiction in transnational cases absent compelling and articulated sovereign concerns to the contrary.³⁰⁸ As extensions of the forum sovereign, courts should be reluctant to shirk the obligation to apply forum law.³⁰⁹ Likewise, courts should be

See generally Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT'L L.J. 521 (1992) (explaining historical development of doctrine and its connection with conflict of laws thought). I thank Bo Rutledge for bringing this similarity to my attention.

³⁰⁵ See *supra* Part II.B.

³⁰⁶ See CURRIE, *supra* note 156, at 183.

³⁰⁷ This may be seen as compatible with Currie's thought if we take his statement that interest analyst's assessments of state interests "are tentative, and subject to modification on the advice of those who know better" at face value. *Id.* at 592.

³⁰⁸ That is to say a forum court must justify on the basis of the forum's own policies the application of foreign law. *See id.* at 52-53, 183-84.

³⁰⁹ See Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 1015 (1991) ("Judges are, after all, agents of the state's citizenry and lawmakers, and their paramount obligation must be the implementation of the state's own law."); Paul, *Comity in Int'l Law*, *supra* note 2, at 24 (noting that Story was committed to "protect[ing] and affirm[ing] forum law"). As Wächter explains,

cautious about needlessly relinquishing jurisdiction given that there is a virtually “unflagging obligation” to exercise jurisdiction in cases before them.³¹⁰ Courts should, of course, be concerned with the nuanced international relations issues present in specific comity cases. But such a concern should not encourage a court at the first instance to disregard the necessity of ascertaining the precise governmental interests at stake in its exercise of jurisdiction.

Third, and notwithstanding this presumption, a court should seek to determine the precise sovereign interests at stake and should endeavor to conduct a governmental interest analysis to determine whether comity is due in the case at bar. Such an analysis should seek to discover first and foremost the interests of the United States and also the interests of foreign sovereigns in having a case heard by a court subject to the following considerations.³¹¹ The reason for this is a matter of legitimacy: what makes the decision to apply a sovereign’s viewpoint legitimate is the fact that the decision was made by the proper institutional actor. As shown below, the appropriate decisional actor in such cases is the Executive Branch when there is legislative silence.

Fourth, to the extent the Executive Branch of the United States has encouraged the exercise of jurisdiction, a court should proceed to hear the case notwithstanding an articulated conflict by a foreign sovereign.³¹² In that the Executive Branch argues that there is no

The judge’s task is to give effect to the law in case of a dispute and of resistance. What law shall he effectuate? Certainly only the law laid down or otherwise recognized by the state. This comes from the nature of the positive law and from the relation of the judge to the positive laws whose mere instrument he should be.

Carl Georg von Wächter, *On the Collision of Private Laws of Different States*, 13 AM. J. COMP. L. 417, 421 (Kurt H. Nadelmann, trans.) (1964).

³¹⁰ *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

³¹¹ Following Currie, I note that the mere assertion of an interest by a sovereign does not “amount to an adjudication of the issue.” CURRIE, *supra* note 156, at 624. As discussed in the main text, courts must analyze the statements to determine the deference due.

³¹² See *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion) (“We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts.”). This approach echoes Currie’s conflicts analysis. To the extent the United States expresses an interest and no other state does, this would be akin to a false conflict. To the extent there is an arguable true conflict given the divergent sovereign viewpoints, a court should apply forum law. See CURRIE, *supra* note 156, at 184 (noting that if only forum has interest, court should apply forum law); *id.* at 181-82, 272-82 (noting that court

conflict to be avoided through the exercise of jurisdiction, it is appropriate for a court to defer to the Executive Branch's primary foreign relations responsibilities,³¹³ so long as it is *specific* in the statements presented.³¹⁴ Proceeding to hear the case on account of clearly articulated governmental interests recognizes that diplomatic channels would more appropriately resolve the potential for international discord than judicial abstention would. This is the case because the Executive Branch is better situated to deal with the important international relations concerns presented in transnational cases impacting foreign sovereign interests.³¹⁵ Indeed, it is axiomatic that the Executive Branch is the branch of government in our separation of powers scheme to resolve such issues.³¹⁶

Fifth, should the Executive Branch request that a court *not* exercise jurisdiction, the court should defer to this position even in the face of a contrary foreign sovereign position, unless the position of the Executive Branch is clearly contrary to congressional intent or questionable given the circumstances of the case.³¹⁷ To be clear, this is a much harder case than when the Executive Branch requests the adjudication of a case because it implicates a court's "strict duty to exercise the jurisdiction that is conferred upon them by Congress."³¹⁸

should apply forum law in cases of true conflicts). This view of comity also has parallels with the so-called *Bernstein* exception to the act of state doctrine. See *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam) (amending previous ruling in same case, 173 F.2d 71 (2d Cir. 1949), after State Department expressly endorsed U.S. courts passing judgment on acts of former Nazi regime).

³¹³ See *United States v. Curtiss-Wright Exp. Corp.*, 209 U.S. 304, 319-20 (1936).

³¹⁴ See *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (emphasis added) (noting that *general views* of United States are not entitled to "special deference," but also noting that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a *particular* question of foreign policy").

³¹⁵ *Curtiss-Wright*, 209 U.S. at 320. Of course, the executive's views may change during the course of the litigation, as appears to be the case in the *Khulumani* case discussed above. In such circumstances, the court would be empowered to reconsider the exercise of jurisdiction subject to the approach described above. A change in litigation positions might, for instance, make the Executive Branch's request questionable and entitled to little or no weight, as in the case of the *Khulumani* decision discussed above.

³¹⁶ See *id.* at 319-20.

³¹⁷ It is important to note that not every governmental submission urges dismissal. See Letter from Michael J. Matheson, Acting Legal Advisor, U.S. Dep't of State, to Frank W. Hunger, Assistant Att'y Gen., U.S. Dep't of Justice (July 8, 1997), exhibited in *Burma v. Unocal, Inc.*, 176 F.R.D. 329, 361-62 (C.D. Cal. 1997) (on file with author).

³¹⁸ See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 716, 717 (1996).

Courts should only decline jurisdiction in cases, therefore, where the Executive Branch has been explicit that jurisdiction creates a conflict that warrants abstention in the context of congressional action. Such an approach seeks to balance a court's general obligation to exercise jurisdiction with important separation of powers concerns raised in the comity analysis. In so doing, courts will respect the separation of powers under the Constitution and the primary responsibility of the Executive Branch in conducting foreign affairs. Again, courts should request that the Executive Branch make its views plain as to the concrete reasons why the instant case creates a conflict warranting abstention.³¹⁹ By requiring the Executive Branch to be explicit, a court can be sure that the Executive Branch has determined that a particular case will harm U.S. interests.

Sixth, should the Executive Branch or a foreign sovereign not take a position, the court should engage in its own process to ascertain the governmental interests at stake, both domestic and foreign. Such determinations are complex, to say the least, and touch on important areas of international relations. Indeed, one of the primary failings of Currie's interest analysis is that it requires a court to state what the sovereign's interests are in many cases when the sovereign has been silent. Currie himself recognized this problem in explaining that legislatures frequently do not place territorial or policy limitations, or even explanations, in their statutes.³²⁰ Currie resolved this dilemma for his conflicts theory by encouraging courts to engage in the general process of statutory construction, thereby determining the relevant governmental interests at stake.³²¹ While such an approach might be appropriate in domestic cases due to the dialogical and organic relationship between domestic legislatures and courts, such an approach is not suited to mediating international conflicts for various reasons.

First, and most obviously, to the extent that domestic courts are unable to determine domestic intent based on general principles of statutory construction,³²² it seems clear that courts are unable to determine foreign sovereign interests utilizing the same principles.³²³

³¹⁹ See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 420 (1964).

³²⁰ CURRIE, *supra* note 156, at 171-72.

³²¹ *Id.*

³²² See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568-69 (2005) (describing problems with legislative history and stating that "[w]e need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed").

³²³ See Brilmayer, *Other State's Interests*, *supra* note 194, at 233-38.

Barriers of language, culture, legal systems, and methodology limit the ability of a domestic court to pronounce a foreign sovereign's interests. Second, the determination of foreign sovereign interests places courts in the awkward position of dictating foreign law in such a way as to either discount it and disregard the dignity of the foreign sovereign or count it in a way that misinterprets the effect of the law. Domestic courts in pronouncing on such issues may needlessly enmesh the judiciary in foreign affairs. Thus, there is a need for a solution to the problem that gives deference to the complex governmental interests at stake while providing the courts with a rule for decision. In the next section, I will develop various options that a domestic court might employ when faced with such issues. But in the interest of completeness for the present section, I finalize the conflicts approach courts should apply.

Seventh, after seeking to elicit governmental interests and should the Executive Branch not take a position notwithstanding the court's solicitation, the court should generally defer to the position of the foreign sovereign (assuming it takes a position), unless such a position is arguably contrary to congressional intent, a violation of public policy,³²⁴ or questionable under the circumstances.³²⁵ In other words, if the Executive Branch refuses to say what its interests are, it should generally be presumed that it does not have an interest in the case.³²⁶ Such a requirement provides litigants and the courts with a bright-line rule, making it relatively easy to resolve the comity question in the face of sovereign silence. Such a bright-line rule would also do much to encourage the U.S. government to take a position, as it has yet to do explicitly, for instance, in the *Khulumani* case.

³²⁴ See BORN & RUTLEDGE, *supra* note 1, at 450-500.

³²⁵ For instance, collusion with the parties might make a foreign sovereign's statement questionable.

³²⁶ Cf. *Abad v. Bayer Corp.*, 563 F.3d 663, 668 (7th Cir. 2009) (Posner, J.) ("And so the plaintiffs in our two cases argue that the United States has a greater interest in the litigation than Argentina because the defendants are American companies, while the defendants argue that Argentina has a greater interest than the United States because the plaintiffs are Argentines. The reality is that neither country appears to have any interest in having the litigation tried in its courts rather than in the courts of the other country; certainly no one in the government of either country has expressed to us a desire to have these lawsuits litigated in its courts."); *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1378 (11th Cir. 1998) ("[W]e think it significant, for purposes of this case, that the Venezuelan government has taken no position on whether this lawsuit proceeds in the United States or in Venezuela. Without such an indication from the foreign nation, we are reluctant to find that the plaintiffs' private cause of action sounding in Georgia tort law implicates important foreign policy on the face of the plaintiffs' pleadings.").

Eighth, should no sovereign take a position notwithstanding solicitation, the default rule should be that the courts will apply forum law.³²⁷ Again, such a bright-line rule would provide much needed clarity for litigants. Such an approach, however, would not be applied in cases where there is congressional intent to the contrary.³²⁸

Finally, in ascertaining the governmental interests at stake, the court should clearly state its approach and reasons for decision in detail in its opinion.³²⁹ In so doing, courts will state their assumptions openly, and courts will be prevented from resolving comity cases “on the basis of preconceptions that they need not articulate or defend.”³³⁰ Furthermore, appellate courts will be better positioned to review these findings, either under an abuse of discretion or other standard of appellate review. On appellate review, the courts should again seek to apply the above approach and, in some cases, resolicit the domestic and foreign governmental interests at stake before deciding the case on comity grounds.

B. *Objections and Implications*

Such an approach is obviously not without objections. First, it might be argued that this approach to comity does not find support in historical notions of the doctrine.³³¹ It is certainly the case that neither Huber nor Story affirmatively asked courts to engage in a process of ascertaining sovereign interests or viewpoints. As noted above, this is an important failing of the comity doctrines those writers proposed. While Currie’s approach generally encouraged a court to engage in a

³²⁷ I note that some courts have begun to do this in the related context of the political question doctrine. *See, e.g.,* *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 389-90 (3d Cir. 2006) (illustrating that Executive Branch’s refusal to file statement counsels against applying doctrine); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, No. 01 Civ.9882(DLC), 2005 WL 2082846 (S.D.N.Y. Aug. 30, 2005) (same).

³²⁸ To be clear, in some cases the United States may not have an interest in the case, because the case does not implicate either domestic plaintiffs or law. In such cases, a court should seek to ascertain the interests of the affected sovereigns, subject to the general default rule that forum law should be applied.

³²⁹ As Robert Lefflar has noted, “honesty is the best policy, even in judicial opinions.” Robert Allen Lefflar, *Choice of Law: States’ Rights*, 10 HOFSTRA L. REV. 203, 215 (1981).

³³⁰ *See* Kramer, *supra* note 292, at 320; *id.* (“Moreover, articulating the assumptions that are supposed to guide a court’s decision forces judges to confront them and to debate their merits.”); *see also* Juenger, *General Course, supra* note 31, at 288 (“Judges should be expected to reveal the true reasons for their decision in multistate as well as in purely domestic cases.”).

³³¹ I thank Bill Dodge for pressing me on this point.

process of statutory interpretation to determine a conflict, it does not adequately address the need to take into account important executive concerns in the application of the comity doctrine to many cases with important public ramifications. While there may be little direct support for resituating comity in this way, the implicit and explicit direction of both Story and Currie to take account of sovereign interests supports seeking the views of the Executive Branch and foreign sovereigns. The approach to comity discussed above takes Currie's important realization that courts should consult governmental interests and precisely directs courts how to consult those interests in cases of legislative silence by seeking governmental statements of interest from the Executive Branch and foreign sovereigns potentially implicated by a court's decision.

It might also be argued that such an approach to comity makes the court "a mere errand boy for the Executive Branch which may choose to pick some people's chestnuts from the fire, but not others."³³² This is an important concern in our separation of powers system. Faced with the choice of muddying these decisions in a nebulous comity doctrine or explaining the important separation of powers concerns that are at stake, I believe the latter does more to encourage dialogue between the branches of government. Furthermore, "[a] court is no less beholden to the Executive when it performs the same function, only less efficiently, by ascertaining executive policy through its own independent investigation."³³³ Indeed, such an approach poses serious challenges to separation of powers.³³⁴ As such, dialogue between the branches should not be resisted, but encouraged in cases where courts might be drawn into conflicts between sovereigns. It is, of course, not the Executive Branch alone that must determine foreign policy, for that is a function shared with the legislative branch. But as to the choice between having courts decide such questions without the considered views of those branches and encouraging that dialogue, the latter is perhaps more in keeping with our constitutional heritage.³³⁵

This section has attempted to resituate the comity doctrine courts presently apply as a conflict of laws doctrine designed to ameliorate conflicts between sovereigns. It has suggested that courts should undertake the task of ascertaining whether a conflict exists through

³³² See *First Nat'l Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 780 (1972) (Douglas, J., concurring) (challenging approach to act of state doctrine).

³³³ Fox, *supra* note 304, at 534 n.75.

³³⁴ *Id.*

³³⁵ See H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* 147 (2002).

ascertaining governmental interests in the case at bar, and only in those cases where there is a conflict should domestic courts then engage the international comity analysis in full. Such a proposal leads to the following question: how should a domestic court go about determining whether the case at bar raises a conflict? What follows is a brief explication of some alternatives available to courts in reaching a decision. After explaining these alternatives, the next section discusses the question of deference. I end by briefly explaining the democracy-enhancing outcomes of this approach.

1. Statements of Interest and Amicus Briefs

As explained above, any resituated comity analysis must first and foremost seek to ascertain the interests of the sovereigns implicated by the case at bar. Statements of interest and amicus briefs filed by the Executive Branch provide an appropriate way to engage that analysis.³³⁶ As a matter of practice, the Executive Branch frequently files such briefs in litigation involving foreign sovereigns.³³⁷ Foreign governments also file such briefs in cases implicating their interests.³³⁸ Such briefs should be encouraged and solicited by courts and parties in transnational cases where comity is an issue.³³⁹ In so doing, courts and parties will recognize and embrace the fact that disputes between private litigants have important ramifications for sovereign interests.³⁴⁰ If the purpose of comity as a doctrine of accommodating sovereign interests is to be served, it is served best by courts and parties encouraging sovereigns to explain precisely their interests in transnational cases.

Supreme Court practice provides a useful exemplar of such an approach. In any given Term, the Supreme Court calls for the views of the Solicitor General (“CVSG”) in cases implicating the interests of the

³³⁶ See 28 U.S.C. § 517 (2006).

³³⁷ See, e.g., *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (involving amicus brief filed by executive); *Flatow v. Islamic Republic of Iran*, 305 F.3d 1249 (D.C. Cir. 2002) (same).

³³⁸ See *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1211-12 (9th Cir. 2007); *Khulumani v. Barclays Nat'l Bank, Ltd.*, 617 F. Supp. 2d 228, 276 (S.D.N.Y. 2009).

³³⁹ In addition to statements of interest and briefs, the United States government as well as foreign governments sometimes file letters with courts regarding pending cases. See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764-65 (1972). In my view, such letters are inferior to statements of interest and briefs because it may be unclear whether they comprise the fully considered views of the government. See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 384 (3d Cir. 2006).

³⁴⁰ See Horatia Muir-Watt, *Choice of Law in Integrated and Interconnected Markets: A Matter of Political Economy*, 9 COLUM. J. EUR. L. 383, 404 (2003).

United States.³⁴¹ Such CVSGs provide the Court with the clear and considered views of the United States in having a case heard by the Court. The overwhelming consensus regarding such briefs is that they are appropriate to certiorari-stage decisionmaking and helpful to the Court in deciding whether to grant certiorari. Of course, the Court does not always accept the considered views of the United States when determining whether or not to grant the writ. But by requesting that the United States go on record regarding the case, the Court is better positioned to analyze the cert-worthiness of the case at bar. Such an approach also generally leads to the United States seeking to intervene either as a party or amicus at the merits stage, which further apprises the Court of the views of the United States.

2. Evidentiary Hearings

Another approach to be considered is the appropriateness of a federal court deciding such issues under its general powers under Federal Rule of Evidence 44.1 to resolve questions of foreign law. In the event neither the United States nor a foreign government adequately responds to the above calls for clarification, a court could consider holding evidentiary hearings on the application of comity. Expert witnesses — in some cases scholars, in other cases government officials — could be examined to help the court conduct its comity analysis. Such an approach should be a last recourse for U.S. courts and should only be attempted after more direct governmental views are solicited. This is so because the point of comity as a conflicts doctrine should be to remove the courts, if possible, from making complex international relations decisions. It is also the case that such an approach to the question may run the risk of obscuring the precise sovereign interests at stake on account of “an adversary’s spin.”³⁴²

C. *The Question of Deference*

Assuming that domestic courts are willing to ascertain the interests of sovereigns through such measures, do governmental statements of

³⁴¹ For a discussion of the Court’s CVSG practice, see David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 270-73 (2009).

³⁴² *Bodum USA, Inc. v. La Cafetiere, Inc.*, No. 09-1892, slip op. at 9 (7th Cir. Sept. 2, 2010), available at <http://www.ca7.uscourts.gov/tmp/1B14GAYR.pdf> (illustrating problems of proving foreign law and containing various statements by Chief Judge Easterbrook and Judges Posner and Wood on issue).

interest resolve the case? In other words, must a domestic court defer in full to executive or foreign views on the case at bar? While the default approach described above will generally answer this question, some further thoughts on the question of deference are warranted.

First, as the Supreme Court has noted, there is a “customary policy of deference to the President in matters of foreign affairs.”³⁴³ While courts should not question either the accuracy of the description of a foreign interest or the wisdom and effectiveness of the explained governmental policy, it remains appropriate for a court to consider the degree to which that articulated foreign policy applies to the litigation at bar.³⁴⁴ As the Supreme Court has explained, deference is appropriate to the extent that a sovereign’s opinion has been stated with particularity regarding “*particular* petitioners in connection with *their* alleged conduct.”³⁴⁵ In conducting this analysis, the court must accept the statement of foreign policy provided by the Executive Branch as conclusive of its view of that subject; the court may not assess whether the policy articulated is wise or unwise or whether it is based on misinformation or faulty reasoning.³⁴⁶ Courts should question general statements of interest on the part of the Executive Branch or a foreign sovereign. In such cases, the first recourse should be a resolicitation of governmental interest, addressing specific questions to the sovereigns involved.

In some cases, however, there will still be room for judicial discretion. As Eric Posner and Cass Sunstein have recently argued, perhaps *Chevron* deference and other principles of administrative law provide the appropriate framework to resolve such questions of comity.³⁴⁷ Curtis Bradley has made similar arguments.³⁴⁸ Even though these arguments are persuasive in the context of the extraterritorial application of federal law, I take no general position on that proposal considering that it does not reach questions of adjudicatory comity. In my view, questions of deference are resolved by the default approach explained earlier, which generally requires the application of forum law and jurisdiction absent a demonstrated conflict by an approach to

³⁴³ See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005). I note that this presumption has not always been honored.

³⁴⁴ See CURRIE, *supra* note 156, at 624 (illustrating that court must not rely simply on asserted interests).

³⁴⁵ *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (3d Cir. 2006).

³⁴⁶ *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

³⁴⁷ Posner & Sunstein, *supra* note 1, at 1179.

³⁴⁸ Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661-62 (2000).

deference resituated in the conflict of laws tradition.³⁴⁹ Such a default approach is perhaps favorable over these other approaches because there remains the concern that courts will submerge the important governmental interests at stake through the nomenclature of law. Unlike Posner and Sunstein, I see no need for the full incorporation of a doctrine of domestic public law concerning the allocation of congressional and executive authority to be incorporated into a doctrine like comity that has important private, international, and sovereign dimensions.

Furthermore, it is my hope that the default approach described above will provide a clear roadmap for courts faced with a question of deference that embraces the separation of powers rationale implicit in the doctrine. While *Chevronizing* comity solves many important questions of deference in areas of foreign relations law, it does not necessarily encourage a court to create an evidentiary record as to the reasons for its decision. Such an evidentiary record provides at least three benefits. First, it precisely details the expressed governmental interests at stake. Second, it appries the domestic and foreign sovereigns that such interests might be implicated by the case at bar. Third, it provides a detailed record for appellate review of the comity question. As should be clear from the foregoing, the conflict of laws approach provided in this Article seeks not only to defer to the Executive Branch, which I take as the main point of Posner and Sunstein's analysis, but also to identify precisely and resolve carefully the governmental interests at stake in transnational cases through a developed record.

Incident to the question of deference is the question of whether such an approach needlessly trenches upon the judicial branch's obligation to hear cases within their jurisdiction.³⁵⁰ In my view, this important separation of powers concern — that the judiciary preserve

³⁴⁹ While this section is influenced by Bradley, Posner, and Sunstein's valuable work, this Article differs substantially from their approach in at least three respects. First, their articles are concerned with the appropriate deference due in cases touching foreign relations law. This Article is concerned with the antecedent question regarding how a court is to determine the sovereign interests at stake in private litigation. Second, Bradley's article does not provide a theoretical examination of international comity, and to the extent Posner and Sunstein advance a theory of the comity doctrine, their theory is grounded in public law and, in particular, administrative law. This Article looks to the conflict of laws tradition to advance a theory of the comity doctrine. Third and finally, their articles are largely concerned with the extraterritorial reach of federal statutes. While there is some reference to abstention-like doctrines such as the act of state doctrine, their articles do not focus directly, as does this Article, on the role of comity in international abstention cases.

³⁵⁰ Cf. BORN & RUTLEDGE, *supra* note 1, at 54 (examining argument).

its duty to “say what the law is”³⁵¹ — can be ameliorated by an approach that encourages dialogue between the branches.³⁵² To recognize and request that the Executive Branch and foreign sovereigns inform the court of their views, and to take those views into account, does not amount to a delegation of the judicial function to the Executive Branch or foreign sovereign. Instead, it fosters the realization that in matters touching international relations, there is a necessary relationship and accommodation between the branches that must be sought. It does not serve separation of powers concerns to obscure this question in the language of deference presented by the modern comity doctrine because that doctrine merely enables courts to obscure these important concerns through legal incantations. In place of that muddled doctrine, a more precise doctrine situated in a conflict of laws tradition and concerned with sovereign interests will necessarily foster inter-branch dialogue and bring about important democracy-enhancing outcomes. As discussed in the next section, this is an important outcome of a conflicts approach to comity.

D. Outcomes

The primary outcome of the above approach is that courts will be encouraged to describe explicitly their reasons for invoking or rejecting the application of comity in such a way that reveals the sovereign interests at stake in comity cases. In so doing, the democratic-enhancing function of comity is brought to the forefront of judicial decision-making. Courts have to carry out important democratic functions as extensions of the sovereign. Through a conflicts approach, courts, parties, and sovereigns will be prevented from obscuring complex issues of international relations behind the nomenclature of law. The sovereign interests at stake will be sought and articulated, and the democratic branches of government will be

³⁵¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁵² *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768-70 (1972) (“Our holding is in no sense an abdication of the judicial function to the Executive Branch. The judicial power of the United States extends to this case, and the jurisdictional standards established by Congress for adjudication by the federal courts have been met by the parties. The only reason for not deciding the case by use of otherwise applicable legal principles would be the fear that legal interpretation by the judiciary of the act of a foreign sovereign within its own territory might frustrate the conduct of this country’s foreign relations. But the branch of the government responsible for the conduct of those foreign relations has advised us that such a consequence need not be feared in this case. The judiciary is therefore free to decide the case without the limitations that would otherwise be imposed upon it by the judicially created act of state doctrine.”).

provided with an important check on judicial decision-making. Likewise, the public grappling with these important issues will perhaps encourage further democratic activity, such as congressional action in important areas of international relations.

The Foreign Sovereign Immunities Act³⁵³ provides a useful example. As has been explained in great detail elsewhere, before the passage of that act, courts generally sought the views of the State Department through suggestions of immunity in cases where a foreign state or government official requested immunity from suit in a U.S. court.³⁵⁴ After years of dealing with such suggestions and on account of inconsistent application,³⁵⁵ Congress recognized that the approach did not adequately take U.S. and foreign sovereign interests into account. In passing the FSIA, Congress directed the courts to presume immunity, subject to various congressionally mandated exceptions. While there has been significant case law developing these exceptions, a dialogue between the courts, Congress, and the executive was encouraged for determining these important questions of sovereign immunity, and that dialogue is ongoing.³⁵⁶

Until such a time that Congress provides direction for comity cases, courts should resist the call to create judicial doctrines of abstention that tramp on sovereign interests, especially when such invocations of the doctrine do not explicitly take account of the direct sovereign interests a court's decision implicates.

CONCLUSION

This Article has sought to resituate international comity as a conflict of laws doctrine. My hope has been to realign comity with general principles of conflict of laws in order to provide domestic federal courts with a principled way to exercise discretion in cases that implicate comity. A principled approach requires the historical recognition that comity is a conflict of laws doctrine designed at its core to ameliorate conflicts between sovereigns and their laws. Conceived of in this way, comity is concerned with governmental interests and, as such, a return to that concern through the lens of Currie's governmental interest analysis has much to offer modern

³⁵³ Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611 (2006)).

³⁵⁴ See *Verlinden v. Cent. Bank of Nigeria*, 461 U.S. 480, 487-89 (1983).

³⁵⁵ *Id.* at 488.

³⁵⁶ See 28 U.S.C. § 1605(a)(7) (2006) (amending FSIA to deny immunity for state sponsors of terrorism).

invocations of the comity doctrine. Many questions, of course, remain unanswered even in this proposed application of the doctrine. Notwithstanding these questions, my hope is that bringing the question more explicitly to the forefront in judicial decisionmaking will encourage dialogue between the branches. In so doing, the “elusive” concept of comity may perhaps become more concrete in U.S. case law.