Federalism, Finality and Foreign Judgments: Examining the ALI's Proposed Federal Foreign Judgments Statute

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Abstract

The force and effect of foreign civil judgments in U.S. courts is a question of historic significance and growing importance. Presently, the question is governed by state common law. The U.S. is not party to any treaty regarding the extraterritorial force of civil judgment and recent efforts to secure bilateral and multilateral agreements on the issue have failed. The American Law Institute recently adopted a model federal statute regarding the question. The ALI’s asserts that its federal statute, if adopted, would entice foreign nations back to bargaining table and increase U.S. leverage in those negotiations.

This article examines the ALI’s proposed federal statute and argues that it should not be adopted. The statute would preempt state and compel state courts to extend less recognition to foreign judgments than presently available under the common law. This article responds to the common assumption that recognition ought to be a matter of federal law and argues that displacement of state law is warranted and undervalues interests protected by federalism. Preemption of the common law of judgments will fail to accomplish its objectives and unnecessarily reduce state authority over the administration of justice in state courts.

Second, the article examines the statute’s controversial reciprocity requirement and argues that reciprocity compounds the problems of preemption and ignores the interests of private litigants. Reciprocity could also diminish international respect for the U.S.’s commitment to the rule of law and thereby weaken the U.S.’s moral authority in future diplomatic negotiations regarding the issue of judgments.

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I. Introduction

When Justice Holmes famously declared that those who study law are not studying a mystery it is unlikely that he had the study of conflict of laws or res judicata on his mind. At the intersection of conflict of laws and res judicata jurisprudence one confronts the difficult question of the extraterritorial force and effect of judgments. The complexity of this issue is highlighted by the Court’s lengthy opinion in Hilton v. Guyot decided just two years prior to Holmes’s declaration of demystification.

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2 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 457 (1897).
4 Hilton v. Guyot, 159 U.S. 113 (1895).
Throughout *Hilton* one senses the Court’s struggle with the tension between its own competing conceptions of law. On one hand, the Court’s opinion examines a potentially brooding and omnipresent\(^5\) law of nations as a potential source of universal obligation of requiring recognition of some foreign judgments.\(^6\) On the other hand, the Court rests its holding on a much more limited conception of law confining law to the realm of territorial sovereignty and, ultimately, rejecting universal norms of international law.\(^7\) In the opening paragraphs of the opinion, citing Justice Story’s Commentaries on the Conflict of Laws, the Court noted the futility of any effort to articulate the effects of foreign judgments with clarity because the issue “touched on the comity of nations, and that comity is, and ever must be, uncertain.”\(^8\) One might be forgiven for finding *Hilton*, and, more generally, the force and effect of foreign judgments in U.S. courts a mysterious study.

What effect, if any, does a civil judgment rendered in one jurisdiction have in another? This question is at the heart of the body of common law referred to as the law of judgments.\(^9\) First year law students quickly learn that civil judgments are not self-executing. Instead, judgments are merely pieces of paper until they are properly presented for recognition and/or enforcement.\(^10\) Thus, one who obtains a money judgment from an Alabama state court, for example, may not seize property in Florida without first presenting the judgment to a Florida Court for enforcement. A judgment presented for enforcement in this context is unlikely to generate difficult legal questions given that the Alabama judgment creditor’s right of enforcement in Florida is secured by the Full Faith and Credit Clause of the U.S. Constitution.\(^11\)

Contrast this scenario with one involving a judgment creditor whose judgment was rendered by a tribunal located in a foreign nation. Consider, for example, a judgment creditor who obtains a money judgment from a tribunal in Yemen. What effect does this Yemeni judgment have when presented to a Florida court? The Yemeni judgment creditor, unlike the Alabama judgment creditor, is not entitled to the protection of the Full Faith and Credit Clause.\(^12\) Does the Yemeni judgment creditor, then, have a right to enforcement and recognition of in Florida? If so, what is the legal basis of this right to recognition and enforcement? This question leads to further complication. Whose law determines whether Florida must recognize the foreign judgment, Florida’s law or federal law? If Florida’s law governs yet another

\(^{5}\) Two decades after his declaration in *The Path of the Law*, Justice Holmes, as part of his continuing quest to rid the law of mystery, opined that “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.” Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

\(^{6}\) See *Hilton*, supra note ___ at 143 (discussing international law and comity as sources of a quasi-obligation to recognize and enforce foreign judgments in U.S. courts).

\(^{7}\) *Id.* (“International law, in its widest and most comprehensive sense, including [public and private international law] is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination. . . . No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”)

\(^{8}\) *Id.* at 143-44 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT BETWEEN FOREIGN AND DOMESTIC LAWS § 28).

\(^{9}\) See, e.g., RESTATEMENT (FIRST) OF JUDGMENTS § 1 (1942).

\(^{10}\) “Recognition” of judgments is distinct from “enforcement” of judgments. See supra notes ___ - ___ and accompanying text. Hereinafter, unless otherwise noted, both recognition and enforcement will be referred to as “recognition” of judgments.

\(^{11}\) U.S. CONST. art. IV. Discussion of the Full Faith and Credit Clause and its application in the interstate context follows at notes ___ - ___ and accompanying text.

\(^{12}\) See supra notes ___ - ___ and accompanying text.
complication emerges. If Florida’s courts, applying Florida’s law, recognize and enforce the Yemeni judgment then does the Florida judgment implicate the foreign affairs of the United States? What if Florida’s courts, applying Florida’s law, refuse to recognize the Yemeni judgment on the finding that Yemen’s tribunals are not part of “a system of jurisprudence likely to secure an impartial administration of justice between the citizens of [Yemen] and those of other countries” as indicated by the Court in Hilton to be a predicate to enforcement of the foreign judgment in U.S. tribunals. In other words, does Florida have the sovereign authority to refuse to extend comity to the tribunals of Yemen?

This question points to an interesting choice of law inquiry. Whose law should determine whether state courts should recognize and/or enforce the judgments of foreign nation’s tribunals? The United States is not a party to any judgment recognition treaty and there is not international consensus regarding the principles which should govern judgment recognition. There are no federal statutes governing the extraterritorial effect of foreign judgments in the United States. The federal courts at one time appeared willing to develop federal common law governing the recognition of foreign nation judgments. Now, however, federal courts, applying Erie and Klaxon apply state law to determine whether and to what extent the judgments of foreign nations are entitled to recognition and enforcement.

A number of scholars argue that federal law should govern recognition and enforcement of foreign judgments. These scholars argue that there are strong federal interests implicated by a state’s refusal to recognize a foreign nation’s judgment and that the states have no interest in regulating international commerce.

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13 Hilton, supra note ___ at 158.
16 See, e.g., Linda J. Silberman, Andreas F. Lowenfeld, A Different Challenge for the ALI: Herein of Foreign Country Judgments, An International Treaty, and an American Statute, 75 Ind. L. J. 635, 635-36 (discussing the lack of federal legislation as one impetus of the ALI’s foreign judgment recognition project).
17 See Hilton, supra note ___ at 158 (stating a rule of federal common law governing recognition and enforcement of foreign judgments).
18 Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (declaring that there is no general federal common law and requiring federal courts, sitting in diversity, to apply state law to resolve all matters of substantive right).
20 Restatement (Third) of Foreign Relations of the United States § 481 cmt. a (1987); see also Charles Allen Wright et al., Federal Practice and Procedure § 4473 at 742-44 (1981) (discussing the federal practice of applying state law to determine the force and effect of foreign judgment in federal court where the court sits in diversity or alienage jurisdiction).
21 See Casad, supra note ___ at 79 (“Although the Republic can survive without federalizing the law of foreign judgment recognition, the arguments in favor of that position are strong and the principle argument against it amounts to little more than inertia.”); Ronald A. Brand, Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance, 67 Notre Dame L. Rev. 253, 300 (1991) (arguing that foreign judgment recognition should be a matter of federal law); see also Behrooz Moghaddam, note, Recognition of Foreign Country Judgments – A Case for Federalization, 22 Tex. Int’l L.J. 331 (1987).
22 See Brand, supra note ___ at 326 (asserting that preemption of state law is a justifiable response to the lack of uniformity in state recognition law and necessary to further national interests).
Two of the most vocal critics of the current state of recognition law, Professors Andreas Lowenfeld and Linda Silberman, served as reporters of the American Law Institute’s (“ALI”) recently completed foreign judgment recognition project which resulted in a proposed “comprehensive federal statute on the subject of foreign country judgments.” According to the introduction prepared by the reporters, the proposed federal statute is intended to achieve two central goals: (1) development of a uniform national approach to the recognition or enforcement of foreign judgments; and (2) a complete statement of the law which would “close the gaps in the American law of foreign judgments that would remain if the solution were left to ad hoc judicial decisions.”

This article wades into the mysteries surrounding recognition and enforcement of foreign judgments in state and federal courts. Part II provides an overview of the judgment recognition law highlighting important jurisprudential questions implicated by collateral review of foreign judgments. Part III introduces the American Law Institute’s proposed federal foreign judgment recognition statute. This part examines the two central features of the ALI statute: preemption and reciprocity.

Part III.A examines the ALI’s case for preemption of state law regarding the recognition and enforcement of foreign judgments. This part argues that the ALI’s case for preemption undervalues several significant state interests. The preemption arguments also unjustifiably emphasize the diplomatic implications of judgment recognition practice and neglect private interests. Specifically, litigants have an interest in avoiding duplicative litigation which is protected by the ancient doctrine of res judicata. The ALI’s federal statute would preempt a state’s authority to protect this private right. Finally, this part argues that the ALI’s case for preemption rests on flawed assumptions concerning the treatment of U.S. judgments in foreign courts. These flawed assumptions lead to a flawed diagnosis for which the ALI prescribes preemption as the remedy. However, because the diagnosis is flawed, preemption will fail to achieve its objective of obtaining more favorable treatment of U.S. judgments abroad.

Part III.B examines the second central feature of the ALI’s proposed statute, the controversial reciprocity requirement. After introducing the reciprocity proposal and the arguments advanced by the reporters in support of the reciprocity requirement, this part argues that the reciprocity requirement would unnecessarily compel states to extend less recognition to foreign judgments and require the states to expend more of their own judicial resources in accommodating the federal reciprocity mandate. The reciprocity requirement, this part argues, is also unlikely to achieve its objective of increasing U.S. leverage in efforts to secure bilateral or multilateral judgment recognition agreements. Finally, this part argues that rather than requiring courts to focus their attention on the public law attributes of the civil judgments presented for recognition and enforcement, as the reciprocity requirement would, the better path would be to allow judges to examine the private rights of the litigants on the basis of common law res judicata principles.

23 See Silberman, supra note ___ at 636 (stating that “it is virtually impossible to explain to French or Dutch or Japanese lawyers that a judgment originating in their country may be enforceable in New York but not in New Jersey” and asserting that a preemptive federal statute is necessary to remedy this confusion). See also Statement of Professor Linda J. Silberman before the Subcommittee on Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary, February 12, 2009 at 3.
25 See ALI Statute, supra note ___ at 1.
II. Brief Overview of U.S. Law regarding Recognition and Enforcement of Foreign Judgments

There are several layers of jurisprudential concern implicated by the presentment of a judgment rendered by a foreign nation’s tribunals in a state court for recognition. Before examining the unique questions arising from presentment of a foreign nation’s judgment in state court, a brief survey of the fundamental principles and policies of the law of judgments will be helpful.

A. TAXONOMY OF JUDGMENT RECOGNITION AND ENFORCEMENT

Before proceeding to a discussion of the jurisprudential interests implicated by the presentment of a foreign judgment in a state or federal court, a basic taxonomy of the law of judgments is necessary. This section provides an overview of the basic contours of the law of judgments.

1. What is a “Judgment”?

A judgment is an official decision of a court determining the rights of private parties as those rights relate to a specific case or controversy submitted to the court for resolution.\(^{26}\) A judgment is distinct, in American law, from a verdict which is the formal decision or finding of the jury regarding matters of fact submitted to the jury for determination.\(^{27}\) A jury’s verdict generally has no force or effect until a judgment is entered by the court upon the verdict.\(^{28}\)

A civil judgment has two significant attributes. First, a civil judgment resolves a dispute between private parties and, in this respect, can be viewed as a purely private matter. But a civil judgment is also a formal act of government. This highlights the second attribute of the civil judgment. It is announced by a court deriving its authority from the state, not merely a private agreement, and the judgment has force and effect within the territorial sovereignty of the government from which the court derives its authority. The judgment has precedential value within the territory of the sovereign which extends beyond the private interests of the litigants who presented the dispute to the court. These two distinct attributes of civil judgments, known as the “double aspect” of civil judgments, provoke challenging questions as one attempts to articulate a consistent rationale for recognition and enforcement of foreign judgments.\(^{29}\) If a civil judgment did nothing more than regulate private right then a foreign judgment should enjoy

\(^{26}\) **BLACK’S LAW DICTIONARY** 841 (9th ed. 2009) (defining judgment as “The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.”).

\(^{27}\) See id. at 1559 (defining verdict as “The formal decision or finding made by a jury, impaneled and sworn for the trial of a cause, and reported to the court (and accepted by it), upon matters or questions duly submitted to them upon the trial.”) See also, e.g., Clark v. State, 97 S.W.2d 644, 646 (Tn. 1936).

\(^{28}\) [Add case support here].

\(^{29}\) See Robert C. Casad, *Issue Preclusion and Foreign Country Judgments; Whose Law?*, 70 IOWA L. REV. 53, 58 (1984) (“A civil judgment has a ‘double aspect.’ In one aspect it is a formal act of government. In the other, it is a transaction between private parties. As an act of government its effects are limited to the territory of the sovereign whose court rendered the judgment, unless some other state is bound by treaty to give the judgment effect in its territory, or unless some other state is willing, for reasons of its own, to give the judgment effect.”)
recognition and enforcement as a matter of private right. But because the judgment is also a public act, the judgment, when presented to a foreign sovereign, potentially implicates the sovereign relations of independent states.

Before discussing these issues it is necessary to distinguish “recognition” and “enforcement” as distinct strands of the law of judgments. Both strands regard the effect of a final judgment in subsequent adjudication. For that reason, perhaps, courts sometimes use the terms interchangeably. Nevertheless, the terms are distinct and involve different state interests and private concerns. Before discussing the interests arising in the context of foreign judgments, it will be helpful to briefly describe the distinction between judgment recognition and judgment enforcement in the purely local context.

2. “Enforcement” of Judgments

The law regulating enforcement of judgments is complex and varied, so much so that the Restatement (Second) of Judgments does not attempt to incorporate enforcement law into its restatement of the law of judgments. A civil judgment is a final decision of a court of competent jurisdiction determining the legal rights of the parties to the dispute. Where damages are awarded by the court, the judgment creates a negotiable private right to collect from the judgment debtor. However, the judgment is not self-executing and, generally, the judgment creditor may not utilize self-help to execute the judgment. Instead, the judgment creditor is required to enlist the coercive power of the sovereign to consummate enforcement. A set of enforcement remedies, known collectively as ancillary remedies, facilitates the judgment creditor’s enforcement. Enforcement remedies are vital to the judgment creditor as most states prohibit enforcement by self-help. The judgment creditor must enlist the coercive powers of the state in order to seize property or compel compliance with equitable orders.

Judgments have important legal effects other than those considered in the law of res judicata dealt with herein. A judgment awarding monetary relief may be the basis for efforts to obtain enforcement of the award through execution. The law governing execution of judgments is highly complex and in this country is subject to a good deal of technical variation from one state to another. Related to the question of execution is the problem of priority among creditors as it may be affected by rendition of judgment, including the issue of when a judgment is “rendered” or “entered” for such purposes. A judgment that awards injunctive or other specific relief may give rise to questions of compliance, including those incident to the sanctions of civil and criminal contempt. The rendition of a judgment may have significance for still other legal purposes; for example, an indenture or other lending agreement may assign significance to the eventuality that a judgment is entered against the borrower during the life of the obligation. All of the foregoing aspects of a judgment are beyond the scope of this Restatement.

30 This is the vested rights rationale of recognition and enforcement. See Casad, supra note ___ at 58 (“Another rationale is that rights, obligations, and other jural relations become fixed, or vested.”).
31 See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 481, cmt. b (1987).
32 [GET CITE].
33 RESTATEMENT (SECOND) OF JUDGMENTS § 1 SCOPE, cmt. c (1982):

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34 BLACK’S LAW DICTIONARY 918 (9th ed. 2009) (“A court’s final determination of the rights and obligations of the parties in a case.”).
35 [Provide examples of self-help here].
Enforcement remedies implicate several state interests. First, because enforcement remedies allow use of the state’s coercive power, they lie at the center of a state’s sovereignty over administration of justice within its borders. Second, enforcement jurisprudence implicates the state’s sovereignty over its treasury. A state has a strong financial interest in efficient enforcement remedies and process. Streamlined enforcement procedures reduce judicial and executive administrative costs. As discussed more fully below, the ALI’s federal statute would compel states to deny enforcement to foreign judgments on the basis of a lack of reciprocity and thereby force several states to expend state resources in derogation of their sovereign will. Third, a state has a strong interest in facilitating just and efficient enforcement of civil judgments in order to secure commerce within the state. Finally, enforcement remedies implicate the state’s interest in protecting its citizens. One of the primary reasons foreign judgments are not self-executing is the potential abusive practice of foreign forum-shopping plaintiffs who secure foreign judgments on the basis of foreign laws which impair the rights of citizens of the state where enforcement is sought and enforce those offensive judgments within the state’s borders. A state’s enforcement remedies also protect citizens from potential violence which is a potential consequence of frequent self-help enforcement.

It is important to note that in the context of enforcement the collateral enforcement action is filed by a party who chose the original forum. Generally, then, the judgment creditor seeking to enlist the sovereign’s coercive powers to enforce the foreign judgment chose to litigate the substantive claims on which the judgment rests in a foreign tribunal. This differs from efforts to use a foreign judgment as a res judicata bar to claims filed in a new jurisdiction chosen by a plaintiff who failed to successfully litigate her claims in the foreign forum. As will be discussed more fully below, the state interests as well as concerns of private right and fairness raised by enforcement actions differ from recognition actions.

3. “Recognition” of Judgments

The common law of recognition is implicated when a judgment is presented in a collateral proceeding in order to preclude litigation of a claim, determination of a fact or reconsideration of an issue on the ground that it has been previously and finally resolved by a competent tribunal. Recognition law is most often associated with the res judicata and collateral estoppel doctrines. Unlike the offensive

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36 See, e.g., Hilton, supra note ___ at 152 (citation omitted) (“Independent states do not choose to adopt [foreign judgments resting on local law] without examination. [Foreign] laws and regulations may be unjust, partial to citizens, and against foreigners. They may operate injustice to our citizens, whom we are bound to protect.”). One prominent example is the problematic libel tourist who secures a foreign judgment in derogation of a U.S. citizens right to freedom of expression. See, e.g., Robert L. McFarland, Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism, [COMPLETE CITE].

37 See Story, supra note ___ at § 598.

38 [Cite restatement of Judgments and cases in support of this definition].

39 Res judicata (“the thing is judged”), also known as claim preclusion, is a common law doctrine that prevents a party from relitigating her claim. The general rule is that a final judgment rendered by a court with a jurisdiction over the parties and subject matter is conclusive as to the rights of the parties (and their privies) to the action and bars any subsequent attempt to retry any matter which was, or could have been, raised as part of the cause of action. See, e.g., Allen v. McCurry, 449 U.S. 90, 94 (1980) (“Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.”). Despite the fact that res judicata rests on the relatively straightforward principle that a party ought only have one bite at the apple, the doctrine often results in complex jurisprudential questions mixing procedural and substantive concerns. See [cite Restatement (Second) of Judgments – introductory comments at 6]. Unsurprisingly, then, res
context of enforcement whereby a judgment creditor solicits the state’s coercive powers to secure collection, the context of recognition is usually defensive whereby a litigant seeks to preclude relitigation of claims or issues previously litigated elsewhere.\(^{41}\)

The primary state interest advanced by the recognition law is finality. Section one of the original *Restatement of Judgments* highlights the fundamental role of finality:

> Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the validity of the claim and any issue actually litigated in the action shall not be litigated again by them.\(^{42}\)

This restatement provision presents a rule of finality which is deeply rooted jurisprudential principle.\(^{43}\) Finality serves two important underlying state interests. First, finality conserves valuable judicial resources. Second, finality avoids inconsistent adjudications which would tend to undermine confidence in the judicial power. Additionally, finality advances the interests of private litigants in several respects. First, litigation is only useful to private parties if it resolves disputes and allows parties to move forward with security.\(^{44}\) Additionally, recognition law protects private litigants from vexatious repetitive litigation.

*judicata* has generated a complex body of state law intimately connected with the system of civil adjudication within the state’s tribunals.\(^{45}\) Collateral estoppel, also known as issue preclusion, is a doctrine that expands the preclusive effect of judgments by preventing the relitigation of an issue of fact or law in a subsequent case even though the subsequent case involves a different cause of action. See, e.g., *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (“Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.”).

\(^{41}\) [Cite Restatement (Second) Conflict of Laws, Intro. Note at Chpt. 5 Topic 2]. \(^{42}\) See also [Cite Restatement (Third) foreign relations law section 481 cmnt. a and b].

\(^{43}\) RESTATEMENT (FIRST) OF JUDGMENTS § 1 (1942).


The desire that judicial determinations be conclusive between the parties has been fundamental in all systems of law that have contributed to our jurisprudence. The Roman law provided that a former adjudication was conclusive in a second suit involving the same central issue and the same legal basis, but a judgment in a personal action did not have any effect in a subsequent suit on a different subject matter. The Roman principle, based on the solemnity of the judicial pronouncement, was early adopted in English law, developing into the principle now known as merger or bar.

The binding force of specific determinations where the second suit is on a different cause of action, known today as collateral estoppel, was derived from medieval Germanic law, which had developed a preclusion based on what was alleged and proved at the trial. This practice had been brought into English law before the reception of the Roman principle with its stress on the judgment, and the Germanic practice continued to operate, with the common law record becoming the authentic source for establishing what determinations had become binding.

\(^{44}\) WILLIAM RICHMAN & WILLIAM REYNOLDS, UNDERSTANDING CONFLICTS OF LAW 343 (2d ed. 1993) (“For the litigant, finality is an important goal; the purpose of litigation is dispute resolution, and the parties want a resolution that they can rely on. A certain and final resolution permits the parties to order their affairs and plan in a sensible
Finality is an interest so intimately tied to the law of judgments that the entire body of law is often referred to simply as the law of res judicata.\textsuperscript{45}

Despite the significance of the interests served by res judicata the doctrine has necessary limits. The interest in finality is often in tension with questions of fairness to the litigants, due process and justice. Consider, for example, the question whether litigants should be permitted to appellate review. Where parties appear and are heard by a competent tribunal regarding the legal merits of any particular legal issue should the parties then have a right to appellate review? Finality says no. The public’s interest in economy and avoidance of inconsistent legal results and the private litigant’s interest in resolution and avoidance of vexatious repetitive legal process are all best served by insulating the original tribunal’s judgment from any collateral attack, including appellate review. But in both the state and federal courts in the U.S., litigants have a right to direct appellate review of all legal decisions of the initial tribunal. This illustration demonstrates the reality that finality sometimes gives way to competing jurisprudential objectives (even without considering the complication of foreign adjudication).

Much of the law of judgments concerns discernment of those occasions which justify departure from the general principle of finality. Achieving the proper balance between finality and justice is a complex task which has contributed to the development web of doctrine.\textsuperscript{46} The complexity of res judicata doctrine is an unavoidable consequence of the great variety of situations raising legal questions regarding the effect of prior adjudication. Should a judgment be enforced? Should a claim be precluded? Should a party be permitted to litigate an issue in an action when that party had the opportunity to litigate the issue in a prior action and chose to forgo that opportunity? Should a non-party be permitted to assert res judicata on any issue? These are a few of the questions addressed within the law of judgments that arise within one sovereign system of law.

The interests advanced by finality are most pressing where there is exact symmetry in the subsequent proceeding. Exact symmetry requires an identical claim presenting the same legal and factual issues filed in the same jurisdiction against the same defendant.\textsuperscript{47} The collateral effect of a judgment in a subsequent action with different legal or factual claims, different parties or within a different court gives rise to more difficult jurisprudential questions.

Consider, for example, the issue of non-mutual offensive collateral estoppel. [describe doctrine here. Case illustrations. Then discuss the particular jurisprudential issues raised by the doctrine].

\textsuperscript{45}\textbf{BLACK’S LAW DICTIONARY} 1425 (9th ed. 2009) (“1. An issue that has been definitively settled by judicial decision. 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit.”). See also \textbf{RESTATEMENT (SECOND) OF JUDGMENTS} 1 \textsc{scope}, cmt. a (1982) (“Taken together the rules in the Restatement, Second, of Judgments are commonly referred to as the rules of res judicata. The principles underlying these rules are long established not only in common law jurisprudence but also in the law of other legal system.”).

\textsuperscript{46} [Describe doctrines – merger and bar, claim preclusion, issue preclusion].

\textsuperscript{47} \textit{Developments in the Law Res Judicata, supra} note _____, at 822. See also \textbf{RESTATEMENT (SECOND) OF JUDGMENTS} (1982).
All of the difficulties of *res judicata* discussed so far presume that the questions are raised within
the confines of one sovereign system of justice. Within one unified system of law *res judicata* rules need
not consider concerns which emerge in a case involving the legislative or judicial acts of a foreign
sovereign. Thus, rules within a unified system focus on the interests of finality and usually give great
weight to that concern. However, where a litigant presents a judgment of a sister state or a foreign court
for recognition, then, in addition to the jurisprudential questions related to the balance between finality
and fairness, concerns related to sovereignty, interstate and international relations are implicated. The
next part of this article discusses the questions arising in the interstate and international context.

B. Recognition and Enforcement in the Interstate and International Setting

This section discusses the legal responses to this reasoning which have emerged in American law.
The extraterritorial effect of judgments of states within the United States is now governed by the Full
Faith and Credit Clause. As discussed below, the Full Faith and Credit Clause altered the sovereignty of
the states and compels the state to recognize and enforce most judgments entered by sister states.
Judgments entered by foreign nations, however, are not entitled to Full Faith and Credit.

1. INTERSTATE JUDGMENTS

One of the first principles of justice in Anglo-American law is that no law has any effect beyond
the territorial limits of the sovereignty from which the law’s authority is derived. A civil judgment is an
expression of law pronounced by a tribunal deriving its authority from a sovereign state. Therefore, a

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48 *RESTATEMENT (SECOND) OF JUDGMENTS* 1 SCOPE, cmt. b (1982) (“The rules in this Restatement focus primarily
on preclusion questions arising within a single legal system. Thus, they address the effect in a state court of a prior
judgment rendered in a court of that state, and the corresponding situation within the federal judicial system. This set
of problems may be called the intramural law of *res judicata*, in contrast to the problems arising in connection with
recognition of a judgment of a sister jurisdiction.”).

49 See, e.g., *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912) (“[Full Faith and Credit is not] conferred by
the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we
are referred to no treaty relative to such a right.”).

50 See *Hilton*, supra note ___ at 143 (“No law has any effect, of its own force, beyond the limits of the sovereignty
from which its authority is derived.”); [CITE STORY’s COMMENTARIES at Section 18] (“The first and most
general maxim or proposition is that, which has already been averted to, that every nation possesses an exclusive
sovereignty and jurisdiction within its own territory.”).

51 This premise was arguably rejected by Justice Story in *Swift v. Tyson*, 41 U.S. 1 (1842) (“In the ordinary use of
language, it will hardly be contended, that the decisions of courts constitute laws. They are, at most, only evidence
of what the laws are; and are not of themselves laws.”). The Court, however, later overruled *Swift* in *Erie Railroad
Co. v. Tompkins*, 304 U.S. 64, ___ (1938). The Court’s reasoning in *Erie* demonstrates the fundamental role of
territorial sovereignty in American law: “But law in the sense in which courts speak of it today does not exist
without some definite authority behind it. The common law so far as is enforced in a State, whether called common
law or not, is not the common law generally but the law of that State existing by the authority of that State without
regard to what it may have been in England or anywhere else . . . .” *Id.* at ___ (quoting [GET PINPOINT and
COMPLETE CITE HERE]).
civil judgment has no extraterritorial force and effect. A corollary of this conclusion is that a state is not required to recognize or enforce any judgment of any foreign court.

An independent state, then, is free to refuse recognition and enforcement of any or all foreign judgments in the exercise of its own territorial sovereignty. Does this mean that a state will absolutely refuse to enforce all foreign judgments? No. A state has good reason to recognize and enforce foreign judgments. However, the potential right of the state to reject foreign judgments is an obvious impediment to the stability of interstate commerce and an impediment to national unity. Recognizing this, the framers incorporated the Full Faith and Credit Clause into the Constitution.

The Full Faith and Credit Clause requires a state to extend to the final judgment of a sister states the same degree of preclusive effect as the judgment would have received in the forum where it was entered. The implementing legislation which was enacted by Congress in 1790 reflects this interpretation of the Full Faith and Credit Clause.

A central objective served by the full faith and credit clause is the reordering of sovereign relations within the federal republic. When combined with the Supremacy Clause, the Full Faith and Credit Clause creates the framework of mutual respect and trust which are a central feature of the “more perfect Union” created by the Constitution. The incorporation of the Full, Faith and Credit Clause is significant, in part, because it is one of the few provisions of the federal Constitution that restricts the sovereignty of the states. The fact that this clause was incorporated to prevent states from rejecting the judgments of sister states demonstrates the framers understanding that state sovereignty entailed the right to reject the judgment of foreign states.

2. INTERNATIONAL JUDGMENTS

52 Vattel suggests a different conclusion at least with respect to judgments pronounced by foreign courts. He reasoned that where a state acquires jurisdiction over the parties and the subject matter of the dispute then the state’s authority to resolve the dispute ought to be respected by all other states. [Cite Vattel Book 2 Chpt. 7 section 84].

53 See Hilton, supra note ___ at 143 (reasoning that foreign judgments are not entitled to recognition as a matter of private right but only by an exercise of the state’s consent to the comity of nations).

54 This was the view of the colonies prior to ratification of the Constitution. Each colony was sovereign within its borders and was free to reject the judgments of foreign colonies as well as foreign nations. [CITE Hilton at ___].

55 [Summarize reasons for extending recognition. CITE example of MASS adopting legislation to extend recognition and enforcement to foreign judgments.”]

56 U.S. Const. Art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and te Effect thereof.”).

57 See Hampton v. McConnell, 16 U.S. (3 Wheat.) 234, 235 (1818) (“... the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.”). See also Restatement (Second) Conflict of Laws § 93, cmt. b.

58 See [cite 28 USC section 1738].

The Full Faith and Credit clause does not extend to judgments of foreign courts. On initial consideration one might be surprised by the inapplicability of Full Faith and Credit clause. Indeed, courts sometimes overlook the differences between judgments rendered by sister states and those rendered by foreign nations and assume that the same rules apply. Even the restatement questionably suggests that “[t]he authority and effectiveness of a foreign judgment entitled to recognition by courts in the United States is, generally, the same as that of a judgment of the courts of one State of the United States in the courts of another state.”

Despite the conceptual similarities between determinations of the effect of foreign and domestic (sister state) judgments, there are significant differences between the two inquiries. In a seminal article regarding the effect of foreign judgments, Professors von Mehren and Trautman assert that examining the effect of foreign judgments in the same manner as domestic judgments “lead[s] to confusion of concepts which should be kept separate.” There are significant differences between domestic and foreign judgments that justify discrimination between them.

Given that foreign judgments are not entitled to Full Faith and Credit, are foreign judgments entitled to any recognition in U.S. courts? If so, what law requires recognition and enforcement of foreign judgments? These questions are examined in two foundational cases. The first decided by the Supreme Court in Hilton v. Guyot and the second decided by the New York Court of Appeals in Johnston v. Compagnie Generale Transatlantique.

a. Hilton v. Guyot

60 See Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912) (“The 1st section of article 4 of the Constitution confers the right to have full faith and credit ‘given in each state to the public acts, records, and judicial proceedings in every other state.’ No such right, privilege, or immunity, however, is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations, and we are referred to no treaty relative to such a right.”). Compare Home Ins. Co. v. Dick, 281 U.S. 397, 410-11 (1930) (distinguishing Fourteenth Amendment protection of contractual right from Full Faith and Credit obligations). See also Restatement (Second) of Conflicts of Law § 98, cmt. b (1971).

61 See Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1605 (1968) (“Recognition of foreign judgments and the application of res judicata doctrines to domestic judgments are sufficiently similar that many courts and commentators treat them alike. Although there is a substantial overlap in the policies that should guide courts confronted with these problems, there are certain fundamental differences which require that recognition problems be analyzed separately.”) (hereinafter “Recognition of Foreign Adjudications: A Survey and a Suggested Approach”).

62 See Restatement (Third) of Foreign Relations of the United States § 481, cmt. c (1987). This comment is ambiguous and possibly meant to suggest foreign judgments should be given the same effect as a domestic judgment would be given under Full Faith and Credit jurisprudence, on the one hand, or, on the other hand, to suggest that a foreign judgment should be given at least the same effect as it would have received in the forum where it was rendered. For more analysis of this ambiguity see Robert C. Casad, Issue Preclusion and Foreign County Judgments; Whose Law?, 70 Iowa L. Rev. 53, 56 (1984).

63 Recognition of Foreign Adjudications: A Survey and a Suggested Approach, supra note _____, at 1605.

64 For clarity, “foreign judgments” will be used from this point forward in this article to refer to judgments of tribunals in a foreign nation or a foreign state (as opposed to judgments of a sister state or the federal courts).

65 159 U.S. 113 (1895).

66 152 N.E. 121 (N.Y. 1926).
In *Hilton* the Court examined the extraterritorial effect of a commercial judgment entered by a French court. *Hilton* was, and still is, a significant decision because it was the Court’s first, and remains the Court’s only, examination of “important questions relating to the force and effect of foreign judgments.” The plaintiffs in *Hilton* were French citizens who obtained a civil judgment from a French commercial tribunal against two citizens of New York for debts related to the commercial dealings of the parties in France. The French judgment creditors brought suit upon their French judgment in federal court against the American judgment debtors in an effort to collect on assets located in the United States. The basis of federal jurisdiction in the collection action was alienage and not federal question.

The Court began its lengthy examination of the force and effect of foreign judgments by searching for a rule of decision. The Court’s search for a relevant rule of decision began with the following:

International law, in its widest and most comprehensive sense, - including not only questions of right between national, governed by what has been appropriately called the “law of nations,” but also questions arising under what is usually called “private international law,” or the “conflict of laws” and concerning the rights of persons within the territory and dominions of another nation, - is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.

This starting point is significant for at least three reasons. First, the Court acknowledges a distinction between private and public international law. As discussed more fully below, this distinction enabled the New York Court of Appeals to reject the Court’s ultimate holding in *Hilton* that recognition is warranted only where U.S. judgments would receive reciprocal treatment in the tribunals of the foreign sovereign. Second, the Court’s starting point is significant because it locates norms of international law, both public and private, within “our law.” This view entails the rejection of notions of universal norms. The Court quickly reinforces this territorial conception of international law by explaining that “no law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.” The Court’s conception of international law, then, rests on notions of “utility and mutual convenience of states” and not of moral or universal duty. Finally, the Court’s starting point is important because it begs the question of whose law, state or federal, should supply the rule of decision where a foreign judgment is presented for recognition. Because the Court reasons that international law is part of “our law” it becomes necessary to determine whose law the Court considers “our law.” In other words, the Court invites the question presented in *Erie v. Tompkins*.

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67 *Hilton*, 159 U.S. at 143.
68 *Hilton*, 159 U.S. at 139-40.
69 *Hilton*, 159 U.S. at 139.
70 *Hilton*, 159 U.S. at 143.
71 *Hilton*, 159 U.S. at 143.
72 *Hilton*, 159 U.S. at 144.
Because *Hilton* preceded *Erie* by several decades, the Court did not examine whether the issue, was a question of state or federal law.\[73\] However, the opinion, written during the height of *Swift v. Tyson* vision of a general federal common law, views the issue as one falling within national law.

The Court first noted a fact that remains unchanged by *Erie* that the “most certain” source of a rule of decision would be a “treaty or statute of this country.”\[74\] This indicates that the Court considered the question to be one capable of national resolution via statute or treaty. Finding no federal statute or treaty, the Court then turned to common law in an effort to identify the rule of decision. The Courts extensive analysis of the common law authorities includes multiple references to state law, including state statutes and cases.\[75\] The Court in *Hilton* did not note anything inappropriate about a state’s individual application of its own law when determining whether or not to extend comity to foreign judgments within their own courts.\[76\] Instead, the Court relied, in part, on authority from state law to fashion the following rule:

> In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not, in an action brought in this country upon the judgment, be tried afresh, as a new trial or an appeal, upon the mere assertion of the party [against whom the judgment was obtained] that the judgment was erroneous in law or in fact.\[77\]

Did the Court expect state courts would apply this rule when examining the force and effect of foreign judgments in their own courts? Probably so. But this question is obscured by the fact that the Court’s “rule” is, in reality, dicta. The Court ultimately held that the French judgment was unenforceable “for want of reciprocity.”\[78\] The Court went on to explain that given the absence of any federal statute or treaty on point “it is not to be supposed that [a statute or treaty] would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments.”\[79\] This statement suggests some uncertainty regarding the source of lawmaking authority. And when combined with the Court’s controversial reciprocity requirement it undermined the authority of the Court’s comity based rule of recognition and opened the door for rejection of the authority of *Hilton* in state courts.

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\[73\] [Cite relevant judiciary act and proper alienage section]. [Brief note here defining alienage jurisdiction].
\[74\] *Hilton*, 159 U.S. at 143.
\[75\] [cite all references to state law in Hilton].
\[76\] In fact, the Court noted with approval the analysis of the Massachusetts Supreme Court on the question. *Hilton*, 159 U.S. at 150.
\[77\] *Hilton*, 159 U.S. at 158.
\[78\] *Hilton*, 159 U.S. at 168.
\[79\] *Hilton*, 159 U.S. at 168.
Two decades after Hilton decision, the New York Court of Appeals, in Johnston v. Compagnie Generale Transatlantique,\(^80\) examined the effect of another French judgment. The dispute in Johnston concerned the defendant’s alleged wrongful delivery of goods from New York to Harve.\(^81\) The plaintiff, before filing his wrongful delivery action in New York, brought a similar claim in the Tribunal of Commerce at Paris.\(^82\) The French tribunal, after a trial on the merits, entered a judgment in favor of the defendant. Accordingly, the defendant, in the New York litigation, raised the French judgment in New York and argued that the plaintiff’s claims ought to be dismissed as res judicata.\(^83\) The trial court, citing Hilton, refused to recognize the French judgment for want of reciprocity.\(^84\)

The New York Court of Appeals examined the “extent to which [New York courts are] bound by Hilton” and held that New York courts were “not bound to follow the Hilton Case.”\(^85\) The court offered several reasons supporting its holding that Hilton was inapplicable. First, the court reasoned that Hilton’s reciprocity requirement was mere dicta because the Court had also noted fraud an independent and alternative ground for refusing to extend recognition to the French judgment at issue in Hilton.\(^86\) This dicta rationale for avoidance of Hilton’s reciprocity rule is dubious. The Hilton majority explicitly refused to rest its judgment on the fraudulent procurement rationale.\(^87\) Instead, the Court refused to enforce the French judgment on the “distinct and independent ground” of want of reciprocity.\(^88\)

The New York court, perhaps recognizing the weakness in its effort to characterize Hilton’s reciprocity requirement as obiter dictum, offered an independent justification for its rejection of the reciprocity requirement. The New York court characterized Hilton’s reciprocity requirement (and its underlying comity rationale) as an aspect of the “rules of evidence laid down by the courts of the United States.”\(^89\) The court reasoned that because the question of recognition at issue was one of “private right rather than public relations” that “[New York] courts will recognize private rights acquired under foreign

\(^{80}\) 152 N.E. 121, 242 N.Y. 381 (N.Y. 1926).
\(^{81}\) Johnston, 152 N.E. at 122.
\(^{82}\) Id.
\(^{83}\) Id.
\(^{84}\) Id.
\(^{85}\) Id. at 123.
\(^{86}\) Id. at 123 (citing Hilton, 16 S.Ct. at 168). In the last substantive paragraph of Hilton’s majority opinion, the Court states: “If we should hold this judgment to be conclusive, we should allow it an effect to which, supposing the defendants’ offers to be sustained by actual proof, it would, in the absence of a special treaty, be entitled in hardly any other country in Christendom, except the country in which it was rendered. . . . The very judgment now sued on would be held inconclusive in almost any other country than France. In England, and in the colonies subject to the law of England, the fraud alleged in its procurement would be a sufficient ground for disregarding it.” Hilton, supra note ___ at 168. The New York court cites this statement as the alternative ground undermining the precedential value of Hilton’s reciprocity requirement. Johnston, supra note ___ at 123.
\(^{87}\) See Hilton, supra note ___ at 161 (“But whether those decisions can be followed in regard to foreign judgments, consistently with our own decisions as to impeaching domestic judgments for fraud, it is unnecessary in this case to determine, because there is a distinct and independent ground upon which we are satisfied that the comity of our nation does not require us to give conclusive effect to the judgments of the courts of France; and that ground is the want of reciprocity, on the part of France, as to the effect to be given to the judgments of this and other foreign countries.”)
\(^{88}\) See id.
\(^{89}\) Johnston, supra note ___ at 123.
laws and the sufficiency of the evidence establishing such rights.”90 This discussion of the relationship between substantive rights and the law of evidence is offered as a rationale for rejecting the binding authority of the federal rule announced in Hilton. In other words, the New York court’s reasoning here seems to anticipate the dichotomy between substantive right and procedural law recognized in Erie.

In the introduction to its proposed federal statute, the ALI “rejects the view of the New York Court of Appeals [in Johnston], and takes as its point of departure the view that recognition and enforcement of foreign judgments is and ought to be a matter of national concern.”91 The ALI’s proposed federal statute would preempt all state recognition and enforcement law in order to achieve national uniformity of recognition and enforcement “administered, for the most part through the concurrent jurisdiction of the state and federal courts” and subject to the “control of the Supreme Court.”92 The following section highlights the central features of the ALI’s proposed federal statute and the rationales proffered in support of adopting a uniform national standard.

c. Synthesis of Hilton and Johnston

Hilton and Johnston raise a number of significant questions concerning the force and effect of foreign judgments. This section examines the questions left open by these foundational cases.

First, whose law determines whether foreign judgments are entitled to recognition and enforcement? Hilton rests on the premise of territorial sovereignty.93 Free and independent states, Hilton reasons, are under no legal obligation to recognize or enforce the judicial acts of foreign states.94 However, Hilton also reasons that the extent of extraterritorial force and effect of judgments “depends upon what our greatest jurists have been content to call ‘the comity of nations.’”95 Comity, the Court explains, “is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will upon the other.”96

The Court’s reasoning in Hilton relies on comity as a norm conditioning the territorial sovereignty of a state when it is asked to determine whether to grant recognition or enforcement to foreign judgments. The Court locates this norm in the law of nations.97 At first glance, it appears that the Court views comity, then, as a universal principle of justice. This view is beset by other statements in the opinion. The Court locates international law “in its widest and most comprehensive sense” within the territorial sovereignty of individual nations: “[International law] is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted for their determination.”98 Assuming the law of nations is part of

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90 Id. This reasoning is consistent with the rule of recognition contained in the ALI’s Restatement (Third) of Foreign Relations Law of the United States [Check section 491 – See Casad article for cite].
91 See ALI Statute, supra note ___ at pg. 3.
92 See id.
93 See Hilton, supra note ___ at 143.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
international law then the Court’s reasoning locates comity within American law. This internal view is articulated later in the opinion as the Court announces that, absent exceptional circumstances, there is no reason why the “comity of this nation should not allow” foreign judgments extraterritorial force.99

The Court’s comity rationale has been the subject of repeated criticism and it is not the purpose of this section to critique the rationale itself. Instead, the focus here is on the question of what law provides the rule of decision when a court is asked to give extraterritorial effect to a foreign judgment. Hilton supports the view that an attribute of the law of nations which is part of “our law” provides the relevant rule. The critical question, then, is whether “our law” means federal common law or whether the question is the proper subject of state law.

Johnston’s holding rests on the view that New York law, rather than federal law, governed the issue in New York’s tribunals.100 If, however, comity is part of “national law,” as indicated by Hilton, then it is possible that Johnston was wrongly decided.101 If, on the other hand, the question is one of state law then the enactment of a federal statute preempting state law diminishes state sovereignty. Reallocate of state law making power to the federal government, according to fundamental principles of federalism, should not occur absent sound justification. Before examining the proposed preemptive federal judgment statute and the justifications for preemption proffered by the ALI, it is necessary to determine whose law, state or federal, governs the question of the extraterritorial force of foreign judgments.

Hilton, decided in the glory days of Swift v. Tyson102 and relying on Justice Story’s view of the federal common law as expressed in his commentaries, locates comity in the federal common law. Johnston rejects this premise and views the question as one of private right located within state law thus creating ambiguity in American law regarding the source of lawmaking power supporting the rule of decision in this arena. Somewhat surprisingly, given the significance of foreign relations and the outright rejection of the Court’s Hilton decision by a state supreme court, the Court has yet to resolve this ambiguity. In the words of one scholar, “for close to one hundred years the Court has essentially abandoned internationally foreign judgments, leaving Hilton a derelict on the waters of the law and one that might be thought to pose greater than normal risks precisely because it lies in international waters.”103

The prevailing modern view is that the force and effect of foreign judgments is a matter of state law.104 Federal courts, pursuant to Erie, apply state law in diversity cases to determine whether to recognize or enforce foreign judgments.105

99 Id. at 158.
100 See Johnston, supra note ___ at 123.
101 The Johnston court directly confronted this argument and concluded that the issue was one of state rather than national law. The opinion states: “It is argued with some force that questions of international relations and the comity of nations are to be determined by the Supreme Court of the United States: that there is no such thing as comity of nations between the state of New York and the republic of France; and that the decision in Hilton v. Guyot is controlling as a statement of law. . . . I reach the conclusion that this court is not bound to follow the Hilton case.” Id.
102 [Cite Swift v. Tyson].
104 See Burbank, supra note ___ at 1574-75 (“Since Erie ushered in dual revolutions there has been near unanimity among courts that, in the absence of a treaty or federal statute, the states are free to define for themselves the
III. The ALI’s Proposed Federal Foreign Judgments Statute

In 1998, with the encouragement of the U.S. State Department, the American Law Institute initiated development of a model federal foreign judgments statute. This ALI project was initially intended to facilitate progress in ongoing multilateral negotiation of an international judgments and jurisdiction treaty at the Hague. Those negotiations collapsed in 2002. Nevertheless, the ALI’s foreign judgments project proceeded and resulted in its ratification of a proposed federal foreign judgment recognition statute in 2005.

There are two central features of the ALI’s proposed foreign judgment recognition statute. First, the statute, if adopted, would preempt state law and interpose a federal rule of decision regarding the force and effect of all foreign judgments presented for recognition in state or federal court. Second, the statute, contrary to the great weight of authority in American law, incorporates Hilton’s reciprocity requirement.

A. Examining the ALI’s Case for Preemption of State Law

As the ALI acknowledges, preemption of state judgment recognition law respecting foreign judgments is a significant redistribution of lawmaking power that “would commit to Congress decisions that have been taken, at least since Erie, by states of the United States or by federal courts applying state law.” Nevertheless, the ALI argues that a federal standard is necessary because recognition and enforcement “is and ought to be” a matter of national concern.

Why? The ALI proffers two central justifications for preemption of state law. First, the reporters view individual decisions regarding the effect of a foreign judgment in private litigation as diplomatic activities implicating foreign relations. Accordingly, the reporters explicitly reject Johnston’s private standards to use in recognizing foreign judgments, and that federal courts sitting to administer state law in diversity are bound to follow those standards.


106 See ALI Statute, supra note ___ at 4.

107 See ALI Statute, supra note ___ at 3. Other portions of the ALI’s proposal contradict the claim that judgment recognition ought to be a matter of federal concern. In comments clarifying the Secretary of State’s authority to negotiate agreements with foreign states, the drafters state that “in the case of federal states [bilateral reciprocity agreements] could be made with subordinate units such as the provinces of Canada.” See ALI Statute, supra note ___ at § 7 cmt. c. This statement undermines the argument that states in federal republics lack the authority to determine when to recognize judgments of tribunals located within foreign nations. If the U.S. government can negotiate with Canadian provinces why not allow New York to negotiate with the Canadian government?
rights rationale. Second, the ALI argues that there is heightened need for uniformity in U.S. law regarding the force and effect of foreign judgments. This uniformity, the reporters assert, would increase leverage in efforts to obtain greater recognition of U.S. judgments abroad.

The fundamental presupposition on which the ALI’s proposal rests is that the legal effect of a foreign judgment is a jurisprudential question falling wholly within the plenary power of the federal government. The introduction to the ALI’s proposal (entitled “National Law in the International Arena”) asserts that viewing the question of enforcement as a matter of state, not national, law is “strange.” The introduction then “reject[s] the view of the New York Court of Appeals,” as stated in Johnston, that the question of enforcement and recognition is one of private right falling within the purview of state law. Instead, focusing solely on the public law aspect of the private civil judgments, the ALI asserts that every “foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties.”

One of the reporters on the ALI’s foreign judgments project, Professor Silberman, in recent Congressional testimony attempts to set aside Johnston and its progeny as a “curious history,” and asserts that “recognition and enforcement of foreign judgments is and ought to be a matter of national federal concern.” Professor Lowenfeld, the other reporter on the project, asserts that any other view than that national law ought to govern the effect of foreign judgments is odd.

Interestingly, rather than offering constitutional authority for this view of plenary federal power over the intricacies of state judicial process, the introduction to the ALI’s statute defensively states that “[t]here is no constitutional problem with the proposed statute.” The introduction then identifies various enumerated powers supporting enactment of the proposed statute or ratification of a foreign judgments treaty.

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108 See ALI Statute, supra note ___ at 1-2. The introduction to the ALI Statute is entitled “Introduction: National Law in the International Arena.” Id. at 1.
109 See ALI Statute, supra note ____ at 1 (“A priori, it would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas but not in Arkansas, in Pennsylvania but not in New Jersey.”).
110 152 N.E. 121 (N.Y. 1926).
111 See ALI Statute, supra note ___ at 3.
112 Id. at 1.
114 Andreas F. Lowenfeld, Nationalizing International Law: Essay in Honor of Louis Henkin, 36 COLUM. TRANSNAT’L L. 121, 122 (1997) (“Quite apart from the title, the Restatement addresses a number of new subjects that touch on legal relations between the United States and other nations, and between residents of the United States (natural and juridical) and residents of other countries. . . . One of the oddities that strikes one in this endeavor is that a legal relationship can be a subject of international law and yet not be a matter of national law within the United States. How can it be, for example, that the judgment of a French or Italian court may be recognized in Connecticut but not in Massachusetts? Or that a forum selection clause between, say, a Japanese manufacturer and its American distributor will be honored in New York and Pennsylvania but not in Alabama?”).
115 ALI Statute, supra note ___, at 3.
116 ALI Statute, supra note ___, at 3-4.
There is little doubt that the political branches of the federal government have the authority to preempt state law.\textsuperscript{117} Congress has the power to regulate international commerce and a foreign judgments statute would be such a regulation.\textsuperscript{118} The President, with the advice and consent of the Senate, has the power to negotiate a federal judgments treaty\textsuperscript{119} which, pursuant to Article VI, would preempt state law.\textsuperscript{120} The fact that such enumerated power exists does not mean either that it must be used or that the states lack power in the foreign relations arena.\textsuperscript{121}

As stated above, the ALI’s project is built upon the presupposition that states are interlopers in the area of foreign judgments and have no reason, \textit{even in the absence of a federal statute or treaty}, to apply their own law in this area. “In my view,” explains Professor Silberman, “a foreign country judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy involves the rights of private parties.”\textsuperscript{122} The fundamental presupposition of the ALI’s project is that \textit{Johnston} was wrongly decided and that state law must give way to national law. The argument here is entirely focused on the public law aspect of the civil judgment and tramples on the private law aspect at the expense of private rights. Because the private dispute involves a decision rendered by a foreign nation the private dispute implicates a federal interest and federal law \textit{ipso facto} controls. This argument is not compelling. It is like reasoning that whenever state tort cases affect an important federal interest (i.e., interstate commerce) federal law \textit{ipso facto} controls. Such reasoning, whether applied in the interstate or international context, is inconsistent with federalism and it completely ignores the private rights in the individual dispute.

Regarding federalism, it should be noted that the preemption of state law here would implicate at least two significant state interests. First, the federal statute would require states to open their courts to litigation and thereby diminish state sovereignty over judicial administration and economy. Many states currently have more liberal recognition and enforcement standards than those proposed by the federal statute. The federal statute would require these states to entertain litigation in their courts that would presently be foreclosed. Because the federal government will not compensate the state for costs associated with such compelled judicial activity the statute is in essence an unfunded mandate which would require states to pay the associated costs out of their own treasuries or pass such costs on to the parties.

Second, the federal statute would diminish state lawmaking authority within its territorial boarders. \textit{Erie} and \textit{Klaxon} demonstrate the fundamental role of state lawmaking authority in our federal system. The ALI argues that this allocation of lawmaking power should be altered in order to achieve uniformity. However, the ALI’s statute then incorporates a “public policy” exception allowing U.S. courts to refuse recognition of foreign judgments where the foreign judgment is contrary to state public policy. By incorporating state policy as grounds for non-recognition, the ALI undermines its own objective of

\textsuperscript{117} See, \textit{e.g.}, Louis Henkin, \textit{FOREIGN AFFAIRS AND THE U.S. CONSTITUTION} 63-67 (2d ed. 1996).
\textsuperscript{118} U.S. CONST. art. I § 8.
\textsuperscript{119} U.S. CONST. art. II.
\textsuperscript{120} U.S. CONST. art. VI.
\textsuperscript{121} See Jack L. Goldsmith, \textit{Federal Courts, Foreign Affairs, and Federalism}, 83 Va. L. Rev. 1617 (1997) (arguing that the foreign relations powers enumerated in the constitution did not mandate federalization of every issue affecting foreign affairs).
\textsuperscript{122} Statement of Professor Linda J. Siberman, \textit{supra} note ______, at 62.
achieving a uniform national standard. If recognition of foreign judgments is really a matter of federal law then state policy is irrelevant. The ALI appears to be speaking out of both sides of its mouth in an effort to appease supposed international concerns regarding uniformity while also giving deference to fundamental principles of federalism. This does not work and the double-talk here invites unnecessary confusion in U.S. law.

Furthermore, it is not clear that the concerns about the lack of uniformity in U.S. judgments law are warranted. The lack of uniformity is argued to result in mistreatment of U.S. judgments abroad. Because foreign nations do not know whether or not, in the patchwork of U.S. states, their judgments will receive recognition those nations refuse to recognize all judgments of all U.S. states, or so the argument goes. This argument rests on two suppositions: (1) U.S. judgments are not recognized abroad; and (2) the lack of recognition abroad is retaliation resulting from confusion due to a lack of uniformity in U.S. law and fear of non-recognition in U.S. states. Both of these suppositions are flawed.

Many assert that U.S. judgments receive less than favorable treatment in foreign courts and the ALI’s proposed federal statute is intended to remedy that mistreatment. Although there are a few well-known examples of foreign refusal to recognize U.S. judgments, it is not clear that U.S. judgments are widely refused recognition in foreign courts. There is a lack of solid empirical data regarding international mistreatment of U.S. judgments. Professor Weintrab has opined that “judgments obtained by U.S. lawyers who follow proper procedures are readily recognized and enforced abroad.” If this is true then preemption of state judgments law is a remedy to a problem that does not exist.

Even if U.S. judgments are mistreated abroad, the supposition that this mistreatment is caused by fears arising from disparate state judgment recognition law is flawed. The most notorious examples of foreign refusals to recognize U.S. judgments illustrate the flaw in this causal reasoning. Consider the judgment entered by a California state court in John Doe v. Eckhard Schmitz. In the case a California resident obtained a tort judgment for sexual battery against a German citizen. The German High Court refused to enforce the punitive damages awarded by the California court on the basis of its determination that U.S. punitive damage awards violated German public policy. As this case illustrates, U.S. judgments are denied recognition and enforcement abroad as a result of substantial disagreements with substantive U.S. tort law not concern about U.S. recognition law. This fact is further illustrated by the failed U.S./English bilateral judgments and jurisdiction treaty. England famously withdrew from the treaty negotiations as a result of significant pressure from English insurers concerned about potential exposure to U.S. tort judgments. These concerns regarding American tort judgments will not be remedied by greater uniformity of U.S. judgment recognition law resulting from

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124 See Joachim Zekoll, The Enforceability of American Money Judgments Abroad: A Landmark Decision By The German Federal Court of Justice, 30 Colum. J. Transnat'l L. 641, 644 (1992) (discussing the facts underlying the unreported California judgment which was presented for enforcement in Germany).
125 Id.
preemption of state judgments law. Instead, the remedy here would require preemption of state tort law in matters affecting international commerce. Preemption of state judgment law will not remedy the problem of non-recognition abroad assuming that that problem does in fact exist.

This discussion leads to an interest point deserving consideration. If, as the ALI claims, preemption of state judgment recognition law is justified by a need for uniformity in matters implicating foreign commerce and foreign affairs then preemption of substantive tort law in cases involving citizens of foreign nations would also be justified by these needs. It is also likely that such substantive preemption would be much more meaningful in facilitating foreign commerce as well as in multilateral efforts to secure U.S. judgment recognition abroad. Why not, then, pursue federal preemption of state tort law in all matters implicating foreign commerce?

Here the federalism argument emerges with much more clarity. It is not difficult to appreciate that preemption of state tort law in every case affecting international commerce on the basis that the private dispute implicates foreign relations would significantly redistribute lawmaking authority in our federal system. Such preemption, even if accomplished by statute, would require the federal courts to plunge into the development of federal common law to determine rights and provide remedies in a wide array of international commercial litigation. One of the consequences of such preemption would be a significant increase in the number of federal question cases as the federal courts begin hearing tort and contract disputes in every case implicating the federal common law of foreign relations. State policy is unlikely to demand much attention in federal court, especially where the federal court is freed from the confines of *Erie* and *Klaxon*.

The ALI, of course, is not proposing the preemption of state tort law in all cases involving foreign defendants. However, the entire project rests on the rejection of *Johnston*’s private right rationale demonstrating the ALI’s commitment to viewing private litigation involving foreign parties, foreign rights and foreign judgments as falling within the purview of federal law. Does the ALI’s judgments project leave any room for state contributions to the development of private international law? Or is every foreign judgment a matter of public import and national concern?

Those advancing the view that recognition and enforcement of foreign judgments are questions of federal law overvalue the public law aspect of the foreign judgment and also undervalue or ignore the state’s legitimate interests in the administration of justice and determination of private right within its sovereign borders. Supporters of the federal view reason that state interests in private disputes involving foreign judgments, to the extent that there are any legitimate state interests in litigation involving a judgment rendered abroad, are outweighed by the national interests in uniformity and certainty because the exercise of judicial power resulting in denial of recognition or refusal to enforce affects the foreign affairs of the United States. As demonstrated above, these goals provide an insufficient justification for preemption of state law and significant departure from the objectives of *Erie* and *Klaxon*. It is also uncertain that there is a significant problem requiring a federal remedy or that the ALI’s proposed statute would address the actual cause of international non-recognition of U.S. judgments. As discussed in the following section, the federal statute proposed by the ALI might, in fact, backfire as a result of the incorporation of a reciprocity requirement.
B. Examining the ALI’s Case for a Federal Reciprocity Requirement

In addition to preempting state law, the ALI’s statute departs from the current majority view concerning the issue of reciprocity and compels states to open their courts to presently foreclosed collateral attacks on foreign judgments. The ALI acknowledges that its proposal departs from the general view of reciprocity and has described its reciprocity rule as “the most controversial issue in the [foreign judgments project] effort.” The reciprocity requirement would force many states to extend less recognition to foreign judgments than currently available under state law.

As discussed above, Hilton refused to recognize or enforce a French judgment “for want of reciprocity.” Under the French civil system at that time no foreign judgment was entitled to conclusive effect in French courts. Justice Gray reasoned that comity, like all of international law, was grounded on the first principles of “mutuality and reciprocity.” This reciprocity requirement sparked immediate controversy. Hilton was a 5-4 decision and the dissent, arguing that the issue of res judicata was one of private right, criticized the majority’s diminishment of private right by its focus on legislative disagreement between France and the U.S. regarding the implementation of res judicata policy.

The reciprocity requirement was not well received in the state courts. As discussed above, Johnston rejected Hilton’s precedential authority in New York and granted recognition to a French judgment despite an absence of reciprocity. Johnston was a unanimous decision which, like the dissent in Hilton, viewed the question of recognition and enforcement as one of private right rather than of international relations.

Most states now reject a reciprocity precondition for recognition of foreign judgments. The Uniform Foreign-Money Judgments Act (“UFMJA”), promulgated by the National Conference of Commissioners on Uniform State Laws in 1962, does not include a reciprocity requirement. Thirty states have adopted the UFMJA. A few states have adopted a reciprocity requirement or limited reciprocity requirement in addition to the provisions of the UFMJA. The UFMJA’s drafters chose to

129 See ALI Statute, supra note ___ at § 7 n.1.
130 See Foreword to ALI Statute, supra note ___ at pg. xiii.
131 Hilton, supra note ___ at 210.
132 Id.
133 Id. at 228.
134 Id. at 170 (Fuller, J., dissenting) (“I cannot yield my assent to the proposition that, because by legislation and judicial decision in France that effect is not there given to judgments recovered in this country which, according to our jurisprudence, we think should be given to judgments wherever recovered (subject, of course, to the recognized exceptions), therefore we should pursue the same line of conduct as respects the judgments of French tribunals.”).
135 See Johnston, supra note ___ at 123 (“But the question is one of private rather than public international law, of private right rather than public relations, and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights. A right acquired under a foreign judgment may be established in this state without reference to the rules of evidence laid down by the courts of the United States.”).
138 See UFMJA, supra note ___ at pt.II (listing thirty states plus the District of Columbia and the Virgin Islands who have adopted UFMJA).
139 See Russell J. Weintraub, COMMENTARY ON THE CONFLICT OF LAWS: FIFTH EDITION, 748-49 at n.75 and accompanying text (2006).
exclude a reciprocity requirement as a means of demonstrating respect for foreign judgments in order to secure reciprocal treatment of U.S. judgments abroad.\textsuperscript{140}

General rejection of the reciprocity requirement in state law is further illustrated by several restatement provisions. The rules of recognition contained in the Restatement (Second) of Conflict of Laws\textsuperscript{141} and the Restatement (Third) of Foreign Relations Law\textsuperscript{142} do not require reciprocity. The general approbation of the reciprocity requirement is supported by well-known conflicts scholars.\textsuperscript{143} One federal district court sitting in diversity and therefore free of Hilton’s reciprocity rule described the reciprocity requirement as “a provincial [concept], one which fosters decisions that do violence to the legitimate goals of comity between foreign nations.”\textsuperscript{144}

Despite significant contrary authority in American law, the ALI’s proposed federal statute incorporates a reciprocity requirement.\textsuperscript{145} The proposed statute states: “A foreign judgment shall not be recognize or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.”\textsuperscript{146} The statute further provides that the issue of reciprocity is an affirmative defense and that the party resisting enforcement has the “burden to show that there is substantial doubt that the courts of the state of origin would grant recognition or enforcement to comparable judgments of courts of the United States.”\textsuperscript{147} The statute then mandates that the U.S. court “shall, as appropriate, inquire whether the courts of the state of origin deny enforcement to” five separate categories of U.S. judgments as the court determines whether the foreign nation satisfies the reciprocity requirement.\textsuperscript{148} The statute then allow the U.S. court to ignore a foreign courts denial of enforcement of the “punitive, exemplary or multiple damages” portion of a U.S. judgment so long as the “state of origin would enforce the compensatory portion of such judgments.”\textsuperscript{149}

\begin{footnotes}
\textsuperscript{140} See Miller, supra note ___ at 252 n.64 (“The Uniform Act’s omission of Hilton’s reciprocity rule stemmed from the lack of support for the rule in most state courts, as well as the sentiment that ‘since the Act was designed as a means to create reciprocity, it does not require reciprocity to operate.’”).
\textsuperscript{141} See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1987) (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying claim are concerned.”); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f (1987) (“Except when otherwise required by local statute, the great majority of State and federal courts have extended recognition to judgments of foreign nations without regard to any question of reciprocity.”).
\textsuperscript{142} See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. d (1988).
\textsuperscript{143} See Russell J. Weintraub, How Substantial is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?, 24 Brook. J. Int’l L. 167, 178 (1998) (“ . . . playing the reciprocity card is likely to be perceived as the negotiating tactic that it is and make a successful conclusion even less likely. On balance, I do not recommend it.”); Friedrich K. Juenger, A Hague Judgments Convention, 24 Brook. J. Int’l L. 111, 113 (1998) (asserting that the reciprocity requirement lacks “any commendable quality.”).
\textsuperscript{145} See ALI Statute, supra note ___ at § 7(a).
\textsuperscript{146} Id.
\textsuperscript{147} Id. at § 7(b).
\textsuperscript{148} Id. at § 7(c). Section 7(c) requires the reviewing court to consider whether the judgment’s state of origin denies enforcement to “(i) judgments against nationals of that state in favor of nationals of another state; (ii) judgments originating in the courts of the United States or of a state of the United States; (iii) judgments for compensatory damages rendered in actions for personal injury or death; (iv) judgments for statutory claims; (v) particular types of judgments rendered by courts in the United States similar to the foreign judgment for which recognition or enforcement is sought; the court may also take into account other aspects to the recognition practice of courts of the state of origin, including practice with regard to judgments of other states.” Id.
\textsuperscript{149} Id. at § 7(d).
\end{footnotes}
Finally, the ALI’s reciprocity requirement authorizes the Secretary of State to negotiate bilateral or multilateral reciprocity agreements and such an agreement would “establish that the requirement of reciprocity has been met as to judgment covered by the agreement.”

The comments in the ALI’s statute offer the following justification for the reciprocity requirement: “The purpose of the reciprocity provision is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.” Reciprocity is a carrot, in other words, dangling in front of foreign nations intended to entice them to discontinue their practice of refusing recognition of U.S. judgments. The reporters expect this carrot, coupled with the authority granted the State Department to negotiate agreements without involving the Senate, will entice foreign powers to a judgments armistice. Each nation will agree to recognize and enforce civil judgments via diplomatic means.

The ALI’s inclusion of a reciprocity requirement enjoys the support of some scholars. Other scholars are critical of the reciprocity requirement. A few states have adopted reciprocity requirements of differing degrees into their own judgment recognition laws. Among these states, all but three recognize reciprocity as relevant but not determinative. The majority of states reject the relevance of reciprocity entirely. As the ALI notes, there is not foreign consensus on the relevance or propriety of reciprocity in private litigation.

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150 Id. at § 7(e). According to the comments, agreements entered into pursuant to this provision “need not be formal treaties, but could be Memorandum of Understanding, exchanges of Diplomatic Notes, or similar bilateral declarations ….” Id. at cmt. c.
151 Id. at § 7 cmt. b.
152 Id. at § 7(e) and cmt. c.
153 [Cite articles favoring reciprocity requirement]
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155 See ALI Statute, supra note ___ at § 7 n. 3 (“Seven [] states (Florida, Idaho, Maine, North Carolina, Ohio, Oregon, and Texas) authorize, but do not require, the court to deny recognition on grounds of lack of reciprocity; three other states (Colorado, Georgia, and Massachusetts) have adopted the [UFMJA] with a mandatory provision that reciprocity be established as a condition for recognition or enforcement.”). Unlike the majority of states that presently recognize reciprocity as relevant but discretionary, the ALI’s reciprocity requirement is a mandatory precondition. See id. at § 7 n. 4.
156 See ALI Statute, supra note ___ at § 7 n.7 (“Foreign countries have taken varying positions on the issue of reciprocal recognition and enforcement of foreign judgments. In Great Britain, foreign civil judgments from countries other than Commonwealth countries or members of the European Union may be enforced either at common law, i.e., by an action on the foreign judgment, as in the United States, or, if reciprocity is established through a bilateral convention, by registration under the English Foreign Judgments (Reciprocal Enforcement) Act. In France, since a decision of the Supreme Court in 1964, foreign judgments are entitled to recognition or enforcement if the meet five conditions, not including reciprocity. In Germany, the Code of Civil Procedure lists reciprocity as a condition for recognition of a foreign judgment, but if the leading commentaries list the state of origin (including states of the United States) as regularly recognizing and enforcing German judgments, the court will not require the judgment creditor to offer proof of reciprocity in individual cases. As among the member states of the European Union, the [Brussels Convention] assures reciprocity in recognition of each other’s judgments, subject to supervision by the European Court of Justice. The parallel Lugano Convention ties Iceland, Norway, and Switzerland into the system of reciprocal recognition, but without the right to appeal to the European Court of Justice. In Canada, as in the United States, enforcement of judgments is a matter of provincial rather than national law, but with appeal (upon leave) to the Supreme Court of Canada [and foreign judgments may be enforced at
The question of reciprocity is interesting and challenging. There are strong policies advanced by both sides of the reciprocity debate. On the one hand, the goal of increasing leverage in bilateral and multilateral negotiations in order to secure recognition of U.S. abroad is a laudable objective. On the other, the desire to reach a just and final result between the parties to the private dispute without regard to the broader diplomatic relations of nations in which tribunals reside is also a laudable objective. For the reasons that follow, the ALI’s reciprocity requirement should be rejected.

First, the reciprocity requirement sacrifices private rights on the diplomatic alter. While it is true that leverage in diplomatic negotiations would probably be enhanced by adopting a national rule uniformly rejecting foreign judgments unless and until the foreign nation relents and enters into a reciprocity agreement with the U.S. government it should be noted that such a rule will ignore the interests of individual litigants in private commercial litigation. *Res judicata* intends to protect private interests in finality and also protect litigant from vexatious and duplicative litigation. These private interests will be sacrificed to the public interest if reciprocity is required.

Consider a routine commercial dispute between a U.S. company and a German citizen involving a defective product manufactured by the company and sold in Germany. If, after appearing and fully litigating their respective rights in the German court, the German citizen secures a civil judgment against the U.S. company in judicial proceedings which were consonant with due process and fundamental fairness then, as between the German citizen and the U.S. Company, is it not true that German judgment is final as between the parties in that their dispute has been fully and fairly resolved? *Res judicata* rests on the rationale that first principles, not merely efficiency, demand that all litigation must obtain finality. If so, the question of reciprocity is irrelevant to the private dispute. When the German citizen asserts a right to collect in a U.S. court on the basis of the German judgment the question of Germany’s reciprocal treatment of U.S. judgments is relevant only if the judge in U.S. action is permitted to consider policies and issues beyond the confines of particular case presented to the court (i.e., the right to collect from the U.S. company). This sacrifice of private right for the greater good is explicitly acknowledged in the introduction to the ALI’s proposed statute. The fact that the ALI’s project rejects the authority of states to protect the private rights of litigants in their courts also highlights the federalism concerns discussed above.

A second problem regarding reciprocity emerges as one considers the effect of the requirement in individual cases. Assume that the German citizen’s above-described judgment is presented to a New York state court for enforcement. Also assume that the ALI’s federal statute has been adopted thereby compelling the New York state court to deny recognition and enforcement if it determines that German courts would not recognize or enforce “comparable judgments of courts in the United States.”* After entertaining expert testimony, the New York court determines that German courts would not recognize or enforce U.S. products liability judgments and therefore determines that the German judgment is not entitled to recognition or enforcement in the U.S. What happens next? Does the German citizen file a

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158 *Id.* at pg. 3 (“The present project rejects the view of the New York Court of Appeals in *Johnston* which held that recognition of foreign judgments was a matter of ‘private right rather than public international law.’”).

159 *Id.*

160 *Id.* at § 7(a).
products liability action in New York court? If so, are none of the factual findings of the German court entitled to recognition? Whose law determines the rights or liabilities of the parties to this private dispute?

A third practical problem regarding imposition of a reciprocity requirement is the burden of determining whether the reciprocity requirement has been satisfied. The ALI’s statute contemplates a hearing whereby expert testimony is received regarding the state of origin’s laws regarding recognition of similar U.S. judgments. This effort will increase costs and demand judicial attention. This will likely be an especially difficult inquiry where the judgment arises from a legal system in non-democratic nations or cultures not sharing U.S. conceptions of law.

A fourth problem with the reciprocity requirement is its circularity. This circularity is related to the renvoi trap. The reciprocity requirement forbids a state from enforcing a foreign judgment until the foreign state recognizes the state’s judgments. If the foreign state adopts the same reciprocity requirement then the problem of circularity arises. This becomes as annoying as the childish game (enshrined in popular culture in Pee-Wee Herman’s Big Adventure) where one responds to every insult with the statement “I know you are but what am I?” As in all cases of retorsion, there is danger that outright rejection of the judgments of non-reciprocating nations, rather than being viewed as enticing carrot, will instead be viewed simply as a disrespectful and hostile act. This should not be surprising because the incorporation of the reciprocity requirement is a hostile act rather than an expression of respect for the rule of law.

Rather than attempting to leverage our power with carrots and sticks the better approach would be demonstration of respect for the rule of law by attempting to achieve justice in individual cases. The maxim “you’ve got to give respect to get it” well expresses this thought. Rather than attempting to secure international respect for U.S. judgments abroad by manipulating the outcomes of individual cases in an effort to maximize diplomatic leverage our courts should instead promote adherence to judicial power as an exercise in recognizing and enforcing private rights as between the parties before the court. Arguably, the U.S. common law approach to foreign judgments, which the ALI seeks to preempt and change, and the practice of many states’ unilateral extension of comity to foreign nations despite mutuality have promoted, rather than deterred, a new trend in international law towards respect and mutuality.

A fourth problem with the reciprocity requirement is its underlying assumption that such reciprocal recognition agreements are possible and workable. Reciprocity is, in fact, very important to the

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162 See Brand, supra note ___ at 282-83 (“Reciprocal reciprocity requirements lead to the problem of “renvoi,” in which the forum jurisdiction’s rule requires reference to the granting jurisdiction’s rule for conflict of laws purposes.”). Professor Brand asserts that “there is no easy exit from this analytical circle.” Accordingly, the best strategy is to avoid the circle altogether and unilaterally determine whether a foreign judgment should be recognized within the U.S. courts without reference to foreign law.

163 See, e.g., Weintraub, supra note ___ at 178 (recommending rejection of a reciprocity requirement because it could be viewed as negotiating tactic).

formation of a cohesive political community. The framers understood this and incorporated a reciprocity requirement, the Full, Faith and Credit Clause, into the constitution. The European Union is committed to reciprocal judgment recognition obligations as between member states. The reciprocity obligations among the United States and also among member states of the EU are made possible by more significant political commitments codified in the U.S. Constitution and the European Conventions. The obligation of reciprocal treatment is secured by the unity of the polity as expressed in the positive law. In the U.S. reciprocity is secured by the Supremacy Clause and, in the event that one state attempts to shirk its obligations, the Supreme Court has the authority to strike down the state’s nefarious activity. In the E.U., member states have a similar right to secure enforcement of reciprocity obligations in the European Court of Justice. Reciprocity, then, works together with supremacy to bind a polity together.

Even if the U.S. secures bilateral or multilateral agreements regarding reciprocal treatment of judgments they will lead to less security and certainty than available within a cohesive polity. Unlike the reciprocity provided by the Full Faith and Credit Clause, such bilateral agreements would not be enforceable by any supreme court applying supreme law. Instead, assuming that law is nothing more than expression of sovereign power, any reciprocity agreement negotiated by the Secretary of State pursuant to the ALI’s statute would be subject to executive (or judicial) fiat in either country. This demonstrates that the “rights” created by the ALI’s statute would likely be remediless if violated.

Finally, the reciprocity requirement fails to acknowledge that some foreign courts refuse to recognize or enforce U.S. judgments simply because the foreign power opposes the U.S. judgment. Foreign courts are troubled by U.S. tort judgments perceived as excessive. Foreign courts reject U.S. judgments for reasons unrelated to judgment recognition practice. Negotiations to achieve bilateral consensus regarding these difficult disagreements are challenging and have previously failed. Multilateral efforts are less likely to result in consensus. Furthermore, as those representing the U.S. will be required to overcome concerns about state jury verdicts without having the power or authority to preempt state tort law, foreign negotiators will likely be asked to accommodate U.S. concerns about their own judgments offensive here on different grounds. For example, as English negotiators will raise concerns about U.S. jury verdicts U.S. negotiators must raise U.S. concerns about offensive English libel judgments. Securing a judgment recognition agreement will require more than simply removing the impediment the ALI’s reciprocity requirement creates.

The ALI’s reciprocity requirement would be a significant step away from the common law. This requirement would make private litigation more complex, less certain and risks diminishing the perception of the U.S. as committed to the rule of law. Although there are tempting justifications for such a requirement it is not warranted and should be rejected both by Congress and state and federal courts.

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166 See Weintraub, supra note ___ at 182-83 (discussing recent international decisions denying U.S. judgments recognition on the basis of concerns about excessive U.S. jury verdicts and noting that these decisions serve as a “red flag warning us that treaty negotiations are likely to focus on punitive and “excessive” damages, particularly U.S. jury awards in what Lord Denning termed ‘fabulous’ amounts.”).

167 English libel judgments which fail to accommodate First Amendment interests are a matter of significant concern. See [ALI Statute at § 5 n. 7(d)] (describing recent U.S. decisions denying enforcement of English civil judgments on the basis of the public-policy exception to enforcement and the First Amendment). For a more extensive discussion of the issue see Robert L. McFarland, Please Do Not Publish this Article in England: A Jurisdictional Response to Libel Tourism, [___ Miss. L. J. ___].
IV. Conclusion

The force and effect of extraterritorial judgments is a significant question for any legal system. The ALI’s proposed federal judgments statute project is a significant contribution to an important discussion regarding this question. The efforts of the ALI to increase respect for U.S. judgments abroad is laudable. However, because the ALI’s statute significantly departs from state common law and undervalues the legitimate interests of both state governments and private litigants the statute should not be adopted. The ALI contends that its statute is necessary to decrease international confusion regarding U.S. law. Yet the proposed statute sends out mixed messages about U.S. respect for foreign courts. The preemption of state law together with the reciprocity precondition will result in less favorable treatment of foreign judgment in many state courts.

The ALI’s statute rests on concerns about international inability to understand the *Erie* doctrine and federalism. In an effort to clear up this confusion, the ALI proposes a uniform federal standard that incorporates a hostile reciprocity provision. This is a curious way to increase respect for U.S. judgments abroad. The ALI insists that reciprocity will be viewed as a carrot and not a stick. Once again the words of Justice Holmes come to mind: “Even a dog distinguishes between being stumbled over and being kicked.”

168 Is it better to explain principles of federalism or to rationalize retorsion with our partners at the international bargaining table?