
COMMENTS

TO ABSTAIN OR NOT TO ABSTAIN?:
A NEW FRAMEWORK FOR APPLICATION
OF THE ABSTENTION DOCTRINE IN
INTERNATIONAL PARALLEL
PROCEEDINGS

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INTRODUCTION

It is obvious to most that the ties between people and businesses in different countries have increased dramatically in recent years. One of the effects of this globalization of the world’s economies and societies is an increase in international or transnational litigation.¹ For, as traveling and conducting business across international borders becomes easier and cheaper, and the number of international business transactions increases, so too have the number of lawsuits involving parties and transactions or occurrences from different countries.²

1. See Linda Silberman, *Transnational Litigation: Is There a “Field”?* A Tribute to Hal Maier, 39 VAND. J. TRANSNAT’L L. 1427, 1427 (2006) (discussing the development of the field of transnational litigation and the growth of its importance in recent years).

2. See N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 608 (2006) (stating that increased global commerce has led to a “proliferation” of the cases in which more than one country has jurisdiction); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 30–47 (2004) (discussing trends in international parallel proceedings); Margarita Treviño de Coale, *Stay, Dismiss, Enjoin or Abstain?: A Survey of Foreign Parallel Litigation in the Federal Courts of the United States*, 17 B.U. INT’L L.J. 79, 80 (1999) (noting that expansion of transnational economic activities and a corresponding increase in international business disputes have increased the number of parallel lawsuits being filed in the U.S. and abroad).

This development has also led to a corresponding increase in the number of lawsuits before United States courts which are similar, or indeed sometimes exactly parallel, to lawsuits pending before foreign courts.³ This is because oftentimes both United States federal courts and courts of foreign countries have jurisdiction to hear cases involving the same or similar parties and issues, and the attorneys involved file lawsuits in multiple jurisdictions in an effort to find the best venue for their client.⁴ In response, litigants sometimes seek to have a federal court stay or dismiss a proceeding and allow the foreign court to decide the legal issues involved.⁵

The increase in foreign parallel litigation has created a need for consistency and predictability in how a federal court will determine whether to stay or dismiss a case in favor of a concurrent, parallel proceeding in a foreign court.⁶ At present, federal courts, due to a lack of Supreme Court guidance⁷ and no relevant statutory authority,⁸ do not uniformly apply one analysis to determine the outcome of

3. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 521 (4th ed. 2007) (noting that expansive principles of jurisdiction, along with incentives derived from differences among the legal systems in different countries, have made it feasible and advantageous for litigants to engage in lawsuits in more than one country).

4. See Andrés Rivero et al., *Essay, A Comity of Errors: Understanding the International Abstention Doctrine*, 17 FLA. J. INT'L L. 405, 416 (2005) (arguing that attorneys representing clients who have been served process in a foreign court should not be put off from filing a similar proceeding in another court because they "owe it to . . . [their] client[s] to try to bring the case in the most convenient and appropriate forum"). *But see* James P. George, *International Parallel Litigation—A Survey of Current Conventions and Model Laws*, 37 TEX. INT'L L.J. 499, 501 (2002) (noting criticisms of parallel litigation, including the arguments that it is "vexing and harassing, wasteful of the parties' and courts' resources," and can produce inconsistent results and inter-governmental discord).

5. Such a request is based on the common law *lis alibi pendens* doctrine, which allows a court to stay or dismiss a proceeding in favor of an action in another court that involves similar parties and matters. See BORN & RUTLEDGE, *supra* note 3, at 522 (providing an overview of federal courts and international parallel proceedings); Treviño de Coale, *supra* note 2, at 89 (discussing the common law doctrine of *lis alibi pendens*).

6. See *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 314 (S.D.N.Y. 1986) (noting the importance of "sensitivity to the need of the international commercial system for predictability in the resolution of disputes") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3355 (1985)); Teitz, *supra* note 2, at 2–3 (arguing that the proliferation of international parallel proceedings and the variety of approaches used to address them highlights the increasing need for a "uniform response").

7. See Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 103–04 (1986) (arguing that the Supreme Court has failed to provide federal courts with meaningful guidance on when to abstain in favor of a concurrent proceeding, noting specifically that "[r]ather than providing the lower courts with meaningful criteria for principled restraint, the Supreme Court has supplied an empty conglomeration of talismanic phrases and incantations").

8. BORN & RUTLEDGE, *supra* note 3, at 523.

such a motion.⁹ The lack of uniformity has made the issue of international parallel litigation one of the most unsettled areas of law involving federal jurisdiction in the United States.¹⁰

Federal courts have primarily followed two abstention doctrines articulated by the Supreme Court when faced with a motion to stay or dismiss a lawsuit in light of a concurrent, parallel proceeding in a foreign court.¹¹ A significant number of federal courts have based their analyses on *Colorado River Water Conservation District v. United States*,¹² which addressed when a federal court should abstain in favor of a parallel proceeding in a state court.¹³ Other courts have applied the analysis set forth in *Landis v. North American Co.*,¹⁴ which addressed when a federal court should abstain in favor of a parallel

9. See Calamita, *supra* note 2, at 603 (noting the lack of consensus in U.S. federal courts as to the framework for addressing international parallel proceedings); Martine Stückelberg, Lis Pendens and Forum Non Conveniens at the Hague Conference, 26 BROOK. J. INT'L L. 949, 960–61 (2001) (arguing that the lack of a Supreme Court decision on international parallel proceedings has led to different interpretations of the issue in different circuits); Louise Ellen Teitz, *Parallel Proceedings: Treading Carefully, in International Litigation* (Baron Legum, ed.), 32 INT'L LAW. 223, 229 (1997) (arguing that the proliferation of bases of international parallel proceedings have left litigants with little certainty); see also *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (noting disagreement among federal courts as to whether they have the power both to dismiss or stay a proceeding pending the outcome of a parallel proceeding in a foreign court).

10. Calamita, *supra* note 2, at 678.

11. See George, *supra* note 4, at 507–08 (noting that federal courts have followed the set of factors laid out in *Landis v. North American Co.* or in *Colorado River Water Conservation District v. United States* when addressing a motion to stay or dismiss pending the outcome of a parallel proceeding in a foreign court); Calamita, *supra* note 2, at 613 (discussing the application of *Colorado River* and *Landis* to the question of international parallel proceedings). These two authors have argued that there exists a third approach, distinct from the first two and based on comity, that is exemplified in the doctrine set forth by the Eleventh Circuit in *Turner Entm't Co. v. Degeto Film GMBH*. George, *supra* note 4, at 508; Calamita, *supra* note 2, at 614. However, the framework laid out in *Turner*, while different than the frameworks based on *Colorado River* and *Landis*, is directly derived from these two doctrines. Far from being a separate doctrine, the *Turner* framework is an evolution of the analyses set forth in *Colorado River* and *Landis* and applied by the federal courts. *Turner* is, therefore, an example of the different ways in which circuit courts, in the vacuum created by the silence of the Supreme Court on the issue, have sought to address the issue of abstention in favor of a foreign proceeding.

12. 424 U.S. 800 (1976).

13. See BORN & RUTLEDGE, *supra* note 3, at 524; Calamita, *supra* note 2, at 613 (arguing *Colorado River* is one of three approaches federal courts have used to decide international parallel litigation cases); George, *supra* note 4, at 507–08 (noting courts have “borrowed” the analysis in *Colorado River* to address international parallel proceedings); Rivero et al., *supra* note 4, at 406–07 (arguing the “genesis” of international abstention cases is the “wise judicial administration” standard set forth in *Colorado River*); Stückelberg, *supra* note 9, at 960–61 (noting that because the Supreme Court has not addressed the use of a stay in the context of international parallel proceedings, federal courts have applied *Colorado River* to help analyze the issue).

14. 299 U.S. 248 (1936).

proceeding in another federal court.¹⁵ Under an application of either scenario—or sometimes a combination of both—federal courts’ analyses in different circuits have varied, leading to additional uncertainty about how a federal court will analyze such a case.¹⁶

This Comment argues that federal courts need a single framework for analyzing how to determine whether they should stay or dismiss a proceeding in favor of a concurrent, parallel proceeding in a foreign court.¹⁷ Although the *Colorado River* framework has not been without its critics with respect to abstention in favor of parallel domestic proceedings,¹⁸ there are facets of the doctrine that, as several lower courts have recognized, are particularly useful where the parallel proceeding is taking place outside of the United States. Thus, this Comment explains the utility of the *Colorado River* doctrine in the context of parallel foreign or international proceedings and suggests a few minor amendments thereto that better account for both the difficulties lower courts have encountered in applying *Colorado River* to date and the unique questions that arise where foreign or international proceedings are concerned. After providing a background on the Supreme Court’s domestic abstention

15. Many of the same scholars who have discussed the application of *Colorado River* have also noted the use of *Landis* by some federal courts seeking precedent on which to base their decisions when presented with a case parallel to currently pending foreign litigation. See Calamita, *supra* note 2, at 613 (noting the application of *Landis* to international parallel proceedings); George, *supra* note 4, at 507–08 (arguing that *Landis* serves as an analytical base for U.S. federal courts in international parallel proceedings); Stückelberg, *supra* note 9, at 960–61 (discussing how some district courts use the precedent in *Landis* to justify their power to stay a case in parallel proceedings).

16. See *supra* note 9 (noting the level of uncertainty on how a court will analyze a motion to dismiss or stay a proceeding pending the outcome of a parallel proceeding before a foreign court).

17. Scholarship in this area has mostly noted the application of the domestic abstention doctrines to international parallel proceedings. See George, *supra* note 4, at 507 (discussing the application of *Landis* and *Colorado River* to international parallel proceedings); Rivero et al., *supra* note 4, at 406 (arguing that a court will apply the *Turner* analysis, which is based on *Colorado River*, when addressing international parallel proceedings). A few commentators have argued for a new approach to the issue, including the establishment of international norms that promote predictability and address concerns of both civil law and common law countries and the use of comity to dictate decision-making. See, e.g., Calamita, *supra* note 2, at 679 (arguing for the development of an international abstention doctrine based on comity and providing deference to the first-filed case); George, *supra* note 4, at 529–30 (making recommendations for model laws and treaties addressing international parallel litigation); Stückelberg, *supra* note 9, at 978–79 (arguing for an international convention to address international parallel proceedings); Teitz, *supra* note 9, at 229 (arguing in support of the establishment of the Model Conflict of Jurisdiction Act proposed by the American Bar Association).

18. See, e.g., James C. Rehnquist, *Taking Comity Seriously: How To Neutralize the Abstention Doctrine*, 46 STAN. L. REV. 1049, 1095 (1994) (arguing that the Supreme Court in *Colorado River* and *Cone* created “an unwieldy six-factor balancing test” that is difficult to apply and difficult for appellate courts to supervise).

jurisprudence and its application to international parallel litigation, this Comment outlines the different options available to a federal court addressing a lawsuit parallel to a concurrent proceeding in a foreign court. This Comment then discusses concerns that must be addressed under a revised framework and suggests how federal courts should improve their treatment of these cases to better reflect the concerns and issues that arise in international parallel proceedings.

I. FROM *PULLMAN* TO *QUACKENBUSH*: THE DEVELOPMENT OF ABSTENTION DOCTRINES IN FEDERAL COURTS

Any discussion of how federal courts address international parallel proceedings must begin with a presentation of the Supreme Court's domestic abstention doctrines,¹⁹ which are most often criticized primarily due to a belief that abstention is unconstitutional.²⁰ This discussion is necessary because, due to the lack of Supreme Court guidance on how federal courts should approach international parallel proceedings, lower federal courts have applied Supreme Court domestic abstention jurisprudence to this issue.²¹

19. There is an inconsistency among scholars when referring to judicial abstention: some refer to one abstention doctrine, with different subparts, and others to different abstention doctrines. This Comment will refer to separate abstention doctrines. See David A. Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651, 656 (1985) (arguing that while some refer to "the abstention doctrine," it is more appropriate to refer to abstention doctrines because each refers to distinguishable lines of cases).

20. Several articles have noted the lack of constitutional support for the use of the abstention doctrine to stay or dismiss a proceeding validly before a federal court. They argue that separation of powers principles and the Constitution require federal courts to hear all, or almost all, cases rightly before them. See Mullenix, *supra* note 7, at 101 (arguing that the so-called "fourth branch" of the abstention doctrine, outlined in *Colorado River*, "is an invidious encroachment on the constitutional and statutory rights of federal litigants"); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 74 (1984) (arguing that federal courts should abstain from exercising their authority to hear a case only in "narrowly defined circumstances").

Other commentators, however, have argued that federal courts do have the power to refrain from exercising jurisdiction. See Leonard Birdsong, *Comity and Our Federalism in the Twenty-First Century: The Abstention Doctrine Will Always Be With Us—Get Over It!!*, 36 CREIGHTON L. REV. 375, 424 (2003) (arguing that federal courts use "prudence and wisdom" in their exercise of abstention); Calamita, *supra* note 2, at 664 ("[Abstention doctrines] are not a betrayal of the text of the Constitution . . . [but] are a deeply entrenched aspect of the judicial function, supported both by the historical development of the U.S. legal system and contemporary judicial practice.").

21. See Teitz, *supra* note 2, at 71 (observing that federal courts apply domestic abstention doctrines to address international parallel proceedings).

A. *Pre-Colorado River Abstention Doctrine Cases*

Prior to its decision in *Colorado River*, the Supreme Court developed three abstention doctrines addressing specific circumstances in which a federal court should abstain from deciding a case and should provide deference to a state proceeding. Because the three doctrines help lay a framework of Supreme Court abstention jurisprudence and are discussed in *Colorado River*,²² they are worth presenting here.

The first abstention doctrine, the *Pullman* Doctrine, stands for the proposition that federal courts should avoid decisions of Constitutional questions when the case may be disposed of by state law.²³ The doctrine is named after the case from which it was developed, *Railroad Commission v. Pullman Co.*²⁴ The Court based its holding on a finding that the issues involved in the case touched on “social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.”²⁵ This type of abstention argues for a stay in the proceeding, rather than a full dismissal.²⁶

22. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813–17 (1976) (discussing three general categories of federal abstention in favor of a state proceeding).

23. See Birdsong, *supra* note 20, at 377 (discussing the implications of *Pullman* abstention); Steven Plitt & Joshua D. Rogers, *Judicial Abstinence: Ninth Circuit Jurisdictional Celibacy for Claims Brought Under the Federal Declaratory Judgment Act*, 27 SEATTLE U. L. REV. 751, 761 (2004) (arguing that *Pullman* abstention is applied when there is an unsettled question of state law, and there is conceivably a construction of the law that will “moot, limit or change the way the federal court will view the federal question”); Redish, *supra* note 20, at 95 (arguing that *Pullman* reflects a simple principle of federalism, which is to avoid invalidating state laws under the Constitution if possible).

24. 312 U.S. 496 (1941). This case involved an order by the state-run Texas Railroad Commission that stated no sleeping car on any trains in the state could be operated unless a conductor from the Pullman Company was in charge of it. *Id.* at 497–98. The company sued the state in federal court, claiming the law was unauthorized under the relevant Texas enabling statute, and also violated the Due Process Clause and the Commerce Clause of the United States Constitution. *Id.* at 498. The union for the Pullman porters intervened in the suit as well, objecting to the order on the ground that it discriminated against African Americans in violation of the Fourteenth Amendment to the United States Constitution. *Id.*

25. *Id.* at 498. The social policy involved was the protection of African Americans from discrimination in the workplace. The opinion suggests that the Justices did not want to have to find that the law was unconstitutional if a state court could first find that the law was invalid because it violated the statute upon which it was based. See Rehnquist, *supra* note 18, at 1070 (discussing the Court’s decision making in *Pullman*).

26. See Birdsong, *supra* note 20, at 379 (noting that *Pullman* stands for the proposition that federal courts may stay but not dismiss a proceeding in federal court); Redish, *supra* note 20, at 759 (stating that the *Pullman* abstention does not undermine separation of powers principles as severely as some of the other principles because it calls for a stay and not a dismissal).

The *Pullman* Doctrine does not apply only to situations in which there are parallel proceedings in a federal and state court. Indeed, at the time *Pullman* was heard, a

The second abstention doctrine arose out of the Supreme Court's decision in *Burford v. Sun Oil Co.*,²⁷ and calls for a federal court to dismiss a proceeding in favor of a state court's parallel proceeding "to avoid needless conflict with the administration by a state of its own affairs."²⁸ The case involved another claim against the Texas Railroad Commission, this time concerning the lease of land for oil drilling.²⁹ The Court held that the case "so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them."³⁰

The third abstention doctrine derives from the Supreme Court decision *Younger v. Harris*³¹ and bars federal courts from hearing constitutional challenges to state action under circumstances in which federal action can be "regarded as an improper intrusion on the right of a state to enforce its laws in its own courts."³² While *Younger* abstention originally applied only to federal litigation that involved the constitutionality of a state criminal proceeding,³³ the Supreme Court extended the doctrine to apply to situations where a federal court is asked to issue a declaratory judgment, or in quasi-judicial and civil proceedings.³⁴

state proceeding had not yet been filed. *Pullman*, 312 U.S. at 501-02. In its opinion, however, the Court stated that such a proceeding should be brought before a state court and that the federal court should only retain jurisdiction over the federal issues pending completion of the state proceedings. *Id.*

27. 319 U.S. 315 (1943).

28. Birdsong, *supra* note 20, at 379 (citations omitted); see Redish, *supra* note 20, at 76 (characterizing *Burford* as abstention used to "prevent federal judicial interference in complex state administrative schemes").

29. Sun Oil sued the Commission and Burford, a competitor, claiming that an order of the Commission granting Burford a permit to drill oil wells on its property denied Sun Oil due process of law. *Burford*, 319 U.S. at 316-17. The Supreme Court reversed the decision of the court of appeals, which had reversed the district court's refusal to enjoin the order of the Commission. *Id.* at 334.

30. *Id.* at 332. Here, the Court found a state court should decide the issue because of the highly technical nature of determining rights in relation to oil drilling contracts. *Id.*

31. 401 U.S. 37 (1971). The case concerned criminal prosecution under the California Criminal Syndicalism Act, which proscribed a wide range of allegedly subversive activities. *Id.* at 38. The defendant, John Harris, Jr., filed a complaint in federal district court after he had been indicted under the California law, urging the court to enjoin Younger, the District Attorney of Los Angeles County, from prosecuting him. *Id.* at 38-39. Harris claimed the prosecution violated his federal constitutional right to free speech and press under the First and Fourteenth Amendments. *Id.*

32. Birdsong, *supra* note 20, at 381 (citations omitted).

33. In *Younger*, the Supreme Court said abstention was appropriate because of the "fundamental policy against federal interference with state criminal prosecutions." 401 U.S. at 46.

34. See Birdsong, *supra* note 20, at 383 (discussing application of the *Younger* doctrine by subsequent Supreme Courts).

*B. Colorado River and Its Progeny**1. Colorado River*

Five years after *Younger*, the Supreme Court decided *Colorado River*, and outlined its fourth and final abstention doctrine. In this case, the Supreme Court laid a foundation for federal courts to decline to exercise their jurisdiction to hear a case in deference to a parallel state proceeding, but only in “exceptional circumstances.”³⁵ The case involved a dispute over water rights in Colorado.³⁶ The federal government filed the lawsuit in federal court against approximately one thousand water users in a certain state water district.³⁷ One of the defendants in that suit filed to join the U.S. government to an ongoing proceeding in state court, while several other defendants filed a motion to dismiss the federal proceeding.³⁸ The district court granted the motion, holding that the doctrine of abstention required deference to the state court proceedings.³⁹ The court of appeals reversed this decision and the Supreme Court granted certiorari to determine whether the federal court had jurisdiction to hear the case⁴⁰ and, if so, whether abstention was appropriate.⁴¹

In its opinion, the Court first reviewed its jurisprudence on abstention, discussing the three doctrines developed in *Pullman*, *Burford*, and *Younger*.⁴² Finding that none applied to the present situation,⁴³ the Court stated that “there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the

35. See BORN & RUTLEDGE, *supra* note 3, at 524–25 (discussing the purpose and application of *Colorado River*).

36. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 805 (1976). This case was based on a lawsuit brought by the United States on behalf of the federal government and two Native American tribes seeking a declaratory judgment as to the federal government’s rights to certain water bodies and their tributaries in the Colorado Water Division. *Id.*

37. *Id.* at 806.

38. *Id.*

39. *Id.*

40. The defendants in their motion claimed that the district court should dismiss the case because the court was without jurisdiction to determine federal water rights. *Id.* While the district court dismissed the case on abstention principles, the court of appeals held that the federal court did have jurisdiction to hear the case under 28 U.S.C. § 1345. *Id.*

41. *Id.*

42. *Id.* at 814–17.

43. *Id.* at 817. *Pullman* did not apply because the case did not present a federal constitutional question. *Id.* at 814. The Court held *Burford* did not apply because while state claims were involved, the state law was “settled” and no questions of state policy were presented for decision. *Id.* at 815. Lastly, the Court said *Younger* was inapplicable because the Court was not being asked to grant a declaratory judgment as to the validity of a state criminal law. *Id.* at 816–17.

contemporaneous exercise of concurrent jurisdictions, either by federal courts or by state and federal courts.”⁴⁴ These principles, it asserted, are based on considerations of “[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.”⁴⁵ The Court cautioned that federal courts should exercise abstention in such situations only in “exceptional” circumstances, as there exists a “virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.”⁴⁶

The Court proceeded to outline some of the circumstances that would make abstention appropriate. A court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.⁴⁷ The following considerations also apply: the inconvenience of the federal forum, the interest in avoiding piecemeal litigation, and the order in which jurisdiction was obtained by the two forums.⁴⁸ The Court noted that no factor is “necessarily determinative,” but in considering them, courts must take into account both their obligation to exercise jurisdiction as well as factors which counsel against it.⁴⁹ In *Colorado River* itself, the Supreme Court found the factors weighed against the exercise of jurisdiction by the federal court, specifically because the interest of avoiding piecemeal litigation was high and the state, rather than the federal government, had historically held control over water rights.⁵⁰

2. *Colorado River questioned*

The Supreme Court revisited its decision in *Colorado River* soon thereafter in *Will v. Calvert Fire Insurance Co.*⁵¹ and temporarily drew into question the applicability of *Colorado River* by emphasizing the

44. *Id.* at 817.

45. *Id.* (alteration in original) (citation omitted). David A. Sonenshein has argued that the policies underlying the Court’s decision in *Colorado River* included not only a consideration of state/federal relations and comity—both of which formed the underlying reasons for the previous abstention doctrines—but also of “judicial economy” and “litigational convenience.” Sonenshein, *supra* note 19, at 664.

46. *Colo. River*, 424 U.S. at 817. Seeking to underscore the importance of this limiting factor, David A. Sonenshein in his work argued that the “tenor” of *Colorado River* and its progeny is that the party seeking to have a federal court abstain from deciding a case “bears an exceedingly heavy burden.” Sonenshein, *supra* note 19, at 693.

47. 424 U.S. at 818.

48. *Id.* at 818.

49. *Id.* at 818–19.

50. *Id.* at 819.

51. 437 U.S. 655 (1978).

discretion a district court judge has to stay or dismiss based solely on the existence of duplicative litigation in a state court.⁵²

Calvert involved a contract dispute between American Mutual Reinsurance Company and Calvert Fire Insurance Company.⁵³ The Supreme Court granted certiorari to determine whether the issuance of a writ of mandamus, designed to compel the district court judge to proceed with the federal claims regardless of the status of the state claims, impermissibly interfered with the discretion of a district court to control its own docket.⁵⁴

In a plurality opinion, Justice Rehnquist noted that it is up to the “‘carefully considered judgment’ of the district court” to determine whether to dismiss a proceeding in favor of a pending proceeding in another jurisdiction.⁵⁵ In addition, the Court held that such a decision should not be overridden by a writ of mandamus, because “[w]here a matter is committed to the discretion of a district court, it cannot be said that a litigant’s right to a particular result is ‘clear and indisputable.’”⁵⁶ Therefore, the Court reversed and remanded the case back to the court of appeals.⁵⁷ While this case cited *Colorado River*, thereby providing support for the abstention doctrine outlined

52. See Plitt & Rogers, *supra* note 23, at 769 (arguing that Justice Rehnquist’s observation that the district court had full discretion to stay the proceeding does not conform with the “exceptional circumstances” test of *Colorado River*); Sonenshein, *supra* note 19, at 671 (noting that Rehnquist’s opinion in *Calvert* has been interpreted to stand for the proposition that lower courts can stay or dismiss based solely on the chance of duplicative litigation if the federal suit continued).

53. *Calvert*, 437 U.S. at 658. In 1974, American Mutual sued Calvert in state court, seeking to obtain a declaration that an agreement between it and Calvert was in full force and effect. *Id.* This lawsuit was in response to Calvert’s attempt to rescind the agreement by which it had become a member of the insurance pool operated by American Mutual. *Id.* After filing a counterclaim in the state suit claiming the agreement was unenforceable against it because of violations of federal and state securities laws, Calvert filed another suit in federal court, seeking damages under both the federal and state laws. *Id.* In response to a motion to dismiss filed by American Mutual, the district court judge stayed all aspects of the federal court proceeding except for the “limited claim for monetary damages under the 1934 Securities Act.” *Id.* at 659–60.

54. *Id.* at 660–61.

55. *Id.* at 663 (citation omitted).

56. *Id.* at 665–66.

57. On remand, the court of appeals discussed another factor that argues for a stay or dismissal—the element of vexatious litigation. See *Calvert Fire Ins. Co. v. Am. Mut. Reinsurance Co.*, 600 F.2d 1228, 1234–36 (7th Cir. 1979). The Supreme Court, in a footnote in the next case in which it addresses the *Colorado River* doctrine, provides tacit support for consideration of this factor, saying it has “considerable merit.” See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 n.20 (1983).

in *Colorado River*, *Calvert* did not provide great clarity on the correct application of the *Colorado River* doctrine.⁵⁸

3. Colorado River reaffirmed

The Supreme Court revisited its *Colorado River* decision for a second time in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁵⁹ In this case, the Court reaffirmed its holding in *Colorado River*⁶⁰ and further developed the factors a federal court should consider when determining whether to stay or dismiss a proceeding in favor of a similar suit in a state court.⁶¹

Cone involved a contractual dispute between the appellant hospital and Mercury, with which it had contracted to construct an addition to the hospital building.⁶² Given its interpretation of the contract, Mercury filed a lawsuit in federal court seeking an order to compel arbitration under the Arbitration Act, 9 U.S.C. § 4.⁶³ The federal district court stayed the proceedings in response to the request by the

58. See Mullenix, *supra* note 7, at 111 (“Although the case is generally construed as reaffirming *Colorado River* abstention, the Court did little in *Will v. Calvert* to elucidate the *Colorado River* standard.”).

59. 460 U.S. 1 (1983).

60. See *id.* at 13 (“*Colorado River Water Conservation District v. United States* . . . provides persuasive guidance in deciding this question [of whether the district court erred in granting a stay]”); *id.* at 19 (“[T]he relevant standard is *Colorado River*’s exceptional-circumstances test, as elucidated by the factors discussed in that case.”).

61. For a discussion of how *Cone* further developed and clarified the *Colorado River* doctrine, see George, *supra* note 4, at 508 (presenting the factors of *Colorado River*, as modified by *Cone*); Mullenix, *supra* note 7, at 112–14 (arguing that the Supreme Court felt compelled to certify the validity of the *Colorado River* doctrine because of confusing opinions in *Calvert*); Plitt & Rogers, *supra* note 23, at 769 (noting that *Cone* “clarified” the conflicting holdings of *Colorado River* and *Calvert*); and Sonenshein, *supra* note 19, at 691 (presenting the discussion of *Colorado River* in *Cone*).

Many cases also argue that *Cone* has clarified the application of *Colorado River*. See, e.g., *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (citing to *Colorado River* and *Cone* for the “long list of factors” to balance); *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (characterizing *Cone* as “instruct[ing]” on how to apply *Colorado River* abstention); *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193, 1194–95 (9th Cir. 1991) (noting that *Cone* gave guidance on how to interpret *Colorado River*); *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (noting that the Supreme Court enumerated the considerations a federal court should consider in determining whether to exercise jurisdiction in *Colorado River* and *Cone*); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 842 (N.D. Ill. 2000) (citing to *Cone* for guidance on whether to grant a stay which is parallel to a proceeding in an Irish court).

62. *Cone*, 460 U.S. at 4. The contract had called for arbitration of any disputes between the parties. *Id.* at 5. However, when Mercury sought to engage the hospital in negotiations on payment for additional costs it claimed it had incurred, the hospital filed suit in state court, seeking declaratory judgment that Mercury was either barred from exercising its right to arbitration because of the statute of limitations or that Mercury had lost the right to arbitration. *Id.* at 6–7.

63. *Id.* at 7.

hospital, who had filed a declaratory judgment action in state court. Mercury appealed the decision.⁶⁴ The Court of Appeals for the Fourth Circuit reversed the district court's decision and ordered the district court to enter an order to arbitrate.⁶⁵

In affirming the court of appeals' decision, the Supreme Court laid the groundwork for analyzing cases in which a federal court is asked to stay a proceeding pending the outcome of a substantially similar proceeding before a foreign court.⁶⁶ First, the Court held that a stay of a proceeding pending the outcome of a similar proceeding in another court is sufficiently final to meet the requirements for an appealable decision.⁶⁷ Second, it held that *Colorado River* provides the "relevant standard" to determine whether a stay or dismissal is appropriate, and contrary to the defendant's reading of *Calvert*, the district court's discretion in determining whether to grant the stay or dismissal does not make its decision unreviewable.⁶⁸ Rather, the discretion "must be exercised under the relevant standard prescribed by this Court."⁶⁹ Third, it added two additional factors to the analysis: (a) whether federal law will govern the outcome of the case (which the Court said emerged from *Calvert*) and (b) whether the state court proceedings will be adequate to protect the rights of the party that brought the case to federal court.⁷⁰

The Court also provided a somewhat different interpretation of one of the *Colorado River* factors. It stated that when considering the order in which jurisdiction was obtained by the concurrent forums, a court should not look merely to the temporal sequence of the filings, but also to which litigation has made more progress.⁷¹

The Court discussed a number of reasons why the stay in *Cone* was appropriate. First, there was no danger of piecemeal litigation, because the issue of whether arbitration is required is "easily

64. *Id.* at 8.

65. *Id.*

66. *Id.* at 19–27.

67. *Id.* at 13. This question is sometimes raised by parties seeking to argue that a high court cannot review a stay because it does not meet the requirements of 28 U.S.C. § 1291. See, e.g., *Boushel v. Toro Co.*, 985 F.2d 406, 408–10 (8th Cir. 1993) (dismissing the appeal, holding that the district court's decision to stay a proceeding pending a decision in a Canadian case was not a final order and, therefore, not appealable). *Cone* provides that the stay is almost always reviewable by the higher court. *Cone*, 460 U.S. at 13.

68. Defendant argued that *Calvert* required the court of appeals to provide greater deference to the discretion of the district court to grant the stay. *Cone*, 460 U.S. at 19.

69. *Id.*

70. *Id.* at 24–27; see also Sonenshein, *supra* note 19, at 692 (discussing the factors *Cone* added to the *Colorado River* abstention doctrine).

71. *Cone*, 460 U.S. at 21.

severable” from the merits of the underlying dispute.⁷² Second, while the state lawsuit was filed first, the federal suit had made more progress at the time the stay was granted.⁷³ Third, federal law provided the rule of decision on its merits, and the Court found that the state could not provide adequate protection of Mercury’s rights because it lacked the ability to compel the hospital to arbitrate.⁷⁴

4. *The Colorado River/Cone factors*

In sum, federal courts applying *Colorado River* after *Cone* are instructed to weigh the following factors when determining whether to stay or dismiss a proceeding in favor of a concurrent, parallel proceeding in another court:

- (1) which court first assumed jurisdiction in rem, (if applicable);
- (2) the relative convenience or inconvenience of the federal court in adjudicating the claim;
- (3) the desirability of avoiding piecemeal litigation;
- (4) the order in which jurisdiction was obtained, (though priority should be evaluated in terms of the relative progress of the two suits);
- (5) the presence of an issue of federal law; and
- (6) the adequacy or inadequacy of the parallel proceeding.⁷⁵

C. *Other Relevant Abstention Doctrines*

1. *Intra-federal parallel litigation*

The Supreme Court, in *Landis v. North American Co.*,⁷⁶ discussed when a federal court can abstain due to the presence of a parallel proceeding in another federal court.⁷⁷ It is appropriate to discuss the Supreme Court’s analysis in this case because some federal courts have applied it when presented with international parallel proceedings.⁷⁸

72. *Id.*

73. *Id.* at 22.

74. *Id.* at 23–27.

75. *See id.* at 15–27 (outlining and applying the factors discussed in *Colorado River*, and adding additional factors to consider); *see also* Mullenix, *supra* note 7, at 118–19 (laying out the facts from *Colorado River* and *Cone*); *cf.* George, *supra* note 4, at 507–08 (describing nine factors relevant to the *Colorado River* abstention doctrine, including whether the suit is vexatious and adding “any other special factors”).

76. 299 U.S. 248 (1936).

77. *See, e.g.*, Stückelberg, *supra* note 9, at 961 (discussing the applicability of *Landis*).

78. *See* Calamita, *supra* note 2, at 666 (discussing the application of the Supreme Court’s decision in *Landis* to cases involving international parallel proceedings); George, *supra* note 4, at 507–08 (arguing that one of three doctrines used by federal courts to determine whether to grant a stay or dismissal is based on *Landis*);

Landis involved a challenge to a district court's decision to stay a proceeding pending a decision by the Supreme Court from an appeal of another federal case.⁷⁹ The district court stayed the proceeding in favor of the other proceeding because it asserted that the other proceeding would determine the constitutionality of a new law under review in both cases.⁸⁰ The Supreme Court vacated the stay order of the district court, finding that it did not comport with the Court's requirement that the length of the stay be reasonable.⁸¹ The Court did, however, state that a district court had the authority to stay a proceeding pending the outcome of another proceeding in a different district court.⁸² To determine whether a stay is appropriate, a court must "weigh competing interests and maintain an even balance."⁸³

Landis did not outline specific factors that should guide a district court's decision whether to grant a stay.⁸⁴ Rather, it acknowledged that a stay would likely be appropriate in the case at bar because the other concurrent proceeding would likely settle many of the issues in the case and "simplify" all of the issues by reducing the number of claims that would need to be litigated in the latter proceeding.⁸⁵ The Court also focused on the length of the stay and suggested that forcing a plaintiff to wait several years for the outcome of the concurrent proceeding would be "immoderate" and therefore not within the authority of the court.⁸⁶ Lastly, the opinion suggested that

Stückelberg, *supra* note 9, at 960–61 (noting that *Landis* has been used by courts to exercise "discretionary power" to stay a case when addressing parallel proceedings).

79. *Landis*, 299 U.S. at 253.

80. *Id.*

81. *Id.* at 258. Specifically the Court held that "[t]he stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, so far, at least, as they are susceptible of prevision and description." *Id.* at 257.

82. *Id.* at 254 ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

83. *Id.* at 254–55.

84. Courts applying *Landis* to international parallel proceedings have applied factors developed by the Eastern District of Pennsylvania interpreting *Landis*. See *Cont'l Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (applying factors outlined in *I.J.A.* to the question of whether to stay a proceeding in favor of Swiss action); *I.J.A., Inc. v. Marine Holdings, Ltd.*, 524 F. Supp. 197, 198 (E.D. Pa. 1981) (discussing factors to apply when determining whether to stay a proceeding (citing *Nigro v. Blumberg*, 373 F. Supp. 1206 (E.D. Pa. 1974))).

85. *Landis*, 299 U.S. at 256. In addition, Justice Cardozo placed the burden on the movant to make out a clear case of "hardship or inequity in being required to go forward," for, as he put it, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255.

86. *Id.* at 256–57.

the pleading party must show some hardship or inequality in being required to go forward with both cases.⁸⁷

Interestingly, the Court was not concerned with the lack of similarity between the parties in the two cases. Instead, it held that the issue was one of “power,” and did not require a showing that the parties in the two cases be identical.⁸⁸ It is generally accepted that the standard for abstention involving parallel cases in two federal courts is easier to meet than in cases present in a state and federal court.⁸⁹

2. *The Supreme Court revisits its abstention doctrines*

Quackenbush v. Allstate Insurance Co.,⁹⁰ decided by the Supreme Court in 1996, adds a wrinkle in the Court’s abstention doctrine jurisprudence.⁹¹ Indeed, the case addressed the applicability of the *Burford* abstention doctrine.⁹² It involved a lawsuit initially brought in state court by the California Insurance Commissioner, Charles Quackenbush, against Allstate for contract and tort damages due to Allstate’s alleged breach of reinsurance agreements.⁹³ Affirming the decision of the Court of Appeals for the Ninth Circuit, the Supreme Court held that the district court did not have the authority to dismiss and remand a federal court proceeding to state court because the relief sought was based on a damages claim and not a claim that arose in equity.⁹⁴ It applied this holding not only to *Burford* abstention doctrine cases, but to all cases in which a party is seeking to dismiss a

87. *Id.* at 255.

88. *Id.* at 254.

89. *See* *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817–18 (1976) (noting that the opportunity for dismissal when a case is in both state and federal courts is “considerably more limited” than when parallel cases are in two federal courts); *see also* *George*, *supra* note 4, at 507–08 (arguing that *Colorado River* has a stronger presumption for retaining the challenged case and allowing both actions to proceed until one reaches a judgment); *Sonenshein*, *supra* note 19, at 670 (arguing that equating the standard for state-federal abstention with federal-foreign abstention “distort[s]” their meanings).

90. 517 U.S. 706 (1996).

91. It should be noted that nowhere in the *Quackenbush* opinion did the Court address the applicability of its abstention principles to international parallel proceedings. *See* *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1223 (11th Cir. 1999) (finding that the Supreme Court in *Quackenbush* must not have meant it to apply to international abstention cases because it only discussed cases in which federal court action risked interfering with state proceedings or state authority); *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1290 (E.D. Mo. 1997) (noting *Quackenbush* made no mention of any type of international abstention).

92. *Quackenbush*, 517 U.S. at 710.

93. *Id.* at 709.

94. *Id.* at 731.

lawsuit based on one of the Supreme Court's abstention doctrines.⁹⁵ That said, the Court held that the equity/damages distinction did not apply to a federal court's authority to *stay* a proceeding pending a resolution in another court.⁹⁶

There is currently no consensus among the courts or scholars as to whether *Quackenbush*, a case addressing the *Burford* abstention doctrine and considering only state-federal parallel proceedings, applies in cases of international parallel proceedings.⁹⁷ If it does, then courts will have to look to the relief requested in determining whether abstention in the form of a dismissal is even appropriate. Also, if *Quackenbush* applies to such cases, then another unresolved issue will have to be addressed: whether a stay in such cases is equivalent to a dismissal.⁹⁸ However, these issues are beyond the scope of this Comment, which assumes that a stay is the functional equivalent of a dismissal in international parallel proceedings, and that *Quackenbush* does not affect the analysis of international parallel proceedings.

95. *Id.* at 727–28 (“[T]he power to dismiss under the *Burford* doctrine, as with other abstention doctrines . . . derives from the discretion historically enjoyed by courts of equity.”).

96. *Id.* at 730 (“[W]e have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether.”).

97. *See, e.g.,* *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1223 (11th Cir. 1999) (holding *Quackenbush* does not apply to analysis of international parallel proceedings); *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (citations omitted) (“*Quackenbush* does not crisply govern in the area of international abstention because the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings.”); Teitz, *supra* note 9, at 227 (concluding that *Quackenbush* does not apply to international abstention cases through a criticism of the holding in *Al-Rifai & Sons*, which held that *Quackenbush* applied to an international abstention case). *But see* *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1291 (E.D. Mo. 1997) (holding an outright dismissal of the case was “improper in light of *Quackenbush*”); Calamita, *supra* note 2, at 660 (arguing *Quackenbush* affects the analysis under *Colorado River* and calls into question the usage of *Colorado River* in *Cone* because the latter case involved a stay and not a dismissal).

98. As noted in *Goldhammer*, for most abstention cases, “as a practical matter, a stay is tantamount to dismissal,” and, therefore, the court asserts that a discussion of their differences “can be somewhat academic.” *Goldhammer*, 59 F. Supp. 2d at 252. The Supreme Court, at least prior to *Quackenbush*, appears to agree. *See* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 13 (1983) (holding a grant of a stay was appealable as a final judgment because while “[i]t is not clear why the judge chose to stay the case rather than to dismiss it outright . . . the practical effect of his order was entirely the same for present purposes”); *see also* Sonenshein, *supra* note 19, at 671 (arguing there is no meaningful difference between a stay and a dismissal in abstention case law).

D. Approaches to International Parallel Proceedings

1. Options available to courts

There are generally two kinds of duplicative proceedings: reactive litigation and repetitive litigation.⁹⁹ Reactive litigation refers to a lawsuit filed by a defendant in another case that addresses the same case or controversy as in the first lawsuit.¹⁰⁰ Repetitive litigation refers to two or more suits that are substantially similar and all filed by the same party.¹⁰¹ While federal courts often note whether the plaintiff filed both suits in their analysis of whether abstention is appropriate, the occurrence is not treated as determinative in an abstention analysis.¹⁰²

Federal courts have several options available to them when deciding a case that is substantially similar to another case pending before a foreign court.¹⁰³ Options include: (a) stay the proceeding pending a decision in the concurrent proceeding;¹⁰⁴ (b) dismiss the proceeding outright;¹⁰⁵ (c) enjoin one party from pursuing the other case (known as an “anti-suit injunction”);¹⁰⁶ or (d) allow both lawsuits to proceed at once.¹⁰⁷ This Comment addresses only stays, dismissals,

99. See Rehnquist, *supra* note 18, at 1064 (citing Allan D. Vestal, *Reactive Litigation*, 47 IOWA L. REV. 11 (1961); Allan D. Vestal, *Repetitive Litigation*, 45 IOWA L. REV. 525 (1960)) (discussing the differences between reactive and repetitive litigation and referring to both as “duplicative litigation”); Sonenshein, *supra* note 19, at 657 n.31 (discussing the differences between reactive and repetitive litigation).

100. See Sonenshein, *supra* note 19, at 657 n.31 (discussing origins and definitions of “reactive” litigation).

101. See *id.* (defining “repetitive” litigation).

102. Compare *Caspian Invs., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 883-85 (S.D.N.Y. 1991) (dismissing the case and considering the fact that Caspian filed both suits as a factor when evaluating the temporal sequence of the filing of both suits), with *Cont'l Time Corp. v. Swiss Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (granting dismissal of the case even though the plaintiff in the New York suit was not a party to a lawsuit brought in Switzerland).

103. See George, *supra* note 4, at 501-02 (listing options available for judges addressing parallel proceedings); James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 777 (1999) (discussing various remedies to parallel litigation); Teitz, *supra* note 2, at 8-9 (noting options available to the courts and the problems with enforceability of such decisions).

104. See, e.g., *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248 (D. Mass. 1999) (denying motion to dismiss, but staying proceeding in favor of proceeding in British court).

105. See, e.g., *Caspian*, 770 F. Supp. at 880 (dismissing the action due to the existence of substantially similar litigation in Ireland).

106. See, e.g., *Laker Airways Ltd. v. Sabena, Belg. World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) (enjoining litigation in foreign court); see also Mark M. Trafeli, *International Deference: A Developing Procedural Remedy*, 22 L.A. LAW. 18, 22-23 (1999) (discussing use of an anti-suit injunction).

107. See, e.g., *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824 (N.D. Ill. 2000) (refusing to grant a motion to dismiss and finding it important that

and decisions to allow parallel litigation to proceed because the concerns surrounding so-called anti-suit injunctions and the analytical approach used to address them are different and beyond the scope of this Comment.¹⁰⁸

2. *Application of the abstention doctrines in the context of international parallel proceedings*

a. Colorado River

*Grammar, Inc. v. Custom Foam Systems, Ltd.*¹⁰⁹ offers an example of the application of *Colorado River* to an international abstention case. This case involved a contractual dispute between Grammar, an American manufacturing company, and Custom Foam Systems, Ltd. (“CFS”) a Canadian manufacturing company.¹¹⁰ CFS sued Grammar in a Canadian court in June 2006, claiming that it was owed compensation for a breach of contract.¹¹¹ Grammar responded by filing an action in a Michigan court, which was subsequently removed to a United States federal district court.¹¹² Soon thereafter, CFS moved to stay or dismiss the federal case, claiming the dispute could be settled in the first-filed case in Canada and *res judicata* would apply.¹¹³

In its opinion, the district court applied the *Colorado River* standard, stating that it had a “virtually unflagging obligation” to exercise jurisdiction but it had the authority to abstain in a “few ‘extraordinarily narrow’ circumstances.”¹¹⁴ It noted that to determine whether a stay or dismissal was appropriate, it had to balance a number of factors, none of which were necessarily determinative.¹¹⁵

the plaintiff—the same party in both the U.S. and international proceedings—relied on trademark statutes in each of the countries as the basis for its suit).

108. This is perhaps the most controversial method of addressing parallel litigation. This is because it involves restricting a party’s ability to bring suit in a foreign court, which has the effect of allowing a U.S. judge to control a foreign court’s exercise of jurisdiction. See Treviño de Coale, *supra* note 2, at 90–91 (discussing the circuit split on the use of anti-suit injunctions).

109. 482 F. Supp. 2d 853 (E.D. Mich. 2007).

110. *Id.* at 855.

111. *Id.*

112. *Id.* at 856. Grammar acknowledged in its complaint that the suit arose out of the “same transaction or occurrence” as the Canadian suit. *Id.* Grammar sought a declaratory judgment that it had no obligations under the contract or, in the alternative, a finding that CFS breached the contract. *Id.*

113. *Id.*

114. *Id.* at 856–57.

115. The court lists eight factors: (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether the source of law is state or federal; (6) the

The court determined that the cases were parallel proceedings,¹¹⁶ and then considered each of the remaining *Colorado River* factors.

The court decided a stay was appropriate because (a) there was a risk of piecemeal litigation because both cases were deciding the same legal issues arising from the same contract; (b) the Canadian action was filed first; (c) no federal law was at issue; (d) there was only a relatively small chance that the Canadian forum would be inadequate to protect the American plaintiff's rights; and (e) the Canadian proceeding had progressed further.¹¹⁷

b. Landis v. North American Co.

The most direct application of *Landis* to international parallel proceedings is *I.L.J., Inc. v. Marine Holdings, Ltd.*,¹¹⁸ in which a federal district court vacated a stay it had previously ordered in favor of pending litigation in Canada.¹¹⁹ In this case, the court reconsidered its previous decision to issue a stay after learning that, contrary to what it had been told, the Canadian proceeding was not near trial, and, therefore, a judgment in that case would not be immediately forthcoming.¹²⁰

The court observed that while it had the "inherent power" to stay the proceeding, as stated by the Supreme Court in *Landis v. North American Co.*, the "complete lack of relief available in the Canadian forum, notions of judicial efficiency, disparity in the identity of the parties, and the improbability of a prompt disposition in the foreign forum" all supported reversing the stay order.¹²¹ The factors upon which it relied were derived from another Pennsylvania district court case that had interpreted the Supreme Court's guidance in *Landis*.¹²²

adequacy of the state court to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. *Id.* at 857.

116. *Id.*

117. *Id.* at 858–61. The court dismissed application of the two remaining factors it had outlined, stating that the in rem jurisdiction factor did not apply to the case and the question of which jurisdiction was more convenient was a "wash" because parties and witnesses were in both locations. *Id.*

118. 524 F. Supp. 197 (E.D. Pa. 1981).

119. *Id.* at 199.

120. The court held that when the foreign litigation is in its incipiency, abstention is not usually appropriate. *Id.* at 199.

121. *Id.*

122. The court relied on *Nigro v. Blumberg*, 373 F. Supp. 1206 (E.D. Pa. 1974), which developed various factors to apply when addressing abstention in favor of a concurrent proceeding in another federal court. The factors include comity, adequacy of relief available in the alternative forum, identity of the parties and issues in the two actions, the likelihood of prompt resolution in the alternative forum, and relative convenience to the parties, counsel, and witnesses. *Id.*

c. The “international abstention” doctrine

The so-called “international abstention doctrine” is the name for an analysis developed by the Court of Appeals for the Eleventh Circuit to address abstention due to the existence of a similar proceeding in a foreign court.¹²³ The case to first introduce the standard was *Turner Entertainment Co. v. Degeto Film GmbH*.¹²⁴ Viewing the issue as one of first impression, the court fashioned its own analysis to address the question of whether it should abstain in favor of the foreign proceeding.¹²⁵

The court outlined three “readily identifiable goals” that a court should seek to promote when addressing international parallel litigation: (1) international comity; (2) fairness to litigants; and (3) efficient use of judicial resources.¹²⁶ With that starting point, the court suggested a number of factors to be considered that help to promote one of the aforementioned goals.¹²⁷ It held that concerns of international comity and efficiency of scarce judicial resources weighed in favor of a stay, relying heavily on the fact that the German court had reached a decision in the contractual dispute.¹²⁸

II. A NEW FRAMEWORK FOR ABSTENTION IN INTERNATIONAL PARALLEL PROCEEDINGS

A discussion of Supreme Court abstention cases makes clear that the Court has never provided a single workable analysis for federal courts to apply when addressing a motion to stay or dismiss a proceeding because of a concurrent proceeding in a foreign court.¹²⁹ This has led federal courts to apply various frameworks to address the issue. To reduce the inconsistencies and improve predictability,

123. For a discussion of how this doctrine differs from that of other courts addressing the same issue, see Rivero et al., *supra* note 4, at 405 (discussing the application of the Eleventh Circuit’s international abstention doctrine), and Calamita, *supra* note 2, at 613 (noting that a third group of courts have applied the reasoning developed by the Eleventh Circuit).

124. 25 F.3d 1512 (11th Cir. 1994). This case involved a contractual dispute between an American company that licensed entertainment properties to a German company for broadcasting in Germany. *Id.* at 1514.

125. *See id.* at 1518 (noting application of the two types of analysis: one based on *Landis* and the other on *Colorado River* in other circuits on the question of international abstention).

126. *Id.*

127. These included order of filing, which forum is more convenient to the parties, the possibility of prejudice in the foreign forum, the desirability of avoiding piecemeal litigation, and whether the alternative forum is likely to render a prompt decision. *Id.* at 1519–22.

128. *Id.* at 1523.

129. *See supra* Part I.D (presenting Supreme Court domestic abstention jurisprudence and its application to abstention in international parallel litigation).

federal courts should adopt one approach—anchored in the relevant Supreme Court jurisprudence—to determine when abstention is appropriate in parallel international proceedings. Because of the concerns involved, and the burden it places on the litigant seeking abstention, *Colorado River* is the appropriate standard.

A. *Colorado River Is a Superior Standard to Landis*

Federal courts seeking the appropriate precedent to apply in international parallel proceedings have applied a range of balancing tests and the frameworks used are derived from the Supreme Court's various abstention doctrine cases.¹³⁰ While a significant number of federal courts have applied the test outlined in *Colorado River Water Conservation District v. United States*, their application of it has varied from circuit to circuit.¹³¹ In addition, courts have applied *Landis* and other ad hoc abstention doctrines,¹³² leading to confusion as to what standard a federal court will apply to a motion to stay or dismiss a case due to the existence of a parallel proceeding in a foreign court.

To bring consistency to international parallel proceedings, federal courts need to develop a succinct and easily applicable framework to determine when to grant a stay or dismissal.¹³³ The analysis not only

130. For a discussion of the different analytical frameworks used, see Calamita, *supra* note 2, at 613–14, and George, *supra* note 4, at 507–08.

131. See, e.g., *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (holding parties and issues must only be substantially similar for *Colorado River* to apply); *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (requiring both concurrent cases to present identical substantive issues for *Colorado River* to apply); *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 253 (D. Mass. 1999) (considering the similarity of the parties and issues along with other relevant factors, such as which case was filed first and which forum is more convenient to parties, witnesses, and counsel).

132. Such ad hoc analyses include opinions which conflate *Landis* and *Colorado River*. See, e.g., BORN & RUTLEDGE, *supra* note 3, at 526 n.31 (noting that courts have “blur[red]” the distinction between *Landis* and *Colorado River* due to the similarity of the factors to be considered); see also George, *supra* note 103, at 905–06 (noting that some federal courts rely on both *Colorado River* and *Landis* when determining whether to dismiss or stay a case in deference to a foreign concurrent, parallel proceeding).

133. Any international abstention doctrine should address, or recognize in its analysis, the underlying differences in approach to the law in civil law and common law countries. The concern is that countries that adhere to a more rule-based approach to the law, instead of judge-made law, might themselves be swayed to proceed with a case that is similar to one already filed in an American court because of the lack of clarity as to how, or even whether, the U.S. court might decide to abstain in favor of the foreign proceeding. Adopting a more rule-based, less ad-hoc analysis would likely increase support for its application among civil-law countries that normally address these issues using statutes or other codified rules. See George, *supra* note 4, at 499 (discussing different approaches to adjudication of international parallel proceedings in the United States, European countries and Australia); Stückelberg, *supra* note 9, at 958–59 (discussing the civil law, code-based system used

should be built on the jurisprudence of *Colorado River* and its progeny but also should specifically address the unique concerns of concurrent international parallel proceedings.¹³⁴ In addition, the balancing test of relevant factors should be more structured, which would provide greater clarity and predictability for the parties involved.¹³⁵

When determining which abstention doctrine would serve as a better basis for analysis of international parallel proceedings, one cannot look to the various factors considered in each. This is because *Colorado River* and *Landis* consider similar factors, including which venue is more convenient to the parties and witnesses, adequacy of relief available in the other forum, and the degree of identity between the parties and issues involved in each proceeding.¹³⁶ Thus, one must look to other differences between the two standards to determine which provides a better framework for international parallel proceedings.

Colorado River is a more appropriate standard than *Landis* because it is designed to apply to situations in which substantially similar lawsuits are before two courts in separate court systems.¹³⁷ *Landis*, on the other hand, addresses abstention when there are two cases before two federal courts.¹³⁸ International parallel proceedings raise concerns more analogous to those involved in state-federal abstention cases because concerns of respect for a different court system are at play.¹³⁹ The contexts of the two distinct standards suggest that

to determine whether to stay or dismiss in cases concerning concurrent proceedings in the European Union under the Brussels and Lugano Conventions).

134. For example, a Massachusetts district court recognized that the primary policy concern that underlies abstention in the federal and state context is federalism and federal supremacy, whereas in international parallel proceedings, policy concerns relate to comity and foreign relations. *Goldhammer*, 59 F. Supp. at 252; see George, *supra* note 4, at 508 (arguing *Colorado River* emphasizes federalism); Sonenshein, *supra* note 19, at 664 (arguing that the policies underlying *Colorado River* include “considerations of state-federal relations,” judicial economy and litigation convenience, as well as a special form of comity that refers to respect for state power).

135. The *Cone* notion that the *Colorado River* factors should not be a “mechanical checklist” has reduced the consistency and predictability in the law because the Court has allowed the international abstention doctrine to develop on an ad hoc basis. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16 (1983).

136. See BORN & RUTLEDGE, *supra* note 3, at 526 (referring to the *Landis* factors as “broadly similar” to those considered under *Colorado River*); George, *supra* note 4, at 507 (noting factors of *Landis* and *Colorado River* are similar).

137. See George, *supra* note 103, at 906 (noting that *Colorado River* applies to abstention of a federal court in favor of a parallel proceeding in a state court).

138. See *id.* (referring to *Landis* as “an instance of intra-federal parallel litigation”).

139. This similarity is present even though scholars have noted that the predominant concern present in federal/state proceedings is federalism, and in

Colorado River is a better foundation for an international abstention doctrine. Indeed, many courts have recognized the similarity in factual scenarios that give rise to state-federal and federal-foreign parallel proceedings and have therefore applied the *Colorado River* framework to their consideration of a stay in favor of a concurrent foreign proceeding.¹⁴⁰

Another reason that *Colorado River* is a more appropriate standard than *Landis* to apply to the analysis of abstention in international parallel proceedings is that it places a heavier burden on the moving party to prove abstention is required.¹⁴¹ A primary concern in abstention cases, which underlies the need for caution, is that when a court abstains from hearing a case rightfully before it, the court is taking away a litigant's right to have a suit heard in a court that has jurisdiction over the claim.¹⁴² This issue is especially significant when a court is considering forcing parties to litigate in another country: a situation in which concerns of the availability of legal remedies and the costs involved are at their highest.¹⁴³

Colorado River emphasized that federal courts are generally required to exercise jurisdiction that Congress grants them¹⁴⁴ and jurisdiction should only be declined in "exceptional circumstances."¹⁴⁵ The Court even made a distinction between parallel proceedings in two different federal courts and those in federal court and state court and stated that the standards for when abstention is appropriate are different.¹⁴⁶ It determined that in the

international abstention the primary issue is comity. See *supra* note 134 (discussing various concerns involved in state/federal and federal/foreign parallel proceedings).

140. See BORN & RUTLEDGE, *supra* note 3, at 524 (noting that a "substantial body" of lower court decisions are based on *Colorado River*); see, e.g., *Grammar, Inc. v. Custom Foam Sys., Ltd.*, 482 F. Supp. 2d 853, 857 n.5 (E.D. Mich. 2007) (noting that the court will apply *Colorado River* to determine whether it should stay a proceeding in favor of a foreign proceeding in part because it is "better supported by precedent").

141. See BORN & RUTLEDGE, *supra* note 3, at 524–25 (noting that *Colorado River* emphasizes the general obligation of courts to exercise jurisdiction, whereas *Landis* focuses on a court's "discretion" to decline to hear a case); George, *supra* note 103, at 906 (noting that *Colorado River* has a "strong presumption" favoring jurisdiction).

142. See Birdsong, *supra* note 20, at 421 (discussing criticisms of abstention, including that it denies litigants a hearing in federal court on claims based on federal law).

143. See, e.g., *Grammar, Inc. v. Custom Foam Sys., Ltd.*, 482 F. Supp. 2d 853, 860 (E.D. Mich. 2007) (discussing the need to ensure that a foreign court proceeding would protect rights that are protected in U.S. courts). But see *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (referring to view that U.S. law should resolve all disputes as a "parochial concept" (citations omitted)).

144. The Supreme Court, in the case, referred to the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

145. *Id.* at 813.

146. *Id.* at 817.

former, the “general principle is to avoid duplicative litigation,” whereas in the latter “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.”¹⁴⁷ This distinction can also be seen in the language of *Landis*, where the Supreme Court focused on a district court’s “discretion” to determine whether a stay is appropriate and noted that “[a court’s] power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket.”¹⁴⁸ The holdings in both cases suggest, therefore, that litigants have a much heavier burden to show abstention is appropriate when a court applies *Colorado River*.

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

B. Support for an Abstention Doctrine in International Parallel Proceedings

Since the Supreme Court’s first decision outlining an abstention principle, skepticism of the legitimacy of a federal court’s ability to refuse to exercise jurisdiction, if it rightly could, persists.¹⁴⁹ There are several relevant policy considerations that suggest, however, that not only do courts have the authority to decline jurisdiction on abstention grounds but also it is wise for them to do so.¹⁵⁰

147. *Id.*

148. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936).

149. See, e.g., Birdsong, *supra* note 20, at 420 (outlining various criticisms levied on the application of the Supreme Court’s abstention principles); Mullenix, *supra* note 7, at 99 (arguing against the application of the *Colorado River* in future cases and calling into question the use of abstention doctrines altogether); Redish, *supra* note 20, at 74–75 (stating that courts should abstain only when a case fits statutorily-defined circumstances).

Scholars emphasizing federal courts’ lack of authority to decline jurisdiction often rely on the words of Chief Justice John Marshall in *Cohens v. Virginia*, where he stated “we [the judiciary] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.” 19 U.S. (6 Wheat.) 264, 404 (1821).

150. For an interesting rebuttal to the criticisms of the application of the various abstention doctrines, see Birdsong, *supra* note 20, at 375, which argues in favor of the application of abstention doctrines because they are used sparingly and achieve important policy objectives.

In addition, N. Jansen Calamita has outlined several reasons why abstention in the case of a concurrent, foreign proceeding is especially useful. Calamita, *supra* note 2, at 610–11. Specifically, he cites increased litigation costs and inconveniences, benefits to the more wealthy litigants at the expense of poorer adversaries, monopolization of scarce judicial resources, and diplomatic risks of inconsistent decisions. *Id.*

1. *International comity*

A policy consideration that supports abstention in international parallel proceedings is international comity.¹⁵¹ While comity is admittedly a somewhat vague term,¹⁵² many courts—including the Supreme Court—agree that it is a concern that arises in the course of how to address parallel proceedings in different court systems.¹⁵³

A workable definition of comity, with respect to how it should be addressed by federal courts, was first developed by the Supreme Court in *Hilton v. Guyot*.¹⁵⁴ In that case, the Court defined the term as follows:

‘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 rights of its own citizens, or of other persons who are under the protection of its laws.¹⁵⁵

Scholars have outlined the importance of comity as a guiding policy consideration behind the application of abstention principles, especially in cases where there is a parallel proceeding in a foreign

151. *Goldhammer v. Dunkin’ Donuts, Inc.*, 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (holding that “policies underpinning international abstention case law are rooted in concerns about international comity”).

152. *See Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 844 (N.D. Ill. 2000) (noting that comity summarizes “in a brief word a complex and elusive concept”); George, *supra* note 103, at 783 (arguing that comity, as a legal doctrine, is “weak, imprecise and unreliable”); Brian Pierce, *The Comity Doctrine as a Barrier to Judicial Jurisdiction: A U.S.-E.U. Comparison*, 30 STAN. J. INT’L L. 525, 527 (1994) (“[C]omity has inspired a host of definitions and a wealth of academic and judicial indignation over courts’ continued use of so nebulous and multifarious a term.”); Rivero et al., *supra* note 4, at 410 (noting that comity is “not a hard and fast rule but rather a general concept that courts use to ensure that, as the gets smaller, we can legally coexist with the rest of the world”; Teitz, *supra* note 9, at 223 n.5 (noting that the notion of comity has become “an all-inclusive doctrine”).

153. *See Hilton v. Guyot*, 159 U.S. 113, 163–67 (1895) (discussing the role of comity in international law); *Seguros Del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164, 1169 (11th Cir. 2001) (explaining the doctrine of abstention in favor of a concurrent, parallel proceeding is rooted in international comity); *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1518 (11th Cir. 1994) (adopting international comity as a factor because two lines of international abstention cases have already adopted international comity as a factor to consider); *Euromarket Designs, Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 845 (N.D. Ill. 2000) (citing *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987)) (noting that international judicial comity is a factor to consider when determining whether to stay or dismiss a proceeding based on the existence of a parallel proceeding in a foreign court); *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 318 (S.D.N.Y. 1986) (noting “comity between nations” as one of “numerous factors” that should be considered by a court when addressing international parallel proceedings).

154. 159 U.S. 113 (1895).

155. *Id.* at 163–64.

court.¹⁵⁶ Some have even argued that comity is not only an important consideration, but can form the basis of a “workable analytical approach to . . . international parallel proceedings.”¹⁵⁷ These scholars have recognized the important role concerns of comity, or respect for foreign nations and their internal workings, play when a court is deciding whether to decide a case while a similar case is being heard in a foreign court.¹⁵⁸

While the precise definition of international comity is not always agreed upon,¹⁵⁹ in the context of international parallel proceedings it has taken on a meaning of the need to respect and to recognize (to some degree) foreign proceedings which are substantially similar to a case before a federal court.¹⁶⁰ It is also recognized as a guiding principle supporting international abstention, much like notions of federalism support abstention by federal courts in favor of state proceedings.¹⁶¹ It is therefore a relevant consideration supporting the right of federal courts to consider abstention in international parallel proceedings.

2. *Concerns of vexatious litigation and inconsistent judgments*

Two other policy concerns that support the use of abstention in international parallel litigation are the need to reduce incentives for

156. See Calamita, *supra* note 2, at 678 (underscoring the importance of what he describes as “adjudicatory comity” in international parallel proceedings).

157. *Id.*

158. The specific problem that this situation causes, which is beyond the scope of this Comment, is how to enforce separate judgments in two countries that each might have the power of *res judicata* over the other but have reached different conclusions. See Stückelberg, *supra* note 9, at 951 (arguing that the enforcement of judgments is an extremely critical issue in international civil litigation); Teitz, *supra* note 2, at 5–6 (noting that enforcement of judgments in transnational litigation is a difficult task and an important issue to litigants).

159. Indeed, courts and scholars do not agree as to whether the term applies to any concurrent proceedings in two countries or whether it is only relevant when there is a decision in the foreign proceeding. See Calamita, *supra* note 2, at 667 n.209 (discussing courts’ differing views on whether principles of comity only apply to situations in which the foreign proceeding has resulted in a final judgment); George, *supra* note 4, at 508 n.40 (calling into question concerns of comity in a pending international proceeding because it does not involve “any final sovereign decree”); Teitz, *supra* note 9, at 225 (comity refers to another country or sovereign’s definitive law or judicial decision). Compare Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp., 988 F. Supp. 1285, 1290 n.3 (E.D. Mo. 1997) (arguing that comity refers to deference of another court’s judicial decision, not to pending actions), with *Ronar, Inc. v. Wallace*, 649 F. Supp. 310, 318 (S.D.N.Y. 1986) (arguing that comity counsels that priority go to the suit first filed when the foreign action is pending).

160. See Teitz, *supra* note 2, at 9 (“Comity is an implicit concern in both parallel proceedings and enforcement of judgments.”).

161. See *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999) (noting that the basis for abstention in a federal proceeding in favor of a state proceeding is different than the basis for abstention in favor of a foreign proceeding).

vexatious litigation and the need to avoid inconsistent judgments. The Supreme Court in *Cone* indicated that it would not be wrong for a court to consider whether a party was involved in vexatious litigation when it was determining whether to abstain from a proceeding.¹⁶² The Court, in a footnote, stated that the Ninth Circuit had considered the issue on remand of another abstention case, *Will v. Calvert Fire Insurance*, and noted that such an issue had “considerable merit.”¹⁶³

One of the reasons why not considering abstention in international parallel proceedings risks increases in vexatious litigation is that it allows the richer party in a lawsuit to file multiple lawsuits as a tactic to “exhaust” their adversaries.¹⁶⁴ While some scholars rightly argue that what constitutes vexation is in the eye of the beholder,¹⁶⁵ nevertheless most can agree that creating disincentives to using such a tactic—which is not only unfair, but also costly to the court system and taxpayers—is a sound idea.¹⁶⁶

The concern of inconsistent judgment in different forums is another issue that supports the development of and need for an international abstention doctrine. This issue is sometimes wrapped up in the issue of international comity,¹⁶⁷ but courts have noted the issue of inconsistent judgment as a rationale for the decision to abstain from a proceeding properly filed before a foreign court.¹⁶⁸ Indeed, the issue is one of such importance that there is an effort to develop international treaties that would address harmonization and/or guidelines for recognition of parallel lawsuits filed in different countries.¹⁶⁹ Because it would likely be years before such a

162. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983).

163. *Id.* at 18 n.20.

164. Calamita, *supra* note 2, at 610.

165. See Mullenix, *supra* note 7, at 149 (“In litigation terms, one party’s good lawyering is the opposing party’s vexation.”); see also Redish, *supra* note 20, at 97 (calling the use of multiple lawsuits by parties in a suit part of the “reality of litigation” and something that only Congress has the power to address).

166. Interestingly, the American Law Institute has recognized the importance of this issue by suggesting, in a draft advising courts on how to address abstention in international parallel proceedings, that one reason a U.S. court could decide *not* to defer to a first-filed foreign action is a finding that the foreign lawsuit was “vexatious or frivolous.” Teitz, *supra* note 2, at 69.

167. See *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1521 (11th Cir. 1994) (noting that inconsistent or conflicting judgments raise concerns of international comity).

168. See, e.g., *Evergreen Marine Corp. v. Welgrow Int’l Inc.*, 954 F. Supp. 101, 104 (S.D.N.Y. 1997) (acknowledging that placing all parties before one tribunal in Belgium, rather than two tribunals, would minimize the risk of inconsistent judgments).

169. See George, *supra* note 4, at 499 (presenting different international-level European and American efforts to address conflicting outcomes of similar cases in

treaty or set of international agreements would be in place, and would take a tremendous amount of political will, addressing the issue through a discernable, consistent international abstention doctrine is appropriate and necessary.

An example of a case where the risk of inconsistent judgments and vexatious litigation was high, but these considerations were ultimately ignored, is *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*¹⁷⁰ The plaintiff in this case, which was a trading and contracting company based in Kuwait, had entered into several “representation agreements” with McDonnell Douglas Corporation (“MDC”) and two of its wholly-owned subsidiaries.¹⁷¹ The plaintiff sued one of the subsidiaries, McDonnell Douglas International Sales Corporation (“MDISC”) in Kuwait seeking damages for non-renewal of the representation agreements and payment of all commissions then due.¹⁷² After three years and a partial judgment in its favor, the plaintiff then filed the lawsuit in U.S. district court against the other subsidiary with which it had contracted, McDonnell Douglas Foreign Sales Corporation (“MDFSC”).¹⁷³ It claimed it was owed money for the same unpaid commissions.¹⁷⁴

In its decision to deny a motion to stay or dismiss the U.S. action, the court refused to concede that issues of international comity were present, holding that comity is only a concern when a “definite law or judicial decision” has been reached in a foreign court.¹⁷⁵ In addition, the court overlooked the time of filing, which suggested the plaintiff only instituted the lawsuit in the U.S. court once it had learned the Kuwaiti court was likely to only award it \$640,000 of the \$16 million the plaintiff was seeking.¹⁷⁶

The court also refused to admit that moving forward in the present action could risk inconsistent judgments or double recovery for the

different countries and recognition of decisions in foreign courts); Stükelberg, *supra* note 9, at 949 (discussing a draft convention at the Hague Conference on Private International Law).

170. 988 F. Supp. 1285 (1997).

171. The purpose of the agreements was to promote product sales. *Id.* at 1287.

172. *Id.* at 1288.

173. *Id.* at 1287.

174. *Id.*

175. *Id.* at 1290 n.3.

176. *Abdullah Sayid Rajab Al-Rifai & Sons W.L.L. v. McDonnell Douglas Foreign Sales Corp.*, 988 F. Supp. 1285, 1288 (E.D. Mo. 1997). The Court of First Instance in Kuwait reserved judgment on the plaintiff’s claims for commissions arising out of several aircraft sales and referred the matter to the Experts Department of the Kuwaiti Ministry of Justice, which found that the plaintiff was owed \$637,588, and the matter was referred back to the Court of First Instance for a final determination. *Id.*

plaintiff¹⁷⁷ and, instead, claimed that, while the issues involved in the two cases were “substantially similar,” the parties were not,¹⁷⁸ and therefore the Kuwaiti action would not resolve any issues before it.¹⁷⁹ The denial of a stay appeared ill-conceived, however, because the facts suggested that the plaintiff treated the subsidiaries as one business partner,¹⁸⁰ and the repetitive litigation and the timing suggest the plaintiff was taking advantage of jurisdictional rules to circumvent a judicial outcome that did not meet its expectations.¹⁸¹ A framework which stresses the considerations of vexatious litigation and interest in avoiding inconsistent judgments, such as the one suggested in this Comment, might have swayed the court to consider more thoroughly the problems associated with allowing the district court action to continue at the same time as the first-to-be-filed Kuwaiti action.

C. Solutions: Revisions to the Colorado River Factors

The following are suggestions of minor amendments to the *Colorado River* factors to be used if the standard is applied to address international parallel proceedings. These amendments are designed to improve the consistency with which they are applied and to promote a stricter adherence to the analytical framework originally provided by the Supreme Court in *Colorado River* and *Cone*.

1. Determine as a threshold issue whether proceedings are parallel

Federal courts, in deciding whether to stay or dismiss a proceeding in favor of a foreign proceeding, should determine as a threshold issue whether the two proceedings are sufficiently parallel before applying a balancing test guided by *Colorado River*.¹⁸² Within the differing applications of various Supreme Court abstention doctrines, some federal courts have treated the issue of whether the concurrent

177. The defendant in the district court case argued that the plaintiff was seeking double recovery by filing the separate lawsuits based on identical claims for the same set of sales. *Id.* at 1292.

178. *Id.* The court stated that while the parties need not be identical in order to warrant a stay, the defendant provided no authority to define substantially similar parties as two separate, wholly-owned subsidiaries, and, therefore, the court would not “pierc[e] the corporate veil.” *Id.*

179. *Id.* at 1293.

180. The facts as summarized in the case show that the plaintiff entered into successive representation agreements, with MDC and its two subsidiaries, that were all for the same purpose. *Id.* at 1287–88.

181. Indeed, the plaintiff moved to dismiss the Kuwaiti action in response to the defendant’s motion to dismiss or stay the U.S. action, suggesting the plaintiff wanted to show its preference for the U.S. court to adjudicate its claim. *Id.* at 1289.

182. See *supra* Part I.B.4 (presenting *Colorado River* factors).

proceedings are parallel as a threshold issue,¹⁸³ and some have addressed the similarity of parties and issues along with other factors.¹⁸⁴ Determining whether the two cases are substantially similar,¹⁸⁵ such that a decision in one would preclude the need for a decision in the other,¹⁸⁶ would simplify the balancing test by eliminating for consideration any cases that were not sufficiently similar. This would also strengthen support for application of abstention principles by applying them only in situations where the cases are overtly duplicative, and, therefore, concerns of international comity, vexatious litigation, and inconsistent judgments are highest.¹⁸⁷

Support for this construction is implicit in the Supreme Court's analysis in both *Colorado River* and *Cone*, and, therefore, is rooted in

183. See *Royal & Sun Alliance Ins. Co. of Can. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 95 (2d Cir. 2006) ("The existence of a parallel action in an adequate foreign jurisdiction must be the beginning, not the end, of a district court's determination of whether abstention is appropriate."); *Seguros Del Estado, S.A. v. Scientific Games, Inc.*, 262 F.3d 1164, 1170 (11th Cir. 2001) (arguing that the threshold question is whether the cases are parallel); *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898 (7th Cir. 1999) (noting that the court's "first task" is to determine whether the two proceedings are actually parallel); *Grammar, Inc. v. Custom Foam Sys., Ltd.*, 482 F. Supp. 2d 853, 857 (E.D. Mich. 2007) (citing *Romine v. CompuServe Corp.*, 160 F.3d 337, 339 (6th Cir. 1998)) (arguing that the threshold question is whether the cases are parallel).

184. The other factors considered along with whether parties and issues are substantially similar include which case is further along, possible prejudice to and adequacy of relief for the parties in the foreign forum, and the promotion of judicial efficiency. See *Turner Entm't Co. v. Degeto Film GMBH*, 25 F.3d 1512, 1523 (11th Cir. 1994) (listing the consideration of whether the actions have the same parties and issues in common as a factor to be addressed under the general concern of judicial efficiency); *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 253 (D. Mass. 1999) (listing the "similarity of parties and issues involved" as one of the factors relevant to the decision); *Cont'l Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (relevant factors include the identity of the parties and the issues of the two actions).

185. See *George*, *supra* note 4, at 500 (discussing the different views of what constitutes parallel litigation). Compare *Cont'l Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (granting dismissal in favor of the suit in Switzerland, even though that case included parties and claims different from those in the U.S. suit), with *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (finding the two lawsuits not identical because the U.S. suit included officers of the defendant corporation).

186. It should be noted, however, that there is no equivalent to the Constitution's Full Faith and Credit Clause such that U.S. courts are uniformly required to recognize and enforce a decision of a foreign court. See *Teitz*, *supra* note 2, at 5-6 (arguing in support of efforts to impose enforcement requirements in U.S. courts for judgments in foreign parallel proceedings).

187. One scholar in particular has noted the problems duplicative litigation causes, such as waste, undermining of different legal systems, and a race to judgment, and has, therefore, suggested that abstention is indeed most proper when designed to avoid duplicative litigation. Rehnquist, *supra* note 18, at 1065, 1114; see *Birdsong*, *supra* note 20, at 380 (noting that *Colorado River* doctrine is invoked to avoid duplicative litigation).

applicable precedent. In both cases, the Supreme Court did not list the similarity of parties and issues as a factor to consider when determining whether to abstain from a proceeding.¹⁸⁸ Rather, both cases imply that the analysis of whether to abstain cannot begin unless a court first determines that the concurrent proceedings are parallel and that the other proceeding will likely resolve the issues before the federal court.¹⁸⁹ Indeed, without “concurrent proceedings,” the principles outlined in *Colorado River* appear not to even apply.¹⁹⁰ This understanding suggests that courts should first determine whether the concurrent proceeding meets a definition of parallel or substantially similar¹⁹¹ before embarking on an analysis of whether a stay or dismissal would be appropriate under the circumstances.

The Court of Appeals for the Seventh Circuit in *Finova Capital v. Ryan Helicopters U.S.A., Inc.*¹⁹² followed this framework when determining whether to stay a proceeding in district court pending a decision in a case being heard in St. Lucia.¹⁹³ The court affirmed a decision by the district court to stay the proceeding pending a

188. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 19–28 (1983) (presenting *Colorado River* factors); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976) (discussing factors to be considered).

189. In both cases, the Court uses the same language to assert a court's power to grant a stay or dismissal of a case, which it says is only appropriate “due to the presence of a concurrent state proceeding.” See *Colo. River*, 424 U.S. at 818; *Cone*, 460 U.S. at 15.

190. Many scholars discussing *Colorado River* have noted that the abstention doctrine outlined in the case is applicable only when a federal court is determining whether to decline to hear a case because of the existence of a parallel proceeding in another court system. See Birdsong, *supra* note 20, at 380 (noting that *Colorado River* is invoked to avoid duplicative litigation, either in two different federal courts or in parallel proceedings in state and federal courts); Sonenshein, *supra* note 19, at 658 (noting that *Colorado River* instructs that a federal court can dismiss or stay an action when the subject of the suit is simultaneously the subject of litigation in a state court); Treviño de Coale, *supra* note 2, at 83 (abstention proper under *Colorado River* in some cases where both federal and state court have concurrent jurisdiction and parallel litigation is proceeding in both courts); see also *Grammar, Inc. v. Custom Foam Sys., Ltd.*, 482 F. Supp. 2d 853, 857 (E.D. Mich. 2007) (noting that if concurrent proceedings are not parallel, then the *Colorado River* abstention is not appropriate).

191. Courts often determine whether the cases are parallel by asking whether they are substantially similar. See *Grammar*, 482 F. Supp. 2d at 857 (“Exact parallelism is not required; it is enough if the two proceedings are substantially similar.” (citing *Romine v. CompuServe*, 160 F.3d 337, 340 (6th Cir. 1998))); see also *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 899 (7th Cir. 1999) (“Suits are parallel if substantially the same parties are litigating substantially the same issues simultaneously in two fora.”). But see *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (“[A]bstention . . . is appropriate where the federal court faces the *identical* substantive issue presented in the state court.”) (emphasis added).

192. 180 F.3d 896 (7th Cir. 1999).

193. The court said the “first task is to determine whether the federal and foreign proceedings are in fact parallel.” *Id.* at 898.

decision of the St. Lucia proceeding, which had been filed first.¹⁹⁴ The circuit court found the cases were parallel because both asked the court to determine ownership of two helicopters that Ryan Helicopters had leased from Rotorcraft, but in which Finova had a security interest.¹⁹⁵ Satisfied that the cases were parallel, the court ultimately found that it should stay the proceeding because the St. Lucia action was first to assume jurisdiction, the helicopters were in St. Lucia, and there was no countervailing federal interest because it was a run of the mill contractual dispute.¹⁹⁶

In sum, the *Finova* court was confident that the foreign court would solve the underlying legal dispute before it and would do so fairly, and faster than it could.¹⁹⁷ Given the doctrine of *res judicata*, therefore, the court found it best to stay the matter until such time as the foreign suit was complete.

The problems associated with determining the similarity of issues and parties as part of the overall balancing associated with whether a court should abstain from hearing a case are exemplified in *Continental Time Corp. v. Swiss Credit Bank*.¹⁹⁸ The U.S. District Court for the Southern District of New York granted a stay of the case filed by Continental Time in favor of the pending litigation in Switzerland.¹⁹⁹ It held that while the two cases did not involve the same parties, the Swiss suit “had the potential of including all parties necessary for the resolution of the claims,” and that factor, plus convenience and the imposition on Swiss Credit to defend itself in two different cases, weighed in favor of a stay.²⁰⁰

If the court had been forced to determine as a threshold issue that the cases were substantially similar, the outcome likely would have been different. Instead of being able to weigh similarities between

194. *Id.* at 897.

195. *Id.* The court held that the only difference between two proceedings was that Rotorcraft was not a party in the federal action, and this was “immaterial” because Finova had at the time assumed Rotorcraft’s rights under the lease. *Id.*

196. *Id.* at 899–90.

197. *See id.* at 899 (noting that the St. Lucia case would more than likely eliminate the need for any further proceedings).

198. 543 F. Supp. 408 (S.D.N.Y. 1982). Continental Time Corp. sued Swiss Credit Bank in New York, seeking to recover damages for Swiss Credit’s alleged failure to honor its obligations under a letter of credit. *Id.* at 409. Prior to the New York suit, S. Frederick & Company and Arlington Distributing Company Co., Inc., had sued Swiss Bank in Switzerland based on the same letter of credit, which had been assigned to them by Continental. *Id.* By the time Continental had instigated its suit, however, it had reacquired seventy-five percent of the letter of credit. *Id.*

199. *See id.* at 410.

200. *See id.*

the cases along with other factors,²⁰¹ the court would have been required to first determine with precision if the decision in the Swiss court would solve most of the legal issues present before it. While the two cases involved the same letter of credit, it is not clear whether the factual bases of the two cases were the same.²⁰² In addition, while it is possible (as discussed by the court) that Continental could have joined the Swiss suit, it had not. This suggests—along with the fact that another party was also not a party to the New York suit—that the factual issues that would have affected the legal issues might have varied. Forcing a court to first determine whether the two suits were parallel would have simplified the subsequent weighing of factors and brought to the forefront the most crucial issue: would a decision in the foreign suit render unnecessary, through the principle of *res judicata*, a decision in the New York lawsuit?

Supreme Court abstention jurisprudence and policy considerations underlying the use of abstention doctrine due to the existence of allegedly parallel litigation support treating the question of the similarity of the two cases as a threshold issue. This treatment would help to improve the consistency of the application of abstention doctrine to international parallel proceedings—a goal that could help to quell some of the criticisms of the *Colorado River* abstention doctrine.²⁰³

2. *Apply the federal law factor to determine if proceedings are parallel*

The Supreme Court's state-federal abstention doctrine, first outlined in *Colorado River*, urges a court to consider whether federal law controls the outcome of the case, and if so, suggests that this factor counsels against abstention.²⁰⁴ This factor should be folded into the initial determination of whether the two lawsuits address the

201. The other factors the court considered were the promotion of judicial efficiency, the likelihood of prompt resolution in the alternative forum, the convenience of parties, counsel, and witnesses, the temporal sequence of filing of each action, and whether Continental and Frederick had engaged in forum shopping. *Id.*

202. The opinion only states that after Continental assigned the interest to Frederick and Arlington, Swiss did not pay the letter of credit. *Id.* at 409.

203. See Mullenix, *supra* note 7, at 118–29 (discussing criticisms of *Colorado River* and its multi-factor balancing test, such as that the factors to be considered are vague and unworkable).

204. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23 (1983). The Court reasoned that if federal law provides the rule of decision on the merits of the case, then this factor would be a “major consideration weighing against surrender.” *Id.* at 25. The Court argued that while this was not a factor in *Colorado River*—because, it argued, it was of “ambiguous relevance”—the four-vote dissenting opinion and Justice Blackmun's concurring opinion both discussed the fact that the case involved issues of federal law. *Id.* at 23.

same issues and parties and, therefore, whether abstention is appropriate.²⁰⁵ This change would simplify the analysis and refocus the question of whether federal law controls to answer the more compelling question: whether a decision in one court would have the effect of *res judicata* on the other court.

Generally speaking, in the framework of concurrent litigation in federal and state courts, this factor makes sense to the degree that one believes a federal court is more equipped to make a decision based on federal law, even if both court systems have jurisdiction to hear the claim.²⁰⁶ In concurrent federal and foreign proceedings, however, the factor is important because if found present, it highlights a significant difference between the two cases that would suggest the foreign proceeding is not sufficiently parallel.²⁰⁷

Euromarket Designs, Inc. v. Crate & Barrel Ltd.,²⁰⁸ is an example of a case that could have been decided more effectively through an application of the question whether federal law controls to a threshold determination of whether the concurrent proceedings were substantially similar.²⁰⁹ After a thorough application of the *Colorado River* and *Cone* factors, the court denied a motion to stay the proceeding.²¹⁰ While the court acknowledged that no single factor is “necessarily determinative,”²¹¹ the court appeared to base its decision

205. See *supra* Part II.D.1 (outlining the argument for treating the question of whether the two cases are parallel as a threshold issue).

206. This premise is undercut by what James Rehnquist calls the Constitution’s “neutrality” on whether issues are litigated in state or federal court. Rehnquist, *supra* note 18, at 1052. According to Rehnquist, if both court systems have jurisdiction, then it is assumed under the Constitution that both can rightly decide the case and that neither court has an interest in which decides the case, as long as jurisdictional requirements are met. *Id.*

In addition, it should be noted that denying a litigant’s ability to have his case heard in federal court, even though the court has jurisdiction, is counter-intuitive and inconsistent with general understandings of how a court determines whether it has the authority to hear a case in the first place. See Mullenix, *supra* note 7, at 126 (“The exceptional circumstances standard thus has the choice of law tail wagging the jurisdictional dog.”).

207. If the foreign proceeding is found not to be sufficiently parallel, then the case for abstention is severely weakened. See *supra* note 191 (presenting courts’ views on what constitutes parallel litigation).

208. 96 F. Supp. 2d 824 (N.D. Ill. 2000).

209. The case involved a trademark dispute between a large American furniture and housewares retailer, Euromarket Designs, Inc. (commonly known as Crate & Barrel), and a small Irish corporation that also used the name Crate & Barrel who sold goods similar to the U.S. retailer both in a store in Dublin and through the Internet. *Id.* at 827–30.

210. Factors considered included the inconvenience of the federal forum, avoidance of piecemeal litigation, which lawsuit was first-filed, whether federal law formed the basis of the claim, the potential probable inadequacy of the foreign forum in protecting the litigant’s rights, the United States’ interest in adjudicating the dispute, and international comity. See *id.* at 842–45.

211. *Id.* at 842.

largely on the fact that the U.S. case was based on U.S. trademark law, whereas the British and Irish cases were based on each country's own trademark laws.²¹² This finding colored the court's determination of most of the other factors.²¹³

This analysis suggests that the court could have reached the same decision using a simpler and more straightforward analysis: because the cases in different countries relied on the trademark laws of their respective countries, while the facts were the same, the elements of the law were different and therefore a decision in a foreign court would not have the effect of *res judicata* on the other proceedings. Therefore, a determination that the concurrent proceedings were not sufficiently parallel and that the abstention doctrine did not apply would have reached the same conclusion and provided a simpler framework for other courts to apply as precedent.²¹⁴

3. *Remove the adequacy of relief factor*

In *Cone*, the Supreme Court instructs courts determining whether to stay or dismiss a proceeding in favor of a concurrent proceeding in a state court to consider the adequacy of the state proceeding in protecting the rights of the parties.²¹⁵ In applying this abstention doctrine to the question of concurrent proceeding in a foreign court, several courts have also considered this factor.²¹⁶ However, inclusion of this factor is troubling because it is a subjective consideration that

212. As the court stated, "[W]hile Plaintiffs are free to litigate in other countries to protect legal rights conferred upon them by the governments of other countries, they also have a right to litigate in the United States to protect the legal rights conferred upon them by the Lanham Act and Illinois statute." *Id.* at 843.

213. *See id.* at 843 (proceeding with each case will not cause piecemeal litigation because each case is based on separate claims); *id.* at 843-44 (noting that adjudication of the U.S.-filed case will be inadequate in a foreign forum because the case is based on U.S. law).

214. An example of where a court might find the two cases were parallel because no federal law controlled the outcome is *Grammar, Inc. v. Custom Foam Sys., Ltd.*, 482 F. Supp. 2d 853 (E.D. Mich. 2007). The court held that the stay was appropriate for several reasons, especially that the dispute could be as easily solved in Canada as it could in the United States because there was no federal law at issue and it was a contractual dispute concerning the same parties. *Id.* at 859. Again, a determination that the two cases were sufficiently parallel would not have precluded a balancing of the other factors, but would have made such balancing appropriate.

215. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983). *But see* Mullenix, *supra* note 7, at 127 (arguing that *Cone* provides little guidance on the definition and relative weight of the adequacy of relief factor).

216. *See, e.g.*, *Boushel v. Toro Co.*, 985 F.2d 406, 409 (8th Cir. 1993) (deeming adequacy of relief available in alternative forum a factor to consider); *Euromarket Designs Inc. v. Crate & Barrel Ltd.*, 96 F. Supp. 2d 824, 842 (N.D. Ill. 2000) (same); *Goldhammer v. Dunkin' Donuts, Inc.*, 59 F. Supp. 2d 248, 253 (D. Mass. 1999) (same); *Caspian Invs., Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991) (same); *Cont'l Time Corp. v. Swiss Credit Bank*, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (same).

allows a judge to substitute his judgment for that of the plaintiff.²¹⁷ To improve the consistency and predictability of the application of the *Colorado River* abstention doctrine in international parallel proceedings, this factor should be removed.²¹⁸

In applying this factor, courts have applied varying interpretations of its meaning. For example, courts have conflated the issue of whether the two cases were sufficiently parallel (e.g., whether they involved substantially similar legal issues and parties) with whether the foreign proceeding would be “adequate.” The court in *I.J.A., Inc. v. Marine Holdings, Ltd.*²¹⁹ followed this interpretation when it determined that the factor compelled it to consider whether the foreign court could resolve each of the substantive legal issues before the U.S. court.²²⁰

Other courts have looked to whether each court would apply the same substantive law to determine if the foreign proceeding could provide adequate relief. In *Euromarket Designs v. Crate & Barrel Ltd.*,²²¹ an Illinois district court interpreted the adequacy of relief of the foreign forum to be based on the substantive law that applied in each case.²²² It found the foreign forums inadequate because the legal question before the court was based on U.S. trademark law, whereas the concurrent proceedings involving the same parties and the same operative facts were based on the other countries’ trademark laws.²²³ Each case, however, was based on the same general cause of action—trademark infringement—and while the statutory basis for the lawsuit in each country was different, the fact that each country offered relief

217. See Mullenix, *supra* note 7, at 141–42 (criticizing the adequacy of relief factor as vague, unworkable, and unjustified).

218. This factor has been removed from the analysis developed by the Eleventh Circuit in *Turner Entm’t Co. v. Degeto Film GmbH*, 25 F.3d 1512 (1994). Rather, the Eleventh Circuit suggests consideration of the possibility of prejudice to the parties resulting from abstention by the federal court. This factor is somewhat analogous to the adequacy of relief and is derived from cases applying the Supreme Court’s abstention decision in *Landis*. *Id.* at 1522.

219. 524 F. Supp. 197 (E.D. Pa. 1981). This opinion was a reconsideration of a previous order to stay the proceedings pending a decision in a Canadian court of a case involving the same parties and same general dispute. *Id.* at 198.

220. See *id.* at 199 (arguing the Canadian court could not complete relief due to different requests for relief in each lawsuit).

221. 96 F. Supp. 2d 824 (N.D. Ill. 2000). The case involved a trademark dispute between a large U.S. company that engaged in the sale of housewares and furniture and an Irish retailer of similar goods. *Id.*

222. See *id.* at 843–44. Each case was based on codified trademark law in the United States, the United Kingdom, and Ireland. *Id.* at 828–30.

223. *Id.*

for such a cause of action could easily have suggested that the foreign forums were adequate.²²⁴

Another method of interpretation of this factor is an assertion that if a court simply stayed rather than dismissed a case, the factor would become unimportant. For example, in *Goldhammer v. Dunkin' Donuts, Inc.*,²²⁵ the court noted the adequacy of relief as a factor to consider, but sidestepped the issue by arguing that a stay of the U.S. action, rather than a dismissal, obviated the concern for whether the foreign forum is adequate.²²⁶ It supported its conclusion by arguing that a stay allowed the parties to open the case in the U.S. and litigate any remaining claims.²²⁷

Lastly, some courts have looked to whether the foreign court is likely to follow procedures similar to those used by the federal courts in determining whether it could provide adequate relief. For example, in *Grammar, Inc. v. Custom Foam Systems, Ltd.*,²²⁸ the district court considered specific procedural processes of the foreign court to determine if it was likely to provide adequate relief.²²⁹ Although Grammar—the party challenging the motion to stay the U.S. proceeding—informed the court that it would not receive a jury trial in Canada and therefore argued the foreign proceeding was not adequate, the court held that the adequacy factor counseled in favor of declining jurisdiction.²³⁰ It based its decision on a belief that, in general, Canadian courts “comport with American notions of due process and are therefore capable of protecting the rights of United States litigants.”²³¹

These cases provide examples of how the lack of an agreed-upon definition of what makes a foreign court “adequate” has led federal judges to apply the factor in various ways. This inconsistency has, therefore, allowed the courts, in effect, to supplant their subjective determination of adequacy of a foreign forum in place of the litigants’ determination.

224. Another consideration supporting the argument that the British and Irish courts offered adequate relief is that the plaintiff in the U.S. case filed each lawsuit, suggesting that the plaintiff believed that the foreign courts could offer it “adequate” relief for damages associated with the alleged trademark infringement. *Euromarket Designs*, 96 F. Supp. 2d at 829.

225. 59 F. Supp. 2d 248 (D. Mass. 1999).

226. *Id.* at 254.

227. *Id.*

228. 482 F. Supp. 2d 853 (E.D. Mich. 2007). This case involves a contractual dispute between an American company and a Canadian company, both in the business of the manufacturing of automobile parts. *Id.* at 854.

229. *Id.* at 860.

230. *Id.*

231. *Id.*

4. *Create a presumption in favor of foreign court if it has issued a decision*

The last suggestion for revision of the application of the *Colorado River* factors for international parallel proceedings is to create a presumption in favor of a stay or dismissal when there has been a judgment in the foreign proceeding.²³² Concerns of piecemeal litigation and conflicting judgments are paramount in such situations,²³³ and international comity²³⁴ weighs in favor of recognition of the decision of the foreign court if the proceedings are indeed parallel.

The Seventh Circuit recognized the importance of this concern when it decided *Ingersoll Milling Machine Co. v. Granger*.²³⁵ In this case, Granger originally sought to have the Illinois suit dismissed under a theory of forum non conveniens, but after that motion was denied, he filed a motion to dismiss, claiming the action was barred by res judicata, because, by that time, the Belgian court had issued a judgment.²³⁶ The district court, among other rulings, issued a stay

232. Some scholars have gone even further to argue that there should be a presumption in favor of the first-filed case. See Calamita, *supra* note 2, at 675–76 (arguing for presumption in favor of the first-filed case in international parallel proceedings, based on a theory of comity); see also Rehnquist, *supra* note 18, at 1068 (arguing for a first-filed rule for the traditional, state-federal abstention doctrine). This position has its merits—particularly that it would discourage forum shopping and reduce concerns of duplicative, wasteful litigation, and the potential for inconsistent judgments. To introduce such a presumption, however, would be inconsistent with *Colorado River* where the Court cautioned that a federal court should decline jurisdiction only in “exceptional circumstances.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Therefore, to stay within the analytical boundaries of *Colorado River*—the most applicable Supreme Court case concerning abstention—a presumption in favor of the first-filed case would be inappropriate.

233. See *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (discussing the concerns related to hearing a case when a decision has already been issued in a parallel proceeding).

234. International comity, while sometimes criticized as ill-defined, is at its base a term used to recognize the importance of respecting a judicial decision from another country or governmental structure. See Calamita, *supra* note 2, at 616–31 (discussing theoretical development of the term “comity”); Teitz, *supra* note 9, at 225 (arguing that comity refers to another country’s or sovereign’s definitive law or judicial decision). Therefore, considerations of comity are high when a foreign court has issued some type of decision in a concurrent, parallel proceeding.

235. 833 F.2d 680 (7th Cir. 1987). This case involved an employment dispute between Ingersoll, an Illinois corporation and John P. Granger, a former Ingersoll employee who had worked for the company in Rockford, Illinois and Brussels, Belgium. *Id.* at 682. Granger brought suit against Ingersoll in a Belgian court in 1978, and Ingersoll responded in part by filing a lawsuit against Granger several months later in an Illinois court, seeking a declaratory judgment in its favor, a return of funds and that the Illinois court enjoin Granger from proceeding in the Belgian suit. *Id.*

236. *Id.* at 682–83.

pending Mr. Granger's appeal of the Belgian suit and Ingersoll appealed.²³⁷

In affirming the decision of the district court, the Seventh Circuit found that "it was manifestly clear that the district court did not abuse its discretion on staying proceedings"²³⁸ The considerations of "judicial economy, especially the need to avoid piecemeal litigation, strongly favored staying the district court proceedings."²³⁹ Given that the two proceedings were parallel, the court found it was more than likely that the Belgian court's judgment would resolve the issues in the federal case and therefore there was no need for concurrent proceedings.²⁴⁰

While *Ingersoll* did not use a presumption in favor of abstention due to the existence of a decision in the foreign court, the factor did weigh heavily in the grant of the motion to stay. In a revised framework, creating a presumption in favor of a motion to stay in such situations would likely provide necessary incentives against filing duplicative lawsuits, which helps improve judicial efficiency, and in the case of international parallel proceedings, will help a court meet the demands of international comity.

CONCLUSION

To increase consistency and predictability in how federal courts will analyze a motion to stay or dismiss a proceeding in favor of a concurrent, parallel proceeding in a foreign court, courts should follow an analysis based on the Supreme Court's decision in *Colorado River*. Consistent with this opinion, courts should only decline the exercise of jurisdiction in "exceptional circumstances" and not use the wider latitude for discretion to abstain permissible under *Landis*.

To address the specific concerns raised in international parallel proceedings, the multi-factor balancing test first set out in *Colorado River* should be amended to better account for both the difficulties lower courts have encountered in applying *Colorado River* to date and the unique questions that arise where foreign or international proceedings are concerned. Specifically, courts should:

- (1) determine as a threshold issue whether the two proceedings are sufficiently parallel before embarking on a balancing test of the other factors;

237. *Id.* at 683.

238. *Id.* at 685.

239. *Id.*

240. *Id.*

(2) fold the question of whether federal law will control the resolution of the claims in the case into an initial determination if the two suits are indeed parallel;

(3) no longer consider the adequacy of relief factor because of its vagueness and likely inconsistent application; and

(4) create a presumption in favor of a stay or dismissal if the case before the foreign court has proceeded to a judgment.

Beyond these suggestions, courts should look to balance the remaining factors developed in *Colorado River* and its progeny²⁴¹ to determine whether to decline the exercise of jurisdiction either temporarily (with a stay) or indefinitely (in a dismissal). This framework will help federal courts to appropriately and consistently address international parallel litigation involving U.S. and foreign courts.

241. These include (1) which court first assumed jurisdiction in res; (2) the relative convenience or inconvenience of the federal forum in adjudicating the dispute; (3) the desirability of avoiding piecemeal litigation; and (4) the order in which the jurisdiction was obtained, evaluated through a determination of which lawsuit had made more progress toward resolution. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15–27 (1983).