VOLUME 54, NUMBER 2, SUMMER 2013

Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States

Gregory H. Shill*

Recent multi-billion-dollar damage awards issued by foreign courts against large American companies have focused attention on the once-obscure, patchwork system of enforcing foreign-country judgments in the United States. That system's structural problems are even more serious than its critics have charged. However, the leading proposals for reform overlook the positive potential embedded in its design.

In the United States, no treaty or federal law controls the domestication of foreign judgments; the process is instead governed by state law. Although they are often conflated in practice, the procedure consists of two formally and conceptually distinct stages: foreign judgments must first be recognized and then enforced. Standards on recognition differ widely from state to state, but under current law once plaintiffs have secured a recognition judgment all American courts must enforce it irrespective of their own recognition laws. This rigid system, which exceeds the constitutional requirement of full faith and credit, enables plaintiffs to effectively launder a foreign judgment by getting it recognized in one state and then enforcing it in another state that would have rejected it in the first place.

This brand of forum shopping, which I call "judgment arbitrage," creates a fundamental structural problem that has thus far escaped scholarly attention: it undermines the power of individual American states to determine whether foreign-country judgments are enforced in their territory and against their citizens. It also creates a powerful, if implied, conflict of recognition laws among sister U.S. states that precedes and often determines the outcome of what scholars currently consider the primary conflict, between American and foreign law. Finally, this system impedes the development of state law and weakens practical constraints on the application of foreign nations' laws in the United States.

This Article contends that statutorily liberating states from the current conception of full faith and credit in domestication would sharpen jurisdictional competition, encouraging the development of better law (however defined) and, eventually, greater uniformity in an area where scholars agree uniformity is desirable. It begins by constructing a novel framework for conceptualizing these problems, and addresses them by proposing a federal statute that would allow states to capture the benefits—and require them to internalize the costs—of their own recognition laws. Rather than scrap the current state-law system in favor of a single federal rule, as the American Law Institute and some leading scholars call for, or institute a national regime of centrally-designed uniform state laws, as the National Conference of Commissioners on Uniform State Laws and other commentators urge, the statute proposed in this Article would

* Visiting Assistant Professor of Law, Hofstra University—Maurice A. Deane School of Law. The author thanks Geert Van Calster, Edward Cantu, Kevin Clermont, J. Scott Colesanti, David Cooper, Andrew Kent, Julian Ku, Michael Morley, Matthew Owen, Jill Santopolo, Mark Schneiderman, Benedict Schweigert, Jamelle Sharpe, Nathan Smith, and Judd Sneirson for detailed comments and James O'Connor, Barry Ronner, and Joseph Sulzbach for research assistance. The author is grateful for the support of Harvard Law School, where he began the project as a Post-Graduate Research Fellow, and thanks the staff of the Harvard and Hofstra law libraries as well as workshop participants at Hofstra Law School and the 2012 Biennial Meeting of the American Society of International Law International Economic Law Interest Group. This paper also benefited from conversations with Yonina Alexander, Jack Goldsmith, and Erin O'Hara O'Connor. The author previously practiced law at Gibson, Dunn & Crutcher LLP, where he represented Chevron Corporation and Bank of New York-Mellon in cross-border disputes with a class of Ecuadorian plaintiffs and the Lehman Brothers estate, respectively. All opinions and any errors are the author's alone.

provide incentives for competition among states for recognition law. The proposal may also suggest ways to manage other sister-state conflicts of law in an age when horizontal conflicts are proliferating.

Introduction

In 1970, a scholar of transnational judgments observed:

> For many years the topic of recognition and enforcement of foreign judgments has been the scholar's delight. Students of conflict of laws, constitutional law, comparative law, international law, and civil procedure have explored its complexities and have proposed reforms. Yet, these efforts have not significantly influenced American law . . . . It should be clear that recognition and enforcement of foreign judgments are far more than attractive subjects for academic exercises; *they have become bread and butter problems for the legal profession which increasingly encounters them on the interstate and international levels*.[1]

Thirty-seven years later, the lead plaintiffs' attorney litigating an $18 billion transnational lawsuit against Chevron Corporation declared:

> [T]his is Ecuador, okay . . . You can say whatever you want and at the end of the day, there's a thousand people around the courthouse, you're going to get what you want . . . Because at the end of the day, this is all for the Court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win.[2]

The system of domesticating foreign-country money[3] judgments in American state and federal courts has been called a "scholar's delight"[4] for the tangle of domestic and international conflicts of law it creates.[5] How-

1. Adolf Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 Am. J. Comp. L. 367, 367–68 (1970) (emphasis added) [hereinafter Homburger, *Recognition and Enforcement*].

2. Steven Donziger, lead American counsel for Ecuadorian plaintiffs who later received an $18 billion judgment from an Ecuadorian court against Chevron. *'Just a Bunch of Smoke and Mirrors and Bulls**t'—Crude Film Outtake*, http://www.youtube.com/watch?v=1N6SyeRUiw0 [hereinafter Donziger "Smoke and Mirrors" clip].

3. Discussion of the recognition and enforcement of foreign judgments in this Article is limited to disputes where the remedy sought is money damages, in any currency ("money judgments"), in a civil action and results in a judgment of a court of a foreign sovereign. *See, e.g.,* Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. pt. 2, 43 § 1(2) (2002) ("'foreign judgment' means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters."). The special considerations involved in cross-border litigation of disputes other than money judgments are beyond the scope of this Article.

4. Homburger, *Recognition and Enforcement*, *supra* note 1, at 367.

5. The term "domesticate" describes the two-stage process of importing and collecting on a final money judgment rendered by a court of one country in another country by (1) recognizing and (2) enforcing it in the second country. In addition, this Article uses the term "foreign" to refer to a country

ever, for at least half a century, commentators, courts, and legislatures have been asking the wrong questions about these conflicts, and the consequences of that misdiagnosis are now being felt.

The issue is one of focus. Promoting agendas of human rights or trade expansion, observers and lawmakers traditionally emphasize the international and comparative law dimensions of judgment domestication—namely, they debate whether it should be easier or harder to enforce foreign-court judgments in the United States and whether U.S. or foreign courts offer more justice to foreign plaintiffs.[6] This emphasis on the nation-state and individual litigant levels of analysis neglects a fundamental conflict embedded in the architecture of the current American domestication system, which in the first instance pits different sources of sister-state law against one another. Ironically, in that overlooked threshold conflict lies the promise of experimentation on the state level that may enrich and inform the debate on which commentators are currently focused.

The leading proposal of the moment, drafted by the American Law Institute ("ALI") and advanced by prominent scholars, acknowledges the existence of sister-state conflicts but misapprehends their nature and proposes to eliminate them outright instead of harness their creative power.[7] The rule it proposes, which would sharply reduce foreign judgment creditors' access to American courts below the level available in almost any state today, reflects a focus on substantive domestication standards rather than the process of generating those standards.

Emerging trends in transnational[8] litigation will soon make a focus on the mechanics of the U.S. judgment domestication system unavoidable. The litigation of disputes against U.S. companies in foreign courts has become so

other than the United States, not to a sister U.S. state. Similarly, use of the term "state" means a U.S. state, not a foreign nation-state. Although some international disputes are resolved through arbitration and other alternatives to litigation, because many such disputes—for example, those asserting tort, environmental, and human rights claims—are not founded on a prenegotiated contract, they "provide little or no opportunity for choosing [an alternative to] a national judicial system for the dispute resolution process." 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, 255 n.3 (1991) [hereinafter Brand, *Enforcement*].

6. *See, e.g.*, Christopher A. Whytock and Cassandra B. Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011) (proposing conformity in standards applicable to domestication and *forum non conveniens* determinations by relaxing domestication standards) [hereinafter Whytock & Robertson, *Forum Non Conveniens*]; Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) [hereinafter Whytock, *Evolving Forum Shopping System*]; Christina Weston, Note, *The Enforcement Loophole: Judgment-Recognition Defenses as a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731, 762 (2011); American Law Institute, Recognition & Enforcement of Foreign Judgments Act: Analysis and Proposed Fed. Statute (proposed 2005) (draft statute prescribing a uniform, highly protective federal legal standard for recognition) [hereinafter ALI Act]; 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 (2000) (arguing in favor of a federal uniform rule to promote trade) [hereinafter Silberman & Lowenfeld, *A Different Challenge*].

7. ALI Act.

8. In the litigation context, "transnational" has been defined as having "connections to more than one country," which connections "may be territorial . . . or they may be based on legal relationships between

profitable that it has spawned an entire industry devoted to financing it. As efforts to enforce foreign judgments in the United States grow more sophisticated, investment-backed judgment creditors[9] will take advantage of long-standing design defects in the American judgment domestication system. The costs of those flaws are now falling not only on the parties themselves but on the U.S. states that struggle to regulate a hodgepodge domestication process that encourages the opportunistic selection of merits and enforcement courts.

Moreover, a shift towards a bifurcation of the litigation and enforcement stages of high-dollar transnational lawsuits is poised to accelerate this development. Plaintiffs now routinely litigate the merits phase of such disputes in foreign forums, where they benefit from newly favorable substantive law and sometimes from a politicized or corrupt judiciary, and then come to American courts to collect on their judgments, where they enjoy a tradition of hospitality to foreign judgments.[10] The emerging bifurcated system of transnational litigation is exposing weaknesses in the U.S. domestication system that make change more urgent, and suggests improvements that may provide a blueprint for managing other conflicts of law within the federal system.

In the United States, no international treaty guides the process of domesticating foreign court judgments.[11] Instead, it is governed by state law, and consists of two formally distinct proceedings: recognition and enforcement. Although requirements for the recognition of judgments vary significantly

---

a country and the actors engaged in or affected by that activity, such as citizenship." Whytock, *The Evolving Forum Shopping System*, *supra* note 6, at 486.

9. For simplicity, the terms "judgment creditor," "creditor," and "plaintiff," on the one hand, and "defendant," "judgment debtor," and "debtor," on the other, will be used interchangeably in this Article. The main distinction lies in the timing of a party's transition from one status to another: following the conclusion of the merits phase of a case, a plaintiff seeking to enforce a judgment becomes known as a judgment creditor, and the erstwhile defendant becomes a judgment debtor.

10. *See, e.g.*, Linda J. Silberman, *The Impact of Jurisdictional Rules and Recognition Practice on International Business Transactions: The U.S. Regime*, 26 HOUS. J. INT'L L. 327, 352 (2004) ("recognition and enforcement of foreign country judgments in the United States has tended to be much more generous than the treatment given by foreign courts to U.S. judgments."); Ramon E. Reyes, Jr., *The Enforcement of Foreign Court Judgments in the People's Republic of China: What the American Lawyer Needs to Know*, 23 BROOK. J. INT'L L. 241, 246 (1997) (foreign judgments "are regularly given effect by [U.S.] state and federal courts.").

11. *See* LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAW: CASES AND MATERIALS 535 (2011) [hereinafter BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW]; ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 95 (2009) [hereinafter O'HARA [O'CONNOR] & RIBSTEIN, THE LAW MARKET] (contrasting lack of judgment-recognition treaty with widely followed Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3; 21 U.S.T. 2517). The Hague Choice of Court Convention could become such a treaty one day, but as of publication it had only been ratified by one country (Mexico) and signed by the United States and European Union. *See* Convention of 30 June 2005 on Choice of Court Agreements, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98. Note: in THE LAW MARKET, O'Connor's surname is listed as O'Hara; for clarity, all citations to the book (and another piece O'Connor co-authored with Larry Ribstein) indicate both surnames.

from state to state, once a judgment is recognized by any American court it can be enforced in any other American court.

Observers have rightly noted that this state of affairs both inhibits the development of uniform standards in an area where uniformity is desirable and cedes regulatory authority to the states in an area where the federal interest is compelling. There are powerful indications that inter-state jurisdictional competition could help develop the doctrine to the point where a uniform standard is either voluntarily adopted by states or can be centrally imposed at a lower cost to innovation in legal standards.

At present, jurisdictional competition among sister states for domestication law is weak. This is in part because a subtle feature of the present state-by-state domestication regime, overlooked by the conflicts literature, vitiates the ability of U.S. states to enforce their recognition laws within their own territory. In federal and state courts, forum law—that is, the law of the state in which the court sits—controls the recognition proceeding; state law on recognition comes in four varieties, with differences that can be outcome-determinative; and judgment creditors can select any forum where a debtor has contacts to bring their recognition action. Further, if the creditor's recognition action succeeds, the foreign-country judgment is stripped of its foreign character and formally converted into a judgment of the American court. This transformation then triggers an interlocking set of constitutional, federal, and state laws mandating that judgments rendered in any American court be given nationwide effect. Thus, the creditor can collect on his state recognition judgment by bringing an enforcement action virtually anywhere in the United States. These incentives make opportunistic selection of separate recognition and enforcement regimes by transnational judgment creditors inevitable. I call the practice "judgment arbitrage" because unlike the more common "judgment laundering," "arbitrage" emphasizes the ease with which creditors can exploit differences among state recognition standards to maximize their expected recovery. Unlike "laundering," the term "judgment arbitrage" is also value-neutral about the integrity of the underlying judgment.

The availability of judgment arbitrage does more than warp the incentives of parties to transnational judgments; it inhibits the territorial prerogatives of states and the development of conflicts law. The current state-by-state conflicts regime embodies a key problem that federalism is supposed to prevent: it encourages disuniformity of law, but discourages competition for the best law. The failure of the ALI Act and uniform acts proposed in 1962 and 2005[12]—and of decades of experience with the current domestication

12. The National Conference of Commissioners on Uniform State Laws has proposed model uniform recognition acts twice, in 1962 and 2005. *See* Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. pt. 2, 43 (2002) [hereinafter "1962 Recognition Act" or "1962 Act"]; Uniform Foreign-Country Money Judgments Recognition Act, 13 U.L.A. pt. 2, 21 (Supp. 2011) [hereinafter "2005 Recognition Act" or "2005 Act"]. These proposals and variations are discussed *infra*, especially at Part III.B.

regime itself—to produce a meaningful consensus on optimal recognition law suggests both that adopting a single national rule is premature and that introducing a competitive inter-jurisdictional domestic "market" for such law could yield innovations that increase the quality of substantive law in the field, and in turn cause states to coalesce around a particular model. In this area, this Article builds on the work of scholars exploring the potential of jurisdictional competition to encourage voluntary coordination by states,[13] a development known as spontaneous uniformity.

This Article proposes an alternative to the draft ALI Act that would facilitate jurisdictional competition among states for optimal law in the area of recognizing foreign judgments. It pursues this goal by permitting courts to apply forum law on the question of recognition at the enforcement stage. Thus, under the proposed statute, if a party won a recognition action in State *A*, State *B* would not have to enforce the resulting recognition judgment unless State *B* would have been willing to recognize the foreign judgment in the first place, under its own recognition law. This would mark a significant departure from the status quo, under which a State *A* judgment recognizing a foreign judgment can be enforced in any court in the United States without regard to the enforcement court's recognition rules.

The proposed statute offers several benefits. First, it would conform the sister-state dimension of the domestication system to the same analytical principles that govern sister-state choice of law at the merits phase of lawsuits, a body of principles from which domestication has long (and somewhat curiously) been exempt. Second, it would enhance the ability of individual states to decide for themselves the appropriate balance between protecting their citizens from questionable or corrupt foreign judgments and assuring market participants that valid foreign judgments are enforceable in the place where their citizens keep many assets. It would also remedy an anomaly that privileges judgment creditors[14] for no principled reason.

A federal statute that facilitates the market for state domestication law could also achieve a broader social good. The United States may well be on the cusp of a revolution in what has been called the horizontal dimension of federalism. Often, federalism discussions focus on the vertical tension between regulatory authority on the federal and state levels, with states being considered as a group. However, many social issues that have been gaining

13. *See especially* O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11.

14. Until recently, it was thought that the ability of a party to select a state recognition law could be exploited by either a debtor or creditor to a foreign judgment. *See, e.g., Recognition and Enforcement of Foreign Judgments Before the Subcomm. on Courts, Commercial & Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 4 (2011) (testimony of Linda J. Silberman) ("At the stage of U.S. enforcement, both the judgment creditor (in an enforcement proceeding) and the judgment debtor (via a declaration for non-enforcement) will have an opportunity to forum shop for a state law favorable to its position.") [hereinafter "Silberman testimony"]. However, the Second Circuit recently rejected a judgment debtor's attempt to use the 1962 Recognition Act as the basis of a declaratory judgment action. Chevron Corp. v. Naranjo, 667 F.3d 232 (2d. Cir. 2012). This suggests that restricting choice of recognition law will affect the decision-making of creditors most directly.

legislative and legal prominence on the state and national level in recent years—including abortion, gun control, immigration, and the rights of same-sex couples—involve horizontal conflicts of state law that are mediated to varying degrees by the federal government. This Article aims to advance the debate on the law market in an area of horizontal conflict that is important but less polarizing.

The Article proceeds in five parts. Part I provides a brief overview of the American system of domesticating foreign-country judgments and discusses its uncomfortable position in conflicts of law.[15] Part II casts the regime of competing recognition standards as a system of incentives and suggests ways of assessing their costs and benefits. Part III surveys the relevant sources of domestication law in the United States and explains how those sources operate to discourage innovation in the market for state domestication law. Part IV argues that incentives favoring bifurcation of the merits and enforcement phases of transnational litigation are growing stronger, discusses two recent examples of the trend, and contends that this shift is placing pressure on the American domestication regime. Part V proposes a federal statute to facilitate competition among U.S. states for law in the recognition of foreign judgments, and compares the proposal to other federal statutes that address sister-state conflicts. The Article concludes by arguing that the proposed statute would encourage experimentation that would yield superior law and may provide a model for mediating other horizontal conflicts of law.

I. Recognition, the Neglected *Domestic* Choice of Law Question

The general rule, announced in 1895 by the U.S. Supreme Court in *Hilton v. Guyot*[16] and still observed today, is that an American court will recognize and enforce a judgment of a foreign country's court as a matter of international comity.[17] The Supreme Court essentially turned over control of the process to the states in *Erie Railroad v. Tompkins*,[18] and courts and commentators now regard the domestication of foreign judgments as almost exclu-

15. Conflicts has for some time been a "largely ignored field of law," O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 4, but there are indications that that is changing. *See, e.g.*, Ralf Michaels, *After the Revolution – Decline and Return of U.S. Conflict of Laws*, 11 Y'book of Private Int'l L. 11, 21 (2009).

16. 159 U.S. 113 (1895).

17. Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials 132–33 (3d ed. 2009) [hereinafter Bradley & Goldsmith, Foreign Relations Law]; Robert L. Felix & Ralph U. Whitten, American Conflicts Law 176 (6th ed. 2011). International "[c]omity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 543 n.27 (1987).

18. 304 U.S. 64 (1938); *see* Restatement (Second) of Conflicts of Laws § 98 cmt. e (1971) [hereinafter Second Restatement of Conflicts].

sively a creature of state law rather than federal common law.[19] States have adopted widely varying standards, however, leaving a patchwork that has "undermine[d] predictability."[20] Today, "there are no institutions for creating order."[21]

Collecting on a foreign judgment in the United States entails a two-stage procedure: the judgment must be (1) *recognized* by an American court and (2) then *enforced* by an American court. In general terms, the task of a court presented with a foreign judgment is to decide whether the judgment was issued under sufficiently fair law and procedures[22] so as to render it equal to a judgment of the court recognizing it. In determining these issues, courts—whether federal or state—apply the recognition law of the state in which they sit.[23]

In seventy-five years of decentralization, domestication regimes have diverged. States now prescribe materially different factors for courts to consider when determining whether to recognize a foreign judgment, and these differences can determine whether a foreign judgment can ultimately be enforced in the United States or not.

Thus far, attempts to return judgment-recognition law to a federal or uniform standard have been unsuccessful: commentators and law-reform organizations have been advocating uniform standards for over fifty years, but only a limited number of states have adopted them, and even those states have enacted two different versions of competing "uniform" standards or have added substantial amendments. The resulting patchwork of state laws fails to achieve either consistency (in an area where commentators agree uniformity is desirable) or flexibility (in an area where the ability to respond to changing trends is critical). In short, the current system has the unusual

19. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (1987) (absent a positive source of federal law, "recognition and enforcement of foreign country judgments is a matter of State law.") [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW]; SECOND RESTATEMENT OF CONFLICTS § 98 cmt. e; BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW, *supra* note 11, at 535; BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW, *supra* note 17, at 133. "The consensus among the State courts and lower federal courts that have passed upon the question [of whether state or federal law governs recognition of foreign judgments] is that, apart from federal question cases, such recognition is governed by State law and that the federal courts will apply the law of the State in which they sit." SECOND RESTATEMENT OF CONFLICTS § 98 cmt. c to 1988 revision. Federal question jurisdiction may be available depending on the subject matter of the foreign judgment, *see* U.S. CONST. art. III, 28 U.S.C. §§ 1333 (admiralty), 1334 (bankruptcy), 1338(a) (copyright, patent); Zschernig v. Miller, 389 U.S. 429 (1968) (federal law governs where application of state recognition law would disrupt foreign relations), but there has been a "dearth of recognition or enforcement cases dealing with true federal questions." Brand, *Enforcement*, *supra* note 5, at 287.

20. O'HARA [O'CONNOR] & RIBSTEIN, THE LAW MARKET, *supra* note 11, at 47.

21. *Id.*

22. *See* Part III.B, *infra.*

23. *See* SECOND RESTATEMENT OF CONFLICTS § 98 cmts. e, g; Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941); *see also* Svenska Handelsbanken v. Carlson, 258 F. Supp. 448 (D. Mass. 1966) (suggesting *Erie* requires federal courts sitting in diversity to apply the recognition law of the state in which they sit).

distinction of suffering from the limitations of both a state-by-state regime and a unitary regime while offering few benefits of either.

Because state laws differ in critical ways in the defenses they afford judgment debtors, *foreign merits litigation is now evolving in such a way as to permit recognition of foreign judgments in some states but not others*.[24] The trend towards bifurcating the merits and enforcement stages of transnational litigation means flaws in the American domestication regime have the potential to be far more consequential now than they have been previously.

A. The Domestication System as a "Market" for Law

The decentralized nature of the American system of domesticating foreign judgments presents states and creditors with important strategic choices. Principally, states must choose the legal standards that govern such actions, and creditors must choose a court in which to satisfy their judgments. Just as parties in other contexts can select from a menu of options when selecting a state of incorporation or the state law that will govern the interpretation of their contract terms, these options for recognition law and forum can be conceived of as creating a "market." Approaching the law- and forum-selection process from this perspective also illustrates why the lack of a formal theory of recognition law is a problem.

The market for recognition law, like other markets, "requires an understanding of both supply and demand conditions in order to identify the resulting equilibrium."[25] Laws are supplied by states, and foreign judgment creditors are able to select from the options states offer with few restrictions on their range of choice. The requirement of obtaining jurisdiction over a debtor's assets is the most serious and probably the only legal hurdle that can conceivably interfere with a creditor's choice of recognition law,[26] but where the debtor is a multinational corporation many states can assert jurisdiction. A creditor will choose a state that maximizes his chances of achieving recognition.[27] The operation of the supply side—state and federal courts

24. *See infra*, Part III; Silberman & Lowenfeld, *A Different Challenge*, *supra* note 6, at 636 ("[I]t 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, in Oklahoma but not in Arkansas. That is, however, the case.").

25. *See* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 Nw. U. L. Rev. 1551, 1553 (2003).

26. States differ on whether a debtor must be subject to personal jurisdiction in order for the court to entertain a recognition action or whether the mere presence of in-state assets is sufficient for jurisdictional purposes. *See* 2005 Recognition Act § 6, cmt. 4. However, at the enforcement phase, it is undisputed that assets are sufficient to confer jurisdiction on the enforcement court. Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977); Lenchyshyn v. Pelko Elec., Inc., 723 N.Y.S.2d 285, 289–90 (N.Y. App. Div.-4th Dept. 2001) ("Those courts that have cited the *Shaffer* footnote [433 U.S. at 210 n.36] have held uniformly that *no jurisdictional basis for proceeding against the judgment debtor need be shown* before a foreign judgment will be recognized or enforced.") (emphasis added) (canvassing decisions from courts of 14 states).

27. *See* Whytock, *Evolving Forum Shopping System*, *supra* note 6, at 486–87.

and state legislatures, which jointly create recognition law[28]—is more complicated.

In theory, state control over recognition law ought to give states reason to compete vigorously for superior law in this area just as they do in other areas of the law market.[29] In practice, however, it has not.[30] An examination of the elements of jurisdictional competition reveals that the control individual states exercise is illusory.

As O'Connor and Ribstein explain in their landmark study *The Law Market*, the market for law in the United States contains four important elements:

> *First*, there must be some significant demand for alternative laws as evidenced by the parties' ability and willingness to take the necessary steps to avoid undesired laws and to select the laws of other states. *Second*, some states must be willing and able to supply the desired laws. *Third*, political forces must respond to enhanced choice [that is, changes in law demanded by parties] . . . *Fourth*, federal statutory or constitutional law may play a role in the competition by either facilitating or hindering party choice.[31]

Judgment arbitrage is a powerful example of the first element, "significant demand" by parties. The size of transnational judgment awards can easily justify the higher transaction costs involved in "tak[ing] the necessary steps to avoid undesired laws and select[ing] the laws of [otherwise inconvenient] states."[32] Further, parties' willingness to pursue strategic advantages in law and forum suggests that demand in the market for recognition is robust. But analysis of the remaining three elements illustrates why that market does not function properly.

In high-value cases against large judgment debtors, the fourth law market element—the rule of "federal statutory or constitutional law," that is, the requirement that states enforce one another's recognition judgments—will have a clear effect on judgment creditors' strategy, since it renders their choice of forum and law conclusive for the remainder of the domestication proceeding. If states truly wished to cater to foreign judgment creditors (perhaps out of a desire to attract litigation to their courts), today's system

---

28. Most state legislatures have enacted statutes that prescribe recognition law and procedures, and those are in turn interpreted by state courts. A significant minority of states continue to entertain recognition actions on a purely common-law basis. For a discussion of recognition law variation across states, *see* Part II.B.2, *infra*.

29. *See* Part V.B, *infra*; *see generally* O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11.

30. *See, e.g.*, Brand, *Enforcement*, *supra* note 5, at 288 (noting that "state legislatures have not given priority to enacting . . . statute[s]" that modify the common-law rule on recognition and enforcement), 284 (noting failure of commentators to stimulate successful such efforts), 287 (deeming the inability to secure passage of state legislation "regrettable" and a "failure").

31. O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 166 (emphasis added).

32. *Id.*

would permit them to. However, it is unsurprising that states have thus far declined to compete for such business since by definition foreign creditors pursuing enforcement actions are seeking to extract wealth from the local economy. States do not appear to be competing for the role of safeguarding the assets of prospective judgment debtors either, however. Not only has there been no race to enact stricter recognition regimes, but New York, the international business capital of the United States, continues to adhere to the receptive 1962 Uniform Foreign Money Judgments Recognition Act,[33] which makes domestication easier than any other recognition statute.[34]

The lack of dynamism in the market for recognition law may be a consequence of the faith-and-credit rules embodied in O'Connor and Ribstein's fourth element. Today, a determination by a New York court that a foreign country's judgment can be enforced in New York also means it can be enforced in Florida, because the New York court's determination creates a New York judgment that Florida must enforce. Forty-seven states and the District of Columbia have adopted a statute that makes this procedure essentially automatic[35] (the other three states routinely enforce sister-state judgments anyway),[36] and a similar federal statute mandates inter-district enforcement of federal judgments.[37] Plaintiffs can thus bring recognition and enforcement actions sequentially, circumventing sources of recognition law they dislike at the recognition stage and then enforcing their recognition judgment in any state where the debtor has sufficient assets to satisfy it. Moreover, the uncertain payoffs of changes to any individual state's recognition law may make focusing on it less appealing for politicians. Indeed, if one were *trying* to blunt the incentives of individual states to innovate recognition law, one could scarcely do better than to adopt the current regime.[38] This limitation and its impact on the development of state law has largely escaped academic criticism.

From a simple rational choice standpoint, a plaintiff who can choose from more than one forum will choose the one in which she can maximize the

33. *See* note 12, *supra*.

34. *See* Part III.B.2, *infra*.

35. *See* Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 261 (1986) (establishing registration procedure to facilitate easy enforcement of sister-state judgments) [hereinafter Enforcement Act]. As of February 3, 2013, California, Massachusetts, and Vermont were the only U.S. states not to have adopted some version of the Enforcement Act.

36. *See, e.g.,* 18B Charles Alan Wright, et al., Federal Prac. & Proc. Juris. § 4467 (2d ed. 2012); Arthur Anyuan Yuan, *Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective*, 36 Geo. Wash. Int'l L. Rev. 757, 761 (2004).

37. *See* 28 U.S.C. § 1963.

38. *Cf.* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 Stan. L. Rev. 1371, 1428 (2012) ("Perhaps all law is a tool for social ends. Conflicts is a meta-tool, a tool for the ends of other legal doctrine . . . . The problem with meta-uncertainty is not just that it diminishes certainty overall, but that it deprives lawmakers of the assurance that their chosen way to resolve each individual problem will be effectuated. For any substantive end, there is a special interest in keeping the plumbing clear.").

expected value of her claim, less litigation costs.[39] This determination will turn in part on "the substantive and procedural rules of that court's legal system."[40] Courts and commentators debate whether U.S. or foreign courts offer a better deal to foreign plaintiffs shopping for a forum in which to litigate the merits of their dispute,[41] but the current discussion of the controversial "forum shopping system"[42] is incomplete because it fails to take account of the United States' state-by-state system of recognizing and enforcing foreign judgments. Specifically, commentators have overlooked what has become a three-stage process that gives plaintiffs considerable power to cherry-pick different forums and legal regimes to govern each stage of their dispute, from merits to enforcement.

Non-U.S. plaintiffs now routinely pursue transnational lawsuits against U.S. citizens and foreign-based corporations in three stages. *First*, they decide to litigate the merits of a suit in the court of a foreign country. *Second*, if they prevail, they bring a recognition suit in an American court for the purpose of converting the foreign judgment into a judgment that can be collected in the United States. The source of recognition law that controls is that of the state in which the recognition suit is filed, and the resulting recognition judgment formally constitutes a new judgment of the recognizing (that is, American) court. *Third*, they seek to enforce that American recognition judgment against the debtor's assets in the United States. This enforcement action is formally distinct from the recognition stage,[43] but so long as the foreign judgment has been recognized, the enforcement action is virtually guaranteed to succeed. The only part of this process over which American courts have discretion is recognition. Accordingly, the near-silence in the literature and cases on the role of incentives in a party's selection of one among many American recognition regimes is surprising.

---

39. *See* Whytock, *Evolving Forum Shopping System*, *supra* note 6, at 486–87; Brand, *Enforcement*, *supra* note 5, at 255; Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 383 (2006) ("To shop among those legitimate choices for the forum that offers the potential for the most favorable outcome is the only rational decision . . . because forum shopping maximizes the client's expected payoff."); Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1372 (2004) (same). As Richard Posner has noted in his treatise, "[t]he assumption of rational utility maximization is a useful tool of analysis rather than a complete description of reality, but it has considerable truth value as otherwise it would not be useful." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 4 (8th ed. 2011).

40. Whytock, *Evolving Forum Shopping System*, *supra* note 6, at 487.

41. *Compare id.* at 483–84 (noting trends favoring foreign forums), *with* Russell J. Weintraub, *Introduction to Symposium on International Forum Shopping*, 37 TEX. INT'L L.J. 463, 463 (2002) (noting pro-plaintiff features of U.S. law and courts), *and* Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730, 733 (C.A. 1982) ("As a moth is drawn to the light, so is a litigant drawn to the United States.").

42. *See* Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 68 (1991); *see* Whytock, *Evolving Forum Shopping System*.

43. *See, e.g.*, Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573, 581 (Me. 2008) (distinguishing between recognition and enforcement stages); Guinness PLC v. Ward, 955 F.2d 875, 889 (4th Cir. 1992) (questions of whether a foreign-country judgment should be recognized "are distinct and separate inquiries from those concerning whether such a judgment once recognized is entitled to enforcement"); *see also* Pinilla v. Harza Eng'g Co., 324 Ill. App. 3d 803 (1st Dist. 2001).

The current recognition-and-enforcement procedure stymies jurisdictional competition for state recognition law. Because states cannot internalize more than a fraction of the benefits that flow from reform to their recognition regimes, their incentives to participate in a competition to be the supplier of the "best" law (however defined) are limited. Thus, the judgment arbitrage loophole that enables State *A* to decide whether a judgment rendered by Country *X* is enforceable in State *B* stunts law development. And it achieves this without creating an offsetting benefit to what might be called full faith and credit values—that is, a sense of national unity—because the recognizing state will generally lack a genuine interest in whether its judgment—which merely embodies another judgment that is the product of a foreign legal system—is enforceable in another state.

The federal statute this Article proposes builds on the work of scholars writing at the intersection of choice of law and law and economics, including O'Connor, Ribstein, and Bruce Kobayashi.[44] It aims both to improve the quality of state recognition law and, ultimately, to promote uniformity. Among other things, uniformity enhances predictability[45] and makes it easier for American judgments to be enforced in foreign countries.[46] Although jurisdictional competition can be expected to encourage disuniformity in the near term, competition may narrow differences in state recognition law through spontaneous uniformity—states copying one another's successful regimes—faster and more completely than the current system of model acts that are promulgated centrally, by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), and that many states have declined to adopt.[47] There is even evidence that the uniform law-proposing process can *interfere* with the process of spontaneous state-law uniformity.[48] Because it adapts through competition and innovation, spontaneous uniformity is also more likely than uniform lawmaking to result in optimal recognition law.

Domestication, like other national systems of state law, should be judged in part by how well it promotes the goal of creating a market for law. Currently, jurisdictional competition in the area is largely illusory because of

44. *E.g.,* O'Hara [O'Connor] & Ribstein, The Law Market; Bruce H. Kobayashi & Larry E. Ribstein, *The Non-Uniformity of Uniform Laws*, 35 J. Corp. L. 327, 359 (2009) [hereinafter Kobayashi & Ribstein, *Non-Uniformity*]; Bruce H. Kobayashi and Larry E. Ribstein, *Evolution and Uniformity*, 34 Econ. Inquiry 464 (1996) [hereinafter Kobayashi & Ribstein, *Evolution and Uniformity*]; Bruce H. Kobayashi and Larry E. Ribstein, *Uniform Laws, Model Laws and the ULLCA*, 66 Colo. L. Rev. 947 (1995) [hereinafter Kobayashi & Ribstein, *Uniform Laws, Model Laws and the ULLCA*]; Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 Ga. L. Rev. 49 (1989).

45. Silberman & Lowenfeld, *A Different Challenge*, *supra* note 6, at 637–38.

46. *See, e.g.*, ALI Act § 5; *see also* 1962 Recognition Act, Prefatory Note.

47. *See* Kobayashi & Ribstein, *Evolution and Uniformity*, *supra* note 44; Kobayashi & Ribstein, *Uniform Laws, Model Laws and the ULLCA*, *supra* note 44.

48. *See* Kobayashi & Ribstein, *Non-Uniformity*, *supra* note 45, at 359 ("We show that NCCUSL does not follow a strategy of providing laws that are likely to be uniformly adopted by the states, and that . . . [it] does not follow the most logical uniformity strategy of utilizing the state process of spontaneous uniformity."); *see id.* at 360.

the trump-card status of the recognition judgment at the enforcement phase. Plaintiffs have an incentive to choose the most favorable law and forum available. Moreover, even states inclined to protect the assets of global companies at risk of becoming transnational judgment debtors have limited incentives to adopt protective recognition laws, since as long as one state offers a liberal regime, plaintiffs can opt into it at the recognition stage (assuming the debtor has contacts or, possibly, assets there) and then bring an enforcement action in any U.S. jurisdiction with virtually guaranteed success. The costs of judgment arbitrage, therefore, fall mainly on the states where debtors to transnational judgments—typically, large companies—keep significant assets[49] (and on the debtors themselves). In addition, the national law market is harmed by the absence of meaningful competition.

B. The Awkward Position of Judgment Domestication in Conflicts of Law

The main task of conflicts-of-law principles is to help decide which sovereign's law applies to a dispute that touches two or more sovereigns.[50] Like other conflicts puzzles, the domestication of foreign judgments involves questions about the allocation of authority among sovereigns, the appropriate role of party choice, and the costs and benefits of enabling choice of law and forum.[51] The academic debate over choice of law has been covered extensively elsewhere,[52] so only the outlines will be sketched here. Even a brief overview of choice-of-law theory demonstrates that the current domestication regime cannot be justified under any school of conflicts analysis.

In the United States, choice-of-law theories come in two major species: traditional and modern. The traditional regime was a set of rules as opposed to standards, and reigned until the middle of the twentieth century.[53] Its rules were embodied in Joseph Beale's treatise[54] and the First Restatement of Conflicts,[55] for which he was the reporter. Under the First Restatement, location and timing determined the state law that applied to a dispute: "a [party's] right vested under the law of the place of the last event necessary to

49. *Cf.* Jack L. Goldsmith & Alan O. Sykes, Lex Loci Delictus *and Global Economic Welfare:* Spinozzi v. ITT Sheraton Corp., 120 HARV. L. REV. 1137, 1137 (2007) (contending that choice-of-law rules that encourage application of forum law "give plaintiffs an incentive to sue in a forum that has more generous [substantive law] than the place of injury.").

50. *See* BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW, *supra* note 11, at 1.

51. *See, e.g., id.* at 633–62, 737–803.

52. *See, e.g.*, BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW, *supra* note 11, at 15–296; LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 11–108 (1991).

53. *See, e.g.*, Erin O'Hara [O'Connor] & Larry E. Ribstein, *Conflict of Laws and Choice of Law* (2009), in ENCYCLOPEDIA OF LAW AND ECONOMICS (Edward Elgar ed.) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1499311 [hereinafter O'Hara [O'Connor] & Ribstein, *Conflict of Laws*]; William Tetley, 38 COLUM. J. TRANSNAT'L L. 299, 317–19 (1999); Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1041–46 (1987).

54. JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935).

55. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT OF CONFLICTS].

the assertion of that right."[56] Thus, a set of territorial "vested rights" rules dominated. Tort suits, for example, were governed by the law of the place of the wrong, or *lex loci delictus*. Most disputes over contract terms were resolved according to the law of the place of contracting, or *lex loci contractus*, and those having to do with contract performance were governed by the law of the place of performance.[57] Property disputes were determined by *lex loci situs*, the law of the property's location.[58]

By the 1950s, the First Restatement had attracted intense criticism from conflicts scholars and courts, including some who had originally been among its chief backers.[59] The traditional "vested rights" approach was inflexible, arbitrary, inefficient, and led to bad results, the modernizers said. A Second Restatement[60] issued, and it embodied more flexible choice-of-law principles. By 2012, only ten states purported to follow the First Restatement in the areas of torts and twelve in contracts.[61]

States that have ditched the First Restatement have generally replaced it with one of three approaches:[62] (1) Robert Leflar's "better law";[63] (2) Brainerd Currie's interest analysis;[64] or (3) the Second Restatement's most significant relationship test.[65] In contrast to the relatively bright-line rules of the First Restatement, these approaches are all subjective. Leflar believed that states making choice-of-law determinations should put a thumb on the scale for the "better law," defined as that law which best promotes justice.[66] Currie and fellow interest analysts objected that "[e]ach state thinks its laws are 'better' in general,"[67] and thus considered "better law" a dubious touchstone. Currie interest analysts believed that states only sought to protect

56. *See* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 252 (1992) [hereinafter Laycock, *Equal Citizens*].

57. *See* FIRST RESTATEMENT OF CONFLICTS § 332.

58. *See* Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad As Its Reputation?*, 32 S. ILL. U. L.J. 39, 58 (2007) (citing FIRST RESTATEMENT OF CONFLICTS § 208–54).

59. *See* BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW, *supra* note 11, at 177–78 (citing work of Walter Wheeler Cook).

60. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

61. Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Fifth Annual Survey*, 60 AM. J. COMP. L. 291, 309 (2012) [hereinafter Symeonides, *Choice of Law 2012*]. There is some overlap among the groups of states following the First Restatement for torts and contracts. For a detailed accounting, *see id.*

62. *See, e.g.*, Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 359–64 (1992); O'Hara [O'Connor] & Ribstein, *Conflict of Laws*, *supra* note 53, at 4.

63. *See, e.g.*, Robert Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966).

64. *See, e.g.*, Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171 (1959).

65. *See, e.g.*, SECOND RESTATEMENT OF CONFLICTS § 6(2) cmt; Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 VT. L. REV. 1 (2002).

66. *See* O'Hara [O'Connor] & Ribstein, *Conflict of Laws*, *supra* note 53, at 4; ROBERT A. LEFLAR, AMERICAN CONFLICTS OF LAW § 107 at 212–15 (3d ed. 1977).

67. *See* O'Hara [O'Connor] & Ribstein, *Conflict of Laws*, *supra* note 53, at 4; Symeon Symeonides, *Revolution and Counter-Revolution in American Conflicts Law: Is there a Middle Ground?*, 46 OHIO ST. L.J. 549, 566 (1985) (discussing Currie's skepticism towards "better law" concept).

their own domiciliaries, not foreign residents, with their laws, and proposed that courts adopt standards that reflect this assumption as a check against the extraterritorial application of state law.[68]

Among the modern schools, the reporters of the now-dominant Second Restatement adopted a third approach, known as the most significant relationship standard. This approach requires courts to apply the law "'of the state of most significant relationship,'" a concept that, the reporters acknowledged, "provides some clue to the correct approach but does not furnish precise answers."[69] A majority of states follow a version of this standard for torts, contracts, or both.[70]

Like issues that arise in sister-state conflicts, domestication is governed by state law; often permits the use of more than one state's law; and raises questions about inter-state forum shopping, fairness, and the ability of U.S. states to regulate activity in their sister states. Despite these similarities, domestication today is not regulated by sister-state conflicts analysis.

The failure of doctrine and commentators to consider conflicts of sister-state recognition law may flow from the sequence in which that law is selected, which prevents the formation of a live conflict. At the first stage of domestication, a creditor files a recognition action in any court that can assert personal jurisdiction over the debtor. The creditor need not justify her selection of the forum; the recognition court will simply permit the suit to move forward, applying its own law. Next, with a state recognition judgment in hand, the creditor can enforce against the debtor's assets anywhere in the country without causing a direct conflict of domestic law, because today (it is assumed) national unity demands that sister states enforce one another's judgments, including those that merely rebrand a foreign country's judgment, with minimal scrutiny.

While domestication does not create direct conflicts of state law, questions fundamental to sister-state conflicts are likewise fundamental to the domestication process. A federal statute creating a territorial limitation on the effect of recognition judgments would focus states on their own interests in an area where, as Currie might observe, states' interests in extending their law beyond their territory are weak anyway.[71] This change would by definition require states to internalize the costs and benefits of their own recognition laws, a step that can be expected to cause states to balance the interests of judgment creditors and debtors more deliberately. Enacting such a statute would require a slight but important enlargement of the conceptual basis of the U.S. domestication system: domestication would automatically take into account a possible sister-state component *before* it becomes active. If the stat-

68. *See* O'Hara [O'Connor] & Ribstein, *Conflict of Laws*, *supra* note 53, at 4.

69. Second Restatement of Conflicts § 6(2) cmt. The reporters listed factors that courts should consider in adhering to that principle. *See id.* § 6.

70. *See* Symeonides, *Choice of Law 2012*, *supra* note 61, at 309.

71. *See* Laycock, *Equal Citizens*, *supra* note 56, at 316–17.

ute were adopted, a creditor wishing to use the courts of more than one state to satisfy her judgment would need to bring separate recognition actions in each state.

Moreover, even as courts and commentators voice reluctance to any formal reopening of judgments,[72] courts presented with major foreign judgments and legislatures considering reforms of recognition law seem increasingly willing to reexamine foreign judgments rather than treating them as a black box not subject to serious review.[73] The regime is evolving in a way that suggests a growing influence of conflicts of law values. Introducing a territorial limitation on recognition law makes that shift explicit, and enables states and the nation at large to capitalize on its benefits better than they can today.

II. Conceptualizing the U.S. Regime for Domesticating Foreign Judgments

"Sister State judgments are entitled to full faith and credit throughout this country. This is not true of judgments rendered in foreign nations. As a result, cases may be expected to arise where effect will be denied a foreign nation judgment rendered in circumstances in which a sister State judgment would be entitled to full faith and credit." — Restatement (Second) of Conflicts (1971), § 10, Reporter's Note.

"It's no wonder that truth is stranger than fiction. Fiction has to make sense." — Mark Twain

A creditor to a foreign judgment must initiate actions for recognition and enforcement in order to import the judgment into the American legal system. In a recognition proceeding, an American court decides whether the foreign judgment should be extended credit in the United States. This imprimatur is all-important: recognition is a necessary precondition to enforcement, and once granted it is binding on all other American courts.[74] This means that a recognition judgment can be enforced in any American court

72. *See, e.g.*, Hilton, 159 U.S. at 202–03; *Society of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000); Louis H. Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 65 (1956).

73. *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 584–626 (S.D.N.Y. 2011), *rev'd on other grounds*, Chevron Corp. v. Naranjo, 667 F.3d 232 (2d. Cir. 2012) (examining facts of Ecuadorian litigation closely); ALI Act § 5(a)(ii) (proposing to make nonrecognition mandatory where the underlying foreign "judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question.").

74. *See* Baker by Thomas v. General Motors Corp., 522 U.S. 233, 233 (1998); Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943); Guinness PLC v. Ward, 955 F.2d 875, 891 (4th Cir. 1992). Some commentators may have overstated the scope of this obligation. *See, e.g.*, Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute*, 45 New Eng. L. Rev. 63, 75 (2010) ("The extraterritorial effect of U.S. state judgments is governed by the Full Faith and Credit Clause, which *compels* states to recognize and enforce most judgments entered by sister states.") (emphasis added); Part III.B.1, *infra*.

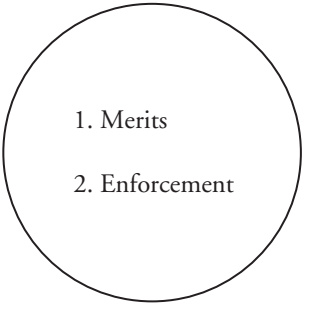
with jurisdiction over the debtor's assets. Recognition judgments are also significant beyond the enforcement context: a foreign-country judgment, once recognized, enjoys preclusive effect in parallel and collateral proceedings.[75]

The American system of domesticating foreign judgments has been surveyed elsewhere,[76] but the evolution of transnational litigation has magnified a weakness in its design—namely, its inter-state component. Examining this neglected dimension reveals that the leap to specify substantive standards of recognition law has skipped an important stage.

A. Incentives in the U.S. Judgment Domestication Regime

Plaintiffs wishing to select the law and forum that will apply to their transnational cases have options. A rational plaintiff will bring the merits, recognition, and enforcement stages of her lawsuits in those jurisdictions that will maximize her chance at (and amount of) recovery, less litigation costs.[77] Thus, a plaintiff in a transnational lawsuit now shops in three stages. She first selects a forum in which to file her merits lawsuit. If successful in winning a judgment, she then selects a forum in which to bring an action to recognize the foreign judgment. Because American courts apply the substantive and procedural recognition rules of the state in which they sit, the plaintiff's choice of a recognition court decides not only the forum but also the governing law of the dispute. Third, the plaintiff chooses a forum in which to bring an action to enforce her U.S. judgment. Finally, none of these three forums need be the same as any other. Figures 1, 2, and 3 illustrate these possibilities, with each circle representing a single jurisdiction.

FIGURE 1: "CONVENTIONAL LITIGATION": ONE JURISDICTION FOR ALL STAGES OF LITIGATION



75. *See, e.g.*, 2005 Recognition Act § 4 cmt. ¶ 2; Jaffe v. Accredited Surety & Casualty Co., Inc., 294 F.3d 584 (4th Cir. 2001).

76. *See, e.g.*, Brand, *Enforcement*, *supra* note 5.

77. *See* note 39, *supra*.

In the conventional model, the forum rendering and enforcing the judgment is the same, obviating the need for any domestication suits.

FIGURE 2: "CLASSIC CROSS-BORDER LITIGATION": ONE JURISDICTION FOR MERITS LITIGATION, ANOTHER FOR DOMESTICATION

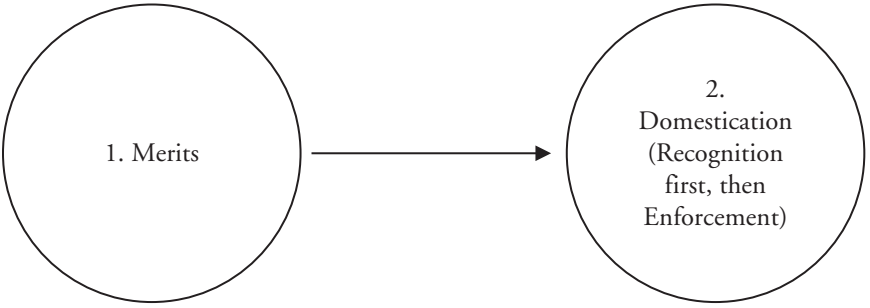
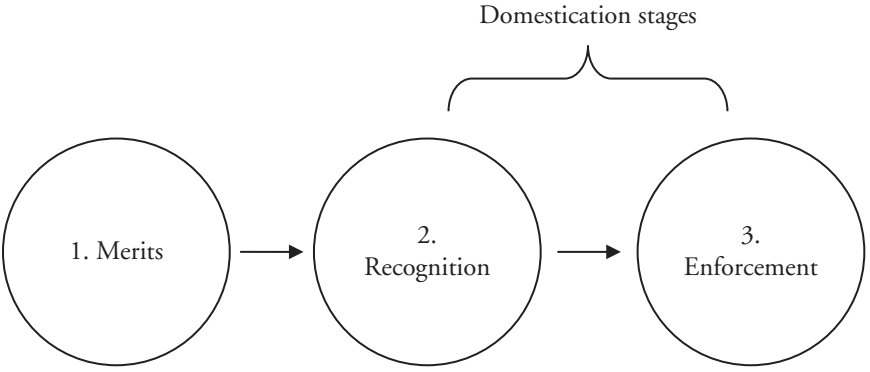


Figure 2 depicts what might be described as the classic model of cross-border litigation: a case is litigated to judgment in one country, and then that judgment is made enforceable—and enforced—in a single jurisdiction within another country. Most transnational cases continue to be litigated this way today. In such cases, courts often collapse the formal distinction between the recognition and enforcement stages of the proceedings, and issue a single decision granting summary judgment to the creditor on recognition and ordering enforcement.[78]

FIGURE 3: "JUDGMENT ARBITRAGE": STRATEGIC SELECTION OF SEPARATE JURISDICTIONS FOR MERITS, RECOGNITION, AND ENFORCEMENT



78. *See, e.g.*, United Steelworkers, Local 1-1000 v. Forestply Indus., Inc., 702 F. Supp. 2d 798, 803 (W.D. Mich. 2010).

To employ judgment arbitrage, plaintiffs bring a recognition action in one U.S. jurisdiction and an enforcement action in a second U.S. jurisdiction.

Whether they opt for the model depicted in Figure 1, 2, or 3, the class of plaintiffs bringing transnational cases occupies a position that would be the envy of every plaintiffs' lawyer: subject only to minimal jurisdictional requirements,[79] they exert unilateral control over both the law and forum that will govern each of the three important stages of their dispute.[80]

When enormous sums are at stake,[81] transnational plaintiffs pursue sophisticated strategies to maximize their chances at enforcement, just as they do at the merits phase. In this connection, one practice manual suggests employing judgment arbitrage (albeit not by name):

> If the circumstances in the [U.S.] state where you are ultimately seeking conversion do not favor recognition, an alternative strategy to obtaining direct recognition is to seek a judgment in another state under that state's foreign country judgment recognition procedures, and then establish the recognized domestic judgment in your state as a sister-state judgment entitled to full faith and credit.[82]

Several academic articles allude to this strategy as well.[83]

Judgment arbitrage affords plaintiffs advantages they would be foolish to ignore, but the nature of the practice makes reliable statistics on its use difficult to obtain. Like other adversaries, parties to transnational judgments "bargain in the shadow of the law."[84] Debtors ordered to pay enormous damages awards by foreign courts often settle out of court rather than take their chances at resisting domestication, a process plaintiffs largely control.[85] In a high-profile transnational lawsuit, the fact of a settlement is likely to

79. *See* note 26, *supra*.

80. Plaintiffs wishing to bring transnational merits lawsuits in the United States, and in some other countries, may also have to contend with the *forum non conveniens* doctrine at the merits stage, discussed at Part IV.A, *infra*.

81. For example, the plaintiffs in the transnational Chevron litigation secured a judgment in Ecuador for $18 billion.

82. Robert E. Lutz, A Lawyer's Handbook for Enforcing Foreign Judgments in the United States and Abroad 29 (2007) [hereinafter Lutz, Lawyer's Handbook].

83. *See, e.g.,* Lucien J. Dhooge, Aguinda v. ChevronTexaco*: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. Transnat'l L. & Pol'y 1, 40 (2009) ("Once [recognition] has been achieved, the resulting state judgment is entitled to full faith and credit throughout the United States."); Saad Gul, *Old Rules for a New World? The Constitutional Underpinnings of U.S. Foreign Judgment Enforcement Doctrine*, 5 Appalachian J.L. 67, 83 (2006) (same); Friedrich K. Juengen, *An International Transaction in the American Conflict of Laws*, 7 Fla. J. Int'l L. 383, 398–99 (1992) (same).

84. *See* Robert H. Mnookin and Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 968 (1979).

85. *See* Parts I.B & C, *infra*.

become public[86] (though the amount may not), but in a less prominent case, the existence of a settlement can often be kept confidential or at least quiet.

The heterogeneity of state laws governing recognition, and creditors' ability to choose from among them, create the possibility of choice. But this choice would not be nearly so consequential if not for a set of interjurisdictional faith-and-credit legal rules, detailed *infra* at Part III, that require American courts to enforce judgments rendered by other American courts.

B. Options for Recognizing Foreign Judgments: A Continuum of Tradeoffs

The standards courts apply to determine whether to recognize foreign judgments fall along a continuum. At one end are jurisdictions with "protective" regimes, which allow consideration of a broad variety of defenses to recognition. At the other end are "receptive" jurisdictions, which permit only a limited class of defenses. A decision about where to locate recognition law on the continuum is a choice among tradeoffs; states weighing regimes along the continuum and the demands of competing interest groups might reasonably reach different conclusions. Philosophers (or law professors), imagining themselves behind the veil of ignorance,[87] subject to a universal moral imperative,[88] or bound to maximize total social welfare,[89] might also reasonably make different choices. The statute proposed in this Article is agnostic on the question whether receptive or protective regimes are preferable. Rather, it alters the system under which they operate by enabling states to select any tradeoff along the continuum, and hold parties that sue within their borders to it.

To the extent one views judgment creditors and debtors as proxies for classes with coherent, shared interests, one might emphasize not only efficiency's allocative dimension (whether a rule favors transnational creditors or debtors) but also its social one (whether a rule favors the interests these classes are believed to represent).[90] Lawyers for transnational plaintiffs often style themselves as "David" figures pursuing "Goliath" corporations, and creditors in a number of prominent large cross-border judgments have indeed included groups of individual plaintiffs suing big companies.[91] Fur-

86. For example, following the court's decision to grant Bank of New York's motion for leave to appeal a U.S. bankruptcy-court judgment nullifying a foreign judgment against Lehman Brothers, *see* Lehman Bros. Special Fin. Inc. v. BNY Corp. Trust Servs. Ltd. (*In re* Lehman Bros. Holdings, Inc.), Adv. Pro. No. 09-01242, dkt. 130 (JMP) (S.D.N.Y. Sept. 21, 2010), it was reported in news outlets that the parties settled for an undisclosed amount. The author represented BNY in this case. *See* note *, *supra*.

87. *See generally* John Rawls, A Theory of Justice (1971).

88. *See, e.g.*, Immanuel Kant, Groundwork of the Metaphysics of Morals (1785).

89. *See, e.g.*, John Stuart Mill, Utilitarianism (1863).

90. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 29–33 (1960).

91. *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd*, Chevron Corp. v. Naranjo, 667 F.3d 232 (2d. Cir. 2012) (individual Ecuadorian plaintiffs leveling environmental and health claims against Chevron); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011) (individual Nicaraguan plaintiffs alleging pesticide contamination brought recognition suit against American banana grower and chemical manufacturer); Bi v. Union

ther, it seems unlikely that "Davids" will regularly be pursued in transnational lawsuits seeking large damage awards. However, creditors and debtors to transnational judgments can both be "Goliaths."[92]

1. *Receptive Regimes*

Receptive regimes naturally promote the values of finality and efficiency, and encourage the reciprocal enforcement of American judgments.[93] By favoring deference to the foreign court's merits determination, receptive regimes make it harder for debtors to challenge judgments rendered through unfair or corrupt means. Indeed, under the first[94] of two versions[95] of a "uniform" state recognition law (each has been adopted by a large number of states),[96] the fact that a judgment was rendered by a concededly non-impartial tribunal or procedure is no defense to recognition so long as the *system* of which that court was a part was not biased on the whole.[97] Thus, by making recognition easier, a receptive regime increases the risk that an illegitimate judgment will be enforced by an American court. Receptive rules naturally favor the interests of creditors over debtors, who have a harder time avoiding judgments.

Among other things, a state's decision to select a receptive regime implies a greater *ex ante* comfort with crediting the decision-making process of foreign courts. In such a regime, the recognition court conducts a review to ensure that very basic due process protections were observed by the rendering court, or in the rendering court system as a whole,[98] and in so doing it effectively delegates the task of ensuring fairness to that court. Unless widely abused, receptive regimes should also promote greater harmony in foreign relations.[99]

2. *Protective Regimes*

Protective regimes are the mirror image of receptive regimes: they make it difficult to domesticate judgments procured through processes unaccept-

---

Carbide Chemical and Plastics Co., 984 F.2d 582, 583 (2d Cir. 1993) (individual plaintiffs harmed by "the most devastating industrial disaster in history" in India attempted to challenge settlement reached between company and Indian government).

92. Transnational judgment creditors are often "Goliath" companies. *See, e.g.,* note 86, *supra*.

93. Indeed, many countries consider the enforceability of foreign judgments in the United States as a factor in deciding whether to enforce U.S. judgments.

94. *See* 1962 Recognition Act.

95. *See* 1962 & 2005 Recognition Acts; *see* Part III.B.2.a, *infra*.

96. *See id.*

97. *See* 1962 Recognition Act; Ashenden, 233 F.3d at 476–77 (holding that proof of a non-impartial "*system*" of tribunals is required and rejecting argument that foreign tribunals can be examined on a "retail," case-by-case basis).

98. *See id.*; 2005 Recognition Act § 4(c)(7–8) (permitting examination of individual rendering tribunal).

99. *See* Yaad Rotem, *International Law and the Economic Crisis: The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505 (2010) [Rotem, *International Law and the Economic Crisis*].

able to American courts. Protective regimes should lower error rates and raise litigation costs. They also enhance the recognizing sovereign's control over the dispute in general and its vision of what merits outcomes and types of damages awards (compensatory only? punitive?) should flow from the type of case before it. European countries generally follow a more protective model than even the most protective U.S. states.[100]

Protective laws make available to judges a variety of tools that lessen the likelihood of recognition. For example, the 2005 Recognition Act permits case-by-case consideration of the foreign court's proceedings,[101] a practice that Judge Posner has ridiculed as inviting "retail" relitigation of the merits.[102] Some protective regimes will deny recognition on reciprocity grounds,[103] where the rendering jurisdiction would be unlikely to enforce a judgment of the recognition court (indeed many countries do not enforce American judgments).[104]

Relative to a receptive regime, a protective rule is fairer to debtors, because it permits the American court greater latitude to consider reasonable defenses to recognition. But fairness is not free. By expanding the scope of a judgment's review, a protective regime will to some extent "give the judgment creditor a further appeal on the merits,"[105] prolonging the process. Moreover, the costs of fairness do not fall equally: litigation costs in protective regimes are higher for both creditors and debtors, but the reduced chance of recovery may lessen the creditor's ability to pursue an aggressive recognition-and-enforcement strategy in the first place due to the way large collection suits are financed. These costs should be considered by any state contemplating a shift towards a protective regime.

---

100. When presented with judgments rendered by courts outside the European Union, some European countries impose an absolute reciprocity requirement, which is rare in the United States. *See, e.g.*, Volker Behr, *Enforcement of United States Money Judgments in Germany*, 13 J.L. & Com. 211, 220–21 (1994) (most European countries require unambiguous reciprocity as a precondition for enforcement, which means "a U.S. judgment may face serious problems" in Europe); Part III.B.2.b, *infra*. This requirement is easily satisfied where the merits litigation and enforcement are both pursued within the EU, because EU member-states are bound to recognize and enforce civil and commercial judgments rendered by fellow members. *See* Geert Van Calster, European Private International Law 115 (2013) (explaining that the Jurisdictional Regulation, known as "Brussels I," *see* Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, "is very liberal on the question of recognition and enforcement[,] seeks to facilitate as far as possible the free movement of judgments, . . . reduc[es] the number of grounds which can operate to prevent the recognition and enforcement of judgments," and simplifies the enforcement procedure, rendering it "near-automatic and indeed notary practice."). For cases where the rendering and enforcement courts are both in the EU, therefore, jurisdictional competition (also known as regulatory competition) among member-states for the "best" domestication regime is effectively outlawed.

101. *See* 2005 Recognition Act § 4(8); Part III.B.2, *infra*.

102. Ashenden, 233 F.3d at 477.

103. *See*, *e.g.*, Shehadeh v. Alexander, 727 S.E.2d 227, 228–29 (Ga. App. 2012) (reversing judgment of recognition where creditor to a Dubai judgment failed to show that Dubai courts recognize American judgments).

104. *See, e.g.,* Silberman & Lowenfeld, *A Different Challenge*, *supra* note 6, at 638–39.

105. Ashenden, 233 F.3d at 477.

Assuming no receptive jurisdiction is available for enforcement,[106] the adoption of a protective rule will make enforcement less likely. This causes the expected value of any recovery in the jurisdiction to drop well below the amount of the original damages award, and thus can be said to allocate the costs of fairness to plaintiffs.

A profound distributional impact would likely follow from this loss to creditors. While the inefficiency inherent in a protective regime will increase litigation costs to both creditors and debtors, debtors to large transnational judgments will generally be big companies with significant legal budgets. If debtors need to spend more money to defend enormous judgments, they will likely find it internally. Creditors in such cases, however, are more likely to rely on third-party litigation funding, a sector known as alternative litigation financing ("ALF").[107] Thus, raising costs to creditors can be expected to increase the bargaining power of companies supplying ALF vis à vis plaintiffs' law firms and plaintiffs themselves. The less efficient a recognition regime becomes, therefore, the more likely it is to distribute winnings to the professionals litigating and funding transnational lawsuits and away from their clients, who will have to surrender litigation costs and a share of any recovery. Since the equity stake or financing cost increases as the expected time to payout increases, the net recovery of individual plaintiffs will fall if the case drags on.[108]

In sum, even incremental increases in protectiveness can be expected to raise real costs to transnational plaintiffs significantly, and may dissuade some such plaintiffs from bringing suit in the United States at all.[109]

The financing history of the plaintiffs' case in the Chevron-Ecuador litigation serves as one illustration of these distributional consequences. The named plaintiffs were a group of forty-seven indigenous people who were presented with a seventy-five-page contract describing their entitlement to any monetary recovery.[110] The contract places them in ninth place in a "distribution waterfall," behind eight tiers of funders, lawyers, and advisers, and requires them to specifically disclaim any guarantee that they will receive a

106. By definition, the domestication phase of judgment arbitrage depends on the existence of at least one receptive jurisdiction for recognition and at least one protective jurisdiction that will enforce a foreign judgment recognized by the receptive state. Absent such mismatches, there would be no arbitrage. *See* Part II.A, Figures 2 & 3, *supra*.

107. *See* Part I.D, *infra*, for a brief discussion of ALF.

108. *See* Nicholas Dietsch, Note, *Litigation Financing in the U.S., the U.K., and Australia: How the Industry Has Evolved in Three Countries*, 38 N. KY. L. REV. 687, 692 (2011) (noting that because "fees increase as a lawsuit continues, a client's net recovery potentially diminishes the longer litigation continues").

109. *Cf.* Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should be Tamed not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55, 75–76 (2004).

110. Roger Parloff, *Have You Got a Piece of This Lawsuit?*, FORTUNE/CNNMONEY, June 28, 2011, http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/ [hereinafter Parloff, *Have You Got a Piece of This Lawsuit?*].

portion of any recovery owed to senior stakeholders.[111] Many indicated their assent to the contract by "signing" it with a fingerprint.[112]

To the extent a recognition regime leans protective, the ethical complications ALF creates when the interests of parties and their lawyers or financiers do not coincide[113] can be expected to increase. The decision to litigate in a protective or receptive jurisdiction, then, or to shift a recognition regime from one end of the spectrum towards the other, will be particularly momentous for ALF-backed cases.

III. How Sources of Law in Recognition and Enforcement Interact

Ideally, lawmakers and judges would choose the package of tradeoffs in recognition law that best advances the values and policy objectives of the sovereigns they serve. That is an unrealistic expectation today, however, because of the way in which U.S. states' incentives are ordered. Creditors can select the law of the most receptive state in the land for their recognition action, and—so long as a debtor has some presence there—can create an American judgment. The current system thus places a ceiling on the gains a state government can realize from the regime it selects. Through judgment arbitrage, a creditor can reap the benefits of a bargain struck by State *A* in choosing a receptive recognition regime without requiring State *A* or its citizens to internalize the regime's costs; upon enforcement in State *B*, those costs fall on the debtor's assets in State *B* and, derivatively, on State *B* itself, in the form of a wealth transfer away from its jurisdiction, and possibly its citizens, to foreign creditors. In addition to privileging judgment debtors, the availability of judgment arbitrage does at least two things to states as sovereigns: it (1) disempowers states that prefer protective recognition laws and (2) removes a major impetus for reform of state recognition law by minimizing the payoff of any such reform. These are some of the major costs of judgment arbitrage to the market for recognition law.

The rule that forum law controls on the question of recognition is partly responsible for the market-distorting effect of judgment arbitrage. This rule enables creditors to transfer the costs of receptive states' recognition regimes onto sister states, and means that states only enjoy full control over the balance of interests between debtors and creditors when creditors elect to

111. *Id.*

112. *Id.*

113. For examples of the growing professional responsibility literature on this question, *see* Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 Fordham L. Rev. 2791 (2012); Stuart L. Pardau, *Alternative Litigation Financing: Perils and Opportunities*, 12 U.C. Davis Bus. L. J. 65 (2011); ABA Comm'n on Ethics 20/20, *White Paper on Alternative Litigation Finance* (draft Oct. 19, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111019_draft_alf_white_paper_posting.authcheckdam.pdf; Vicki Waye, *Conflicts of Interests Between Claimholders, Lawyers and Litigation Entrepreneurs*, 19 Bond L. Rev. 225 (2007) (Austl.).

bring recognition actions within their territory. However, when creditors bring recognition and enforcement actions in separate states, the enforcing jurisdiction's autonomy slips away: recognition, and thus enforceability, has already been conclusively determined by the first state. The interaction of a default rule of constitutional law and two statutes—one federal, the other adopted by almost every state—assures this result, and leaves recognition as the only stage of the process where courts enjoy meaningful discretion. We will first examine the mandatory enforcement rules and then the different sources of recognition standards.

A. The Enforcement of State and Federal Judgments in Other State and Federal Courts

One precondition of judgment arbitrage is America's inflexible inter-jurisdictional faith and credit rules: upon a decision of one American court to accept a foreign judgment, every court in the land must agree to enforce it.

This obligation is a creature of the distinctive American system of overlapping sovereigns, which creates a structure of fifty co-equal quasi-sovereigns under the control of one super-sovereign. For purposes of recognition and enforcement, however, all fifty-one are co-equal: in general, American law does not tolerate resistance of a judgment where the dispute has already been decided by a U.S. state or federal court. The procedure for enforcing judgments across state and federal district lines is largely routine, and claims already litigated in one state or federal court are deemed *res judicata* if brought anew in a second American court. Except in rare circumstances,[114] the enforcement court will not reopen or block an out-of-state judgment; it will simply enforce it, and will deem any future claim based on the same underlying transaction or occurrence precluded.[115] This limitation to federalism surely helps to "alter the status of the several states as independent foreign sovereignties" and "make them integral parts of a single nation."[116] Transnational judgments complicate this principle, however. A statement of three features of the doctrine illustrates why:

1. A judgment of a state or federal court recognizing *a judgment of a foreign country's court* automatically strips the latter judgment of its foreign character and constitutes a *new judgment* of the recognizing (American) court.

114. *See, e.g.*, Sun Oil v. Wortman, 486 U.S. 717 (1988) (running of statute of limitations in State *B* will block enforcement of State *A* judgment); Baker by Thomas v. Gen. Motors Corp., 522 U.S. 222 (1998) (State *A* injunction loses its effect when enjoined party leaves for State *B*).

115. *See* 18B Charles A. Wright, Arthur R. Miller, et al., Federal Prac. and Proc. Juris. § 4467 (2d ed. 2012).

116. Milwaukee County v. M.E. White Co., 296 U.S. 268, 276–77 (1935).

2. This new American judgment enjoys a status *identical to that of any other judgment of that American court*, for example, a judgment resulting from a case litigated on the merits in that court.
3. State and federal courts consider *judgments of other American courts* formally equal to their own judgments.

The interaction of these commands means that American courts generally enforce recognition judgments of other American courts without scrutiny.

These commands can be found in a federal statute and a model uniform statute adopted by forty-seven states. Both provide a registration procedure that simplifies the process of enforcing a judgment of one American court in another. For this proceeding, the creditor can select any state or federal judicial district where the debtor has assets,[117] so long as the enforcement court has jurisdiction over those assets.

Selecting separate jurisdictions for recognition and enforcement imposes essentially no costs on creditors beyond the transaction costs of bringing separate actions. Most importantly, a debtor resisting an enforcement action brought in a second state or federal district possesses no special defenses to this type of enforcement action, only those defenses that he would have if resisting a judgment rendered by the enforcement court.[118] The stated purpose of automating this procedure, to speed the collection of already-decided judgments, is inspired, if not required, by the Full Faith and Credit Clause of the U.S. Constitution.[119] The intuition is that for reasons of national unity, it is better for American courts to treat the judgments of other American courts equally than to permit their reopening. Even errors of law or fact made by a State *A* court are deemed no defense to enforcement of the resulting State *A* judgment in a State *B* court.[120] When it comes to judgments that originate in foreign countries, the system currently permits no relaxation of this faith-and-credit policy.

1. *Enforcing Judgments from One Federal Court in Another*

In federal courts, 28 U.S.C. § 1963 establishes procedures for the inter-district enforcement of federal judgments. Section 1963 provides that a judgment rendered by any federal court "in an action for the recovery of money or property" can be registered by filing it with the clerk's office in any federal district court.[121] Once registered, such a judgment "shall have the same effect as a judgment of the district court of the district where

117. *See* note 26, *supra*.

118. *See* 28 U.S.C § 1963 (providing registration procedure for inter-district judgment enforcement in federal courts); Uniform Enforcement of Foreign Judgments Act (providing registration procedure for enforcement of sister-state judgments in state courts) [hereinafter Enforcement Act].

119. *See* U.S. CONST. art. IV, § 1; Part III.B.1, *infra*.

120. *See* SECOND RESTATEMENT OF CONFLICTS § 106.

121. 28 U.S.C. § 1963.

registered and may be enforced in like manner."[122] Section 1963, then, transforms the inter-district enforcement of federal judgments, including recognition judgments, into a ministerial task. Because the recognition law of the state in which the federal court sits controls the recognition stage,[123] Section 1963 enables a creditor to use the federal courts to externalize the costs of the state recognition law he selects onto any state in the country that can get jurisdiction over a debtor's assets.

2. *Enforcing State and Federal Judgments in State Courts*

As it is in federal courts, the enforcement of out-of-state and federal judgments in state courts is straightforward. Forty-seven states and the District of Columbia have adopted the Uniform Enforcement of Foreign Judgments Act ("Enforcement Act"),[124] which provides a registration procedure for sister-state and federal judgments identical in substance to the federal Section 1963. The Enforcement Act is a model act drafted by the Uniform Law Commission of the NCCUSL and was based on Section 1963.

Similar to Section 1963, the Enforcement Act permits enforcement of a sister-state or federal judgment merely "upon the act of filing it in the office of a Clerk of Court," and a filed judgment "has the same effect and is subject to the same . . . defenses . . . as a judgment of a [court] of this state and may be enforced or satisfied in like manner."[125]

In its commentary to the Enforcement Act, the NCCUSL promoted enactment on the grounds that the law significantly lowers the burden on judgment creditors, removes an impetus for federal preemption in the area, and "offers the states a chance to achieve uniformity in a field where uniformity is highly desirable."[126] California, Vermont, and Massachusetts are the only states not to have adopted the Enforcement Act.[127] In those states, judgment creditors must initiate a separate suit to enforce a foreign judgment,[128] but these proceedings are swift and are routinely conducted via summary judgment, and they permit only those (minimal) defenses to enforcement of a sister-state judgment that are available to debtors to an in-state judgment.[129] Because errors in a judgment (whether of law or fact) do not constitute grounds for courts in other states to reject the judgment,[130]

122. *Id.*; *see* Anderson v. Tucker, 68 F.R.D. 461, 463 (D. Conn. 1975) (once registered under Section 1963, judgments of other federal districts "are not 'foreign' judgments").

123. *See* note 23, *supra*.

124. Enforcement Act. The Enforcement Act defines "foreign judgment" to mean a sister-state or federal judgment, not a foreign-country judgment. *Id.* § 1.

125. *Id.* § 2.

126. *Id.* Prefatory Note. The NCCUSL is also known as the ULC, for Uniform Law Commission.

127. *See* NCCUSL, Enforcement of Foreign Judgments Act—Enforcement Status Map, *available at* http://www.uniformlaws.org/Act.aspx?title=Enforcement%20of%20Foreign%20Judgments%20Act.

128. This procedure remains available in the states that have adopted the Enforcement Act as well; the statute does not preempt it. *See* Enforcement Act § 6.

129. *See id.* § 2.

130. *See* Second Restatement of Conflicts § 106.

once a creditor secures recognition he can enforce in any state with few impediments.

B. Sources of Law on the Recognition of Foreign Judgments

Few breeds of plaintiff can select their forum with greater freedom than foreign judgment creditors. First, liberal personal jurisdiction rules in the United States, premised on the concept of minimum contacts,[131] mean that foreign judgment creditors can gain court access in many jurisdictions around the country.[132] The multinational corporations that comprise a large percentage of the defendants in high-stakes transnational litigation often have meaningful contacts with many states. This means creditors to foreign judgments can properly invoke the jurisdiction of many states when they bring their recognition and enforcement actions.[133] Second, from the pool of courts where plaintiffs can establish personal jurisdiction, they can select state or federal courts, and can choose the same court or two separate courts for the recognition and enforcement stages of their lawsuit. Third, forum law governs the question of recognition,[134] meaning that a plaintiff's ability to choose the court in which he files a recognition action also means he can select the substantive law.

Plaintiffs, then, can largely select both the substantive law that governs recognition and the court that will make that determination. Once enshrined in a recognition judgment, that determination has nationwide effect, and plaintiffs can enforce it anywhere in the United States where the debtor has assets.

A recognition action constitutes a request that a state or federal court declare a judgment capable of being enforced in that jurisdiction notwithstanding its having been rendered by the court of a foreign country. The creditor's required showing differs from state to state, but he must generally show that the underlying foreign judgment was final, valid, and enforceable where rendered.[135] The burden will then shift to the debtor to show why the judgment should not be recognized, on grounds that vary by state.[136]

In the United States, the substantive law governing recognition of money judgments is domestic in most relevant particulars. No treaty or other source of international law applies of its own force,[137] but foreign and inter-

131. *See e.g.*, International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); Sara L. Johnson, *Annotation, Validity, Construction, and Application of Uniform Enforcement of Foreign Judgments Act*, 31 A.L.R. 4th 706 § 15 (1984) (canvassing "minimum contacts" decisions of state courts).

132. *See* Roger P. Alford, *Arbitrating Human Rights*, 83 Notre Dame L. Rev. 505, 508–09 (2008).

133. *See* note 26, *supra*.

134. *See* note 23, *supra*.

135. *See*, *e.g.*, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009) (describing creditor's burden under Florida recognition statute).

136. *See*, *e.g.*, *id.* (describing shift of burden to debtor to "establish one or more grounds for non-recognition").

137. *See* note 11, *supra*.

national law can be considered to the extent incorporated by the relevant domestic source of law, that is, state law.[138] This typically takes the form of requiring that the rendering court observe international due process minima.[139] Some state laws provide for further consideration of foreign law by imposing a requirement of reciprocal enforceability. Finally, while state law supplies the rule of decision in recognition cases, federal conflicts-of-law rules dictate the inter-state effect of U.S. recognition judgments. The interaction of these sources of law works in subtle ways to give creditors almost complete control over the selection of forum and substantive law in domestication actions.

It is not clear that a federal statute would be required to change the current regime that is presumed to mandate inter-state enforcement of all American judgments. However, a federal statute expressly liberating American courts from full faith and credit in the domestication of foreign judgments would provide parties with more certainty than an attempt by courts or state legislatures at the same goal. Congress's power to enact such a statute is well-established.

1. *Constitutional Law*

The U.S. Constitution establishes a novel union of co-equal sovereigns under the reign of a single super-sovereign. Integral to this structure are a series of provisions and principles "designed to foster national unity and to move interstate relations away from the international model."[140] The Full Faith and Credit Clause of the U.S. Constitution[141] is key among these provisions. It does not explicitly regulate domestication, but because recognition constitutes a substitution by an American court of its own judgment for a foreign court's judgment, any effort to import one state's recognition judgment into a sister state implicates the Clause.

The Full Faith and Credit Clause imposes a duty upon states to enforce certain official acts of other states, and authorizes Congress to define the contours of that obligation. It provides:

> 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

138. *See* notes 18 & 23, *supra*.

139. *See* Part III.B.3, *infra*.

140. *See* Laycock, *Equal Citizens*, *supra* note 56, at 259–60 (citing "the Privileges and Immunities, Full Faith and Credit, Extradition, and Free Navigation Clauses, the Supreme Court's jurisdiction over suits between states, the prohibition of war and diplomacy between states, [and] the prohibition of state taxes on imports and exports" as examples of clauses "creating one nation out of separate states") (footnote calls omitted).

141. *See* U.S. CONST. art. IV, § 1.

> such Acts, Records and Proceedings shall be proved, and the Effect thereof.[142]

There is an inherent tension within the Clause: the first sentence would seem to require that "full" faith and credit be given to sister-state judgments, yet the second sentence, known as the Effects Clause,[143] specifies that Congress may prescribe the amount of "credit" that must be "given," implying that the amount of credit constitutionally due is not fixed and may be less than "full."[144] In 1790, Congress exercised its conflicts-regulating powers under the Effects Clause by enacting the Full Faith and Credit Act,[145] but this statute likewise did not expressly mandate the inter-state enforcement of judgments.[146]

Differences between the constitutional and statutory articulations of faith and credit have led to considerable doctrinal confusion.

> Starting in the later 1800s, "intellectual slippage" as to the difference between the clause and the statute led to a considerable power grab by the judiciary at the expense of legislative discretion. Without realizing what it was doing, the Court came to read the Full Faith and Credit Clause as itself dictating conclusive effect of judgments, leaving to the legislature a power to create exceptions. And that view prevails in the courts of today.[147]

The Supreme Court has referred to the faith and credit requirement as an "exacting" obligation and has interpreted it to mean that a final judgment of a competent state court "gains nationwide force."[148] The Clause thus provides a default rule favoring the enforceability of sister-state judgments, "not an inexorable and unqualified command."[149]

Recently, scholars have challenged the assumption that courts have a duty to grant *full* faith and credit to sister-state judgments.[150] Some commenta-

142. U.S. CONST. art. IV, § 1.

143. U.S. CONST. art. IV, § 1, cl. 2.

144. Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1273 (2009) [hereinafter Sachs, *Full Faith and Credit*].

145. 28 U.S.C. § 1738.

146. *See* Sachs, *Full Faith and Credit*, *supra* note 144, at 1238 ("[W]e know that [the Full Faith and Credit Act] was *not* understood to allow immediate cross-border execution of judgments (Madison's original hope for the effects power).") (citing Mills v. Duryee, 11 U.S. (7 Cranch) 481, 485 (1813); Phelps v. Holker, 1 U.S. (1 Dall.) 261, 264 (Pa. 1788) (opinion of Rush, J.)).

147. Kevin M. Clermont, PRINCIPLES OF CIVIL PROCEDURE 406–07 (3d ed. 2012) (quoting David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1589 (2009)) [hereinafter Engdahl, *The Classic Rule of Faith and Credit*].

148. Baker by Thomas v. General Motors Corp., 522 U.S. 233, 233 (1998); *see* Magnolia Petroleum Co. v. Hunt, 320 U.S. 430, 438 (1943) (rejecting public policy as a basis for denying full faith and credit to a sister-state judgment).

149. Pink v. A.A.A. Hwy. Exp., 314 U.S. 201, 210 (1941).

150. *See, e.g.*, Engdahl, *The Classic Rule of Faith and Credit*, *supra* note 147; Sachs, *Full Faith and Credit*, *supra* note 144.

tors[151] have argued that the Clause's mandatory dimension is evidentiary rather than substantive—that is, that it merely mandates that sister-state "Acts, Records, and judicial Proceedings" be admitted into the court record, not that these materials bind the courts of other states automatically.[152] Both the "substantive" and "evidentiary" interpretations of the Effects Power support the view that Congress can prescribe conflicts rules to control the substantive effect state and federal courts must grant one another's judgments. There is near unanimity among scholars that the Clause grants Congress the authority "to specify choice-of-law rules"[153] that govern the effect of sister-state judgments.

Using the Effects Power, Congress has prescribed inter-state conflicts rules in some areas.[154] Where Congress is silent, however, the presumption is that sister-state judgments are enforceable to the same extent as a judgment of the forum.[155] To date, apart from the Full Faith and Credit Act, Congress has not enacted a framework for adjudicating inter-state conflicts of law rules. With the exception of a statute governing state and federal recognition of foreign defamation judgments,[156] Congress has also not specified the effect of foreign-court judgments in the United States (much less the effect State *A* must accord the decision of State *B* to recognize a judgment from Country *C*). Thus, until Congress acts, rare is the state court that will resist the constitutional default rule of full faith and credit and deny enforcement of a sister-state judgment recognizing a foreign judgment. In fact, research revealed only one example of a state court holding that it was not bound by this requirement where the enforcement court's recognition law differed from that of the recognition court.[157] Straightforward inter-state

151. *See, e.g.*, Sachs, *Full Faith and Credit*, *supra* note 144, at 1206 (contending Full Faith and Credit Clause does not mandate substantive effect of sister-state records).

152. *See, e.g.*, *id.* at 1211; *but see* Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 526 (2013) (contending that in the nineteenth century "giving 'full faith and credit' to something meant viewing it as absolutely true and indisputable," and arguing that the evidentiary interpretation "simply would not have comported with this definition.").

153. Laycock, *Equal Citizens*, *supra* note 56, at 301; *see* Sachs, *Full Faith and Credit*, *supra* note 144, at 1206.

154. *See* Part V, *infra*. Federal statutes containing choice-of-law rules include laws regulating the enforcement of foreign defamation judgments (the Securing the Protection of our Enduring and Established Constitutional Heritage Act, 28 U.S.C. § 4101 *et seq.* (2010)), federal banking laws (the National Bank Act, 12 U.S.C. § 86 (2007)), and the Defense of Marriage Act (1 U.S.C. § 7 and 28 U.S.C. § 1738C).

155. *See* note 84, *supra*.

156. *See* Securing the Protection of Our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), 28 U.S.C. § 4101 *et seq.* (2010).

157. This case involved the commencement of contemporaneous actions to recognize a foreign-country judgment and enforce a sister-state judgment recognizing that same foreign-country judgment. The court apparently viewed the attempt at judgment arbitrage as clear in that case. *See* Reading & Bates Constr. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702 (Tex.App.-Hous. 1st Dist. 1998) (declining enforcement of a Louisiana judgment recognizing a Canadian judgment because "we refuse to allow [the judgment creditor] to enforce its Canadian judgment 'through the back door'" in Texas).

enforcement is the more usual result.[158] The same rules that are seen to mandate inter-state enforcement of recognition judgments would also limit the degree to which a state legislature seeking to eliminate judgment arbitrage within its territory could tighten procedures for the enforcement of sister-state recognition judgments.

2. *Varieties of State Law*

Substantive legal standards governing the recognition of foreign judgments differ significantly from state to state. The strategy of judgment arbitrage depends on this diversity of supply. If the market for recognition law offered creditors no options—for example, if the domestication process were governed by a uniform federal rule, as some academics and law-reform organizations have proposed[159]—then there would be little reason to select one state's recognition regime and another state for enforcement. In the current system, however, judgment creditors have several different sources of recognition law to choose from, and all permit nationwide enforcement.

State recognition regimes can be divided into four groups, three legislative and one common-law in nature. Each group requires that a foreign money judgment be final, conclusive, and enforceable where rendered, and not constitute a penalty, in order to be recognized. Where those preconditions can be established, each state-law regime generally favors recognition. However, the specifics of the process—especially the defenses available to judgment creditors—vary widely.

Just as it did in the enforcement realm, the NCCUSL has proposed model legislation in this area: the 1962 Uniform Foreign Money Judgments Recognition Act[160] ("1962 Recognition Act") and the 2005 Uniform Foreign-Country Money Judgments Recognition Act ("2005 Recognition Act"),[161] a revision of the 1962 version that contains substantial differences (more on this in a moment). Each Recognition Act was endorsed by the American Bar Association after it was proposed.[162] The states that have enacted one or the other Recognition Act in the form proposed by the NCCUSL comprise two groups. In addition, a third class of states has enacted their own bespoke

158. *See, e.g.*, Guinness PLC v. Ward, 955 F.2d 875, 891 (4th Cir.1992) (finding "no persuasive reason to conclude that the . . . Enforcement Act is not applicable to a foreign country judgment once such judgment has been found to be entitled to recognition under the [1962] Recognition Act."); Jaffe v. Accredited Surety & Casualty Co., Inc., 294 F.3d 584 (4th Cir. 2001) (holding that a Florida judgment rejecting a Canadian judgment on grounds of Florida public policy was entitled to preclusive effect in Virginia, even if the Canadian judgment would not have violated Virginia public policy).

159. *See, e.g.*, Silberman & Lowenfeld, *A Different Challenge*, *supra* note 6; ALI Act; Part IV.C, *infra*.

160. *See* note 12, *supra*.

161. *Id.*

162. *See* Recommendation 104A, American Bar Association, Feb. 13, 2006, *available at* http://apps.americanbar.org/intlaw/policy/investment/foreigncountryjudgment.pdf (ABA recommended adoption of 2005 Recognition Act); NCCUSL, Foreign Money Judgments Recognition Act, Description, *available at* http://uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act (ABA recommended adoption of 1962 Recognition Act).

statutes based on the 1962 Act, but only after amending them.[163] These modifications favor judgment debtors, either by providing them with additional defenses or by explicitly shifting the burden on some issues to judgment creditors. For this reason, this Article refers to this class of jurisdictions as "1962-Protective" states. Finally, a fourth group of states have adopted no statute governing the recognition of foreign-country judgments; their courts apply the common-law standards of *Hilton*.

a. The 1962 and 2005 "Uniform" Recognition Acts

To date, a majority of the states—twenty-seven in total—have enacted one of the Recognition Acts proposed by the NCCUSL without major substantive amendments: nine states have enacted the 1962 Recognition Act[164] and eighteen have adopted the 2005 Act.[165] Under both versions of the stat-

163. The NCCUSL website does not differentiate between those states that have enacted its model acts verbatim and those that have adopted custom statutes that modify them. The effect of the amendments can be outcome-determinative, however, and thus will be detailed below.

164. As of February 15, 2013, the following nine states plus the U.S. Virgin Islands had adopted the 1962 Recognition Act in the form proposed by the Commission: Alaska, Connecticut, Maryland, Missouri, New Jersey, New York, North Dakota, Pennsylvania, and Virginia. *See* ALASKA STAT. § 09.30.120; CONN. GEN. STAT. § 50a-34; MD. CODE, CTS. & JUD. PROC. § 10-704; MO. STAT. § 511.780; N.J. STAT. § 2A:49A-20; N.Y. C.P.L.R. § 5304; N.D. CENT. CODE § 28-20.2-04; 42 PA. STAT. § 22001 *et seq*; VA. CODE § 8.01-465.10; 5 VIRGIN ISLANDS CODE § 565. The Maryland and New York statutes also bar recognition of foreign defamation judgments that would violate constitutional free speech protections if rendered in those states, *see* MD. CODE, CTS. & JUD. PROC. § 10-704(c); N.Y. C.P.L.R. § 5304(a)(8), but Congress enacted similar legislation in 2010 and applied it to recognition proceedings in state as well as federal courts, *see* SPEECH Act; Part V.B, *infra*, essentially rendering this change superfluous. In addition, the Maryland and New York statutes each alter the necessity of nonrecognition under a 1962 Act ground: the New York statute makes lack of subject matter jurisdiction in the rendering court a discretionary rather than mandatory ground for nonrecognition, N.Y. C.P.L.R. § 5304(b)(1), and the Maryland statute makes fraud a mandatory ground rather than discretionary, MD. CODE, CTS. & JUD. PROC. § 10-704(a)(4).

165. As of February 15, 2013, the following eighteen states plus the District of Columbia had adopted the 2005 Recognition Act in the form proposed by the Commission: Alabama, California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, and Washington State. *See* ALA. CODE § 6-9-253; CAL. CIV. PROC. CODE § 1715-16; COLO. REV. STAT. § 13-62-104; D.C. STAT. § 15-364; DEL. CODE tit. 10, § 4803; HAW. REV. STAT. § 658F-4; IDAHO CODE § 10-1404; ILL. COMP. STAT. 735 § 5/12-664; IND. CODE § 34-54-12-3; IOWA CODE § 626B.104; MICH. COMP. LAWS § 691.1134; MINN. STAT. § 548.57; MONT. CODE ANN. § 25-9-605; NEV. REV. STAT. § 17.750; N.C. GEN. STAT. § 1C-1853; N.M. STAT. § 39-4D-4; OKLA. STAT. tit. 12, § 718.4; OR. REV. STAT. § 24.360; WASH. REV. CODE § 6.40A.030. Some of these jurisdictions previously adopted the 1962 Act and have not expressly repealed it. In addition, the California statute bars recognition of foreign defamation judgments that would violate constitutional free speech protections if rendered in that state, *see* CAL. CIV. PROC. CODE § 1716(c)(9), but Congress enacted similar legislation in 2010 and applied it to recognition proceedings in state as well as federal courts, *see* SPEECH Act; Part V.B, *infra*, essentially rendering this change superfluous. The California statute contains an explicit burden-shifting regime. CAL. CIV. PROC. CODE §§ 1715(c), 1716(d) (once a party seeking recognition has met its burden of demonstrating that the judgment should be recognized, a party resisting recognition "has the burden of establishing that a ground for nonrecognition stated in subdivision (b) [listing mandatory grounds] or (c) [listing discretionary grounds] exists."). The North Carolina statute establishes a presumption that courts will not recognize foreign judgments that conflict with subsequent final judgments but will recognize foreign judgments that conflict with prior final judgments, *see* N.C. GEN. STAT. § 1C-1853(d)-(e), and like California specifies a burden-shifting regime, *see* N.C. GEN. STAT. § 1C-1853(f)-(h).

ute, the general rule is that final judgments rendered by foreign courts should be regarded as conclusive determinations of the parties' rights in a dispute, and thus should be recognized by the court in which they are presented.[166] Both statutes allow defenses to recognition, but those defenses differ in potentially outcome-determinative ways.

The grounds for rejecting foreign judgments have proved to be a fertile area of litigation.[167] Exceptions to the general rule favoring recognition come in two species: mandatory and discretionary. If a mandatory ground is triggered, the court will be *required* to deny recognition to the foreign judgment; if a discretionary ground applies, then the court is *allowed* to reject the foreign judgment. Both versions of the Recognition Act contain the same three mandatory grounds and six discretionary grounds for nonrecognition. However, the 2005 Recognition Act adds two more discretionary grounds for nonrecognition, each of which is significant.

Under the three *mandatory* exceptions, which are common to both Recognition Acts, recognition of a judgment rendered abroad *must* be denied under the following circumstances:

> (1) "Due Process Exception": The Rendering Court *System* Does Not Provide Due Process ("the [foreign] judgment was rendered under a judicial *system* that does not provide impartial tribunals or procedures compatible with the requirements of due process of law");
>
> (2) The Rendering Court Lacked Personal Jurisdiction Over the Defendant; or
>
> (3) The Rendering Court Lacked Subject Matter Jurisdiction.[168]

The 2005 and 1962 Recognition Acts likewise share six *discretionary* bases for nonrecognition. In a proceeding commenced under either Recognition Act, a court *may* deny recognition on the following six grounds:

> (1) Lack of Notice to Defendant in Rendering Court;
>
> (2) Fraud and Prejudice ("the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case");

166. *See, e.g.*, 2005 Recognition Act §§ 4, 7 & cmt. 1 to § 7; 1962 Recognition Act § 3.

167. *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011) (granting preliminary injunction barring enforcement of Ecuadorian judgment for $18.2 billion under New York's 1962 Recognition Act), *rev'd*, Chevron Corp. v. Naranjo, 667 F.3d 232 (2d. Cir. 2012); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (declining enforcement of Nicaraguan judgment for $97 billion under Florida's variant of 1962 Recognition Act), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

168. 2005 Recognition Act § 4(b) (emphasis added). Section 4(a)(1) of the 1962 Recognition Act contains the same due process requirement as the 2005 Recognition Act § 4(b)(1), but uses the term "system" rather than "judicial system." However, the drafters have explained that this change was for clarity only and is not substantive. 2005 Recognition Act § 4, cmt. 4.

> (3) Public Policy ("the judgment or the [claim] on which the judgment is based is repugnant to the public policy of this state or of the United States");
>
> (4) *Res Judicata* ("the judgment conflicts with another final and conclusive judgment");
>
> (5) Foreign Proceeding Violated Forum-Selection Clause; or
>
> (6) "Seriously Inconvenient Forum" ("in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.")[169]

In addition to these grounds, the 2005 Recognition Act supplies *two more discretionary defenses* to recognition. Each gives courts significantly more discretion in denying recognition to foreign judgments, and their availability can be significant to judgment debtors. They permit courts to reject recognition where there are concerns about either the fairness of the tribunal rendering the judgment or about the foreign merits proceeding:

> (7) Substantial Doubt Exists About Integrity of Rendering Court ("the [foreign] judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"); or
>
> (8) The Specific Proceeding Leading to Judgment Violates Due Process ("the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.").[170]

These tribunal-specific fairness defenses have the potential to create a substantial gap in recognition law between states following the two statutes.

Under the 1962 Recognition Act, the scope of permissible attacks on the specific foreign proceeding that led to the judgment is tightly circumscribed. As with the 2005 Act, under the 1962 Act the only mandatory grounds for nonrecognition that turn on the integrity of the rendering court are jurisdictional objections.[171] Thus, assuming adequacy of jurisdiction and notice in the rendering court, a debtor sued in a 1962 Act jurisdiction who was denied due process by the foreign country's court but is unable to mount a credible attack on the entire foreign legal system must allege fraud.[172]

The debtor will find, however, that mere fraud by or before the foreign tribunal will not suffice; she will have to demonstrate prejudice, that is, that the fraud in the rendering court prevented her from making her case.[173] In

169. 2005 Recognition Act § 4(c)(1–6); 1962 Recognition Act § 4(b).

170. 2005 Recognition Act § 4(c)(7–8).

171. *See* 1962 Recognition Act § 4(a)(1–2).

172. *See id.*

173. *See* 1962 Recognition Act § 4(b)(2); Chevron Corp. v. Salazar, 275 F.R.D. 437, 453 (S.D.N.Y. 2011) (observing that analysis of a fraud claim requires a "case-specific inquiry").

addition, the debtor bears the burden on this question.[174] However, if no provable fraud occurred—perhaps the foreign tribunal was merely incompetent, or consistently ruled against the debtor due to bias (not fraud), or the fraud was simply well-hidden and thus hard to prove—the debtor cannot establish a ground for nonrecognition under the 1962 Recognition Act by attacking the rendering court's process.[175]

The addition of tribunal-specific fairness defenses in the 2005 Recognition Act makes it much easier for recognition courts to probe the rendering court's respect for due process. The 1962 Act's due process exception, which mandates nonrecognition where the rendering court *system* fails to respect due process, was interpreted to mean that only where the rendering justice system as a whole denied due process could recognition be denied. In states following the 1962 Act, this created (and continues to create) a conundrum. Some judges, including Judge Posner in a leading case applying the 1962 Act, have dismissed the notion of inquiring into the fairness of individual rendering tribunals on a "retail" basis,[176] while at the same time others have been reluctant to impugn foreign countries' legal systems en grosse.[177] The 2005 Recognition Act changed this by adding tribunal-specific defenses, thus obviating condemnation of entire foreign legal systems and authorizing nonrecognition on two types of fairness grounds, that is, where there is doubt about the integrity of the rendering court[178] or the specific proceeding in that court that led to the judgment.[179]

The impact of the 2005 Recognition Act's new tribunal-specific fairness grounds may be significant. As of July 2012, no published state or federal case cited either new ground for a nonrecognition holding. However, a number of 1962 Act decisions decline to apply the due process defense to recognition on the grounds that the exception applies only to the foreign legal system involved, not the specific rendering court.[180] For example, the district court in the Chevron-Ecuador litigation, which centers on a judgment issued by a court in Lago Agrio, Ecuador, underscored this distinction in the 1962 Act:

---

174. *See* notes 185 & 187, *infra* (discussing burden allocation).

175. For reasons of national unity, these would not ordinarily be grounds for denying recognition to a merits judgment rendered by a sister state either. However, the international counterpart to national unity—international comity—is less compelling. It is curious, and perhaps unintentional, that by operation of the 1962 Act comity considerations could (implicitly) preclude nonrecognition.

176. Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

177. *See, e.g.*, Chevron Corp. v. Naranjo, 667 F.3d 232, 244 (2d Cir. 2012) ("It is a particularly weighty matter for a court in one country to declare that another country's legal system is so corrupt or unfair that its judgments are entitled to no [judicial] respect").

178. *See* 2005 Recognition Act § 4(C)(7).

179. *See id.* § 4(C)(8).

180. *See, e.g.*, CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 100 N.Y.2d 215, 222 (2003) (emphasizing that relevant inquiry under 1962 Recognition Act is "the overall fairness of England's legal 'system,'" not that of the rendering tribunal, and rejecting notion that "the English *system* as a whole [is] incompatible with our notions of due process"); Ashenden, 233 F.3d at 477.

> [I]t is not yet clear that evidence of the manner in which the Lago Agrio case actually was handled—*as distinguished from the characteristics of the Ecuadorian legal system in general or, perhaps, in categories of cases such as the Lago Agrio case*—would be received in evidence on the issue of whether the Ecuadorian system is impartial and consistent with due process.[181]

It is notable that the *Chevron* court suggested that the distinction between an unfair *court* and an unfair *system* was so significant that it had evidentiary implications, that is, that it might preclude the fact that an individual tribunal is unfair from being used as evidence that the system of which it was a part is unfair. Judge Posner likewise drew significance from the distinction between the legal system as a whole and its constituent tribunals, emphasizing that the use of the word "system" in the 1962 Act settled the dispute and barred consideration of complaints about individual tribunals.[182] Other courts applying the 1962 statute have reached similar results.[183] The availability of judgment arbitrage may mitigate the practical impact of the new defenses; judgment debtors can sidestep them by simply filing recognition actions in states following the 1962 Act (or, as we will see, states without recognition statutes). Furthermore, because many transnational judgment suits are quietly settled out of court, the full impact of the introduction of tribunal-specific fairness defenses may be difficult to quantify.

The allocation of burdens of proof is another area where the 1962 and 2005 Acts differ, both textually and in application. The 1962 Recognition Act is silent on the question of allocating burdens of proof to judgment creditors and debtors. Most 1962 Act states appear to have established burden-shifting regimes, placing the initial burden on the creditor to prove that "the judgment is final, conclusive, and enforceable where rendered."[184] What happens at the next stage in these states varies: some shift the burden of demonstrating *any* ground for nonrecognition to the debtor, others shift the burden only as to the discretionary grounds, with the creditor retaining the burden to demonstrate that no mandatory ground for nonrecognition

181. Chevron Corp. v. Donziger, 800 F. Supp. 2d 484, 492–93 (S.D.N.Y. 2011) (emphasis added).

182. *See* Ashenden, 233 F.3d at 476–77.

183. *See, e.g.*, Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573, 579 (Me. 2008); CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 296 A.D.2d 81, 88 (N.Y. App. Div.-1st Dep't 2002) (rejecting due process attack on English judgment); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411–1412 (evidence of politicized trials and biased judiciary showed that debtor could not have received a fair trial in Iran), *cert. denied* 516 U.S. 989 (1995); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287 (S.D.N.Y.), *aff'd* 201 F.3d 134 (2d Cir. 1999) ("The Liberian judicial system simply did not provide for impartial tribunals."); Choi v. Kim, 50 F.3d 244, 249–50 (3d Cir. 1995) (same, as to relevant feature of South Korean legal system). It has not been conclusively established that courts applying the 1962 Act cannot treat a tribunal-specific problem as evidence of a systemic problem for nonrecognition purposes, as the *Chevron* court suggested it could not, 800 F. Supp. 2d at 492–93, but Posner's widely-cited opinion in Ashenden further suggests that they cannot. *See* Ashenden, 233 F.3d at 477. N.B.: Illinois, whose 1962 Act recognition statute the Seventh Circuit was applying in that case, has since adopted the 2005 Act.

184. *See, e.g.*, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1324 (S.D. Fla. 2009) (applying Florida recognition law, a variant of the 1962 Recognition Act), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

exists.[185] The 2005 Recognition Act explicitly places the burden of establishing any ground for nonrecognition on the party resisting recognition,[186] and courts have applied that burden straightforwardly.[187]

b. "1962-Protective" Recognition Statutes

In addition to those states that have adopted a Recognition Act without substantive amendments,[188] Florida, Georgia, Massachusetts, Maine, Ohio, and Texas have enacted bespoke statutes that supplement the 1962 Act's stock provisions.[189] The changes each law makes are straightforward, significant, and unidirectional: they all make recognition more difficult. The states that have enacted 1962-Protective regimes have done so despite the availability of judgment arbitrage. Thus, in many cases judgment creditors need not clear the bar that these six states have raised; they can sidestep it instead.

Every 1962-Protective state law in this group shares at least two characteristics: it is based on the 1962 Recognition Act, and it adds lack of reciprocity as a ground for denying recognition.[190] In Florida, Maine, Ohio, and Texas, lack of reciprocity is a discretionary nonrecognition ground; in Georgia and Massachusetts, it is mandatory. In addition, Georgia, Massachusetts, and Ohio have enacted the discretionary grounds for nonrecognition in the 1962 Act as mandatory grounds. Both of these types of changes have the potential to significantly raise the cost of recognition litigation to judgment creditors.

185. *See* 2005 Recognition Act § 4, cmt. 13 (discussing burden allocation and noting divergence among interpretations of 1962 Recognition Act). *Compare* Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 285 (S.D.N.Y. 1999) (judgment creditor bears burden to show no mandatory basis for nonrecognition exists; judgment debtor has burden regarding discretionary bases) (applying 1962 Recognition Act) *with* The Courage Co. LLC v. The ChemShare Corp., 93 S.W.3d 323, 331 (Tex. App. 2002) (party seeking to avoid recognition has burden to prove ground for nonrecognition) (applying 1962 Recognition Act) *and* Osorio, 665 F. Supp. 2d at 1324 (same) (applying 1962 Recognition Act).

186. 2005 Recognition Act § 4.

187. *See, e.g.*, United Steelworkers, Local 1-1000 v. Forestply Indus., Inc., 702 F. Supp. 2d 798 (W.D. Mich. 2010) (holding judgment creditor failed to satisfy his burden of demonstrating a ground for nonrecognition of the judgment).

188. As indicated in note 163, *supra*, the NCCUSL's count of enactors on its website does not differentiate between states that have adopted a proposed Recognition Act verbatim and those that have adopted Recognition Act language but with substantial modifications. It simply counts as enactors those states that have adopted at least part of a statute. *See Foreign Money Judgments Recognition Act* [1962 Act], Uniform Law Commission, *available at* http://uniformlaws.org/Act.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act; *Foreign-Country Money Judgments Recognition Act* [2005 Act], Uniform Law Commission, *available at* http://uniformlaws.org/Act.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act. As of March 1, 2013, the NCCUSL site also did not reflect the fact that some 1962 Act states, including Delaware and Illinois, had since adopted the 2005 Act.

189. *See* FLA. STAT. § 55.605; GA. CODE § 9-12-114; MASS. GEN. LAWS ch. 235, § 23A; ME. REV. tit. 14, § 8505; OHIO STAT. § 2329.92; TEX. CIV. PRAC. & REM. CODE § 36.005.

190. *See, e.g.*, FLA. STAT. § 55.605(2)(g). The Florida law also bars recognition of foreign defamation judgments that would violate constitutional free speech protections if rendered in the recognizing court. *See* FLA. STAT. § 55.605(2)(h). However, Congress enacted similar legislation in 2010 and applied it to recognition proceedings in state as well as federal courts, *see* SPEECH Act; Part V.B, *infra*, essentially rendering this provision superfluous.

Transforming discretionary grounds into mandatory grounds removes judicial discretion to permit recognition, making recognition less likely in general. In addition, a change to an all-mandatory regime is likely to have an effect on burden allocation. In states that allocate the burden of proof to judgment creditors as to mandatory grounds for nonrecognition, an all-mandatory regime will place the burden as to all defenses on judgment creditors. In some cases the lack-of-reciprocity ground will present an even more serious hurdle. Many countries are reluctant to recognize foreign judgments,[191] and some impose reciprocity requirements of their own.[192]

A recent decision in Georgia illustrates some costs of a reciprocity requirement, compounded by other protective measures. Georgia places the burden of establishing reciprocity on the creditor, and makes non-reciprocity a mandatory basis for nonrecognition. In *Shehadeh v. Alexander*, an intermediate Georgia appeals court reversed a judgment of recognition where the creditor to a Dubai judgment failed to carry his burden to "show that the Dubai courts recognize judgments of U.S. courts and the several states."[193] Where the debtor has assets in more than one U.S. state, these types of requirements will encourage creditors to consider other states at the recognition stage. They probably do not motivate prospective judgment creditors to move assets from one U.S. state to another, however, because creditors can sidestep such strategies via judgment arbitrage.

c. Common-Law States

Seventeen states follow common-law standards in adjudicating recognition actions.[194] In these jurisdictions, there is no expedited procedure for

191. Rotem, *International Law and the Economic Crisis*, *supra* note 99, at 509; William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 163 (1995) ("Some countries recognize foreign judgments on the basis of comity . . . Not all nations, however, are equally generous.").

192. *See, e.g.*, Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573, 580–81 (Me. 2008) (observing that Germany considers reciprocity a mandatory condition for recognizing a foreign country judgment); 1962 Recognition Act, Prefatory Note (reciprocity is condition of recognition in "a large number of civil law countries").

193. 727 S.E.2d 227, 228 (Ga. App. 2012).

194. As of February 15, 2013, Guam, Puerto Rico, the Northern Mariana Islands, and the following seventeen states use the common-law method of recognition: Arizona, Arkansas, Kansas, Kentucky, Louisiana, Mississippi, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *See, e.g.*, Alberta Sec. Comm'n v. Ryckman, 200 Ariz. 540, 545 (Ariz. Ct. App. 2001); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011–12 (E.D. Ark. 1973) (applying Arkansas law); Baker & McKenzie Advokatbyra v. Thinkstream Inc., 20 So.3d 1109, 1117–19 (La. App. 1 Cir. 2009); Harrison v. Boyd Mississippi, Inc., 700 So. 2d 247, 250 (Miss. 1997); Shen v. Leo A. Daly Co., 222 F.3d 472, 476 (8th Cir. 2000) (Nebraska law); Vergiette v. Samara, Civil No. 93-529-B, 1995 WL 66260, at *2 (D.N.H. Feb. 15, 1995) (New Hampshire law); *Ex parte* Marquez Estrella, 128 D.P.R. 243 (1991) (citing *Ef.* Litográficos v. Nat. Paper & Type Co., 112 D.P.R. 389 (1982)); Oman Int'l Fin. Ltd. v. Hoiyong Gems Corp., 616 F. Supp. 351, 357–58 & n.5 (D.R.I. 1985) (Rhode Island law); Kwongyuen Hangkee Co., Ltd. v. Starr Fireworks, Inc., 634 N.W. 2d 95, 96–97 (S.D. 2001); Maberry v. Maberry, No. M1999-01322-COA-R3-CV, 1999 WL 1072568, at *3 (Tenn. Ct. App. Nov. 30, 1999); Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 999 (10th Cir. 2005) (Utah law); Office of Child Support v. Sholan, 172 Vt. 619, 621–22 (2001); State *ex rel.* Domico v. Domico, 153 W. Va. 695, 702 (1970); *cf.* Alpine Atl. Asset Mgmt. AG v. Comstock, 552 F.

bringing such a suit. Thus, recognition lawsuits must be initiated by civil action.[195] The substantive standards described in *Hilton* are supplemented by the Restatements of Foreign Relations Law[196] and Conflicts.[197] *Hilton* provided the definitive statement of international comity in the context of judgment recognition:

> [W]here there has been opportunity for a *full and fair trial* abroad before a court of *competent jurisdiction*, conducting the trial *upon regular proceedings*, after *due citation or voluntary appearance* of the defendant, and under a *system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries*, and there is *nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason* why the *comity* of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . upon the mere assertion of the party that the judgment was *erroneous in law or in fact*.[198]

Both Recognition Acts are based in large measure on the factors the Court described in *Hilton*. However, the Recognition Acts specify acceptable grounds for nonrecognition more clearly, distinguish between discretionary and mandatory grounds, and provide a streamlined procedure. Because of the high cost of litigating domestication actions, creditors will likely prefer states that follow a Recognition Act to common-law states.

3. *Foreign and International Law*

Although the sources of law on recognition and enforcement are domestic in themselves, all varieties of U.S. recognition law require consideration of foreign legal systems and international legal norms. There are at least three important roles for foreign and international law in judgment recognition.

First, American courts have a general duty to promote international comity, which favors recognizing foreign judgments in the United States as a means of encouraging harmonious foreign relations and the recognition of U.S. judgments abroad. The *Hilton* Court emphasized that comity is "no[t]

Supp. 2d 1268, 1282 (D. Kan. 2008) (dicta regarding common law in Kansas); *In re* Steffke's Estate, 65 Wis. 2d 199, 205 (1974) (discussion of international comity in divorce decree context). There appear to be no cases applying the common law of Kentucky, Mississippi, South Carolina, Wyoming, Guam, or the Northern Mariana Islands on the recognition of foreign-country judgments, but they have not enacted legislation governing the procedure.

195. Restatement of Foreign Relations Law § 481 cmt. g.

196. *Id.* §§ 481–82.

197. Second Restatement of Conflicts § 98.

198. Hilton v. Guyot, 159 U.S. 113, 202–03 (1895) (emphasis added). *Hilton* has influenced the development of both state legislation and common law on judgment recognition. *See* Brand, *Enforcement*, *supra* note 5, at 261; George A. Bermann, Transnational Litigation in a Nutshell 333 (2003).

a matter of mere courtesy and good will" but instead "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience."[199] Comity is in part aspirational, however, and "more a matter of grace than a matter of obligation."[200] Nevertheless, even if it will rarely supply the rule of decision, comity is among the most powerful reasons to enforce a judgment of a foreign legal system in the first place.

Second, in some jurisdictions, American courts can be called upon to determine whether the rendering country would recognize or enforce a U.S. judgment in its own courts. Lack of reciprocity is not a defense under either model Recognition Act, but has nonetheless been made a ground for nonrecognition in some statutory states and common law ones as well.[201] A determination of reciprocity can be difficult for a court to make,[202] and in the face of uncertainty, courts—American and foreign—often look for ways to find reciprocity.[203]

Third, and probably most significant, a claim that the foreign judgment was rendered under unfair laws or procedures can require a searching examination of foreign law and legal systems. The requirement of due process appears in *Hilton*[204] and is codified in the 2005 and 1962 Recognition Acts,[205] and the 2005 Act adds two tribunal-specific defenses that require even greater scrutiny of foreign courts.[206] Together, these provisions create the potential for serious international judicial disagreement.

In states following either Recognition Act, courts must deny recognition where "the [foreign] judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[207] Due process, in turn, is defined as international due process, and it is difficult for debtors to show they were denied due process on that standard.[208] Showing that the rendering court's procedures merely failed to conform to the recognition court's *own* due process norms is insufficient; a debtor must show "that the foreign procedures [were not] fundamentally fair and . . . offend against basic fairness" based on *international* norms.[209] In most cases, this test does not endanger recognition;

199. *See* Hilton, 159 U.S. at 164 (declining recognition of French judgment on reciprocity grounds but lamenting harm to comity in doing so).

200. United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997).

201. *See* Part III.B.2, *supra*.

202. *See* Part III.B.2.b, *supra*.

203. *See, e.g.*, Genujo, 943 A.2d at 581 (noting this habit among German courts with approval).

204. Hilton, 159 U.S. at 202.

205. *See* 2005 Recognition Act § 4(b)(1); 1962 Recognition Act § 4(a)(1).

206. *See* 2005 Recognition Act § 4(c)(7–8).

207. 2005 Recognition Act § 4(b)(1); *see* 1962 Recognition Act § 4(a); note 180, *supra*.

208. *See* Ashenden, 233 F.3d at 477.

209. *Id.* (internal quotation marks omitted) (collecting cases); *see also id. at* 478–79 ("no judgments of a foreign legal system would be enforceable in Illinois if the system had to conform to the specifics of the American [or Illinois] doctrine[s] of due process").

it "is even less demanding than the test [courts] use to determine whether to enforce a foreign arbitral award under the New York Convention,"[210] which mandates international enforcement of foreign arbitral awards with very few exceptions. However, it risks creating tension between sovereigns, because it requires an American court to pass judgment on the rendering country's legal system, which sometimes includes slights to or outright condemnation of specific foreign courts, judges, and political figures.

Given the proliferation of transnational disputes, and the growing preference among plaintiffs for litigating the merits stage in foreign courts, this standard is poised to place American recognition courts in an awkward position more often in the future. Consider, for example, the holding of a Florida federal court in a 2009 case, *Osorio v. Dole Food Company*, denying recognition to a $97 million Nicaraguan judgment in favor of banana plantation workers and against Dole. It denied recognition because it found, among other things, that the Nicaraguan court "unfairly discriminate[d]" against foreign defendants and "stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims."[211]

The *Osorio* court held that the circumstances of the Nicaraguan proceedings failed to clear even the low bar of international due process, thus "compel[ling] non-recognition of the $97 million Nicaraguan judgment."[212] It also held the judgment unenforceable on the grounds that the Nicaraguan court lacked jurisdiction, that the substantive law in question violated Florida public policy, and that Nicaragua lacked impartial tribunals.[213] But the *Osorio* court expressed its concern about inquiring into the adequacy of foreign legal protections and systems. The court noted "that it is not entirely comfortable sitting in judgment of another nation's judicial system, but does so in deference to the Florida Recognition Act, which includes the absence of impartial tribunals as a mandatory basis for non-recognition."[214]

The court's opinion illustrates the onion-like nature of the conflicts inquiry: the court examined Nicaraguan law, procedures, and the Nicaraguan legal system against the standard of international due process, as incorporated by American law[215]—here, Florida's, which enacts the 1962 Recognition Act with some modifications.[216] The court found that Nicaragua has a "weak and corrupt judiciary" controlled by "the country's two strongmen,"

210. *Id.* at 477 (citing 9 U.S.C. § 201 *et seq.*).

211. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1351 (S.D. Fla. 2009) (applying Florida recognition statute), *aff'd*, 635 F.3d 1277 (11th Cir. 2011) (quoting Hilton, 159 U.S. at 202)).

212. *Id.* at 1352.

213. *Id.* at 1312.

214. *Id.* at 1347.

215. *Id.* at 1321–22, 1335.

216. These modifications added two discretionary grounds for nonrecognition, making it harder to win a recognition action based on a foreign country's defamation judgment or where the rendering country's courts do not afford American judgments reciprocity. *See* Part III.B.2.b, *supra*.

whom it named, and who it found jointly dominate "key governmental institutions, including the Nicaraguan Supreme Court."[217] These conclusions led the Florida court to hold that "the [Nicaraguan] judgment was rendered under a system in which political strongmen exert their control over a weak and corrupt judiciary, such that Nicaragua does not possess a 'system of jurisprudence likely to secure an impartial administration of justice.'"[218] Florida now has a foreign judicial policy: this finding essentially requires Florida courts to reject Nicaraguan judgments.

The Eleventh Circuit seemed concerned about the prospect of expanding the lower court's holding circuit-wide—both of the other states in the circuit have adopted similar provisions of recognition law, with Alabama adhering to the 2005 Act and Georgia adopting a more protective version of the 1962 Act[219]—and chose to affirm it on the other three grounds found by the district court (jurisdiction, international due process, and Florida public policy), expressly declining to address the impartial tribunals holding.[220]

As the *Osorio* case illustrates, notwithstanding the formal status of recognition law in the United States as domestic law, the examination of foreign judgments and legal systems that it requires introduces considerations that are primarily international and comparative in nature. Thus, differences in recognition precedent—and especially the existence of tribunal-specific defenses in some jurisdictions but not others—in the realm of judicial foreign relations have led some commentators to call for a single, national regime. This may appear sensible, but closer examination reveals it to be misguided.

IV. Shifting Incentives Portend More Frequent Bifurcation of Merits and Domestication Actions

"Change alone is eternal, perpetual, immortal." — Arthur Schopenhauer

The litigation of transnational disputes is now a sophisticated multi-billion dollar industry, driven by the globalization of business and the possibility of securing an enormous money judgment against a multinational corporation. Alongside this development, two emerging realities of transnational litigation are conspiring to raise the profile of the domestication process in the United States.

First, at the merits stage, plaintiffs perceive that the favorability of substantive law and court access in the United States is declining. At the same time, foreign countries have created new legal claims; have made new legal tools available to transnational litigants, like the class-action device; and have become more friendly to transnational litigation than they once were,

217. *Id.* at 1348, 1351–52.
218. *Id.* at 1351–52 (quoting Hilton, 159 U.S. at 202).
219. *See* Part III.B.2.b, *supra*.
220. *See* Osorio v. Dow Chemical Co., 635 F.3d 1277, 1279 (11th Cir. 2011).

including by means of political pressure or outright corruption. Indeed, some transnational litigation experts and practitioners claim that foreign litigants now generally prefer foreign forums and foreign law at the merits phase.[221] The second development is primarily financial rather than legal: a robust litigation-funding industry has sprung up in the past few years to provide millions of investment dollars, enabling the litigation of lawsuits that plaintiffs previously might not have been able to afford.

A. *Foreign Courts Eclipse American Courts for Some Transnational Merits Suits*

The domestication process is based on some unspecified but essential assumptions. One key assumption is that the difficulty of enforcing a foreign judgment "provide[s] natural constraints on the extraterritorial application of a nation's laws"[222]—and, by extension, that that difficulty supplies natural mechanisms to preserve the sovereignty of the recognizing state over its citizen-debtors. These assumptions characterize the recognition system in the United States[223] (as well as that of other countries). In the American system, however, inconvenience alone no longer provides a meaningful way to protect those values. Judgment arbitrage has further transformed erstwhile practical constraints into practical advantages, and today's domestication regime is not well-equipped to deal with the change.

Since by definition transnational suits involve connections to two or more countries, the judicial power and substantive law of two or more countries can often be invoked.[224] Previously, the decision matrices that might be seen to result from these options necessitated no great strategizing: the United States was the plaintiffs' classic choice for both forum and law. This is because the American judicial system and American substantive law, both state and federal, have long provided important legal and economic advan-

221. *See, e.g.*, Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 33 (2011) [hereinafter Quintanilla & Whytock, *The New Multipolarity*]; Press Release, Gibson, Dunn & Crutcher LLP, Gibson Dunn Launches Transnational Litigation and Foreign Judgments Practice Group (Dec. 15, 2010), http://www.gibsondunn.com/news/Pages/GibsonDunnLaunchesTransnationalLitigationandForeignJudgmentsPracticeGroup.aspx (noting growing "threat to corporations" of "massive and multifaceted assaults" in the form of lawsuits filed in foreign courts).

222. *See* BRILMAYER, GOLDSMITH & O'CONNOR, CONFLICT OF LAW, *supra* note 11, at 9.

223. Indeed, judgment arbitrage became available in the United States in 1938, when *Erie* created 50 state recognition regimes. At that time, however, the volume of global trade was far less significant, and the phenomena discussed in this section had not yet emerged to encourage the litigation of the merits stage of transnational lawsuits in foreign courts.

224. This Article does not address parallel international litigation, that is, the circumstance where merits suits are proceeding simultaneously in the courts of two or more countries. For discussion of some of the issues such suits present in American courts, *see, e.g.*, Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 270–73 (2010) (proposing that American courts adopt a lis pendens rule and stay a U.S. merits suit where a parallel foreign suit is ongoing); Belize Telecom, Ltd. v. Gov't of Belize, 528 F.3d 1298, 1305, 1308–09 (11th Cir. 2008) (abstaining from deciding an appeal of a district court judgment where a Belizean tribunal had issued a judgment in parallel litigation).

tages to plaintiffs bringing suit against a defendant with U.S. ties.[225] So long as he could withstand a motion to dismiss the lawsuit from American courts on *forum non conveniens* grounds,[226] a plaintiff would generally prefer to bring suit in the United States. If the plaintiff prevailed and the defendant had assets in the United States, then enforcement would naturally follow in the United States. The conventional view among commentators and litigants has been that "compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery."[227]

Today, however, the dynamics are shifting away from a U.S.-centric litigation strategy and towards a system where plaintiffs bifurcate their claims, litigating the merits stage in one country and enforcement in another.[228] At the merits stage, both the courts and the law in the United States are perceived to have become more hostile to transnational lawsuits in recent years.[229] "Meanwhile, foreign legal systems appear to be developing some of the plaintiff-favoring qualities of the U.S. legal system, and they appear more likely to grant relief to plaintiffs [at the merits stage] and to do so in larger amounts than they previously were."[230]

The new "pull" of foreign courts is probably more significant than the "push" of American courts in driving bifurcation. The class action, an erstwhile peculiarly American device, is being adopted by a growing number of countries to broaden access to relief in transnational cases.[231] In addition, populist leaders in foreign countries have opened courts in an effort to ex-

225. *See* note 41, *supra*. These advantages include the perception of American courts as plaintiff-friendly, the virtually unique possibility of a trial by jury, the familiarity and competence of U.S. lawyers with class-action and human-rights litigation, the contingency-fee norm of American plaintiffs' lawyers, the American Rule regarding attorneys' fees, the availability of punitive damages, and the norm of huge damage verdicts against multinationals. *See* Whytock & Robertson, *Forum Non Conveniens*, *supra* note 6, at 1446 n.4. In addition, alone among nations, the United States permits foreign plaintiffs to sue in tort for violations of customary international law. *See* Beth Stephens, *Translating* Filártiga: *A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 8 (2002).

226. *See* Part I.C.2, *infra*.

227. *See* Russell J. Weintraub, *International Litigation and* Forum Non Conveniens, 29 TEX. INT'L L.J. 321, 323 (1994).

228. *See, e.g.*, Quintanilla & Whytock, *The New Multipolarity*, *supra* note 221.

229. *See, e.g.*, Whytock & Robertson, *Forum Non Conveniens*, *supra* note 6, at 1462 (contending that American courts are no longer as receptive to asserting jurisdiction over suits regarding foreign conduct); Whytock, *Evolving Forum Shopping System*, *supra* note 6, at 503 tbl.1 (federal courts are estimated to grant defendants' *forum non conveniens* dismissal motions more than 60 percent of the time when plaintiffs are foreign).

230. Whytock & Robertson, *Forum Non Conveniens*, *supra* note 6, at 1448–49; Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165, 166 & n.4 (2008) (noting increasing adoption by foreign jurisdictions of U.S.-style class-action suits, litigation financing, and punitive damages); R. Daniel Kelemen & Eric C. Sibbit, *The Globalization of American Law*, 58 INT'L ORG. 103, 103 (2004) ("American legal style is spreading to other jurisdictions"); Michael D. Goldhaber, *Alien Territory*, AM. LAW., Feb. 2011, at 63, 65.

231. *See, e.g.*, Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 313, 348–52 (2011) (tracing the growing availability of collective-action mechanisms in European countries, including for transnational litigation).

tract political and economic benefits by promoting legal claims against large foreign corporations.[232]

With the assistance of foreign governments, plaintiffs have been able to exert a remarkable degree of influence—legal, political, and economic—over the conduct of proceedings in foreign courts. In the United States, collusion by parties with government officials and courts themselves on the scale that occurs in some foreign countries would be unethical under bar or court rules, would in some cases constitute crimes, and would likely be unfeasible in many cases.[233] Although courts in some developing countries previously favored multinationals,[234] there is now a countervailing trend favoring plaintiffs, and unlike the earlier trend this one is poised to place the U.S. domestication system under significant pressure.[235]

Two recent litigation battles—both involving the recognition of Latin American judgments in federal courts—suggest some of the emerging advantages of pursuing the merits phase of a transnational dispute in a foreign court.

1. *Chevron Lawsuit*

In 2011, an Ecuadorian court rendered a judgment against Chevron Corporation for oil contamination in the Ecuadorian Amazon. The court ordered Chevron to pay forty-seven individual plaintiffs a total of $18 billion. The history of the litigation in Ecuador and the United States has been recounted elsewhere[236] and space considerations preclude a full retelling here.[237]

---

232. *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 1078 (2007) (noting "increasingly frequent efforts by courts and legislatures around the world to impose substantial judgments against companies perceived to have the wherewithal to pay them.").

233. *See* Part I.A, *supra*; Maria Dakolias and Kim Thachuk, *Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform*, 18 Wis. Int'l L.J. 353, 370–71 (2000) ("In Ecuador, litigants have described examples of cases being 'lost' and important cases being assigned to 'friendly' judges without passing through the normal process.").

234. For example, petitioners in *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013), alleged that they had been killed, tortured, and forced into exile by the Nigerian government in collusion with the Shell oil company. *See id.* (rejecting extraterritorial application of Alien Tort Statute without reaching merits of petitioners' claims).

235. A pro-plaintiff practice in transnational cases in foreign courts will tend to create more judgments seeking domestication. A pro-defendant practice, by contrast, leads to the rendering of fewer judgments in the first place. In addition, by narrowing the scope of the Alien Tort Statute, *Kiobel* may further incentivize plaintiffs to bring their merits suits abroad and then seek to enforce the resulting judgments in the United States.

236. *See, e.g.*, Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 584–626 (S.D.N.Y. 2011), *rev'd on other grounds*, Chevron Corp. v. Naranjo, 667 F.3d 232 (2d. Cir. 2012). The 2011 Ecuadorian judgment against Chevron, for $18 billion, fueled an unprecedented worldwide litigation and enforcement scramble. A federal court granted Chevron's request for a preliminary injunction barring recognition and enforcement of the Ecuadorian judgment, but was reversed. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 621 (S.D.N.Y. 2011), *rev'd*, Chevron Corp. v. Naranjo, 667 F.3d 232, 240 (2d. Cir. 2012) (holding that New York judgment-recognition law does not provide an affirmative basis to declare foreign judgments non-enforceable). As of publication, the enforcement litigation was ongoing.

Manipulation and corruption of the Ecuadorian proceeding by lawyers for the plaintiffs has been well-documented,[238] and has provided the basis for fraud findings by at least seven U.S. courts.[239] One court noted that evidence in the case had "sent shockwaves through the [U.S.] legal communities, primarily because [it] shows, with unflattering frankness, inappropriate, unethical and perhaps illegal conduct."[240] Among other things, plaintiffs' counsel colluded with powerful figures in the Ecuadorian government, including President Rafael Correa, and with judges before whom they appeared, including the judge who ultimately rendered the $18 billion judgment.[241] They also wrote and personally filed the report of the "independent" special master for the case, who was appointed by the court to determine damages, and they wrote most or all of the judgment itself, which they submitted to the court *ex parte*.[242]

Of the many examples of impropriety in the Ecuadorian proceeding, perhaps most revealing was a videotaped private conversation between Steven Donziger, the lead American attorney for the plaintiffs, and his team of environmental experts. In the clip, later made public in litigation, Donziger boasts of the benefits of litigating the merits of his case in Ecuador—specifically, of his ability to influence the Ecuadorian litigation by fomenting a village uprising. "You can say whatever you want," he tells his experts, but "at the end of the day, there's a thousand people around the courthouse, you're going to get what you want" because "this is Ecuador."[243] When his experts expressed concerns about the strength of their evidence, Donziger dismissed them by saying that expert opinions in Ecuador are "for the court just a bunch of smoke and mirrors and bullshit. It really is. We have enough, to get money, to win."[244] The case provides some examples of the advantages foreign forums offer transnational litigants for the merits stage of their lawsuits.

---

237. As noted *supra*, *see* note *, the author represented Chevron in United States proceedings in this litigation.

238. *See, e.g.*, decisions cited in notes 239-40, *infra*; decisions cited in note 236, *supra*; Parloff, *Have You Got a Piece of This Lawsuit?*, *supra* note 110; Michael D. Goldhaber, *Overexposed*, AM. LAWYER, Apr. 25, 2011; Editorial, *Shakedown in Ecuador*, WALL ST. J., Feb. 16, 2011.

239. *See In re* Application of Chevron Corp., 633 F.3d 153, 166 (3d Cir. 2011); *In re* Application of Chevron Corp., No. 10-cv-02675, Hr'g Tr. at 43:13-44:16 (D.N.J. Jun. 11, 2010); *In re* Application of Chevron Corp., 749 F. Supp. 2d at 167; *In re* Chevron Corp., No. 10-mc-00021-JCH-LFG, Order (D.N.M. Sep. 13, 2010) (seal lifted Sept. 28, 2010, *see* dkt. 195); Chevron Corp. v. Page, No. RWT11-1942, Oral Arg. Tr. at 11:2–24 (D. Md. Aug. 31, 2011); *see also* In re Application of Chevron Corp., No. 10-cv-1146, 2010 WL 3584520, at *6 (S.D. Cal. Sept. 10, 2010); Chevron Corp. v. Camp, Nos. 10-mc-27, 10-mc-28, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010).

240. *In re* Chevron Corp., No. 10-mc-00021-JCH-LFG, Order, at 3–4 (D.N.M. Sept. 2, 2010).

241. *See* sources cited in notes 236, 239-40, *supra*. An Ecuadorian court later increased the amount of the judgment to $19 billion.

242. *Id.*

243. *See* Donziger "Smoke and Mirrors" clip, *supra* note 2.

244. *Id.*

2. *Dole Lawsuit*

As with the Ecuadorian litigation in the *Chevron* case, the *Osorio* litigation against Dole in Nicaraguan courts suggests some of the incentives foreign plaintiffs now have to bring merits suits abroad. Between 2002 and 2009, Nicaraguan courts rendered a total of $2 billion in judgments against Dole Foods for pesticide poisoning.[245] The *Osorio* recognition lawsuit in Miami federal court concerned a $97 million Nicaraguan judgment against Dole. The U.S. court noted:

> The [Nicaraguan] trial court applied a law that unfairly discriminates against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law. Both the substantive law under which this case was tried [and the judgment itself] purport to establish facts that do not, and cannot, exist in reality. As a result, the law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims.[246]

The court also criticized Nicaragua's judicial system as one in which "political strongmen exert their control over a weak and corrupt judiciary," and held that Nicaragua lacks impartial tribunals."[247]

Although the *Osorio* decision itself denied recognition, like the *Chevron* case it documents some of the incentives to litigate the merits stage abroad. In both cases, plaintiffs were able to enlist well-connected local allies in an effort to manipulate weak or corrupt foreign courts, and those courts then issued judgments that plaintiffs appeared to have a reasonable chance of domesticating in the United States. Incentives to use foreign forums for merits litigation remain powerful. One of these, the explosion of financing for litigation, suggests that those incentives may be growing.

B. Alternative Litigation Financing

Perhaps as important as the changes in substantive law and court systems in shaping the trajectory of transnational litigation has been the emergence of a lending and investment sector known as alternative litigation financing. Companies supplying ALF identify and fund lawsuits on the basis of maximizing returns to their shareholders.[248] The growth of ALF increases the

245. Edvard Pettersson, *Dole Uses Judge Attack in Banana Case to Undo $2 Billion Awards*, BLOOMBERG (June 24, 2009, 12:01 a.m.), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aS5ED.ApmVPk.

246. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1351 (S.D. Fla. 2009), *aff'd*, 635 F.3d 1277 (11th Cir. 2011).

247. *Id.* at 1351–52 (quoting Hilton, 159 U.S. at 202).

248. *See* STEPHEN GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES 1 (RAND 2010) [hereinafter GARBER, ALTERNATIVE LITIGATION FINANCING].

likelihood that foreign judgments will make it to American courts and that creditors are represented by sophisticated counsel there. If the $18 billion judgment in the *Chevron* case, currently being litigated worldwide, is ultimately recognized and enforced, ALF and other mechanisms encouraging parties to bring merits suits abroad can be expected to increase exponentially.

As of early 2010, a total of fifteen companies in the United States were exclusively in the business of supplying ALF to plaintiffs' law firms.[249] Nine acted as lenders, extending loans or lines of credit from $100,000 to $25 million to plaintiffs' law firms,[250] and the remaining six, two of them publicly-held, were in business solely to invest equity in plaintiffs' lawsuits.[251] The RAND Corporation contends that the rapid growth of the sector—ALF suppliers tripled in number between July 2009 and early 2010—"suggest[s] that the industry is in its infancy."[252] The business case for ALF is not hard to follow. Even a small equity stake in an enforceable judgment on the scale of those against Dole and Chevron ($2 billion and $18 billion, respectively) would make millionaires of many investors. In the litigation against Chevron, one publicly-traded ALF firm, Burford Capital, reportedly invested $4 million in the plaintiffs' case in exchange for a 1.5% stake in any recovery, and said that it planned to increase its investment to $15 million, boosting its stake to 5.5%.[253]

The interaction of push-and-pull macro trends in U.S. and foreign legal systems has increased the incentive for plaintiffs to litigate the merits of transnational disputes in countries other than the United States. Coupled with the inexorable growth of transnational disputes, this trend elevates the importance of the U.S. domestication process, and suggests that an effort to reform that process now might yield meaningful results.

---

249. *See id.* at 14–15; *see also* GEOFFREY MCGOVERN, ET AL., THIRD-PARTY LITIGATION FUNDING AND CLAIM TRANSFER (RAND 2010).

250. GARBER, ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES, *supra* note 248, at 13–14.

251. *Id.* at 15 & n.23. These suppliers of ALF "typically provide capital in exchange for a share of the eventual recovery . . . , and the term *investment* is typically used to describe such transactions." *Id.* at 13.

252. *Id.* at 39. Since that time, the field has only become more crowded and sophisticated. Litigation finance firms BlackRobe Capital, Fulbrook Capital Management, and Bentham Capital launched in 2011, and the litigation finance team at Credit Suisse decamped to found Parabellum Capital in 2012. William Alden, *Looking to Make a Profit on Lawsuits, Firms Invest in Them*, N.Y. TIMES, Apr. 30, 2012. In April 2013, Gerchen Keller Capital announced its formation with $100 million in committed capital, with the goal of investing in what it views as meritorious lawsuits on either the defense or plaintiff side. William Alden, *New Firm Plans to Invest in Lawsuits*, N.Y. TIMES, Apr. 8, 2013.

253. Parloff, *Have You Got a Piece of This Lawsuit?*, *supra* note 110. Burford later accused the Ecuadorian plaintiffs and their "U.S. representatives" of a "scheme to deceive and defraud in order to secure desperately needed funding" from Burford, accusations the plaintiffs denied. *See* Roger Parloff, *Investment Fund: We Were Defrauded in Suit Against Chevron*, FORTUNE/CNNMONEY, January 10, 2013, http://finance.fortune.cnn.com/2013/01/10/burford-capital-chevron-ecuador/?iid=SF_F_River.

C. Proposed Alternative to Current Recognition Regime: The ALI Act

The leading proposal for reform of the recognition regime is a draft statute the ALI has prepared and transmitted to Congress.[254] The ALI's proposed statute, The Foreign Judgments Recognition and Enforcement Act ("ALI Act"),[255] mainly accomplishes two things: it would eliminate horizontal conflicts by straightforwardly federalizing recognition law, and it would make judgment recognition law in the United States much more protective than the current modal state's law. The ALI Act's reporters justify the preemption of the field on the grounds that foreign relations is an area of profound federal concern,[256] and contend that the protective tightening is necessary on the grounds that the American judgment domestication regime has invited abuse by foreign plaintiffs.[257] Both changes would constitute a marked departure from current practice. It is the leading proposal for domestication reform. Silberman, one of the ALI Act's reporters (the other is Andreas F. Lowenfeld), testified before Congress in favor of the proposal in 2011.[258]

The ALI Act strikes a different balance between receptivity and protectiveness than either the 1962 or 2005 Act by adding a series of mandatory grounds for nonrecognition. For example, it would require courts to decline enforcement if "the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question."[259] This is significantly more protective than either the 1962 or 2005 Act: under the former, doubt about the rendering court's integrity is not grounds for nonrecognition at all, and under the latter it is merely a discretionary, not a mandatory, ground.[260] The ALI Act also imposes a reciprocity ground for nonrecognition, and makes it mandatory.[261] Neither model Recognition Act contains a reciprocity ground (mandatory or discretionary). Of the six states that have enacted 1962-Protective statutes, all added non-reciprocity as a defense to recognition, but only two—Georgia and Massachusetts—make it mandatory.

The ALI Act's recognition standards are perfectly defensible, but the standards themselves, combined with the statute's federalization of recognition, would represent a major shift. First, like the statute proposed in this Article, the ALI Act would eliminate judgment arbitrage. However, the ALI Act also selects a specific set of tradeoffs along the receptive-protective continuum between the interests of judgment creditors and debtors that are more protective than either of the two dominant models of state legislation cur-

254. *See* Silberman & Lowenfeld, *A Different Challenge*, *supra* note 6, at 635–36.
255. *See* note 6, *supra*.
256. *See* ALI Act at 1.
257. *See id.* at 3.
258. Silberman testimony, note 14, *supra*.
259. ALI Act § 5(a)(ii).
260. 2005 Recognition Act § 4(c)(7).
261. ALI Act §7(a).

rently in effect. It would make it significantly harder to enforce foreign judgments than is currently the case in many states, including in New York (which follows the 1962 Act) and California (which follows the 2005 Act).

Second, and perhaps more important, the ALI's proposed federalization of recognition law would come at the expense of experimentation and discovery. As discussed below, transnational judgment litigation is becoming more commonplace. This suggests that a properly functioning national market for state recognition law could produce significant refinements and improvements in recognition law that the ALI Act would foreclose. The ALI Act's reporters and other commentators who support federalizing judgment recognition have not addressed the costs of foregoing jurisdictional competition.

V. Proposed Federal Statute to Facilitate the Market for State Recognition Law

"When the water starts boiling, it is foolish to turn off the heat." — Nelson Mandela

Although the conflicts literature does not approach it as such, the fifty-state system of domesticating foreign judgments in the United States creates a market for law. Parties demand sources of recognition law, and state legislatures and courts supply them. The generative potential of this market remains unknown, however, because the superstructure of federal and state faith-and-credit statutory provisions, constitutional default rules, and common law precedent guarantee that the heat is turned off just as the water begins to boil. A federal statute that allows states to capture the benefits of their own recognition laws would help facilitate the market for state recognition law, which ultimately is likely to coalesce around one or two variants of recognition law via spontaneous uniformity.

A. The Proposed Statute

Here is the proposed statute:

WHEREAS foreign-country judgments granting or denying money damages ("foreign-country money judgments") are sometimes presented in the state and federal courts of the United States for domestication, which consists of separate recognition and enforcement phases, with recognition constituting a precondition to enforcement, and

WHEREAS the procedure at the recognition stage is for the court (the "recognition court") to decide, on the basis of the law of the state in which it sits ("forum law"), whether to replace the foreign-country money judgment with a judgment of its own (a "recognition judgment"), and

WHEREAS upon issuance of a recognition judgment, it is the procedure for the judgment creditor to move for enforcement in the same or another court, and

WHEREAS upon a motion to enforce a recognition judgment it is the practice of the court (the "enforcement court") to enforce a recognition judgment as it would any other sister-state or federal judgment,

PURSUANT TO Congress's authority to prescribe rules governing the effects of sister-state conflicts of law and its power to regulate interstate and foreign commerce and conduct affecting the United States's relations with foreign countries,

IT IS HEREBY ENACTED:

(a) With respect to the issuance of recognition judgments, all courts shall apply forum law on the conflicts of law.

(b) Notwithstanding any state or other federal law, if a recognition judgment of one state or federal court should be presented in another state or federal court for enforcement, the enforcement court shall be obligated to enforce the recognition judgment only to the same extent that it would have been obligated to recognize the underlying judgment under forum law.

(c) This statute shall only apply to recognition judgments that recognize foreign-country money judgments that:
   1. Grant or deny recovery of a sum of money; and
   2. Are final, conclusive, and enforceable under the law of the foreign country where rendered.

(d) This statute shall not apply to:
   1. The recognition or enforcement of sister-state or federal judgments where the underlying judgment was not rendered by a foreign country's court;
   2. The recognition or enforcement of foreign-country money judgments where the jurisdictional basis for such proceedings is federal question jurisdiction;
   3. The recognition or enforcement of
      i. Foreign-country money judgments determining the rights of parties under an agreement governed by a choice of law or forum clause selecting the jurisdiction of recognition or enforcement, respectively;
      ii. Judgments for taxes, fines, or other penalties; or
      iii. Judgments for divorce, support, maintenance, or other judgments rendered in connection with domestic relations.

The proposed statute raises several issues that warrant discussion.

1. The proposed statute regulates an area of federal interest that is within Congress's power to legislate. Ensuring the enforceability of foreign judgments is a core federal interest. It promotes harmony among states as well as between the United States and foreign nations, and is important to the foreign rela-

tions power of the federal government[262] and the power to regulate foreign commerce.[263] American jobs and the American economy in general increasingly depend on American companies' access to foreign markets: companies comprising the Standard & Poors 500-stock index ("S&P 500")—which have millions of U.S. employees[264] and are indirectly responsible for millions of additional jobs[265]—now generate more than half their revenue abroad.[266] Along with other big American companies, the S&P 500 constitute a large share of judgment debtors in transnational litigation.[267] A fair domestication procedure assures American companies, and foreign companies with U.S. assets, that foreign judgments will not be enforced in the United States without safeguards. At the same time, an efficient procedure provides judgment creditors access to American courts to enforce foreign judgments. This assures foreign counterparties—both corporations and sovereigns—that the American companies' assets are reachable. An efficient procedure can also afford foreign judgments creditors greater access to justice.

Congress's authority to facilitate the market for state recognition law also falls squarely within the Effects Power,[268] which allows Congress to guide the implementation of the full faith and credit mandate. The Full Faith and Credit clause provides a default rule favoring the enforceability of sister-state judgments, "not an inexorable and unqualified command."[269] Although it may establish some outer limits on non-enforceability, "full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state . . . "[270] Congress has deployed its power to legislate state conflicts rules previously, with the ef-

262. This power is shared between Congress and the president. *See, e.g.,* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 63–67 (2d ed. 1996).

263. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–321 (1936).

264. Wal-Mart alone employs 1.3 million people in the United States, *see* Wal-Mart Stores, Inc., Annual Report at 12 (Form 10-K) (Mar. 29, 2006), and at least fifty American companies in the Fortune 500 employ 125,000 or more people. *See* FORTUNE/CNNMONEY, *Fortune 500—Top Companies: Biggest (by employees)*, May 21, 2012, *available at* http://money.cnn.com/magazines/fortune/fortune500/2012/performers/companies/biggest/.

265. *See, e.g.*, Meredith Bennett-Smith, *It's Not Just Instagram. The 'App Economy' Is Taking Off*, CHRISTIAN SCIENCE MONITOR, Apr. 11, 2012 (over 500,000 people in the United States are employed by companies making applications for smartphones manufactured by large corporations).

266. Javier Espinoza, *A Smarter Way to Invest Globally?*, WALL ST. J., June 4, 2012, at C5 (statistic current as of Dec. 31, 2011).

267. For example, in addition to Chevron and Dole, fellow S&P 500 companies Philip Morris, Wal-Mart, and Union Carbide (now part of Dow Chemical) have been defendants in major transnational cases in the past few decades. *See, e.g.*, Philip Morris International, *Litigation*, http://www.pmi.com/eng/tobacco_regulation/pages/litigation.aspx (last visited Aug. 10, 2012 5:30 p.m.) (reporting that company had been sued in at least 18 countries); Michael Barbaro, *Wal-Mart Accused of Violating Workers' Rights*, WASH. POST, Sept. 14, 2005 (noting corporation sued over labor practices in China, Bangladesh, Swaziland, Nicaragua, and Indonesia); Milt Freudenheim and Henry Giniger, *New Plaintiffs Sue in Bhopal*, N.Y. TIMES, Apr. 7, 1985 (discussing Union Carbide litigation in India).

268. *See* U.S. CONST. art. IV, § 1, cl. 2; Part III.B.1, *supra*.

269. Pink v. A.A.A. Hwy. Exp., 314 U.S. 201, 210 (1941); *see* Part III.B.1, *supra*.

270. Hughes v. Fetter, 341 U.S. 609, 611 (1951).

fect of catalyzing the market for state law.[271] This proposed statute to facilitate the market for recognition law follows in the tradition of those efforts.

2. The proposed statute addresses a central problem in the current market for recognition law: most costs and benefits of experimentation by states are externalized, not internalized. In the current system, a decision by a single state to move in either direction along the receptive-protective continuum of recognition law may be ineffective at best and harmful at worst.

Suppose elements of the business community lobby a state legislature to enact the most protective recognition statute in the country, with the goal of protecting significant in-state assets of multinationals, preferring the short-term benefit of asset protection to the long-term benefit of assuring their counterparties that adverse judgments will be enforceable. In such a circumstance, a creditor wishing to enforce a foreign judgment against in-state assets can sidestep the protective law through judgment arbitrage: the creditor can opt for the recognition law of another state and then come to the newly-protective state for enforcement, neutralizing the effect of the new law's substantive changes.[272] It is questionable whether states today have the capacity to make it meaningfully more difficult to enforce foreign judgments against large debtors in their territory.

Experimentation on the receptive end of the spectrum today, however, holds more potential for harm, because of the tendency of the current system to encourage externalization of costs. Suppose the bar association of State *A* successfully lobbies its state legislature to enact the most receptive recognition statute in the country, so as to generate work for lawyers barred in State *A*.[273] State *A* begins marketing itself as the capital of judgment recognition in the United States, much in the way that Delaware is the national business-incorporation capital and Nevada was the national divorce capital before no-fault divorce became universally available.[274] Judgment creditors can now reap the benefits of State *A*'s receptive statute, as can State *A*. The costs of a "pro-creditor" receptive law will of course fall on debtors in part, but will also fall on other states, where assets will now be easier to reach using State *A*'s recognition law in judgment arbitrage.

Current law suggests that this risk is asymmetrical: while creditors can use judgment arbitrage to take advantage of a receptive law, in many cases debtors lack the ability to use a protective recognition law to pursue a declaratory action to invalidate a foreign judgment. In 2012, the U.S. Court of Appeals for the Second Circuit reached that conclusion explicitly, holding in the *Chevron* case that the 1962 Recognition Act does not provide an affirmative cause of action on which a declaratory judgment proceeding could be

271. *See, e.g.*, O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, 47–48.

272. *See* Part III, *supra*; Lutz, Lawyer's Handbook, *supra* note 82, at 29.

273. Bar associations are effective at advocating for lawyers' interests. *See* O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, 74–77.

274. *See id.* at 171–75.

maintained.[275] The 2005 Recognition Act does not contain any language that would suggest a different result. Thus, in most states, debtors are unlikely to be able to take advantage of judgment arbitrage by racing to file a declaratory judgment action in a state that follows a protective rule.

Judgment arbitrage interferes with the process of assessing the costs and benefits of different recognition statutes. Because states can externalize most of the costs of recognition regimes but cannot internalize their full benefits, states' incentives to experiment are diminished. Congress should intervene and correct this failure in the market for state law.

3. The proposed statute does not favor either receptive or protective recognition laws. The statute is agnostic on the question whether receptive or protective regimes promote the optimal balance of interests between efficiency and fairness and between creditors and debtors. By prescribing a neutral rule, the statute acknowledges the existence of disagreement—judicial, legislative, and scholarly—over these important competing values and seeks to enlist the ingenuity at the core of that tension in the service of developing recognition law. One could imagine states selecting different positions along the continuum in accordance with different policy objectives, either with the support or over the opposition of various interest groups.[276]

4. The benefits of the proposed statute outweigh the costs. The proposed statute can be expected to raise the cost of enforcing foreign judgments in the United States in the near term, but these would likely be outweighed by the benefits in the medium to long term.

The point of enabling states to internalize the benefits of experimentation is to encourage experimentation, which by definition creates disuniformity. However, today's system is already characterized by disuniformity: four general varieties of state recognition law exist today, and no single form predominates. Furthermore, proposals for uniform rules have been on the table since 1962,[277] and none has succeeded in establishing itself as the leading rule. Experimentation may provide a way to sharpen competition and allow for greater consensus as the process of discovery helps lead the market to settle on the best solution. Moreover, if spontaneous uniformity only achieves incomplete uniformity when perfect uniformity is desired, Congress

275. Chevron Corp. v. Naranjo, 667 F.3d 232, 240 (2d. Cir. 2012). This holding upended commentators' assumptions about the symmetrical use of recognition law. *See* note 14, *supra*.

276. It is notable that New York, arguably the nation's most significant state in international commerce, currently follows the 1962 Recognition Act (which is reasonably receptive) rather than a model at either the protective or receptive extreme, notwithstanding the fact that the value of judgments on which domestication suits are brought in that state—and thus the potential return on a change in recognition standards in one direction or the other—is high. California and Delaware follow the 2005 Act, which is more protective but still less so than those in the 1962-Protective states. This moderation among states where personal jurisdiction is available over many multinationals suggests that the proposed statute is unlikely to set off a "race" to either radical protectiveness or receptiveness. Such a possibility cannot be excluded, however, and Congress might see fit to tailor the statute in light of states' responses to it.

277. *See* Part III.B.2, *supra*; Part V.B, *infra*.

can intervene and enact the leading form of state recognition law as the national standard and still reap many benefits of experimentation.

The statute this Article proposes would also place less at risk than the ALI Act. By federalizing the field, the ALI Act would eliminate legislative experimentation by states, but might still not achieve greater uniformity of judicial interpretation than a state-law system where states adopt uniform legislation or copy one another's laws.[278] In addition, the ALI Act's choice of substantive standards increases the chance that it will impose significant unknown costs: not many states—perhaps only Georgia and Massachusetts—have recognition regimes as protective as the ALI Act's, so we do not yet know what its effect is likely to be. Yet, by virtue of the fact that it is a federal statute, fixing any unintended consequences in the ALI Act would be more difficult, as congressional momentum would have to be marshaled anew for the enactment of amended substantive standards. The statute this Article proposes contains no substantive standards of recognition law, and thus would permit greater experimentation at all levels of the system.

Finally, like the ALI Act, the statute this Article proposes eliminates the possibility of judgment arbitrage. It is unclear whether this should be deemed a "cost" of either statute, however. States have little equity in the question whether their *recognition* judgments, as opposed to merits judgments rendered by their own legal system based on their own substantive laws, are automatically credited in other states. Under the statute this Article proposes, recognition judgments would have a more limited geographic reach, but states would enjoy a monopoly over the question whether foreign-country judgments can be recognized and enforced within their territory. In addition, where recognition and enforcement take place within the same state, they would be unaffected by the proposed statute.

B. Other Federal Conflicts-of-Law Legislation

In the past, Congress has dealt with horizontal conflicts by federalizing areas of law or facilitating the state market for law in particular fields, with the former more common than the latter.[279] If it were interested in reforming domestication—for example, to promote trade[280]—Congress would have to decide whether to eliminate the patchwork market for recognition

278. *See Recognition and Enforcement of Foreign Judgments Before the Subcomm. on Courts, Commercial & Administrative Law of the H. Comm. on the Judiciary, 112th Cong. 4 (2011)* (testimony of H. Kathleen Patchel, Uniform Law Commissioner, Indiana, and Associate Professor of Law Emeritus, Indiana University School of Law) (contending that courts applying state enactments of the 1962 Recognition Act do so with "at least as high a degree of uniform interpretation as one would expect to find if the courts had been interpreting one statute rather than uniform statutes of a number of jurisdictions."); *see also* Kobayashi & Ribstein, *Non-Uniformity*, *supra* note 44, at 359 (proposed uniform state laws impede development of uniformity).

279. *See* O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 47.

280. Trade is essential to the health of American firms and their employees and investors. *See* Javier Espinoza, *A Smarter Way to Invest Globally?*, Wall St. J., June 4, 2012, at C5 (S&P 500 companies generate majority of their revenue abroad).

law by preempting state law with a federal rule (as the ALI Act would), or to try to harness its experimental potential with the goal of promoting development of the highest quality law. In short, if Congress wants to alter the existing order, its first-order decision will be between enhancing federal or state control.

Congress's historical preference for federalization over facilitation of the law market reflects political incentives. O'Connor and Ribstein have noted that "[c]ongressional representatives have little political interest in mediating the choice-of-law decisions that govern matters left to state authority."[281] Thus "Congress has never acted to eliminate the general chaos created by the state choice-of-law systems. Instead, when Congress does act to correct state law problems, it is far more likely to federalize the legal territory than to specify a system of choice-of-law rules."[282] Yet federalism provides a natural method to empower the states as legal laboratories: jurisdictional competition, mediated by a federal choice-of-law rule that permits courts to apply forum law on domestication. Enactment of other conflicts-regulating legislation in the past indicates Congress might consider such a proposal.

To date, Congress has legislated federal conflicts rules on a number of occasions, usually in response to interest-group pressures.[283] Statutes containing choice-of-law rules include the Securing the Protection of our Enduring and Established Constitutional Heritage Act ("SPEECH Act"), federal banking laws, and the Defense of Marriage Act ("DOMA").[284] These laws establish rules enhancing or eliminating jurisdictional competition.

The SPEECH Act regulates judgment domestication directly. It provides that neither recognition nor enforcement can be extended by American courts to foreign judgments in defamation cases where the underlying speech would not constitute defamation under the U.S. Constitution. It applies in federal and state courts. The SPEECH Act prescribes a clear choice of law rule: where a foreign defamation judgment conflicts with the definition of protected speech under the First Amendment, recognition and enforcement of the foreign defamation judgment must be denied. This federalization of one corner of judgment domestication law was inspired by a fear that Americans were effectively being penalized by foreign courts for speech that would be constitutionally protected in the United States, and that American courts were then being asked to complete the deprivation of those citizens' rights by enforcing defamation judgments against them. Under prior law, recognition of such defamation judgments could have been

281. O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 47.

282. *Id.* at 49.

283. *See id.*

284. *See* SPEECH Act; National Bank Act, 12 U.S.C. § 86 (2007); 1 U.S.C. § 7 and 28 U.S.C. § 1738C [collectively hereinafter DOMA]; *see also* O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 48 (discussing impact of federal banking legislation).

denied on grounds of public policy,[285] but in states following the 1962 and 2005 Recognition Acts nonrecognition was not required.[286] (Under the ALI Act, courts finding that a foreign judgment was repugnant to public policy would be obligated to deny recognition.)[287] Congress decided that the mere ability to reject constitutionally problematic foreign defamation judgments was insufficient, and chose to make it mandatory. The passage of the SPEECH Act suggests that Congress can mobilize to regulate the domestication process, and may be more likely to do so where it perceives foreign law to be weakening non-controversial fundamental rights. It also provides an example of O'Connor and Ribstein's observation that Congress eliminates the market for state law more often than it facilitates it.[288]

Congress's enactment of certain inter-state banking laws and the ensuing revolution in bank chartering provides a second illustration of the law market. These suggest some of the challenges inherent in a system where parties can reap the benefits of favorable state laws without internalizing their costs. In the 1970s, "inflation rates rose so high that it was becoming impossible to borrow money in some states without running into several state-fixed interest rate ceilings,"[289] that is, usury laws. Congress responded by enacting a law that permitted a bank to charge any interest rate permissible in the state where it was chartered.[290] Delaware and South Dakota capitalized on this change and repealed their usury laws, and credit card companies tripped over themselves to re-charter themselves in those states.[291] As a consequence, most credit card issuers are now unconstrained by state legislation in either the interest rates or late fees they charge customers.[292]

While Congress's decision to energize the market for state banking law may appear on the surface to resemble the statute proposed in this Article, it would in fact change the status quo federalism architecture in the opposite way. Prior to the change in state banking law, states could not extend their laws beyond their territory.[293] By contrast, today state recognition law knows no domestic territorial constraints: a creditor can bring a recognition

285. *See, e.g.*, 2005 Recognition Act § 4(c)(3) (discretionary public policy ground for nonrecognition); 1962 Recognition Act § 4(b)(3) (same).

286. *Id.*

287. ALI Act § 5(a)(vi) (mandatory public policy exception). The burden of proof is on the party resisting enforcement. ALI Act § 5(a).

288. O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, 49.

289. *Id.* at 48.

290. *See* National Bank Act, 12 U.S.C. § 86 (2007); *see Marquette Nat'l Bank v. First Omaha Serv. Corp.*, 439 U.S. 299 (1978) (determining that a bank is located in the state where it is chartered).

291. O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 48.

292. *See id*. During the 1980s, South Dakota's tax receipts from credit card issuers increased by 900 percent, and Delaware's soared nearly 2000 percent. North Carolina lost several thousand bank-related jobs as a result of refusing to relax its usury laws; other states feared a similar outcome and followed the lead of Delaware and South Dakota. *Id.*

293. *See, e.g.*, Stephen J. Friedman and Connie M. Friesen, *A New Paradigm for Financial Regulation: Getting From Here to There*, 43 Md. L. Rev. 413, 426 (1984) (observing that "[c]ommercial banking enterprises are unique among major American businesses in that, historically, they have not been permitted to engage in business in more than one state").

proceeding in one state, and any other state asked to enforce the resulting judgment will be obligated to do so. Thus, the federal statute that permitted the 1970s revolution in usury laws provided a means for states to externalize the cost of their laws onto other states. By introducing a territorial limitation, the statute this Article proposes does the opposite: it requires states to internalize the cost of their regimes by enabling other states to block sister-state recognition judgments that violate forum law. Accordingly, while federal banking laws and the proposed statute both seek to catalyze jurisdictional competition, the statute this Article proposes does so in a way that seems less likely to create a race to appeal to a single class of party, with all the moral and policy concerns that such a contest might trigger.

Finally, DOMA provides another illustration of congressional regulation of the state law market. DOMA does mainly two things: Section 3 of the statute defines marriage for purposes of federal law as a union of a man and a woman ("federal marriage definition"),[294] and Section 2 permits states to decline recognition of same-sex marriages solemnized in other states ("nonrecognition provision").[295] From an individual rights standpoint, DOMA codifies disapproval of same-sex relationships and mandates unequal treatment of same-sex couples under federal law. Purely from the perspective of the law market, however, Section 2 inaugurated a system of fifty independent markets for a particular kind of law; no state could impose its vision of one kind of law on other states. The nonrecognition provision was said to "protect[ ] state sovereignty and democratic self-governance."[296]

Several courts have held that the federal marriage definition in DOMA violates the U.S. Constitution's guarantee of equal protection,[297] and some courts have invalidated state bans on same-sex marriage on the same ground.[298] However, courts have thus far left DOMA's nonrecognition provision untouched. Like the federal marriage definition, the nonrecognition provision was meant to further the policy goals of social conservatives who "fear[ed] the legalization and proliferation of same-sex marriages in the United States,"[299] not to encourage the process of discovery in the law market. However, as one court striking down the federal marriage definition noted, the nonrecognition provision nevertheless caused a natural experiment to unfold: "One virtue of federalism is that it permits this diversity of

294. DOMA § 3. The Supreme Court may soon decide the fate of this provision in *United States v. Windsor*, No. 12-307.

295. DOMA § 2.

296. H.R. Rep. No. 104–664, at 12 (1996).

297. *See, e.g.*, Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1, 17 (1st Cir. 2012).

298. *See, e.g.*, Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012) (invalidating California law).

299. O'Hara [O'Connor] & Ribstein, The Law Market, *supra* note 11, at 48.

governance based on local choice, [and] this applies as well to the states that have chosen to legalize same-sex marriage."[300]

The economic and health-insurance benefits of marriage give same-sex couples powerful financial incentives to reward jurisdictions that perform same-sex marriages with their residency and state tax dollars. For example, the cost of establishing, by contract, the same private rights and protections that marriage confers can run to $10,000.[301] In addition, states have a powerful incentive to supply laws affording equal access to marriage; in the first year following legalization, New York City's economy reaped $259 million in benefits from same-sex ceremonies and associated business and visits,[302] a significant transfer of wealth and tax revenue away from states that do not allow same-sex marriage. The discretionary nature of the nonrecognition provision enables states to tap into the market for same-sex marriage law by either legalizing same-sex marriage (thus attracting same-sex couples and same-sex marriage business) or recognizing such marriages when solemnized out of state (foregoing a stake in the nuptials themselves and associated business).

Finally, unlike the issue of marriage rights, the recognition of foreign-country judgments does not implicate fundamental constitutional rights. Important rights—including ones that would be considered fundamental rights under the U.S. Constitution—can of course be litigated in foreign forums, and providing access to American courts to enforce judgments rendered by those courts is important. But nowhere has it been suggested that it is constitutionally required.[303] Thus, a proposal that encourages states to experiment with striking different balances among competing values in domestication law is freighted with far fewer constitutional and moral implications than DOMA, and need not imply a weakening of federal protection of individual rights.

Conclusion

This Article identifies two problems in recognition law and proposes a statute that would facilitate states' efforts to find a solution.

The first problem is that, in the name of national unity, the current domestication regime assumes that the final judgment of a state or federal

300. Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d at 16.

301. Rex W. Huppke, *'Marriage' Benefits Costly for Gay Couples*, Chicago Trib., Jan. 18, 2010 (discussing rights to hospital visitation and inheritance, among others).

302. Henry Goldman, *Gay Marriage Produced $259 Million for New York City Economy*, Bloomberg News, July 24, 2012, available at http://www.bloomberg.com/news/2012-07-24/gay-marriage-produced-259-million-for-new-york-city-economy-1-.html.

303. Indeed, if recognition of a particular foreign judgment were somehow deemed to be required by the U.S. Constitution, the recognition proceeding would constitute the rare exception to the rule of state-law control of recognition and could be recognized under federal common law. *See* note 19, *supra* (discussing federal exceptions to rule of state-law domestication regime).

court must be treated as a legal "black box": American courts must enforce almost every judgment of any other American court without inquiring into the legal standards that produced it. However, states vary significantly in the degree to which they favor recognition of foreign judgments. This creates the possibility of exploiting differences in state recognition law through judgment arbitrage.

Treating recognition judgments as a black box obscures what should be considered a robust conflict among states' recognition laws. The substance of the conflict is not felt in court: it is irrelevant at both the recognition stage (because states apply their own recognition law) and the enforcement stage (because the current model mandates nationwide enforceability of any recognition judgment). The result, then, is that judgment arbitrage can neutralize any implied conflict between the recognizing state and the enforcement state. Conceiving of conflicts in recognition as involving primarily conflicts among national rather than subnational laws misses both the dysfunction in the state recognition-law market and the ability of sophisticated parties to transnational judgments to take advantage of it. The question of how, or whether, to tap into that market dynamic has been ignored thus far. Going forward, it should be the focus of efforts to reform domestication.

Second, the overall process of domesticating foreign judgments places American courts in an uncomfortable position. This has long been the case, but trends towards a bifurcation of the merits and enforcement stages of transnational litigation are exacerbating it. Increasingly, American courts must explicitly take a position on another country's laws, legal system, and internal politics, and even on specific foreign leaders. Moreover, the courts placed in this position are often state courts, applying state law.

These two problems are linked, and share a solution. Those, like the ALI, Silberman, and Lowenfeld, who would federalize the U.S. recognition regime are right that the current decentralized, federalist recognition regime holds the potential to disrupt foreign relations law and invites abuse by parties. The state-by-state dimension of domestication, however, holds promise and this Article's proposed statute would help states capitalize on it.

Today, states make decisions (on recognition) the consequences of which (enforcement) may be borne primarily by citizens of other states. Although they are simply seeking to maximize their expected recovery rather than work any damage to the constitutional order, today's system enables creditors to enlist one state's courts in a proceeding that has the effect of depriving another state of the ability to apply its chosen package of tradeoffs between protective and receptive values within its own borders. The collateral damage states thus risk doing to one another, which commentators have overlooked, suggests a role for federal regulation.

Moreover, the presence of foreign relations concerns does not necessarily militate against a state-law model, and need not require suspending juris-

dictional competition. Regulation of foreign relations law by states is not novel. As the Supreme Court emphasized last term when upholding part of an Arizona immigration law, "[e]ven in its international relations, the Federal Government must live with the inconvenient fact that it is a Union of independent States, who have their own sovereign powers. This is not the first time it has found that a nuisance and a bother in the conduct of foreign policy."[304] The potential for domestication law to cause international tension does not by itself suggest a need for exclusive federal regulation of the field.[305] Proponents of exclusive federal regulation contend that it serves American foreign policy objectives and the interests of multinationals, but have not explained why state-level experimentation would not, in the long run, better serve the very interests they wish to promote, or why it should be presumed an exception to the general rule favoring jurisdictional competition.

Jurisdictional competition would likely intensify if the proposed statute were enacted. States already disagree on the scope of some defenses: some permit searching examinations of foreign legal proceedings via tribunal-specific defenses; others authorize the defense of non-reciprocity; and some do one but not both of these things. States also disagree over the effect of defenses—some require nonrecognition, and others merely permit it—and over the allocation of burdens of proof, with some placing the burden on debtors as to all nonrecognition grounds and others only as to some. The level of disagreement among states and commentators over recognition law might be sufficient to foment vigorous competition if states could capture its benefits.

The ALI Act ignores this disagreement and the organic process underneath it. It would impose a single rule nationwide, introducing direct federal control over a process that has been run by states for seventy-five years. On its own, the diversity of state recognition law, which has persisted despite the availability of judgment arbitrage, suggests that declaring a uniform national rule would cut off an experiment in the fifty state laboratories before it runs its course. That major transnational litigation is only now beginning to come into its own as a phenomenon suggests that recognition law would benefit from greater freedom to adapt.

Sharpening competition for state recognition law may also reveal ways to manage other sister-state disputes. Because Congress has so rarely prescribed rules governing conflicts of law, we may find that testing the application of

304. Arizona v. United States, 132 S. Ct. 2492, 2514–15 (2012).

305. *See, e.g., id.* at 2515 (noting legitimate interests of U.S. states that cause international tension); Medellín v. Texas, 552 U.S. 491 (2008) (states have authority under U.S. constitution to violate U.S. international law obligations imposed by a non-self-executing treaty); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1642 (1997) ("the most natural inference [from the Constitution's structure] is that all foreign relations matters not excluded by Article I, Section 10 fall within the concurrent power of the state and federal governments until preempted by federal statute or treaty.").

such rules here will provide powerful insights about the effectiveness of federal statutes regulating other conflicts of laws in the future.