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Comity Concerns Are No Joke: Recognition of Foreign Judgments Under Dormant Foreign Affairs Preemption

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NOTES

COMITY CONCERNS ARE NO JOKE: RECOGNITION OF FOREIGN JUDGMENTS UNDER DORMANT FOREIGN AFFAIRS PREEMPTION

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This Note gives the legal background of the doctrine of dormant foreign affairs preemption, examines the laws governing the recognition of foreign judgments under the lens of dormant foreign affairs preemption, and argues that courts should adopt an objective standard for future dormant foreign affairs preemption cases.

Dormant foreign affairs preemption is premised on the idea that the federal government should have exclusive control over foreign affairs. The doctrine allows courts to preempt state laws in some cases where there is no conflicting federal policy or statute. The U.S. Supreme Court has only once held a state statute unconstitutional under the doctrine. In addition, not all scholars agree that courts should apply dormant foreign affairs preemption, and many argue the federal government merely has supreme, rather than exclusive, authority in foreign affairs. However, lower courts continue to apply a wide variety of tests to preserve the federal government's exclusive role in foreign affairs.

Dormant foreign affairs preemption is best understood by exploring an area of law that captures the competing interests in current dormant foreign affairs preemption analyses. This Note considers the laws governing the recognition of foreign judgments, an area of traditional state competence that also has a substantial and growing impact on modern conceptions of foreign affairs.

Finally, this Note argues that courts would benefit from applying an objective standard that looks at whether other countries would reasonably expect the federal government to have exclusive jurisdiction over an area of law. Unlike current standards, this analysis accounts for changing notions of foreign affairs and protects against encroachments on state sovereignty.

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Under the objective standard, the federal government would have exclusive jurisdiction over regulation of the recognition of foreign judgments.

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INTRODUCTION

Forty-seven Ecuadorans (the Lago Agrio plaintiffs) won an $18 billion Ecuadoran judgment against the oil giant Chevron Corporation in February 2011.[1] The Lago Agrio plaintiffs live in an area of the Amazonian rain forest that was only inhabited by indigenous tribes until another oil corporation, Texaco, led a consortium of companies in oil drilling throughout the Amazon from 1967 to 1992.[2] The Lago Agrio plaintiffs claim that throughout this time, Texaco dumped 18 billion gallons of toxic waste in their region and "left behind hundreds of open pits full of malignant black sludge," causing "cancer deaths, miscarriages, birth defects, dead livestock, sick fish, and the near-extinction of several tribes."[3] Chevron claims that Texaco's stake in the consortium was only 37 percent, and therefore its liability is limited to 37 percent of any damage.[4] Further, Chevron claims that, in 1998, the Ecuadoran government released Texaco from any future claims after Texaco spent $40 million cleaning up 37 percent of the pits.[5]

The litigation has lasted over twenty years and is "now considered one of the nastiest legal contests in memory, a spectacle almost as ugly as the pollution that prompted it."[6] The lawsuit began in 1993, when lawyers filed a class action on behalf of 30,000 Ecuadorans in the Southern District of New York.[7] In 2001, a federal judge dismissed the case on forum non conveniens[8] grounds, holding that the case had "everything to do with Ecuador and nothing to do with the United States."[9] In 2003, the Lago Agrio plaintiffs refiled their case in Ecuador, and in 2011, an Ecuadoran court entered the multibillion dollar judgment in favor of the Lago Agrio plaintiffs.[10]

The lawsuit returned to the Southern District of New York in 2011, when Chevron sued the Lago Agrio plaintiffs' lead attorney, Steven Donziger,

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1. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 594 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir.), *cert. denied*, 133 S. Ct 423 (2012). Since February 2011, the Ecuadoran Supreme Court has reduced the judgment to $9.5 billion. Roger Parloff, *Chevron Alleges Still Another Fraud by Ecuadorians*, CNN MONEY (Nov. 26, 2013, 8:02 AM), http://features.blogs.fortune.cnn.com/2013/11/26/chevron-alleges-still-another-fraud-by-ecuadorians/.

2. Patrick Radden Keefe, *Reversal of Fortune: The Lago Agrio Litigation*, 1 STAN. J. COMPLEX LITIG. 199, 199 (2013). Chevron inherited the lawsuit, which was originally against Texaco, when it acquired Texaco in 2001. *Id.* at 200.

3. *Id.* at 199.

4. *Id.* at 209.

5. *Id.*

6. *Id.* at 200.

7. *Id.* at 203.

8. Forum non conveniens allows courts to decline to exercise jurisdiction over a lawsuit, even where the court has subject matter and personal jurisdiction and venue is proper, when another forum would be more convenient. C.P. Jhong, *Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After Enactment of 28 U.S.C. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. FED. 352, § 1(a) (1972).

9. Aguinda v. Texaco, Inc., 142 F. Supp. 2d 534, 537 (S.D.N.Y. 2001).

10. Keefe, *supra* note 2, at 199, 203.

and others for violations of the Racketeering Influenced and Corrupt Organizations Act (RICO); state claims of fraud, tortious interference with contract, and trespass to chattels; unjust enrichment; civil conspiracy; violations of New York Judiciary Law governing the conduct of lawyers; and for a declaratory judgment that the $18 billion Ecuadoran judgment was not entitled to recognition or enforcement in the United States or elsewhere.[11] In particular, Chevron argued that Donziger "exploit[ed] the corruption of the Ecuadoran system," rendering the judgment unrecognizable and unenforceable.[12] The district court granted the global injunction based on New York's statute governing the recognition of foreign judgments.[13]

The Second Circuit later vacated the judgment.[14] For one, granting the injunction was improper under New York's recognition law, which does not authorize such an injunction.[15] Additionally, according to the Second Circuit, the district court may have violated principles of "international comity."[16]

International comity is the practice among nations to recognize, within their territories, the legislative, executive, or judicial acts of other nations with "due regard both to international duty and convenience, and to the rights of [their] own citizens or of other persons who are under the protection of [their] laws."[17] Comity is not a matter of obligation;[18] however, comity promotes cooperation, reciprocity, and international courtesy.[19] In the long term, adhering to comity improves the positions of cooperating countries.[20]

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11. Chevron Corp. v. Donziger, 768 F. Supp. 2d 581, 625–26 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir.), *cert. denied*, 133 S. Ct 423 (2012). The court later held that the judgment was unrecognizable because it was procured by fraud. Chevron Corp. v. Donziger, 11 Civ. 0691 (LAK), slip op. at 2 (S.D.N.Y. Mar. 4, 2014); Christie Smythe and Patricia Hurtado, *Chevron Wins U.S. Ruling Calling Ecuador Judgment Fraud*, BLOOMBERG NEWS (Mar. 4, 2014), http://www.bloomberg.com/news/2014-03-04/ecuador-judgment-against-chevron-ruled-a-fraud-by-u-s-.html.

12. Keefe, *supra* note 2, at 211. Chevron gained access to video footage, internal emails, and even Donziger's own diary, which showed that Donziger and his colleagues ghostwrote an independent environmental-damages assessment, as well as persuaded a judge to grant the multibillion dollar judgment for personal reasons. *See id.* at 210–14; *see also Donziger*, 11 Civ. 0691 (LAK), slip op. at 2.

13. *Donziger*, 768 F. Supp. 2d at 632–33 (applying N.Y. C.P.L.R. § 5304(a)–(b) (MCKINNEY 2011)).

14. *Naranjo*, 667 F.3d 232 at 247; *see also infra* notes 350–62 (elaborating on the Second Circuit's opinion).

15. *Naranjo*, 667 F.3d at 242–44.

16. *Id.* at 244.

17. Hilton v. Guyot, 159 U.S. 113, 163–164 (1895); *see also* BLACK'S LAW DICTIONARY 303 (9th ed. 2009) (defining comity).

18. *Hilton*, 159 U.S. at 163–164.

19. Ayelet Ben-Ezer & Ariel L. Bendor, *The Constitution and Conflict-of-Laws Treaties: Upgrading the International Comity*, 29 N.C. J. INT'L L. & COM. REG. 1, 9–10 (2003).

20. *Id.* at 10; Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 339–44 (1990) (arguing that when states are involved in repeated prisoner's dilemmas involving different strategies on choice of law, states adopt reciprocity).

While the states promulgate the laws governing the recognition of foreign judgments,[21] those laws are intertwined with concepts of international comity and foreign affairs. For example, the district court's nonrecognition of the Ecuadoran judgment involved a determination that Ecuador's judicial system was inadequate to the point that a court applying New York law could not recognize Ecuadoran judgments.[22] Further, the district court's global injunction insulted the legal systems of other countries, which the court deemed "insufficiently trustworthy" to evaluate the judgment.[23]

State laws that affect foreign policy, such as laws governing the recognition of foreign judgments, raise constitutional concerns. Those concerns are often dealt with through preemption doctrines, which allow courts to hold state statutes unconstitutional.[24] Dormant foreign affairs preemption is the doctrine that deals with state laws that affect foreign policy when there is no conflicting federal law or policy.[25] The doctrine is based on the idea that the federal government has exclusive authority over foreign affairs.[26]

The Constitution neither explicitly grants the federal government exclusive authority over, nor explicitly excludes the states from, foreign affairs.[27] However, the text of the Constitution, historical context, and U.S. Supreme Court jurisprudence to some extent support federal exclusivity in foreign affairs.[28] Critics of federal exclusivity draw on the same categories of evidence to show that the federal government is limited to supremacy, as opposed to exclusivity, in foreign affairs.[29] But significantly, the Supreme Court has held a state statute unconstitutional solely because of its impact on foreign affairs.[30] Furthermore, because the Court has remained largely silent on the issue of preemption in the absence of a conflicting federal statute or policy since its decision in 1968,[31] lower courts have applied a wide array of tests to exclude states from foreign affairs.[32]

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21. *See infra* Part II.B. Unless otherwise noted, "foreign judgments" in this Note refers to foreign money judgments.

22. Chevron Corp. v. Naranjo, 667 F.3d 232, 244 (2d Cir. 2012), *cert. denied*, 133 S. Ct 423 (2012).

23. *Id.*

24. *See infra* Part I.A.

25. *See infra* Part I.B.

26. *See infra* Part I.B.

27. *See infra* Part I.C.1.

28. *See infra* Part I.C.

29. *See infra* Part I.C.

30. Zschernig v. Miller, 389 U.S. 429, 441 (1968); *see also infra* Part I.B. *Zschernig* is distinguishable within Supreme Court preemption jurisprudence because most preemption doctrines require the presence of a conflicting federal statute in order to invalidate a state statute. *See infra* Part I.A.

31. This is with the exception of one case, in which the Court specifically addressed the unsettled doctrine in dictum. *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 419 n.11 (2003); *see also infra* notes 78–92 and accompanying text.

32. *See infra* Part I.B.2.

This Note addresses the scope of federal exclusivity in foreign affairs,[33] and proposes a new standard for evaluating issues under dormant foreign affairs preemption. The current analyses either do not account for changing notions of foreign affairs or fail to protect against encroachments on state sovereignty. An objective standard that looks to whether other sovereigns would reasonably expect the federal government to have exclusive jurisdiction over certain areas of law accounts for both considerations.

This Note also analyzes the law governing the recognition of foreign judgments. The recognition of foreign judgments captures the competing interests in dormant foreign affairs preemption analyses, and highlights the need for an adequate standard. The law regulating the recognition of foreign judgments in the United States has long been within the domain of the states, and yet its impact on modern conceptions of foreign affairs is both apparent and growing.[34]

Part I of this Note provides background on preemption, introduces Supreme Court and lower court jurisprudence on dormant foreign affairs preemption, and outlines the justifications and criticisms of the doctrine. Part II introduces and analyzes the law governing the recognition of foreign judgments and looks at its impact on foreign affairs. Part III critiques current dormant foreign affairs preemption standards, proposes a new objective standard for dormant foreign affairs preemption analysis, and evaluates the recognition of foreign judgments under the new standard.

I. A SOMEWHAT EXCLUSIVE CLUB: FOREIGN AFFAIRS PREEMPTION

Part I.A reviews the various doctrines of foreign affairs preemption. Part I.B considers the doctrine of dormant foreign affairs preemption and reviews Supreme Court and lower court cases implicating the doctrine. Part I.C analyzes the arguments in support and against dormant foreign affairs preemption and federal exclusivity in foreign affairs.

A. Preemption Doctrines

Article VI of the Constitution establishes the supremacy of federal law over state law.[35] The supremacy of federal law means that federal law overrides state law in cases where the two conflict.[36] Preemption can be an

33. Defining the scope of dormant foreign affairs preemption is essential, even as scholars debate the foundations of dormant foreign affairs preemption, *see infra* Part I.C, since courts continue to hold state statutes unconstitutional without a conflicting federal statute or policy, *see infra* Part I.B.

34. *See infra* Part II.

35. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). This is commonly known as the Supremacy Clause.

36. Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770 (1994).

even greater limitation on state power.[37] Preemption means, "(a) that states are deprived of their power to act *at all* in a given area, and (b) that this is so *whether or not* state law is in conflict with federal law."[38]

"Preemption" refers to a wide array of doctrines, including statutory preemption, obstacle preemption, and dormant preemption.[39] Statutory preemption doctrines all have the same underpinning: a federal statute is at issue.[40] The judiciary's role, therefore, is to determine whether Congress intended the federal statute to preempt the state law.[41] The first statutory preemption doctrine is express preemption, which "occurs when a statute on its face addresses preemption."[42] There are also three doctrines of implied statutory preemption: conflict preemption, and two variations of field preemption.[43] Under conflict preemption, courts may preempt a statute when it is impossible to comply with both a federal statute and a state statute.[44] Field preemption can occur when: (1) a federal regulatory scheme is "so pervasive" that Congress could not have intended for states to supplement it, or (2) a federal interest is "so dominant" that state laws in the field should not be enforced.[45]

Similar to statutory preemption is obstacle preemption. In cases that employ obstacle preemption, a court "identifies the 'purposes and objectives' of a federal statute that is silent about preemptive scope" and determines whether the "state statute 'stands as an obstacle to the accomplishment' of these purposes and objectives."[46]

Dormant preemption doctrines do not rely on the existence of a federal statute.[47] One dormant preemption doctrine is dormant Foreign Commerce Clause preemption, which requires courts to decide "whether a state law facially discriminates against foreign commerce or has substantial

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37. *Id*. at 771.

38. *Id.*

39. *See* Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 202. It should be noted at the outset that preemption jurisprudence is riddled with equivocation. *See id.* at 178 ("The Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate. Their relations to one another are unclear. And the decisional outcomes are difficult to cohere."). Often, state statutes that violate principles of statutory preemption also raise dormant foreign affairs preemption issues, or in other words, issues concerning the federal government's exclusive control over foreign affairs. *See infra* Part I.C.3.

40. *See* Goldsmith, *supra* note 39, at 205–06.

41. *Id.*

42. *Id.* at 205.

43. *See id.* at 206.

44. *Id.* at 205.

45. *Id.* at 206 (citations omitted).

46. *Id.* at 205–06 (quoting Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995)).

47. *Id.* at 204. Some scholars argue that the absence of a conflicting federal statute in dormant foreign affairs preemption cases suggests that the dormant foreign affairs preemption is not rooted in the Supremacy Clause. *See* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 348–49 (1999) ("[Dormant foreign affairs preemption] operates outside the scope of the Supremacy Clause, as it does not require for its invocation a conflicting congressional statute or treaty. It is, instead, non-Article VI preemption." (footnotes omitted)).

discriminatory effects," and "preempts state laws that prevent the federal government from speaking with 'one voice' in foreign relations."[48] Similarly, in another dormant preemption doctrine—federal common law of foreign relations—courts look to the effects of a state law on foreign affairs to determine whether federal common law should replace the state law.[49]

The third dormant preemption doctrine is dormant foreign affairs preemption, which allows courts to hold state laws unconstitutional if they interfere with federal foreign policy.[50] The theory is that the federal government has exclusive power over the conduct of foreign affairs, and that states may not encroach on this power.[51] While the power to conduct foreign affairs is lodged in the federal political branches, states sometimes act in areas in which those branches have failed to act.[52] In such cases, "the structure of the Constitution establishes a self-executing presumption . . . that such activity is governed by federal law."[53]

B. Dormant Foreign Affairs Preemption in the Courts

The Supreme Court and lower courts have dealt with dormant foreign affairs preemption in various contexts. The Court preempted a state statute under dormant foreign affairs preemption in *Zschernig v. Miller*[54] and proposed a new test for the doctrine in dictum in *American Insurance Ass'n v. Garamendi*.[55] Likewise, the lower courts have applied a number of different tests, all purportedly to maintain federal exclusivity in foreign affairs.

1. Dormant Foreign Affairs Preemption in the Supreme Court

The Court applied dormant foreign affairs preemption in *Zschernig*.[56] The sole heirs of an Oregon decedent's estate petitioned the Court to overturn the judgment of the Supreme Court of Oregon, which held that their estate would escheat to the state as the requirements of an Oregon state statute were not satisfied.[57] Where a nonresident alien claimed real or personal property, the Oregon statute required:

> (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country; (2) the right of United States citizens to receive payment here of

48. Goldsmith, *supra* note 39, at 204.
49. *Id.*
50. Ramsey, *supra* note 47, at 348.
51. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620 (1997).
52. *Id.*
53. *Id.*
54. 389 U.S. 429 (1968).
55. 539 U.S. 396 (2003) (dictum).
56. *See Zschernig*, 389 U.S. at 441.
57. *Id.* at 430.

> funds from estates in the foreign country; and (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."[58]

The Court reversed the judgment of the Supreme Court of Oregon, holding that the Oregon law was unconstitutional as applied because it had "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[59] Furthermore, the Court held that it had "more than some incidental or indirect effect in foreign countries, and its great potential for disruption or embarrassment makes [the Court] hesitate to place it in the category of diplomatic bagatelle."[60] The Court was particularly concerned because state courts were inquiring into the governmental operations and protection of rights in foreign nations.[61] Not only did the statute require Oregon judges to determine whether Oregon citizens shared the same rights as those protected by foreign law, but it also "ma[d]e unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[62]

In its reasoning, the Court precariously distinguished an earlier decision, *Clark v. Allen*,[63] in which the Court had upheld a California statute containing a similar reciprocity clause as it would only have "some incidental or indirect effect in foreign countries."[64] The Court distinguished *Clark* because there, the Court decided only the facial constitutionality of the California statute; a state statute with a reciprocity clause could still be unconstitutional as applied.[65]

Zschernig is the only case in which the Court's holding rested entirely on dormant foreign affairs preemption.[66] In prior cases, the Court had found state statutes preempted where there was a federal statute, treaty, or policy that conflicted with a state statute.[67] However, the Court decided *Zschernig* without regard to statutory or obstacle preemption; the Court's concern was solely with state intrusion into foreign policy.[68] Nonetheless, the Court was willing to hold the state statute unconstitutional: "Where those [state] laws

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58. *Id.* at 430–31 (quoting OR. REV. STAT. § 111.070 (1967), *repealed by* 1969 Or. Laws 1221 (1969)).

59. *Id.* at 441.

60. *Id.* at 434–35 (internal quotation marks omitted).

61. *Id.* at 433–34 ("States have launched inquiries into the type of governments that obtain in particular foreign nations—whether aliens under their law have enforceable rights, whether the so-called 'rights' are merely dispensations turning upon the whim or caprice of government officials, whether the representation of consuls, ambassadors, and other representatives of foreign nations is credible or made in good faith, [and] whether there is in the actual administration in the particular foreign system of law any element of confiscation.").

62. *Id.* at 440.

63. 331 U.S. 503 (1947).

64. *Id.* at 517.

65. *Zschernig*, 389 U.S. at 433.

66. *See* Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337, 339 (2001) ("Most everyone was comfortable supposing that the national government monopolized foreign relations until the Supreme Court actually began applying that notion [in *Zschernig*].").

67. For examples of such cases, see *infra* Part I.C.3.

68. *See Zschernig*, 389 U.S. at 440–41.

conflict with a treaty, they must bow to the superior federal policy. Yet, even in absence of a treaty, a State's policy may disturb foreign relations."[69]

In his concurring opinion, Justice Harlan expressed reservations with the Court's broad holding and stated that he would have held the state statute unconstitutional because it conflicted with an earlier federal treaty with Germany.[70] He argued that precedent supported permitting state legislation "in areas of [states'] traditional competence even though their statutes may have an incidental effect on foreign relations."[71] Moreover, he believed that the Court's mistake was that its reasoning—that judicial criticism of foreign nations could have an effect on foreign affairs—was "based almost entirely on speculation":

> [T]he Court does not mention, nor does the record reveal, any instance in which such an occurrence has been the occasion for a diplomatic protest, or, indeed, has had any foreign relations consequence whatsoever.
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> . . . .
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> . . . [J]udges have been known to utter dicta critical of foreign governmental policies even in purely domestic cases, so that the mere possibility of offensive utterances can hardly be the test.[72]

Zschernig has proven controversial in the years since it was decided. Scholars point out that *Zschernig* is unclear in its reasoning and scope.[73] For instance, the case fails to adequately demarcate the line between constitutionally permissible and prohibited state and local action.[74] Moreover, the case does not provide guidance on how to distinguish between incidental and serious effects.[75]

The Court has thus far refused to reinvoke the dormant foreign affairs preemption doctrine, and Supreme Court justices have criticized the opinion. For instance, in her dissent in *Garamendi*, Justice Ginsburg expressed reservations about relying on *Zschernig*, noting, "We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here."[76] Further, in oral arguments in *Garamendi*, Chief Justice

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69. *Id.* at 441 (citation omitted). Justice Stewart's concurrence was an even greater sanctioning of dormant foreign affairs preemption. *See id.* at 441–43 (Stewart, J., concurring) ("[T]he conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States."). Justice Stewart also emphasized that the constitutionality of state laws infringing on foreign affairs should not depend on the "shifting winds at the State Department." *Id.* at 443.

70. *Id.* at 462 (Harlan, J., concurring).

71. *Id.* at 458–59.

72. *Id.* at 460–61.

73. *See* Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re) Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201, 232 (2011).

74. *Id.*

75. Emily Chiang, *Think Locally, Act Globally? Dormant Federal Common Law Preemption of State and Local Activities Affecting Foreign Affairs*, 53 SYRACUSE L. REV. 923, 966 (2003).

76. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting).

Rehnquist bluntly stated, "I don't regard [*Zschernig*] as a very strongly reasoned opinion."[77]

In addition to *Zschernig*, the Court addressed dormant foreign affairs preemption in dictum in the more recent case, *Garamendi*.[78] California had enacted a statute in 1999 that required insurance companies doing business in California "to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one related to it."[79] At the same time, the United States was in the midst of negotiations with Germany regarding this very matter.[80] The negotiations culminated in the German Foundation Agreement, which President Clinton and German Chancellor Schroder signed in July 2000, and which established a German fund for the compensation of "those 'who suffered at the hands of German companies during the National Socialist era.'"[81] The United States supported the fund both by promising to encourage state and local governments to respect the foundation as an exclusive means of remuneration and by submitting a statement, nonbinding on U.S. courts, saying "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II."[82] The leaders also agreed that the German Foundation would work with the International Commission on Holocaust Era Insurance Claims (ICHEIC), the responsibilities of which included providing information about Holocaust-era unpaid insurance policies.[83]

The Court held that the California statute was unconstitutional because it conflicted with a federal policy in the same domain.[84] Since the California statute fell within an area of traditional state competence—namely, insurance—the Court endorsed a balancing approach to determine whether the federal policy preempted the state law: courts should "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted."[85] In applying this test, the Court relied on *Crosby v. National Foreign Trade Council*,[86] noting that the California statute "undercuts the President's diplomatic discretion" and compromised the

77. Transcript of Oral Argument at 7, *Garamendi*, 539 U.S. 396 (No. 02-722), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/02-722.pdf.

78. *See Garamendi*, 539 U.S. at 419 n.11.

79. *Id.* at 401 (internal quotation marks omitted).

80. *Id.* at 407.

81. *Id.* at 405 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," U.S.-Ger., July 17, 2000, 39 I.L.M. 1298).

82. *Id.* at 406 (quoting Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," *supra* note 81, at 1303).

83. *Id.* at 406–07.

84. *Id.* at 427. Cases under this type of preemption—"obstacle preemption"—are discussed *infra* in Part I.C.3.b.

85. *Garamendi*, 539 U.S. at 420.

86. 530 U.S. 363 (2000). For further discussion of *Crosby*, see *infra* notes 221–29 and accompanying text.

president's ability to "'speak for the Nation with one voice in dealing with other governments.'"[87] Moreover, in addition to an express foreign policy and a clear conflict, California only had a weak interest in regulating disclosure of the insurance policies.[88]

The Court, in a footnote, also proposed a possible model for dormant foreign affairs preemption.[89] If a state were to encroach on foreign policy without claiming to address "traditional state responsibility," the Court would not require a conflicting federal statute or policy.[90] However, where a state has acted within its "'traditional competence,' but in a way that affects foreign relations," the Court would require a conflict "of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."[91] The Court would also possibly weigh the asserted federal foreign policy interest.[92]

2. Dormant Foreign Affairs Preemption in Lower Courts

Lower courts apply a wide variety of tests and standards in the name of dormant foreign affairs preemption.[93] Some courts apply the *Zschernig* test, looking to whether state laws have a direct impact on foreign affairs.[94] For example, in *Trojan Technologies, Inc. v. Pennsylvania*, the Third Circuit applied the *Zschernig* test to uphold a Pennsylvania law that required steel suppliers contracting with a public agency in connection with a public works project to provide American-made steel.[95] After rejecting statutory and foreign commerce preemption challenges to the constitutionality of the state law, the court held that the state law did not raise the same foreign policy concerns as the statute in *Zschernig*.[96]

Similarly, in *Deutsch v. Turner Corp.*,[97] decided before *Garamendi*,[98] the Ninth Circuit held that a California statute creating a cause of action for claims involving Second World War slave labor was unconstitutional despite the lack of a conflicting federal statute.[99] The court held that the statute encroached on a field that the Constitution explicitly reserved for the federal government—the federal government's power to make and resolve

87. *Garamendi*, 539 U.S. at 423–24 (quoting *Crosby*, 530 U.S. at 381).
88. *Id.* at 425.
89. *See id.* at 419 n.11.
90. *Id.*
91. *Id.* (quoting Zschernig v. Miller, 389 U.S. 429, 459 (1968) (Harlan, J., concurring)).
92. *Id.*
93. Chiang, *supra* note 75, at 972–73. Chiang argues that lower court decisions may depend on whether a state law is, on its face, directed at a foreign nation, is generally applicable, or is facially neutral but is intended to address only some foreign nations. *Id.* at 972–73.
94. *See, e.g.*, Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903 (3d Cir. 1990).
95. *Id.* at 904, 909.
96. *See id.* at 909.
97. 324 F.3d 692 (9th Cir. 2003).
98. 539 U.S. 396, 439 (2003).
99. *Id.* at 703, 715.

war.[100] The court viewed the statute as an attempt by California to "rectify[] wartime wrongs committed by our enemies,"[101] encroaching on war-related issues that were "for the federal government alone to address."[102]

Since *Garamendi*, the Ninth Circuit has applied a test that looks at the purposes behind state laws.[103] For example, in *Movsesian v. Victoria Versicherung AG*, victims of the Armenian genocide filed suit under a California statute vesting California courts with jurisdiction over, and extending the statute of limitations of, insurance claims brought by Armenian genocide victims.[104] Although the district court upheld the California statute, the Ninth Circuit reversed.[105]

The court interpreted dictum in *Garamendi* to require a two-part test for preemption under *Zschernig*: first, uncover the "real purpose" of a state law to determine whether a state has a serious claim of addressing a traditional state responsibility, and second, determine whether the state regulation intrudes on the federal government's foreign affairs powers.[106] Applying the test, the court first held that the state did not have a serious claim of addressing a traditional state responsibility because "the real purpose of [the state statute was] to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events."[107] Second, the court held that the statute expressed a point of view and that its effect on foreign affairs was more than incidental.[108] The court said that "[the statute] is, at its heart, intended to send a political message on an issue of foreign affairs by providing relief and a friendly forum to a perceived class of foreign victims."[109]

Finally, courts sometimes apply confused tests with a number of considerations.[110] For example in *Springfield Rare Coin Galleries v. Johnson*,[111] the court struck down an amendment to a state law that created exemptions from certain taxes, but specifically excluded South Africa.[112] The court relied on an assortment of federal and state cases to derive a number of principles to support its holding.[113] The state law was

100. *Id.* at 713–15.
101. *Id.* at 708.
102. *Id.* at 712. The court also contrasted the power to make and resolve war with powers concerning foreign commerce, saying that statutes mainly involving foreign commerce "are among those least likely to be held invalid under the foreign affairs power." *Id.* at 711.
103. *See, e.g.*, Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1075 (9th Cir. 2011); Von Saher v. Norton Simon Museum of Art, 592 F.3d 954, 964–65 (9th Cir. 2010).
104. *Movsesian*, 670 F.3d at 1069.
105. *Id.* at 1077.
106. *Id.* at 1074.
107. *Id.* at 1076.
108. *Id.* at 1077.
109. *Id.*
110. Chiang gives a comprehensive review of such cases. *See* Chiang, *supra* note 75, at 967–69.
111. 503 N.E.2d 300 (Ill. 1986).
112. *Id.* at 302.
113. *See id.* at 306–07.

unconstitutional because the motivation behind the amendment was disapproval of South Africa's policies, the exclusion targeted a single foreign nation, and the practical effect of the exclusion was to impose or encourage an economic boycott of the South African gold coin, the Krugerrand.[114]

C. Legal Foundation of Dormant Foreign Affairs Preemption

The debate over the foundation and scope of dormant foreign affairs preemption[115] takes shape around principles of federalism, the division of power between the federal and state governments.[116] Dormant foreign affairs preemption rests on the argument that the federal government has exclusive authority in the conduct of foreign affairs.[117] Proponents of the doctrine draw on (1) the text and structure of the Constitution; (2) historical context, including the intent of the founders and responses to the Articles of Confederation; and, (3) Supreme Court dictum to support the notion that the federal government has exclusive, and not just supreme, authority.[118] Critics of the doctrine draw on the same categories of evidence to show that while federal supremacy in foreign affairs is undeniable, federal exclusivity does not follow.[119]

1. The Text and Structure of the Constitution

Proponents of dormant foreign affairs preemption argue that the Constitution "should be read as a whole" and interpreted in light of the powers granted to the federal government and denied the states.[120] Thus, when taken together, the specific provisions "indicate an intent on the part of the Framers to vest foreign affairs powers in the federal government."[121] Proponents argue that structurally, "[u]nlike power over domestic matters, power over foreign affairs cannot be shared without substantially impairing its effective exercise."[122] Proponents further support these textual

114. *Id.*

115. *See generally* Chiang, *supra* note 75 (arguing in favor of dormant foreign affairs preemption); Goldsmith, *supra* note 51 (arguing that the courts' practice of applying the federal common law of foreign relations lacks justification); Ramsey, *supra* note 47 (arguing that courts should permit some state interference in foreign affairs); Swaine, *supra* note 66 (discussing the constitutional context and values in foreign relations federalism); Joseph B. Crace, Jr., Note, *Gara-mending the Doctrine of Foreign Affairs Preemption*, 90 CORNELL L. REV. 203 (2004) (discussing the effects of dormant foreign affairs preemption on states' ability to legislate in areas of traditional state concern).

116. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (2d ed. 1996); Goldsmith, *supra* note 51 (discussing the relationship between federalism and foreign affairs).

117. *See* Goldsmith, *supra* note 51, at 1620.

118. *See* Chiang, *supra* note 75, at 932.

119. *See, e.g.*, Goldsmith, *supra* note 51, at 1665.

120. Chiang, *supra* note 75, at 934–35.

121. *Id.*; *see also* Ramsey, *supra* note 47, at 366.

122. Ramsey, *supra* note 47, at 366.

arguments with Supreme Court jurisprudence differentiating between structural assumptions for domestic and foreign affairs.[123]

The textual argument against dormant foreign affairs preemption relies on viewing the Constitution as a structure of enumerated powers.[124] Since the Constitution adopts such a structure, powers that are not "specifically granted to the federal government or denied to the states remain within the concurrent powers of the state and federal governments until preempted by a federal statute or treaty."[125]

The Constitution does not explicitly grant the judiciary the power to preempt state laws that interfere with foreign affairs.[126] Moreover, even though the Founders referred to the ability to "regulate the intercourse with foreign nations" as a class of powers,[127] the Constitution does not grant a single "foreign affairs" power to the federal government.[128] Rather, the provisions empowering the federal government to regulate foreign affairs are scattered throughout the text of the Constitution. For instance, among the enumerated powers granted to Congress in Article I, Section 8 are the powers to "regulate commerce with foreign nations" (the Foreign Commerce Clause);[129] "establish an uniform Rule of Naturalization";[130] "coin Money, regulate the Value thereof, and of foreign Coin";[131] "define and punish Piracies and Felonies committed on the High Seas, and Offenses against the Law of Nations";[132] "declare War";[133] "raise and support Armies";[134] and "provide and maintain a Navy."[135] Article II is likewise replete with foreign affairs empowerment, naming the president "Commander in Chief of the Army and Navy of the United States,"[136] granting the president the "Power, by and with the Advice and Consent of the Senate, to make Treaties,"[137] and directing the president to "receive Ambassadors and other public Ministers."[138] Finally, the Constitution grants the Supreme Court jurisdiction "[i]n all cases affecting Ambassadors, other public Ministers and Consuls."[139]

123. *See* Chiang, *supra* note 75, at 935–36.
124. *Id.* at 934–35.
125. *Id.* at 934.
126. *See* Goldsmith, *supra* note 51, at 1641–42.
127. THE FEDERALIST NO. 42, at 207 (James Madison) (Lawrence Goldman ed., 2008).
128. *See* Chiang, *supra* note 75, at 933.
129. U.S. CONST. art. I, § 8, cl. 3.
130. *Id.* cl. 4.
131. *Id.* cl. 5.
132. *Id.* cl. 10.
133. *Id.* cl. 11.
134. *Id.* cl. 12.
135. *Id.* cl. 13.
136. *Id.* § 2, cl. 1.
137. *Id.* cl. 2. Critics of the doctrine, such as Goldsmith, argue that a primary purpose for establishing procedural hurdles (bicameralism, presentment, and veto requirements) with respect to foreign relations law "was to preserve state influence and protect state interests." Goldsmith, *supra* note 51, at 1645.
138. U.S. CONST. art. II, § 3.
139. *Id.* art. III, § 2, cl. 2.

Just as there is no discrete grant of "foreign affairs" powers to the federal government in the Constitution, there is similarly no specific clause wholly forbidding the states from participating in "foreign affairs."[140] However, the Constitution does contain precise prohibitions relating to the states and their international reach, including that "[n]o State shall enter into any treaty, alliance, or confederation,"[141] and

> [n]o State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.[142]

2. Historical Context

Scholars also view the text and structure of the Constitution in light of contemporaneous history.[143] Scholars often draw upon *The Federalist Papers* and other sources to determine the Framers' intent, and consider responses to deficiencies in the Articles of Confederation to support their arguments for and against federal exclusivity in foreign affairs.

a. The Intent of the Framers

Supporters and detractors of dormant foreign affairs preemption frequently look to the Framers' intent to substantiate their claims that the Constitution does or does not exclusively reserve foreign affairs powers for the federal government.[144] While supporters of the doctrine argue that the Framers intended for the federal government to have exclusive authority over foreign affairs,[145] detractors contend that the Framers at most intended the federal government to have supreme, not exclusive, authority.[146]

In *The Federalist Papers*, John Jay, James Madison, and Alexander Hamilton each argued in favor of adopting the new Constitution. In *The*

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140. *See generally* U.S. CONST.

141. *Id.* art. I, § 10, cl. 1.

142. *Id.* cl. 3.

143. *See, e.g.*, Goldsmith, *supra* note 51, at 1643–44; Ramsey, *supra* note 47, at 380–82.

144. *Compare* Chiang, *supra* note 75, at 936–39 (arguing that *The Federalist Papers* "provide a powerful counterpoint to the anti-preemption commentary"), *and* Crace, *supra* note 115, at 229–30 (citing *The Federalist Papers* in support of a "well-grounded" constitutional federal foreign affairs power), *with* Goldsmith, *supra* note 51, at 1642–43 (contending that the Framers' intent does not support dormant foreign affairs preemption), *and* Ramsey, *supra* note 47, at 382 ("[T]he framers' views relate only to the need for federal supremacy, not federal exclusivity.").

145. *E.g.*, Crace, *supra* note 115, at 230 (reviewing the passages from *The Federalist Papers* and concluding that "[the passages] indicate that the Framers intended the federal government to be the sole organ of foreign policy").

146. Goldsmith, *supra* note 51, at 1643 ("[O]utside of Article I, Section 10, there is no evidence that the Constitution was designed to establish a judicially enforceable, self-executing realm of federal exclusivity in foreign affairs."); Ramsey, *supra* note 47, at 382 ("[T]he framers' views relate only to the need for federal supremacy, not federal exclusivity.").

Federalist No. 3, John Jay argued that a national government, because of its uniform set of laws and government, was best equipped to handle issues concerning treaties and the laws of nations.[147] Moreover, a uniform government would be more likely to observe the "law of nations" and therefore less likely to give other nations excuses to go to war.[148] In Jay's view, the decisions of a national government would also be "more wise, systematical, and judicious" than those made by the individual states.[149] In particular, he believed that the national government would be more immune to malicious local influence and better able to counteract it.[150]

Jay further argued in *The Federalist No. 4* that a unified government is better prepared to act in defense of the "safety of the whole," as it can draw on the human and military resources of the entire nation, act with uniform policy, and in the formation of treaties "regard the interest of the whole and the particular interests of the parts as connected with that of the whole."[151] Moreover, a united America would have superior military power, efficiency in the regulation of the military, and would be immune from opponents' divisive tactics.[152] Finally, in *The Federalist No. 5*, Jay warned of the dangers of having fully sovereign individual states that would eventually succumb to envy and jealousy and turn on each other.[153]

In *The Federalist No. 42*, James Madison wrote both generally of the importance of national unity in foreign affairs—"[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations"[154]—and in support of the individual foreign affairs powers in the Constitution.[155] He drew significantly upon the defects in the Articles of Confederation to demonstrate the importance of the federal foreign affairs powers, such as the ability to receive ambassadors and "other public ministers and consuls," and the power to define and punish crimes committed on the high seas.[156]

In *The Federalist No. 44*, Madison wrote specifically on restricting the authority of the states.[157] First, Madison believed it self-evident that states should be restricted from entering into treaties, alliances, and

147. THE FEDERALIST NO. 3, *supra* note 127, at 20 (John Jay) ("Under the national government, treaties and articles of treaties, as well as the laws of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States . . . will not always accord or be consistent.").

148. *Id.* at 19.

149. *Id.* at 20.

150. *Id.* at 21.

151. *Id.* at 24.

152. *Id.*

153. *Id.* NO. 5, at 27–28 ("[T]hey would neither love nor trust one another, but on the contrary would be a prey to discord, jealousy, and mutual injuries; in short, . . . they would place us exactly in the situations in which some nations doubtless wish to see us, viz., *formidable only to each other*.").

154. *Id.* NO. 42, at 208 (James Madison).

155. *Id.* at 208–10.

156. *Id.*

157. *Id.* NO. 44.

confederations.[158] He also justified a broad rule giving exclusive authority to grant letters of marque[159] to the national government by stressing the importance of vesting the foreign affairs powers in the national government alone: "This alteration is fully justified by the advantage of uniformity in all points which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible."[160] Additionally, Madison supported prohibiting the states from issuing bills of credit by arguing that retrospective alterations in their value might cause foreign powers to suffer, "and hence the Union be discredited and embroiled by the indiscretion of a single member."[161]

On the other hand, in a letter to Thomas Jefferson, Madison warned that the management of foreign affairs was particularly susceptible to governmental abuse for two reasons.[162] First, the government has wide discretion in disclosing foreign relations information to the public.[163] Second, the public is less capable of judging, and therefore "more under the influence of prejudices," in this area of affairs: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[164]

Alexander Hamilton wrote in support of federal judicial authority over cases that involved the United States and citizens of foreign nations.[165] To Hamilton, justification for federal diversity jurisdiction in such cases came down to a simple proposition: "[T]he peace of the WHOLE ought not to be left at the disposal of a PART."[166] Hamilton explained his reasoning: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."[167] Thus, according to Hamilton, it followed that the federal judiciary should preside over cases concerning foreign citizens.[168]

Hamilton followed this expansive interpretation of the federal judiciary's authority by proposing a distinction, for the purposes of diversity jurisdiction cases involving foreigners, between "cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law": the former would fall under federal jurisdiction and the

158. *Id.* at 222.

159. Letters of marque were government licenses authorizing privateers to attack and capture enemy vessels. J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 468 (2005).

160. THE FEDERALIST NO. 44, *supra* note 127, at 222 (James Madison).

161. *Id.* at 223.

162. 2 JAMES MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 140–41 (Phila., J. B. Lippincott & Co. 1867).

163. *Id.*

164. *Id.*

165. THE FEDERALIST NO. 80, *supra* note 127 (Alexander Hamilton).

166. *Id.* at 389.

167. *Id.*

168. *Id.*

latter under that of the states.[169] Yet, in the same breath, Hamilton disavowed the proposal, conceding the inherent difficulty of distinguishing run-of-the-mill cases arising under municipal laws from those that may affect foreign relations:

> But it is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign . . . . And a still greater objection to the distinction would result from the immense difficulty, if not impossibility, of a practical discrimination between the cases of one complexion and those of the other.[170]

Hamilton argued that all cases that could affect foreign affairs should fall under federal jurisdiction because a majority of the cases involving foreign parties involve national questions, and it was therefore safer to submit those matters to a federal court.[171]

Lastly, supporters of dormant foreign affairs preemption draw on writings from Thomas Jefferson. First, Jefferson wrote from Paris at the conclusion of the Constitutional Convention about his "general idea" on the Constitution.[172] Jefferson thought that the states should preserve their sovereignty "in whatever concerns themselves alone," but the federal government should retain sovereignty over "whatever may concern another State, or any foreign nation."[173] Additionally, in a letter from Jefferson to Madison in 1786, Jefferson wrote that "[t]he politics of Europe rendered it indispensably necessary that with respect to everything external we be one nation firmly hooped together."[174]

b. The Articles of Confederation

Supporters of dormant foreign affairs preemption also often highlight that the Framers intended the Constitution to remedy certain defects in the Articles of Confederation. For instance, the Articles of Confederation provided an ineffective framework for controlling the states, thus undermining the national interest in security, diplomacy, and a unified international trade policy.[175] Moreover, the Confederation government lacked the means to maintain a national military, and states had neither the means nor the motivation to protect against external security threats to the

169. *Id.*
170. *Id.*
171. *Id.*
172. 2 THOMAS JEFFERSON, MEMOIR, CORRESPONDENCE, AND MISCELLANIES: FROM THE PAPERS OF THOMAS JEFFERSON 230 (Thomas Jefferson Randolph ed., Charlottesville, F. Carr & Co. 1829).
173. *Id.*
174. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 46 (1928) (quoting Letter from Thomas Jefferson to James Madison (Oct. 8, 1786)).
175. While Goldsmith does not write in support of dormant foreign affairs preemption, he does review the difficulties associated with the Articles of Confederation. *See* Goldsmith, *supra* note 51, at 1643.

Confederation.[176] Additionally, the national government was limited in its ability to bargain effectively with foreign nations, as states pursued their own commercial policies with foreign nations and refused to comply with national treaty obligations.[177] Finally, the national government lacked authority to enforce compliance with international law.[178]

One incident stands out as a particularly egregious example of state noncompliance. Following the 1783 Treaty of Paris, which required states to pay prewar debts to British creditors,[179] several states passed legislation barring British merchants from collecting on the debts.[180] Britain then refused to honor its treaty obligations to abandon military outposts along the northwestern frontier and barred almost all American goods from entering the British West Indies.[181] States refused to cooperate with the national government's efforts to normalize trade relations, and retaliated against Britain by discriminatorily taxing British imports.[182]

3. Supreme Court Precedent

Supporters of dormant foreign affairs preemption argue that the Court's precedent supports federal exclusivity in foreign affairs.[183] In regard to foreign affairs cases generally, supporters draw on dictum from early cases, such as *Chae Chan Ping v. United States*,[184] *Chy Lung v. Freeman*,[185] and *United States v. Curtiss-Wright Export Corp.*,[186] which speak emphatically about the federal government's expansive powers in foreign affairs—or foreign affairs as conceived at the time of the cases.[187] Conversely, critics point out that none of the parties in other early foreign affairs cases, such as *Ware v. Hylton*[188] and the *Passenger Cases*,[189] argued that that the

176. *Id.* at 1643–44.

177. *Id.* at 1644; *see also* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1199 n.263 (2000).

178. Goldsmith, *supra* note 51, at 1644.

179. *Id.*

180. Chiang, *supra* note 75, at 938.

181. *Id.*

182. *Id.*

183. *Id.* at 942–43.

184. 130 U.S. 581, 606 (1889) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.").

185. 92 U.S. 275, 279 (1875) ("If [the United States] should get into a difficulty which would lead to war, or to suspension of intercourse, would California alone suffer, or all the Union?").

186. 299 U.S. 304, 315–16 (1936) ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.").

187. The language of the cases referring to "foreign affairs" should be interpreted keeping in mind that the definition of "foreign affairs" has changed dramatically over time. *See infra* notes 393–97 and accompanying text.

188. 3 U.S. (3 Dall.) 199 (1796).

189. Smith v. Turner (The Passenger Cases), 48 U.S. (7 How.) 283 (1849); Mayor of N.Y. v. Miln, 36 U.S. (11 Pet.) 102 (1837).

Constitution contains a generalized exclusion of states from foreign affairs.[190]

The Court's jurisprudence in foreign affairs preemption is of particular note. First, in cases in which the Court holds state statutes unconstitutional because of a conflicting federal statute or policy, the Court often refers to issues of exclusive federal control over foreign affairs, which would be the crucial issue if there were no conflicting federal statute or policy. Second, in cases that deal with the Foreign Commerce Clause or the federal common law of foreign relations, the Court addresses the same underlying issue as in dormant foreign affairs preemption, which is whether the Court should hold a state statute unconstitutional in the absence of a conflicting federal statute or policy.

a. Statutory Preemption

Hines v. Davidowitz[191] stands as an example of statutory preemption, or preemption where there is a conflicting federal statute.[192] In 1940, Congress enacted the federal Alien Registration Act, which covered many of the same areas as a Pennsylvania statute.[193] The Court held that the state statute conflicted with the federal Alien Registration Act and, pursuant to the Supremacy Clause, the federal act prevailed.[194] The Court was principally concerned with local interference with foreign relations[195] and the delicacy of international relations.[196]

While the Court seemed to condone federal exclusivity in foreign affairs,[197] it was unwilling to endorse preemption of state statutes without a conflicting federal statute or policy,[198] and expressly refused to condone the plaintiffs' contention that the federal government had exclusive authority within the field of regulation and registration of aliens.[199] However, the Court suggested that it was willing to enjoin enforcement of state statutes that conflicted with congressional policy, in addition to federal statutes,[200] which the Court later did under the doctrine of obstacle preemption.

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190. Ramsey, *supra* note 47, at 418–19.

191. 312 U.S. 52 (1941).

192. *See supra* notes 40–45 and accompanying text.

193. *Hines*, 312 U.S. at 60.

194. *Id.* at 62–63.

195. *Id.* at 63 ("Our system of government is such that the interest of the cities, counties and states . . . imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

196. *See id.* at 64.

197. *Id.* at 63 ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.").

198. *Id.* at 68 & n.22 ("[W]here the Constitution does not of itself prohibit state action, . . . and where the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not.").

199. *Id.* at 61.

200. *See id.* at 67, 70. On the other hand, Justice Stone expressed reluctance to permit preemption in cases where there was only a conflicting federal policy. *Id.* at 78 (Stone, J., dissenting) ("Every Act of Congress occupies some field, but we must know the boundaries

b. Obstacle Preemption

Two early examples of obstacle preemption, or cases in which the Court preempts state laws because of a conflicting federal policy,[201] concern Russian assets held in the United States after Soviet nationalization of private property. First, in *United States v. Belmont*,[202] the U.S. government sought to recover assets deposited by a Russian corporation with a private banker in New York City.[203] The Court held that the United States was entitled to the assets because international compacts entered into by the president, though not Senate-ratified treaties, need not take into consideration state law or policy: "[C]omplete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."[204] The Court further stated that "[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government."[205] With respect to the current treaty, the federal government could act as if New York did not exist.[206] Moreover, since the Soviet Union maintained an interest in the collection of assigned claims in general, the claims were a "public concern, the determination of which well might involve the good faith of the United States in the eyes of a foreign government."[207]

The second case, *United States v. Pink*,[208] involved a similar situation. The United States sought the recovery of assets of a New York branch of a Russian insurance company, which at the time of the suit were in the State of New York's possession.[209] The case followed the nationalization of the insurance business and the agreement—known as the "Litvinov Assignment"—between the two countries.[210] The Litvinov Assignment entitled the United States to Soviet assets in possession of U.S. nationals in the United States.[211] The New York Court of Appeals, like the Second Circuit in *Belmont*,[212] held that because the property was in New York, New York law applied.[213] Consequently, New York was entitled to the assets because nothing required the court to succumb to a "confiscatory decree[]."[214]

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of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution.").

201. *See supra* note 46 and accompanying text.
202. 301 U.S. 324 (1937).
203. *Id.* at 325–26.
204. *Id.* at 331–32.
205. *Id.* at 330.
206. *Id.* at 331.
207. *Id.* at 327.
208. 315 U.S. 203 (1942).
209. *Id.* at 210.
210. *Id.* at 210–13.
211. *Id.*
212. United States v. Belmont, 85 F.2d 542, 544 (2d Cir. 1936), *rev'd*, 301 U.S. 324.
213. *Pink*, 315 U.S. at 220–21.
214. *Id.* at 221.

The Court reversed, reiterating its holding in *Belmont* that state laws and policies must always yield to federal foreign affairs policies: "We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."[215] The Court was concerned that other countries would hold the United States as a whole accountable for difficulties created by individual states.[216]

Just as the Court in *Belmont* recognized the positive interests of adhering to the federal government's policy, the Court in *Pink* asserted the dangers of deviation from federal policy.[217] The Litvinov Assignment was intended "to eliminate all possible sources of friction," and the unpaid claims "had long been one impediment to resumption of friendly relations."[218] The New York Court of Appeals, by refusing to give force to the federal policy, had disapproved of or refused to recognize nationalization under the Soviet Union in the face of the national government's acceptance.[219] Thus, New York had "restore[d] some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate."[220]

Crosby v. National Foreign Trade Council[221] is a more recent example in which the Court preempted a state statute because it conflicted with federal policy.[222] In this case, state officials petitioned the Court to overturn the First Circuit's judgment holding a Massachusetts state law unconstitutional.[223] The Massachusetts law "generally bar[red] state entities from buying goods or services from any person . . . identified on a restricted purchase list of those doing business with Burma," with some exceptions and exemptions.[224] Soon after Massachusetts passed the law, Congress enacted a statute "imposing a set of mandatory and conditional sanctions on Burma."[225] The federal act also authorized the president to impose further conditional sanctions on Burma, as well as "to develop 'a . . . strategy to bring democracy to and improve human rights practices and the quality of life in Burma.'"[226]

The Court affirmed the First Circuit's judgment, holding that the Massachusetts law was preempted and therefore unconstitutional under the Supremacy Clause because it "conflict[ed] with Congress's specific

215. *Id.* at 233.
216. *Id.* at 232.
217. *Id.* at 225, 231–32.
218. *Id.* at 225.
219. *Id.* at 231–32.
220. *Id.* at 232.
221. 530 U.S. 363 (2000).
222. *Id.* at 371.
223. *Id.*
224. *Id.* at 367 (internal quotation marks omitted).
225. *Id.* at 368.
226. *Id.* at 369 (quoting Foreign Operations, Export Financing, and Related Programs Appropriations Act § 570, Pub. L. No. 104-208, 110 Stat. 3009-166 to 3009-167 (1997)).

delegation to the President" of power[227] and "undermine[d] the intended purpose and 'natural effect' of . . . three provisions of [a] federal Act."[228] The Court was principally concerned with the Massachusetts statute's effect on the president's ability to conduct diplomacy, since the statute "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[229]

c. Dormant Foreign Commerce Clause Preemption

This concern for speaking with one voice also plays a central role in the Court's dormant Foreign Commerce Clause preemption jurisprudence. An example of preemption of state law under the Foreign Commerce Clause is *Japan Line, Ltd. v. County of Los Angeles*.[230] In *Japan Line, Ltd.*, the Court held that a California property tax violated two additional tests that come into play when a state seeks to tax the instrumentalities of foreign, as opposed to interstate, commerce.[231] The Court considered whether the tax "creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"[232]

Soon after *Japan Line, Ltd.*, the Court limited the scope of the Foreign Commerce Clause. For example, in *Barclays Bank PLC v. Franchise Tax Board*,[233] the Court held that a state tax did not "impair federal uniformity in an area where federal uniformity is essential,"[234] reasoning that Congress, "whose voice, in this area, is the Nation's," was the proper place "to evaluate whether the national interest is best served by tax uniformity, or state autonomy."[235] Not only did the Court hold that Congress was the proper place for such an inquiry, but it also specifically held that "[t]he judiciary is not vested with power to decide 'how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please.'"[236] Moreover, the Court held that Congress had passively indicated its consent to the tax by not enacting legislation to the contrary in the face of explicit international displeasure.[237] The Court would also have required "specific indications of congressional intent" to find congressional disapproval.[238] Finally, the Court held that executive statements, which could have been interpreted as executive disapproval of the worldwide combined reporting system, were insufficient

227. *Id.* at 388.
228. *Id.* at 373 (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)).
229. *Id.* at 381.
230. 441 U.S. 434 (1979).
231. *Id.* at 449–50.
232. *Id.* at 451.
233. 512 U.S. 298 (1994).
234. *Id.* at 320 (quoting *Japan Line, Ltd.*, 441 U.S. at 448).
235. *Id.* at 331.
236. *Id.* at 328 (quoting Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983)).
237. *Id.* at 324 & n.22.
238. *Id.* at 324 (quoting *Container Corp. of Am.*, 463 U.S. at 196–97).

to prove unconstitutionality under the Foreign Commerce Clause.[239] The Court emphasized separation of powers, holding that "[t]he Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'"[240]

d. The Federal Common Law of Foreign Relations

The Supreme Court applied federal common law of foreign relations in *Banco Nacional de Cuba v. Sabbatino*.[241] In *Sabbatino*, a Cuban bank sued an American commodities broker to recover proceeds from a shipment of sugar that the Cuban government had expropriated in response to a U.S. reduction of the sugar quota for Cuba.[242] The Cuban bank argued that the act of state doctrine proscribed judicial inquiry into the validity of the Cuban government's expropriation of the sugar.[243] The act of state doctrine prevents the courts of a country from "sit[ting] in judgment on the acts of the government of another done within its own territory."[244] The American commodities broker argued that the expropriation violated international law because of a "combination of retaliation, discrimination, and inadequate compensation," and that the act of state doctrine did not apply to actions that violated international law.[245]

The Court ultimately held that there was no exception to the act of state doctrine for violations of international law, and therefore the Court could not inquire into the validity of the expropriation.[246] Furthermore, the Court explicitly held that state courts must also follow the act of state doctrine: "the problems involved are uniquely federal in nature" and if "the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject."[247] Even after acknowledging that New York had adopted the act of state doctrine, and therefore indicating that the Court could have avoided the question of whether federal or state law applied, the Court held that the issue "must be treated exclusively as an aspect of federal law," and that the issue was beyond the scope of the *Erie Railroad Co. v. Tompkins* doctrine.[248]

The Court also directly addressed the question of the legal basis for mandating acceptance of the act of state doctrine.[249] The Court held that the act of state doctrine was neither compelled by international law,[250] nor

239. *Id.*
240. *Id.* at 328–29 (quoting U.S. CONST. art. I, § 8, cl. 3).
241. 376 U.S. 398 (1964).
242. *Id.* at 401–06.
243. *Id.* at 416.
244. *Id.*
245. *Id.* at 433–34.
246. *Id.* at 436–37.
247. *Id.* at 424.
248. *Id.* at 424–25; *see* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
249. Sabbatino, 376 U.S. at 421–27.
250. *Id.* at 421.

by the text of the Constitution itself.[251] Instead, the act of state doctrine has "constitutional underpinnings": "[i]t arises out of the basic relationships between branches of government in a system of separation of powers" and concerns the competency of certain branches to make decisions in the area of international relations.[252]

II. RECOGNITION OF FOREIGN JUDGMENTS

The law governing the recognition of foreign judgments captures the competing interests in current dormant foreign affairs preemption analyses. State regulation over the recognition of foreign judgments can be viewed as both a traditional state activity and an area of law that has an impact on foreign affairs. In fact, Justice Harlan drew on recognition of foreign judgments in his *Zschernig* concurrence to highlight the inadequacy of the Court's new dormant foreign affairs preemption standard.[253] He emphasized that the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which a majority of states adopted to regulate their recognition of foreign judgments,[254] had the same defect that caused the Court to strike down the state law in that case.[255] Yet, the Court would not want to find it unconstitutional.[256] Furthermore, while some courts apply state law governing the recognition of foreign judgments, other courts continue to equivocate between applying state law and federal common law,[257] and sometimes even explicitly apply federal common law.[258]

Part II.A introduces the law governing the recognition of foreign judgments, with emphasis on the pivotal case, *Hilton v. Guyot*,[259] modern recognition law under the UFMJRA, and federal preemption of state libel tourism laws. Part II.B reviews recognition law's impact on foreign affairs, looking at *Chevron Corp. v. Donziger*[260] to ascertain the comity concerns in the refusal to recognize a judgment, and the "international" due process analysis for an example of unavoidable judicial criticism inherent in recognition cases.

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251. *Id.* at 423.

252. *Id.* (internal quotation mark omitted).

253. *See* Zschernig v. Miller, 389 U.S. 429, 461–62 (1968) (Harlan, J., concurring).

254. Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1168 (2007).

255. *Zschernig*, 389 U.S. at 461–62 (Harlan, J., concurring).

256. *Id.* (discussing that the requirement for state courts to inquire into the administration of foreign law "is shared by other legal rules which I cannot believe the Court wishes to invalidate").

257. *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134, 141 n.1 (2d Cir. 2000).

258. *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981).

259. 159 U.S. 113 (1895).

260. 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir.), *cert. denied*, 133 S. Ct 423 (2012).

A. The Law Governing the Recognition of Foreign Money Judgments

This section outlines the current state of the law governing the recognition of foreign money judgments. First, the Supreme Court set out basic conditions for the recognition of foreign judgments in *Hilton*.[261] Second, after the Court held in *Erie* that federal courts sitting in diversity should apply the substantive law of the state in which the court sits,[262] a majority of the states adopted the UFMJRA as their substantive law governing the recognition of foreign judgments. Finally, the federal government has recently preempted state law governing the recognition of foreign libel judgments.

1. Recognition Law

Judgments are typically "final," meaning that they are entitled to res judicata and collateral estoppel effects, and thus "bar[] the relitigation of the same claims in a second court or, in many cases, relitigation of issues on which a party has previously litigated and lost."[263] Foreign judgments, however, must first be recognized before they are enforced.[264] "Recognition" therefore denotes "the res judicata status of a foreign judgment."[265] A court's recognition of a foreign judgment is equivalent to saying that the foreign adjudication is binding on the parties.[266]

Enforcement of a judgment is necessary when a defendant requires judicial compulsion to pay on a judgment that the United States has recognized or rendered.[267] "Enforcement" of a judgment thus refers to the "authorization of affirmative relief based on the foreign judgment;" it is a "domestic judgment rendered pursuant to a claim predicated upon the foreign judgment."[268] Therefore, a foreign judgment must be recognized before it is enforced,[269] and once a judgment is recognized in one state, all

261. *See infra* notes 274–82 and accompanying text.

262. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); *see also* Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531, 1532 (2011).

263. *See* JOACHIM ZEKOLL ET AL., TRANSNATIONAL CIVIL LITIGATION 617 (2013). For an interesting argument that judgment creditors should be permitted to register judgments without waiting for judgment debtors to file appeals, see generally Cristina M. Rincon, Note, *The Early Bird Waits for the Worm: May Federal Judgments Be Registered Prior to Appeal?*, 82 FORDHAM L. REV. 1091 (2013).

264. Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 459 (2013).

265. Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720, 721–22 (1970).

266. *Id.*

267. ZEKOLL, *supra* note 263, at 617–18.

268. Ginsburg, *supra* note 265, at 721. Moreover, "[a] proceeding to enforce a foreign judgment normally takes the form of an action by the judgment creditor to collect a sum due from the judgment debtor under a judgment rendered in another state." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. b (1987).

269. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 8, intro. note.

American courts must enforce it regardless of their own recognition laws.[270] Judgments are also recognized for purposes other than enforcement.[271] For example, recognition issues may arise where a party seeks to rely upon the res judicata effect of a prior adjudication, or where a party seeks to rely on a prior determination of fact or law.[272]

The U.S. Constitution does not discuss the recognition of judgments obtained in other countries.[273] The Court, however, set out conditions for recognition of foreign judgments in *Hilton*, which involved a French liquidator's attempt to recover upon a judgment entered in a French court in Paris.[274] The central issue was whether foreign judgments could be reexamined on their merits.[275] According to the Court in *Hilton*, a court should recognize a judgment where: (1) there has been regular proceedings and an opportunity for a "full and fair trial abroad before a court of competent jurisdiction"; (2) there has been "due citation" or the defendant voluntarily appeared; (3) there was 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 (4) there was no prejudice in the court, nor fraud in procuring the judgment.[276]

However, the Court did not evaluate whether the judgment met those conditions.[277] The Court instead held that a party seeking recognition of a foreign jurdgment must first prove "reciprocity," a requirement that was not satisfied in this case.[278] The Court held that reciprocity requires that the country of the rendering court give effect to judgments entered in the United States.[279] Since France would not give judgments entered in the United States conclusive effect, the Court would treat French judgments merely as prima facie evidence of the plaintiff's claim.[280] The foundation for the Court's decision to include reciprocity, besides an extensive analysis of the treatment of foreign judgments in other countries,[281] was a belief in an underlying "comity of nations."[282] The dissent, on the other hand, would not have required reciprocity, and characterized foreign judgments as "private rights acquired under foreign laws," which are enforceable unless contrary to a state's public policy.[283]

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270. Shill, *supra* note 264, at 459.
271. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4, ch. 8, intro. note.
272. *Id.* § 481 cmt. b.
273. Carodine, *supra* note 254, at 1166.
274. Hilton v. Guyot, 159 U.S. 113, 114 (1895).
275. *Id.* at 151.
276. *Id.* at 202.
277. *Id.* at 210.
278. *Id.* at 210–12.
279. *Id.*
280. *Id.* at 227–28.
281. *See id.* at 217–228.
282. *Id.* at 163–64; *see also supra* notes 17–18 and accompanying text.
283. *Hilton*, 159 U.S. at 233 (Fuller, J., dissenting).

While the *Hilton* conditions—mostly without reciprocity—still guide the decisions of courts today,[284] some state courts did not consider *Hilton* binding.[285] For instance, in *Johnston v. Compagnie Generale Transatlantique*,[286] the New York Court of Appeals expressly refused to follow *Hilton*.[287] A U.S. plaintiff had brought suit in France against a French steamship carrier after the steamship carrier allegedly delivered goods to a wrong party.[288] The French court ruled in favor of the steamship carrier, but the same plaintiff sued the carrier in New York on the same grounds.[289] The lower courts followed *Hilton* and refused to give effect to the French judgment for want of reciprocity.[290]

The New York Court of Appeals reversed, holding that the court was not bound to follow *Hilton*'s reciprocity requirement.[291] The court recognized the federal government's possible foreign affairs interest in the recognition of foreign judgments, but determined that the federal government's interest did not give rise to exclusive federal authority in the domain.[292] The court, like the dissent in *Hilton*, interpreted the question to be "one of private rather than public international law, of private right rather than public relations."[293] Further, in holding that New York did not require reciprocity, the New York Court of Appeals reasoned that comity "rests, not on the basis of reciprocity, but rather upon the persuasiveness of the foreign judgment."[294] Since reciprocity was the sole basis for refusing to recognize the French court's judgment, the court reversed.[295]

2. The Uniform Foreign Money-Judgments Recognition Act

Since *Erie*, state law has generally governed the recognition of foreign monetary judgments.[296] However, the fractured judgment recognition system proved problematic for enforcement of U.S. judgments abroad, as some civil law nations that required reciprocity were not satisfied that it

284. Ginsburg, *supra* note 265, at 725 ("*Hilton v. Guyot* presents a catalogue of conditions to recognition that remain vital in United States practice."); *see also, e.g.*, John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co., 569 F.2d 696, 697 & n.1 (1st Cir. 1978) (following the "considerations" set out in *Hilton* and disregarding state law due to the similarities between state law and *Hilton*).

285. Ginsburg, *supra* note 265, at 724.

286. 242 N.Y. 381 (1926).

287. *Id.* at 387 ("I reach the conclusion that this court is not bound to follow the *Hilton* case . . . .").

288. *Id.* at 383.

289. *Id.*

290. *Id.* at 383–84.

291. *Id.* at 386–87.

292. *Id.*

293. *Id.* at 387.

294. *Id.*

295. *Id.* at 388. Most states no longer require reciprocity. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. d n.1 (1987).

296. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a. However, courts continue to follow the reasoning set out in *Hilton*. *See supra* notes 257–58.

existed in the United States.[297] The consequent need for codification and unification of recognition law prompted the National Conference of Commissioners on Uniform State Laws (NCCUSL) to draft the UFMJRA in 1962.[298] The drafters intended to encourage the equal treatment of judgments rendered abroad with judgments entered in sister states in order to facilitate the enforcement of U.S. judgments abroad.[299] Although the United States is generally considered one of the nations most receptive to the recognition of foreign judgments, the drafters of the UFMJRA intended to expand recognition for foreign judgments.[300]

The UFMJRA, which is based on *Hilton*,[301] codified common law and provided "skeletal" procedures for recognition and enforcement.[302] Under the UFMJRA, a judgment creditor must show that a judgment is "final and conclusive and enforceable where rendered."[303] A judgment debtor can contest the conclusiveness of a judgment on mandatory grounds, upon proof of which a court must refuse recognition of the judgment, or permissive grounds, proof of which allows a court discretion to dismiss for nonrecognition.[304] The three mandatory grounds for nonrecognition include when: (1) the foreign court's system lacked "impartial tribunals or procedures compatible with the requirements of due process of law"; (2) the foreign court did not have personal jurisdiction over the defendant; and (3) the foreign court did not have subject matter jurisdiction.[305] The six permissive grounds for nonrecognition include if: (1) the defendant did not receive notice; (2) the judgment was obtained by fraud; (3) satisfaction of the underlying claim would violate the public policy of the state; (4) the judgment conflicts with another conclusive judgment; (5) the parties agreed to have their claims heard in an alternate forum; and (6) in cases where jurisdiction is based on personal service and "the foreign court was a seriously inconvenient forum for the trial of the action."[306]

Although thirty-one states have adopted the UFMJRA in some form,[307] the laws within those states are still not uniform.[308] While some states

297. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT prefatory note, 13 U.L.A. pt. II, at 40 (2002); *see also* Melinda Luthin, *U.S. Enforcement of Foreign Money Judgments and the Need for Reform*, 14 U.C. DAVIS J. INT'L L. & POL'Y 111, 120 (2007) ("[T]he purpose of the '62 Recognition Act was to facilitate international business by recognizing money judgments obtained in other nations."); Christina Weston, *The Enforcement Loophole: Judgment-Recognition Defenses As a Loophole to Corporate Accountability for Conduct Abroad*, 25 EMORY INT'L L. REV. 731, 738–39 (2011).

298. Luthin, *supra* note 297, at 118, 121 ("The idea behind the '62 Recognition Act was to provide statutory proof of reciprocity.").

299. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT prefatory note, 13 U.L.A. pt. II, at 40.

300. Luthin, *supra* note 297, at 117, 119.

301. Carodine, *supra* note 254, at 1168.

302. Luthin, *supra* note 297, at 112.

303. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2, 13 U.L.A. pt. II, at 46.

304. *Id.* § 4, 13 U.L.A. pt. II, at 58–59.

305. *Id.* § 4(a), 13 U.L.A. pt. II, at 58–59.

306. *Id.* § 4(b), 13 U.L.A. pt. II, at 59.

307. *Legislative Fact Sheet—Foreign Money Judgments Recognition Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%

adopted the UFMJRA in its entirety, others adopted "only those portions that mirrored their already established common law."[309] Even those states that adopted the UFMJRA in its entirety may still apply their pre-UFMJRA rules.[310]

The NCCUSL proposed the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA),[311] a revision to the UFMJRA, in 2005.[312] The drafters of the UFCMJRA intended to further increase the certainty and uniformity provided by the original UFMJRA in order to facilitate international commercial transactions.[313] The UFCMJRA updated the definitions section, clarified the scope of the Act, set out recognition procedural mechanisms, expanded the grounds for nonrecognition, allocated the Act's burden of proof for application of the Act and for maintaining nonrecognition, and established a statute of limitations.[314] Eighteen states and the District of Columbia have adopted the UFCMJRA, and three have introduced it in some form.[315]

3. The SPEECH Act: Federal Preemption of "Libel Tourism" Laws

State law does not govern all cases concerning the recognition of foreign judgments. Federal law exclusively governs the recognition of foreign libel judgments,[316] an area of law that raises both domestic and foreign policy concerns. Congress passed the Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act[317] in August 2010.[318] The legislation prohibits recognition or enforcement of a foreign judgment for defamation unless a foreign court "provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located," or if the defendant would have been found liable for defamation

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20Money%20Judgments%20Recognition%20Act (last visited Mar. 25, 2014). The U.S. Virgin Islands and the District of Columbia have also enacted a form of the UFMJRA. *Id.*

308. Luthin, *supra* note 297, at 120.

309. *Id.*

310. *Id.*

311. UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT prefatory note, 13 U.L.A. pt. II, at 21 (Supp. 2013).

312. Luthin, *supra* note 297, at 137.

313. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT prefatory note, 13 U.L.A. pt. II, at 21.

314. *See id.*

315. *Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act*, UNIFORM L. COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act (last visited Mar. 25, 2014).

316. *See* Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, 28 U.S.C. § 4102 (Supp. V 2011).

317. *Id.*

318. John R. Crook, *U.S. Legislation Blocks Enforcement of "Libel Tourism" Judgments*, 104 AM. J. INT'L L. 681, 681 (2010).

under U.S. and the domestic state's law.[319] The Act followed similar state iterations, such as New York's Libel Terrorism Protection Act,[320] although once passed the SPEECH Act preempted state law governing the enforcement of foreign libel judgments.[321]

The legislation was a response to "[l]ibel tourism," or "the practice of obstructing the First Amendment by suing American authors and publishers for defamation in foreign courts where a lower legal standard allows for easier recovery."[322] In other words, plaintiffs often choose to bring libel suits against U.S. journalists, writers, and publishers in foreign jurisdictions, such as the United Kingdom, because such jurisdictions have harsh libel laws, whereas the United States has substantial free speech protections under the First Amendment.[323] For instance, the United States places a heavy burden on plaintiffs in libel actions to prove that the statement at issue is false and was made maliciously, while the United Kingdom has a presumption that the statement at issue is false.[324]

Additionally, minimum-contacts personal jurisdiction is easier to establish in the United Kingdom.[325] The issue is especially salient in an age of common international dissemination of written works.[326] U.S. authors were previously able to keep "out of reach of the long arm of the British courts . . . . [However,] in an era of massive global communications, it is sometimes impossible to keep a written work from disseminating internationally."[327]

For example, in the lawsuit that precipitated the SPEECH Act and its state law predecessors, the author Rachel Ehrenfeld had not published her book *Funding Evil: How Terrorism Is Financed—And How To Stop It* in the United Kingdom, but she had posted parts of the book on the Internet, and twenty-three copies ended up in the United Kingdom.[328] In the book,

319. 28 U.S.C. § 4102.

320. Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375, 381–82 (2011).

321. Darren J. Robinson, Note, *U.S. Enforcement of Foreign Judgments, Libel Tourism, and the SPEECH Act: Protecting Speech or Discouraging Foreign Legal Cooperation?*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 911, 916 (2013).

322. Marissa Gerny, Note, *The SPEECH Act Defends the First Amendment: A Visible and Targeted Response to Libel Tourism*, 36 SETON HALL LEGIS. J. 409, 410 (2012).

323. Robinson, *supra* note 321, at 913. Australia, Brazil, Indonesia, and Singapore are also known as jurisdictions with harsh libel laws. Crook, *supra* note 318, at 682.

324. Robinson, *supra* note 321, at 913.

325. *Id.* Further, the United Kingdom subscribes to the "multiple publication" rule, which "'holds that every publication of the disputed work, in any forum throughout the world, gives rise to a separate tort' . . . . This means that a limitations period might not expire until a publication is unavailable in any format—including online." Klein, *supra* note 320, at 379–380 (quoting Sarah Staveley-O'Carroll, Note, *Libel Tourism Laws: Spoiling the Holiday and Saving the First Amendment*?, 4 N.Y.U. J.L. & LIBERTY 252, 260–61 (2009)).

326. *See* Gerny, *supra* note 322, at 410 ("The widespread use of the Internet expands [the jurisdictional] problem. Material posted on the Internet can be accessed in any country."); Robinson, *supra* note 321, at 913.

327. Robinson, *supra* note 321, at 913.

328. *Id.* at 912–13, 917.

Ehrenfeld accused a Saudi Arabian billionaire of supporting terrorism.[329] The billionaire had previously been convicted of money laundering, bribery, supporting terrorism, arms trafficking, and many other crimes, and he had also brought over twenty-nine libel suits in the United Kingdom alone.[330] Ehrenfeld could not defend the suit because it was too expensive to litigate in the United Kingdom.[331] The British court consequently entered a $200,000 default judgment against her.[332]

The domestic concern with libel tourism is that it has the effect of chilling free speech.[333] If American writers can be subject to any jurisdiction's libel laws, then writers who do not want to fall victim to such laws must be cognizant of them all, including those with strict limitations on free speech.[334] This "cuts off the free flow of information that should reach the public, and instead silences authors and journalists."[335]

Commentators have also expressed "comity concerns" over "the collateral effects of U.S. legislation aimed at curbing libel tourism": "[s]uch legislation has the ability to impact much more than just defamation actions—it might well create foreign policy friction among nations that, in the normal course of business, would respect valid judgments rendered in one another's courts."[336] Additionally, the states' pre-SPEECH Act responses raised "serious concerns about consistency, particularly in an area where the sensitivities of foreign nations are at stake and where principles of federal constitutional law are driving the laws' enactments."[337]

B. Recognition Law: Impact on Foreign Affairs

This section analyzes the impact of laws governing the recognition of foreign judgments on foreign affairs. First, the cases involving Chevron illustrate that there are comity concerns in cases where courts refuse to recognize foreign judgments or enjoin other courts from recognizing judgments. Second, courts applying the international due process standard

329. *Id.* at 912.
330. *Id.*
331. *Id.*
332. *Id.* at 426.
333. Gerny, *supra* note 322, at 413.
334. *Id.*
335. *Id.*
336. Klein, *supra* note 320, at 387; *see also* David A. Anderson, *Transnational Libel*, 53 VA. J. INT'L L. 71, 72 (2012) ("The SPEECH Act sets aside hard-won concepts of international comity in favor of unilateral fiat."); Doug Rendleman, *Collecting a Libel Tourist's Defamation Judgment?*, 67 WASH. & LEE L. REV. 467, 487 (2010) ("[The] panoptic rejection of all foreign-nation defamation judgments is both too blunt and too broad. The idea, moreover, that a foreign nation's substantive law is 'repugnant' unless it is identical to ours is itself a repugnant one."); Todd W. Moore, Note, *Untying Our Hands: The Case for Uniform Personal Jurisdiction Over "Libel Tourists,"* 77 FORDHAM L. REV. 3207, 3236 (2009); John J. Walsh, *The Myth of 'Libel Tourism,'* N.Y. L.J., Nov. 20, 2007, at 2 (arguing that domestic borders limit the principles of the First Amendment and that the myth of "libel tourism" threatens "long-standing and important relationships").
337. Klein, *supra* note 320, at 383.

are examples of the unavoidable judicial criticism inherent in recognition cases.

1. Nonrecognition of Foreign Judgments: The Multibillion-Dollar Judgment Between Chevron and the Lago Agrio Plaintiffs

Chevron Corp. v. Donziger[338] and *Chevron Corp. v. Naranjo*[339] show that the refusal to recognize a foreign judgment can itself raise foreign policy concerns.[340] In March 2011, the district court in *Donziger*, applying New York's law on recognition and enforcement of foreign judgments, a version of the UFCMJRA[341] (New York's Recognition Law), granted a global antienforcement injunction of the Lago Agrio plaintiffs' $18 billion Ecuadoran judgment.[342] First, the court held that it was likely to conclude that Ecuador's legal system did not provide an impartial tribunal or procedures compatible with due process of law, and therefore the court would not be able to recognize or enforce the judgment in New York.[343] Second, the court held that a declaratory judgment would "finally determine the controversy over enforceability."[344] The court held that the injunction should extend worldwide because of the interests in equity and finality and because the controversy over the judgment was global—the Lago Agrio plaintiffs had stated that they intended to pursue enforcement of the judgment in multiple jurisdictions worldwide as soon as possible.[345]

Although the district court took note of international comity considerations,[346] it viewed those concerns as "trees" that could obstruct sight of the "forest."[347] The court reasoned that the Lago Agrio plaintiffs were, like Chevron, simply engaging in "procedural fencing," as they hoped

338. 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *rev'd sub nom.* Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir.), *cert. denied*, 133 S. Ct 423 (2012).

339. 667 F.3d 232, *cert. denied*, 133 S. Ct 423.

340. *See supra* notes 1–23 and accompanying text (providing further background on the cases).

341. *See supra* notes 312–15 and accompanying text (discussing the UFCMJRA).

342. *Donziger*, 768 F. Supp. 2d at 660 ("[D]efendants . . . are enjoined and restrained . . . from directly or indirectly funding, commencing, prosecuting, advancing in any way, or receiving benefit from any action or proceeding, outside the Republic of Ecuador, for recognition or enforcement of the judgment previously rendered in [the *Lago Agrio Case*] . . . or any other judgment that hereafter may be rendered in the *Lago Agrio Case* by that court or by any other court in Ecuador . . . .").

343. *Id.* at 636.

344. *Id.* at 638.

345. *Id.* For example, the Lago Agrio plaintiffs are seeking enforcement of the judgment in Canada, where an appeals court reversed a lower court's ruling blocking the recognition and enforcement of the now $9.5 billion judgment, thus allowing the Lago Agrio plaintiffs to present the merits of their case. *See* Yaiguaje v. Chevron Corp. (2013), 118 O.R. 3d 1, 19 (Can. Ont. C.A.); *see also* Daniel Fisher, *Canada Appeals Court Allows Ecuadoreans To Try and Enforce $9.5 Billion Judgment*, FORBES (Dec. 17, 2013, 3:43 PM), http://www.forbes.com/sites/danielfisher/2013/12/17/canada-appeals-court-allows-ecuadoreans-to-try-and-enforce-9-5-billion-judgment/.

346. For instance, the court solicited the views of the U.S. Department of State, because it was "mindful of the seriousness" of international comity and other concerns. *Donziger*, 768 F. Supp. 2d at 595 n.5.

347. *Id.* at 595.

to benefit from the burdens imposed by instituting enforcement proceedings in multiple jurisdictions.[348] Furthermore, the court concluded that equity concerns in finality outweighed comity concerns, because comity concerns are an unavoidable aspect of recognizing and enforcing foreign judgments:

> Ecuador doubtless would rather not have the judgment or its legal system called into question. To that extent, there is bound to be a certain amount of friction . . . . [T]he fact that the judgment and the forum in which it was rendered are open to attack in the forum where enforcement is sought is inherent in the international scheme.[349]

The Second Circuit vacated the district court's injunction, holding that Chevron would have to wait to contest the validity of the judgment until the Lago Agrio plaintiffs chose to bring an action for recognition and enforcement.[350] New York's Recognition Law did not authorize "a court to declare a foreign judgment unenforceable on the preemptive suit of a putative judgment-debtor."[351] Furthermore, the principles embedded in New York's Recognition Law were "motivated by an interest to *provide for* the enforcement of foreign judgments, not to prevent them."[352]

Unlike the district court, the Second Circuit did not reject international comity concerns.[353] First, New York's legislature did not intend to create a cause of action that would "preempt the courts of other countries from making their own decisions about the enforceability of such judgments."[354] New York had adopted a statute that sought to provide a ready means for enforcement of foreign judgments in New York, while reserving New York's right to decline enforcement of "fraudulent 'judgments' obtained in corrupt legal systems."[355] In this way, "New York undertook to act as a responsible participant in an international system of justice—not to set up its courts as a transnational arbiter to dictate to the entire world which judgments are entitled to respect and which countries' courts are to be treated as international pariahs."[356] Moreover, New York's Recognition Law was designed to instill trust in the enforcement-facilitation framework.[357] In particular, the due process exception was meant "to facilitate trust among nations and their judicial systems by preventing one jurisdiction from using the trappings of sovereignty to engage in a sort of seignorage by which easy judgments are minted and sold to any plaintiff willing to pay for them."[358]

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348. *Id.* at 638.
349. *Id.*
350. Chevron Corp. v. Naranjo, 667 F.3d 232, 246–247 (2d Cir. 2012), *cert. denied*, 133 S. Ct 423 (2012).
351. *Id.* at 240.
352. *Id.* at 241.
353. *Id.* at 242.
354. *Id.* at 243.
355. *Id.* at 242.
356. *Id.*
357. *Id.* at 241.
358. *Id.*

The Second Circuit, like the district court, spoke specifically of the international comity concerns inherent simply in cases of nonrecognition of foreign judgments: "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 respect from the courts of other nations."[359] Further, the Second Circuit emphasized that the comity concerns "become far graver" if "a court in one country attempts to preclude the courts of every other nation from ever considering the effect of that foreign judgment."[360] When a court acts in this way, it

> risks disrespecting the legal system not only of the country in which the judgment was issued, but also those of other countries, who are inherently assumed insufficiently trustworthy to recognize what is asserted to be the extreme incapacity of the legal system from which the judgment emanates. The court presuming to issue such an injunction sets itself up as the definitive international arbiter of the fairness and integrity of the world's legal systems.[361]

While the court premised its holding on New York's Recognition Law, the court was clearly concerned with the international repercussions of the district court's decision.[362]

Scholars have also noted the foreign affairs implications emanating from the Chevron litigation. Daniel Restrepo, President Obama's former primary advisor on the Western Hemisphere, argues that the lawsuits against Chevron have affected the United States' relationship with Ecuador.[363] For example, Restrepo contends that the lawsuits have colored discussions under the Andean Trade Promotion and Drug Eradication Act, even though many countries, including the United States, tend to invoke "judicial independence" when faced with complaints about their judicial processes.[364]

2. The International Due Process Analysis

Courts applying the UFMJRA must evaluate the procedural adequacy of a rendering court's judiciary system,[365] which also raises the specter of unavoidable judicial criticism of other nations.[366] The UFMJRA prohibits

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359. *Id.* at 244.
360. *Id.*
361. *Id.*
362. *See id.*
363. Daniel A. Restrepo, *Individual-Based, Cross-Border Litigation: A National Security Practitioner's Perspective*, 34 U. PA. J. INT'L L. 743, 743 n.a1, 744 (2013).
364. *Id.* at 745.
365. *See, e.g.*, Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000).
366. At least one scholar has argued that an American Law Institute proposal for a federal statute governing the recognition and enforcement of foreign judgments raises the same issue—judicial criticism of foreign nations—by including a "corruption" defense to the recognition of foreign judgments. Michael Traynor, *The Corruption Defense to Recognition of a Foreign Judgment: A Cautionary Note*, 34 U. PA. J. INT'L L. 755, 761–762 (2013). Traynor further argues that the corruption defense therefore represents "an aspect of the foreign relations interests of the United States." *Id.* at 762 (quoting *Recognition and*

recognition of foreign judgments that are "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[367] This has been interpreted as requiring procedures that are "'fundamentally fair' and do not offend against 'basic fairness,'"[368] which is "the basis for the . . . international due process exception to foreign judgment recognition."[369]

Courts applying this international due process standard have sorted countries into those with and those without fundamentally fair procedures. For example, in the leading case on "international" due process, *Society of Lloyd's v. Ashenden*, a foreign corporation brought suit against American members of the corporation's insurance syndicates under the Illinois version of the UFMJRA for recognition and enforcement of money judgments entered in an English court.[370] First, the Seventh Circuit held that the reference to due process in the UFMJRA indicated "a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers."[371] The UFMJRA required procedures that are on the whole—not necessarily in the specific proceeding at issue—"'fundamentally fair' and do not offend against 'basic fairness,'" although not procedures that are identical to those in the United States.[372]

The court affirmed recognition of the judgment because it did not violate the "international" due process standard.[373] The court held that while parties could potentially offer evidence to impinge the available proceedings in "Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question," England has a civilized legal system, and that any suggestion to the contrary "borders on the risible."[374]

In two other cases involving different countries—Iran and Liberia—courts came to the opposite conclusion under the "international" due process standard. However, like in *Society of Lloyd's*, these courts did not review the specifics of the individual foreign proceedings.[375] In the first case, *Bank Melli Iran v. Pahlavi*,[376] two Iranian banks sought recognition and enforcement of judgments against the sister of the former Shah of Iran, a California resident.[377] The court refused to recognize the judgment, finding that the Shah's sister "could not expect fair treatment from the

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Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of H. Comm. on the Judiciary, 112th Cong. 8 (2012)).

367. UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a)(1), 13 U.L.A. pt. II, at 58–59 (2002).

368. *Soc'y of Lloyd's*, 233 F.3d at 477 (quoting Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 687–88 (7th Cir. 1987)).

369. Carodine, *supra* note 254, at 1168.

370. *Soc'y of Lloyd's*, 233 F.3d at 475.

371. *Id.* at 476–77.

372. *Id.* (quoting *Ingersoll Milling Mach. Co.*, 833 F.2d at 687–88).

373. *Id.* at 481–82.

374. *Id.* at 476.

375. Carodine, *supra* note 254, at 1176.

376. 58 F.3d 1406 (9th Cir. 1995).

377. *Id.* at 1407.

courts of Iran, could not personally appear before those courts, could not obtain proper legal representation in Iran, and could not even obtain local witnesses on her behalf," all of which "are ingredients of basic due process."[378] The court based its holding on consular information sheets containing travel advisories, a 1991 report on terrorism, Department of State documents, country reports, a declaration from a State department official, and prior U.S. court decisions recognizing that "in the early to mid-1980s Americans could not get a fair trial in Iran."[379]

Similarly, in *Bridgeway Corp. v. Citibank*,[380] a Liberian corporation sought recognition and enforcement of a judgment against Citibank, which had previously maintained a branch in Monrovia, Liberia.[381] The district court sua sponte granted summary judgment, refusing to recognize the judgment because Liberia's courts were unlikely to "secure an impartial administration of justice."[382] The circuit court affirmed, holding that during the relevant time period, which coincided with the Liberian civil war, "Liberia's judicial system was in a state of disarray,"[383] and that "the chaos within the Liberian judicial system" was enough proof, as a matter of law, that there was an inadequate guarantee of procedural due process.[384]

III. AN OBJECTIVE STANDARD FOR DORMANT FOREIGN AFFAIRS PREEMPTION

This section critiques current standards applied under dormant foreign affairs preemption, proposes an objective standard that looks to the reasonable expectations of other sovereigns, and evaluates the laws governing the recognition of foreign judgments under the new standard.

A. Current Standards

The Supreme Court's standards for dormant foreign affairs preemption—the holding in *Zschernig*[385] and the proposed test in *Garamendi*[386]—are inadequate. The Court's standard in *Zschernig* is deficient in two ways. First, it is overinclusive. Under the *Zschernig* standard, state laws that have a direct impact on foreign relations are unconstitutional, without regard for state sovereignty.[387] Second, the standard is unclear in its reasoning and scope, particularly due to the lack of an adequate definition for what

378. *Id.* at 1413. The court looked to federal common law to make its determination. *See id.* at 1409 (citing Hilton v. Guyot, 159 U.S. 113 (1895)).
379. *Id.* at 1412.
380. 201 F.3d 134 (2d Cir. 2000).
381. *Id.* at 138.
382. *Id.* at 139.
383. *Id.* at 138.
384. *Id.* at 142. The court in *Citibank* also noted that while the district court applied New York law, federal law might have been applicable. *Id.* at 141 n.1. However, it was not necessary to decide the issue, because of the similarities between the two standards. *Id.*
385. 389 U.S. 429, 441 (1968).
386. 539 U.S. 396, 419 n.11 (2003).
387. *See supra* notes 55–69 and accompanying text.

impacts foreign relations.[388] For example, under this standard, courts should hold state laws governing the recognition of foreign judgments unconstitutional solely because of their impact on foreign relations.[389] Such an analysis fails to consider the states' interests in continued regulation of the recognition of foreign judgments.

While the Court's proposed standard in *Garamendi* considers state sovereignty, the standard is problematic in multiple ways. First, the standard would impose a difficult and ambiguous balancing test.[390] A court would first have to determine whether a state law is within a state's traditional competence and, if it is, require the substantiality of the conflict to vary with the strength of the asserted state interest.[391] The court would then possibly have to weigh the federal foreign policy interest against the state interest and substantiality of the conflict.[392] For example, if a court classified a state law governing the recognition of foreign judgments as within an area of traditional state competence, the court would then have to weigh the state law against the federal law and determine the strength of the conflict. It is unclear, however, how strong of a conflict would mandate preemption and how foreign affairs interests would factor in.

The *Garamendi* standard is also problematic because it relies on an antiquated categorization—traditional state competence—which fails to account for laws that affect modern notions of foreign relations. Foreign relations traditionally referred to the relationship between national governments, which mainly encompassed diplomatic and military issues.[393] These issues are mostly accounted for in Article I, Section 10 of the Constitution.[394] The last thirty years, however, have seen an increase in the "integration of the international economy, changes in transportation and communications technology, and the growth of international law and iustitutions [sic]."[395] Increases in international cooperation, coordination, and regulation have blurred the line between foreign and domestic relations.[396] For example, areas of law that were formerly solely domestic concerns but are now foreign affairs concerns include "trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory and commuting labour, . . . transfrontier drug traffic and epidemics," and even the manner in which a nation treats its own citizens.[397] Furthermore, domestic activity increasingly has consequences abroad and vice versa, and the participants in foreign relations have

388. *See supra* notes 73–75 and accompanying text.
389. *See infra* notes 400–07 and accompanying text (arguing that decisions made under the law governing the recognition of foreign judgments has a substantial impact on foreign affairs).
390. *See supra* notes 89–92 and accompanying text.
391. *See supra* notes 89–92 and accompanying text.
392. *See supra* notes 89–92 and accompanying text.
393. Goldsmith, *supra* note 51, at 1670.
394. *Id.*
395. *Id.* at 1671.
396. *Id.*
397. *Id.* at 1671.

changed.[398] The recognition of foreign judgments is an example of an area of law that would not fall under the traditional notion of foreign affairs and yet may have a substantial impact on modern conceptions of foreign affairs.[399]

B. An Objective Standard

Instead, courts should analyze dormant foreign affairs preemption issues under an objective standard. The analysis should look to whether another sovereign would reasonably expect the federal government to have exclusive jurisdiction over a type or body of law. This inquiry is objective in that it focuses on the reasonableness of exclusive federal jurisdiction, rather than the purpose behind a state law or the actual expectations of other sovereigns.

Courts should rely on an objective standard for a number of reasons. First, the analysis incorporates a flexible and realistic standard for evaluating a state law's impact on foreign affairs. In this inquiry, only reasonable expectations regarding laws and their possible impact on the relationships between the United States and other countries define what can have an impact on "foreign affairs," rather than relying on outdated notions of foreign affairs and areas of traditional state competence. In this way, the objective standard serves the main goal of dormant foreign affairs preemption—to prevent state interference in areas of law that affect the United States' relationships with other countries.

Additionally, the analysis protects state sovereignty, because a court can look to a law's contacts with other areas of federal and state law, as a sovereign would reasonably expect the United States to treat similar laws alike. This is also advantageous because it does not rely on the outdated "traditional competence" categorization and avoids the traditional competence's circular inquiry—states should maintain jurisdiction because they have always had jurisdiction.

C. Recognition of Foreign Judgments Under the Objective Standard

Under the objective standard, the federal government should have exclusive jurisdiction over laws governing the recognition of foreign judgments. When looking to whether another sovereign would reasonably expect the federal government to have exclusive jurisdiction over a type or body of law, the first issue is the extent to which a law may have an impact on foreign relations. The second analysis is the extent of the law's contacts with federal and state law.

Decisions made under the law governing the recognition of foreign judgments can have a substantial impact on foreign affairs. First, state

398. *Id.* at 1672–74.

399. *See infra* notes 400–07 and accompanying text (arguing that decisions made under the law governing the recognition of foreign judgments has a substantial impact on foreign affairs).

variations in recognition laws present all of the lack of uniformity problems that were raised by the Founders,[400] are still raised in Foreign Commerce Clause preemption[401] and federal common law of foreign relation cases,[402] and prompted reform under the UFMJRA.[403] Second, the act of refusing to recognize a judgment implicates comity concerns.[404] Further, the power to enjoin courts of other countries presents even greater comity concerns.[405] Relatedly, a state's ability to manipulate its laws on recognition of foreign judgments allows a state to participate in international forum shopping. For example, flexible recognition laws may cause a state to become an international forum for the recognition of foreign judgments. On the flip side, a state with more severe requirements may become an international pariah. Finally, the international due process standard allows judges to criticize the judicial systems of other countries, often on little more than a surface evaluation.[406] This is exactly the kind of judicial inquiry that persuaded the Court in *Zschernig* to hold the state statute unconstitutional.[407]

Contacts with state and federal law may also support exclusive federal jurisdiction over the recognition of foreign judgments. On one hand, laws governing the recognition of foreign judgments have substantial contacts with state law. Most significantly, states regulate the recognition and enforcement of sister states' judgments. States in those cases, however, need not consider international issues. On the other hand, the federal government already regulates a subset of recognition law under the SPEECH Act.[408] While domestic concerns over libel tourism prompted federal intervention, considerations of international comity and foreign affairs—such as the need for consistency across states and avoiding state-created friction in foreign relations—bolstered the case for federal intervention,[409] and are still relevant in nonlibel foreign recognition cases.

CONCLUSION

The objective standard for dormant foreign affairs preemption takes into account changing notions of foreign affairs and protects encroachment on state sovereignty. The objective standard is even more important as notions of what constitutes foreign affairs change and areas of law that were traditionally reserved for the states increasingly affect foreign affairs. The law governing the recognition of foreign judgments is an example of a body of law that the federal government should have exclusive jurisdiction over.

400. *See supra* Part I.C.2.a.
401. *See supra* Part I.C.3.c.
402. *See supra* Part I.C.3.d.
403. *See supra* Part II.A.2.
404. *See supra* Part II.B.1.
405. *See supra* Part II.B.1.
406. *See supra* Part II.B.2.
407. *See* Zschernig v. Miller, 389 U.S. 429, 440–441 (1968).
408. *See supra* Part II.A.3.
409. *See supra* notes 336–37.

Although states have traditionally regulated the recognition of foreign judgments, recognition laws and decisions made under recognition laws have a substantial and growing impact on modern conceptions of foreign affairs.