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Political Judging: When Due Process Goes International

Montre D. Carodine
University of Alabama - School of Law, mcarodine@law.ua.edu

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POLITICAL JUDGING: WHEN DUE PROCESS GOES INTERNATIONAL

MONTRÉ D. CARODINE*

ABSTRACT

The Supreme Court's recent reliance on foreign precedent to interpret the Constitution sparked a firestorm of criticism and spawned a rich debate regarding the extent to which U.S. courts should defer to foreign law when developing U.S. constitutional norms. This Article looks at a subset of the issue of deference to foreign law and international influences in judicial decision making: the extent to which our courts should apply American notions of due process in determining whether to recognize and enforce judgments obtained abroad.

* Assistant Professor, Washington & Lee University School of Law, Lexington, Virginia. I would like to thank Professors Elena Baylis, Dorothy Brown, Mechele Dickerson, Amanda Frost, Kevin Johnson, Ronald Krotoszynski, Jr., Thomas Metzloff, Joan Shaughnessy, Stephanie Tai, Melissa Waters, David Zaring, and the participants at the 2005 Southeastern Association of Law Schools Conference and the 2006 Mid-Atlantic People of Color Conference for their invaluable comments on earlier drafts of this Article. I would also like to thank Amy Anderson, Lindsay Stoudt, Rufus McNeill, and Erika Walker-Cash for their excellent research assistance. I would finally like to acknowledge the financial support of the Frances Lewis Law Center, Washington & Lee University.

Courts reviewing foreign judgments to determine whether they are worthy of recognition have created an "international due process" analysis. The analysis requires courts to pass judgment on the overall judicial and political systems of the countries from which the judgments originated and to determine whether the systems as a whole are fundamentally fair. Remarkably, courts ignore the individual proceedings that resulted in the judgment and refuse to determine whether the foreign courts afforded the individual litigants due process, relying instead on political "evidence" and judges' own personal perceptions of the foreign countries. Courts have gone so far as to label countries "civilized" and "uncivilized." Under this analysis, courts will enforce judgments from "civilized" nations that violate U.S. constitutional norms and refuse to enforce judgments from "uncivilized" countries even if the foreign countries afforded the litigants due process. This Article argues that the international due process analysis violates the separation of powers because it requires courts to make foreign policy. This Article also re-envisions an international due process analysis that would require courts to assess—according to American notions of due process—the particular foreign proceedings in which judgments sought to be recognized and enforced were rendered.

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INTRODUCTION

The Supreme Court's reliance in *Roper v. Simmons*[1] and *Lawrence v. Texas*[2] on foreign precedent to interpret the Constitution sparked a firestorm of criticism.[3] It spawned a rich debate among scholars regarding the extent to which U.S. courts should defer to foreign law when developing U.S. constitutional norms.[4] But a larger issue is the extent to which globalization, which is increasing at exponential rates, should influence domestic legal principles. Not only are American consumers and businesses becoming more global in their perspectives, but judges are as well. This Article looks at a subset of the issue of deference to foreign law and international influences in judicial decision making: the extent to which courts should apply American notions of due process in determining whether to recognize and enforce judgments obtained abroad.

Blind deference to foreign courts is becoming the norm in the area of foreign judgment recognition. In *Society of Lloyd's v. Ashenden*, Judge Richard Posner found that foreign judgments from the United Kingdom need not comport with American notions of due process to be enforced in the United States.[5] Instead, Judge Posner held that

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1. 543 U.S. 551, 575-78 (2005).

2. 539 U.S. 558, 573 (2003).

3. *See, e.g.*, Mary Ann Glendon, Editorial, *Judicial Tourism*, WALL ST. J., Sept. 16, 2005, at A14; *The Insidious Wiles of Foreign Influence*, ECONOMIST, June 11, 2005, at 25; Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, Apr. 9, 2005, at A3. Some members of Congress have also criticized the Court for its reliance on foreign law and even introduced a bill to prohibit reference to foreign law in constitutional cases. *See The Insidious Wiles of Foreign Influence*, *supra*, at 26 (noting that Republicans introduced the bill and that it is "almost certainly a violation of the separation of powers").

4. For example, the November 2005 issue of the *Harvard Law Review* was devoted to this issue. *See* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistence, Engagement*, 119 HARV. L. REV. 109 (2005); Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005); *see also* Roger P. Alford, Roper v. Simmons *and Our Constitution in International Equipoise*, 53 UCLA L. REV. 1 (2005); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

5. 233 F.3d 473, 480-81 (7th Cir. 2000).

foreign judgments from the United Kingdom and other "civilized" countries need only comply with a much looser standard:

> We'll call this the "international concept of due process" to distinguish it from the complex concept that has emerged from American case law. We note that it is even less demanding than the test the courts use to determine whether to enforce a foreign arbitral award under the New York Convention ....[6]

Under Judge Posner's analysis, the fact that a foreign court denied a judgment debtor due process is inconsequential. The only issue is whether, in the court's view, the foreign country, as a general matter, has a fair judicial system.[7] If the court feels that the country has a fair judicial system, it can, in the name of comity, enforce the judgment against the judgment debtor. On the other hand, had the judgment creditor obtained the judgment in a country that the court feels has unjust and "uncivilized" judicial and political systems, the court will completely disregard the judgment.[8] This analysis, under which courts divide judicial systems of the world into the "civilized" and the "uncivilized," is what Judge Posner dubbed international due process.

Judge Posner is not alone in his conclusion that American standards of due process do not apply to foreign judgments. In recent years, courts have ignored the due process mandates of the U.S. Constitution in an effort to promote liberal foreign judgment recognition rules.[9] This Article argues that the international due

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6. *Id.* at 477.

7. Several courts have found that the entire legal system in the foreign country had to be unfair or lacking in due process to preclude recognition of a foreign judgment. For example, the Fifth Circuit has observed "that the Texas Recognition Act requires that the foreign judgment be 'rendered [only] under a *system*' that provides impartial tribunals and procedures compatible with 'due process of law.'" Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (alteration and emphasis in original) (quoting TEX. CIV. PRAC. & REM. CODE § 36.005(a)(1) (Vernon 1985)); *see also Ashenden*, 233 F.3d at 477 (emphasizing that the "system" must be unfair to preclude recognition, and expressing doubt as to the viability of the "retail approach," which focuses on the particular proceedings). Furthermore, courts require only that the foreign procedures be *compatible* with due process. *Turner*, 303 F.3d at 330 ("[T]he foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements of enforceability under the statute."). But the proceedings must be "fundamentally fair." *Id.*

8. *See infra* Part I.A.

9. *See generally* Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J.

process analysis violates the separation of powers because it requires judges to make foreign policy. Moreover, this Article re-envisions an international due process analysis of foreign judgments that considers the particulars of the foreign proceedings that produced the judgment sought to be enforced. This approach is not only more desirable than the current international due process analysis, but it is also constitutionally mandatory under the state action doctrine.[10] U.S. courts are not at liberty to recognize foreign judgments that are unconstitutional.

Part I briefly discusses foreign judgment recognition generally. It then looks at the international due process cases in depth. Specifically, it focuses on cases in which courts have condemned a country's entire judicial and political system and found its judgments unworthy of recognition. In these cases, the courts ignored the individual proceedings from which the judgments originated and refused to determine whether the foreign courts afforded the individual litigants due process. The courts relied instead on political "evidence" and judges' own personal perceptions of the foreign countries. Part I also focuses on *Ashenden* and other Lloyd's of London cases that are based on the same facts and follow Judge Posner's international due process analysis. In the Lloyd's cases, courts across the country labeled the British judicial system fair as a matter of law despite strong arguments that the British courts denied individual debtors due process in their particular cases.[11]

Part II argues that the international due process analysis violates the separation of powers. It draws on principles underlying the political question doctrine,[12] which is rooted in separation of powers principles. Courts lack the institutional competence to undertake the international due process analysis. Should courts continue to apply this analysis, there will be an increasing potential to embarrass the executive branch in its foreign relations efforts. Though foreign judgment recognition cases are most often decided by federal courts sitting in diversity, this Part specifically addresses the

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COMP. L. 369 (2001).

10. See *infra* text accompanying notes 480-83 for an explanation of the state action doctrine.

11. *See infra* Part I.C.

12. *See* Powell v. McCormack, 395 U.S. 486, 518-49 (1968); Baker v. Carr, 369 U.S. 186, 208-37 (1962).

problem with state courts applying the international due process analysis. Like federal courts, state courts cannot make foreign policy. The Supreme Court has struck down a state statute that requires an analysis almost identical to the international due process analysis, finding that it violated the dormant foreign affairs doctrine.[13] This doctrine is also rooted in separation of powers principles.

Part III offers a solution for reshaping the due process review of foreign judgments. Under this solution, courts cannot pass judgment on the judicial and political systems of the countries in which the judgments were rendered. If there are countries whose judgments the executive branch deems unworthy of recognition, then it can compile an official list, much like the terrorist country list it maintains. If, however, the executive branch has not officially stated that a particular country's judgments are not to be recognized, then courts must consider whether the foreign country afforded the litigants due process in the individual foreign proceedings. This Article argues that, under the state action doctrine, courts must assess the individual proceedings, applying American notions of due process. This is the approach that courts have taken when faced with judgments that would violate the First Amendment's free speech guarantees.[14] My solution eliminates the separation of powers problems with the international due process analysis. It also recognizes that courts cannot enforce judgments obtained in violation of due process.

I. THE INTERNATIONALIZATION OF DUE PROCESS

This Part looks in depth at the international due process cases. The courts in these cases interpreted the due process provisions of the Uniform Foreign Money Judgments Act and the Third Restatement of Foreign Relations, which are identical, as only requiring that the entire legal system in the foreign country be unfair or lacking in due process guarantees to preclude the recognition of a foreign judgment. It is insufficient merely to argue that the

13. *See infra* notes 204-14.

14. See *infra* Part III.C.1 for an example of this approach, the "international free speech" cases.

individual proceedings in the foreign court were unfair. An analysis of these cases reveals that there was no type of due process analysis, international or domestic. The courts in these cases, instead of engaging in a due process analysis, engaged actively in international politics. Their opinions are replete with political commentaries on the countries from which the foreign judgments came.

Before turning to the international due process cases, however, this Part will discuss briefly the general scheme in the United States for the recognition of foreign judgments, which is based on the loosely-defined doctrine of comity. As this brief history will demonstrate, the politicization of foreign judgment recognition began long before the international due process cases.

A. Foreign Judgment Recognition Generally

The U.S. Constitution does not deal with judgments obtained in other countries. Unlike with sister state judgments, there is no full faith and credit for foreign judgments.[15] In 1895, the Supreme Court decided the landmark case of *Hilton v. Guyot*,[16] which laid the foundation for modern foreign judgment recognition law. *Hilton* involved a French liquidator's attempt to collect on a judgment obtained in France against an American citizen.[17] In a 5-4 decision, the Supreme Court ruled in favor of the judgment debtor, Hilton, and refused to recognize the French judgment.[18] The Court began its analysis with a discussion of the comity doctrine.[19] The Court made its now well-known statement regarding the principle of comity:

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows

15. *See* U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.").

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

17. *Id.* at 114.

18. *Id.* at 227-28 (stating that foreign judgments should be viewed as prima facie, rather than conclusive, evidence because that is how they were considered at the time of the Constitution's adoption).

19. *Id.* at 163-64.

> within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[20]

The Court painstakingly reviewed the treatment of foreign judgments in other countries, particularly Great Britain,[21] and then announced its rule regarding the conclusiveness of foreign judgments:

> [W]e are satisfied that, where there has been opportunity for a full and fair trial abroad before a [foreign] court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.[22]

Though the French judgment seemed to meet these requirements, the Court nevertheless refused to recognize the judgment because France did not at that time recognize American judgments.[23] In other words, the Court refused to recognize the judgment because there was no reciprocity.[24]

Hilton's comity-based rules for recognition and enforcement of foreign judgments survive today, though most states reject its re-

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20. *Id.* at 163-64. Scholars have noted that the definition of comity is illusive and has often been the source of confusion. As an example, see generally Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

21. *Hilton*, 159 U.S. at 171.

22. *Id.* at 202-03.

23. *Id.* at 227-28.

24. Note that the Court did not include reciprocity in its definition of comity. *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 9 (1991) (observing the lack of a reciprocity requirement in *Hilton*'s definition of comity and finding unresolved the question of "whether comity is conditioned on reciprocal treatment or is discretionary").

ciprocity requirement.[25] The National Conference of Commissioners on Uniform State Laws drafted the Uniform Foreign Money-Judgments Recognition Act (Uniform Act)[26] in 1962, and the American Bar Association approved it the same year.[27] Since 1962, a majority of states have adopted the Uniform Act.[28] States that have not adopted the Uniform Act rely on common law rules and principles and the Restatement of Foreign Relations Law (Restatement), which are based on *Hilton*.[29] In fact, the Uniform Act codified "rules that ha[d] long been applied by the majority of courts in [the United States]," and which were based on *Hilton*.[30]

Under the Restatement and the Uniform Act, if a party obtains a judgment outside the United States but wishes to collect on it in the United States, that party must have the judgment "recognized" and then enforced.[31] Courts will enforce a judgment unless the

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25. *See* Mata v. Am. Life Ins. Co., 771 F. Supp. 1375, 1382 & n.15 (D. Del. 1991) (noting that few states require reciprocity). After *Hilton*, state courts continued to develop their own rules for recognizing foreign judgments. State courts did not consider *Hilton*'s reciprocity requirement binding because the ruling was from a federal court. For example, in *Johnston v. Compagnie Générale Transatlantique*, the New York Court of Appeals recognized a French judgment. 152 N.E. 121, 123 (N.Y. 1926).

26. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962), *available at* http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/ufmjra62.htm.

27. *See* Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905, 911-13 (N.D. Iowa 2002) (detailing the history of the Uniform Act).

28. The National Conference of Commissioners on Uniform State Laws (NCCUSL), Legislative Fact Sheet, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Jan. 24, 2007). The states that have adopted the Uniform Act are Alaska, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and Washington. *Id.* The District of Columbia and the U.S. Virgin Islands have also adopted the Act. *Id.*

29. *See In re* Breau, 565 A.2d 1044, 1049 (N.H. 1989) (referencing the common law principles of *Hilton v. Guyot*, as well as section 481 of the Third Restatement of Foreign Relations Law, adopted in 1987). For an overview of state law standards for enforcement and recognition of foreign judgments, as well as a chart comparing factors considered in *Hilton* and the Uniform Act, see Cedric C. Chao & Christine S. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147 (2001).

30. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, prefatory note (1962).

31. The Uniform Act applies to "any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters." *Id.* § 1(2). Therefore, tax judgments and family law judgments, such as for child support and alimony, are specifically excluded from the Uniform Act. Additionally, the Uniform Act applies only to judgments that are "final

judgment debtor establishes the applicability of one of the statutory grounds for nonrecognition. Some of those grounds are mandatory exceptions, and some are discretionary.[32] Under the Restatement and the Uniform Act, the section dealing with the mandatory grounds for nonrecognition provides that "[a] foreign judgment is not conclusive if ... the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[33] This provision has become the basis for the so-called international due process exception to foreign judgment recognition.

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and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal." *Id.* § 2. The court in which recognition and enforcement are sought may, however, stay its proceedings until the appeal has been determined or until the time period in which the defendant may appeal has expired. *Id.*

32. NCCUSL recently revised the Uniform Act, renaming it the UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (2005), *available at* http://www.law.upenn.edu/bll/ulc/ufmjra/2005final.htm. *See infra* notes 438-44. At this time, no state has adopted the revised Uniform Act. *See* http://www.nccusl.org/Update/uniformact_factsheets/ uniform acts-fs-ufcmjra.asp (last visited Jan. 24, 2007). Part III will discuss the revised Act's failure to deal with the international due process problem. NCCUSL did not modify the provision on which the international due process is based. Though some states have made variations, such as adding a reciprocity requirement, the version of the Uniform Act that is still in effect in thirty states specifically asserts that

> (a) A foreign judgment is not conclusive if
>
> (1) the judgment was rendered under a system which does not provide 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; or
>
> (3) the foreign court did not have jurisdiction over the subject matter.

UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, § 4(a) (1962). The Uniform Act further provides for discretionary grounds for nonrecognition:

> (b) A foreign judgment *need not* be recognized if
>
> (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> (2) the judgment was obtained by fraud;
>
> (3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;
>
> (4) the judgment conflicts with another final and conclusive judgment;
>
> (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
>
> (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

Id. § 4(b) (emphasis added).

33. *Id.* § 4(a). The Restatement and the Uniform Act also contain notice provisions. *Id.* § 4(b)(1).

Courts today emphasize that the Uniform Act and the Restatement require that the foreign judgment be "'rendered [only] under a *system*' that provides impartial tribunals and procedures compatible with 'due process of law.'"[34] Furthermore, courts note that the Uniform Act requires only that the foreign procedures be *compatible* with due process.[35] As many courts have found, "the foreign proceedings need not comply with the traditional rigors of American due process to meet the requirements of enforceability under the statute," but the proceedings must be fundamentally fair.[36]

B. "Bad Country" Cases: Pahlavi *and* Bridgeway Corp. v. Citibank

It seems difficult to show that an entire country's judicial system is so flawed and so lacking in fundamental fairness that no judgment obtained under that system is worthy of recognition. But despite this high standard, and the seeming difficulty of proof, there have been cases involving such allegations of "serious injustice," in which courts have found that as a matter of law the country from which the judgment was obtained failed to provide due process. These judgments were from courts in Iran and Liberia, respectively.

1. Bank Melli Iran v. Pahlavi

In *Bank Melli Iran v. Pahlavi*, the Ninth Circuit refused to recognize an Iranian judgment.[37] The court rendered its decision in June 1995, not long after President Clinton imposed tough economic sanctions on Iran.[38] In *Pahlavi*, two Iranian banks sought to enforce

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34. *See* Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 (5th Cir. 2002) (alteration and emphasis in original) (quoting TEX. CIV. PROC. & REM. CODE § 36.005(a)(1) (Vernon 1985)); *see also* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000) (emphasizing that the "system" must be unfair to preclude recognition and expressing doubt as to the viability of the "retail approach," which focuses on the particular proceedings).

35. *Turner*, 303 F.3d at 330.

36. *Id.*

37. 58 F.3d 1406, 1413 (9th Cir. 1995).

38. *See Clinton Approves Order for New Sanctions on Iran*, WALL ST. J., May 9, 1995, at A6 ("President Clinton signed an executive order imposing tough new economic sanctions on Iran. The move ... bars trade with Iran as well as trade financing ... and new investment in Iran ...."); Robin Wright, *New Sanctions Against Iran Wrong Move, U.S. Allies Say*, SEATTLE TIMES, June 7, 1995 ("The Clinton administration's escalating campaign against Iran -

judgments that they had obtained against Shams Pahlavi, the sister of the former Shah of Iran, in the tribunals of Iran.[39] In the Iranian proceedings, the banks served Pahlavi notice by publication. The Iranian courts entered default judgments in 1982 and 1986 against Pahlavi for a combined total of $32 million.[40]

The banks brought collection actions against Pahlavi in connection with several promissory notes that she had signed.[41] They sought to enforce their judgments against Pahlavi in a California federal district court under California's version of the Uniform Act.[42] Pahlavi sought to dismiss the action in a Federal Rule of Civil Procedure 12(b)(6) motion, attaching several documents supporting her position that the Iranian courts did not afford her due process in entering the judgments.[43] The district court converted her motion to a motion for summary judgment and granted it.[44]

The Ninth Circuit affirmed, holding that Pahlavi could not have received due process in Iran during the period that the Iranian court entered the judgments against her.[45] The Ninth Circuit never seemed to be concerned with whether the particular judgments at issue were obtained in a manner that comported with due process. Instead, the case turned on an assessment of the entire judicial system of Iran.[46] Rather than holding that the Shah's sister was not afforded due process, the Ninth Circuit held that she *could not* have been because during the period from 1982 through 1986, due process was not available in Iran generally.[47]

The Ninth Circuit pointed to reports and advisories issued by the State Department. A 1991 report stated that Iran was a "continuing state sponsor of terrorism."[48] A Country Report on Human Rights

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including U.S. economic sanctions that went into effect yesterday - ends any chance of major openings in Iran's foreign or domestic policies during the final two years of President Hashemi Rafsanjani's term in office, ranking envoys from several allied nations charge.").

39. *Pahlavi*, 58 F.3d at 1407-08.

40. *Id.* at 1408. The court noted that the banks were "at the very least closely associated with" the Iranian government. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1410.

46. *Id.* at 1411-12.

47. *Id.*

48. *Id.* at 1411.

Practices for 1982 stated that Iranian trials, "rarely held in public," were "highly politicized," and the judiciary did not enjoy independence from the Iranian regime.[49] The court also found significant a 1990 declaration from a State Department official that judges are routinely scrutinized in Iran and "cannot be expected to be completely impartial toward U.S. citizens"; the official also declared that "U.S. claimants can have little reasonable expectation of justice."[50] The court acknowledged that those observations pertained to Americans but concluded that "it can hardly be doubted that they would apply equally to Pahlavi."[51] The court made this determination even though Pahlavi herself did not declare that the Iranian courts would deal unfairly with her.[52] The court also declined to apply judicial estoppel even though Pahlavi had previously argued that Iran was the proper forum in another case in which she urged dismissal for forum non conveniens.[53]

The court pointed to consular information sheets that "gave travel warnings from 1981 through 1993 and noted that anti-American sentiment could make it dangerous to travel in Iran."[54] The State Department had observed that "U.S./Iranian dual nationals have often had their U.S. passports confiscated upon arrival and have been denied permission to depart the country documented as U.S. citizens."[55] Furthermore, the court found that there was evidence indicating it would be dangerous for the Shah's sister if she returned to Iran.[56] While the court acknowledged that the travel warnings were only applicable to U.S. citizens, it found that the Shah's sister faced the same threats as Americans in Iran.[57] The Ninth Circuit also pointed to other cases in which federal courts found that the Iranian courts did not afford Americans fair trials from the early to the mid-1980s.[58] The court found that these other judicial opinions, and the other evidence presented, were significant

49. *Id.*
50. *Id.* at 1412.
51. *Id.*
52. *Id.*
53. *Id.* at 1413.
54. *Id.* at 1411.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 1412.

because "much of the [Iranian] hostility to United States citizens stemmed from [the United States's] connection to the Shah's regime."[59]

The Ninth Circuit asserted that "fair treatment from the courts" and the ability to appear personally before those courts, to "obtain proper legal representation," and to obtain witnesses on one's behalf are "not mere niceties of American jurisprudence";[60] they are "ingredients of 'civilized jurisprudence.'"[61] The court, therefore, refused to enforce the Iranian judgments against Pahlavi.[62]

2. Bridgeway Corp. v. Citibank

Similarly, in *Bridgeway Corp. v. Citibank*, the Second Circuit refused to recognize and enforce a Liberian judgment because it found that, at the time of the judgment, the judicial system in Liberia was plagued by unfairness and instability.[63] *Bridgeway* differed from *Pahlavi* in a significant respect—the judgment creditor did not obtain the judgment by default. The judgment debtor, Citibank, defended the lawsuit in Liberia and won at the trial court level, but the Liberian Supreme Court reversed.[64]

The judgment creditor, Bridgeway, had been a customer with Citibank, which had pulled out of Liberia. Bridgeway still had $189,376.66 in its account at Citibank's branch in Liberia when Citibank left the country.[65] According to the trial court, Liberian law provided that Bridgeway had to accept the judgment in Liberian dollars.[66] Moreover, the Court determined that Citibank had the right to choose the currency with which to pay Bridgeway's balance under the terms of the parties' contract.[67] The Liberian Supreme Court reversed, and Bridgeway obtained a judgment from that court in 1993 obligating Citibank to pay Bridgeway's account balance in

59. *Id.*
60. *Id.* at 1413.
61. *Id.* (quoting Hilton v. Guyot, 159 U.S. 113, 205 (1895)).
62. *Id.*
63. 201 F.3d 134, 137-38 (2d Cir. 2000).
64. *Id.* at 138-39.
65. *Id.* at 138.
66. *Id.*
67. *Id.* at 139.

U.S. rather than Liberian dollars.[68] Bridgeway then moved to have a New York state court enforce the judgment, but Citibank removed the case to federal court.[69]

The district court granted summary judgment, sua sponte, in favor of Citibank, holding that, "as a matter of law, Liberia's courts did not constitute a system of jurisprudence likely to secure an impartial administration of justice."[70] The Second Circuit affirmed, finding that there was enough "powerful and uncontradicted documentary evidence describing the chaos within the Liberian judicial system during the period of interest to this case to have met [the burden of proof] and [for Citibank] to be entitled to judgment as a matter of law."[71]

The court began its analysis of Liberia's judicial system with an overview of Liberia's history. Founded in 1817 as a settlement for emancipated slaves from America, Liberia gained its independence in 1847.[72] Liberia's Constitution "established a government modeled on that of the United States."[73] Judicial authority was "vested in a Supreme Court and such subordinate courts as the Legislature may establish."[74] This high court was "composed of one chief justice and four associate justices," all appointed for life by the President and approved by the Senate.[75] But the American-style government was suspended in Liberia during the 1990s.[76] After years of "a Liberian government marked by corruption and human rights abuses, as well as by rampant inflation" and a civil war, the 1986 Constitution was reinstated in 1997.[77]

The court found that during the civil war, Liberia's judiciary "was in a state of disarray and the provisions of the Constitution concerning the judiciary were no longer followed."[78] An agreement between the opposing sides reconfigured the Supreme Court. Under

68. *Id.*
69. *Id.*
70. *Id.* at 139 (internal quotation marks omitted).
71. *Id.* at 141-42.
72. *Id.* at 137.
73. *Id.*
74. *Id.* at 138.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

the agreement, each side independently appointed justices.[79] The court pointed to State Department reports, one of which observed that "corruption and incompetent handling of cases remained a recurrent problem."[80]

The court rejected Bridgeway's argument that Citibank was estopped from attacking the impartiality of the Liberian judicial system.[81] Bridgeway pointed out that Citibank had filed several lawsuits in Liberia since 1992, during the period of the purported disarray in the Liberian system, and had participated in other cases in which it was not the plaintiff.[82] In other words, Citibank had "availed itself" of Liberia's courts without challenging their fairness.[83] The court refused to conclude that taking advantage of a foreign judicial system, even though the party is a plaintiff, is "fundamentally inconsistent" with later asserting that the foreign system lacks impartiality and fails to afford due process.[84]

Interestingly, though the court in *Bridgeway* refused to recognize the Liberian judgment, a year later, it allowed Bridgeway to sue Citibank for breach of contract.[85] In other words, the court allowed Bridgeway to relitigate its claims against Citibank in the United States. The case went to trial, a jury found in favor of Citibank, and the Second Circuit upheld the jury's verdict in 2004.[86]

The courts in *Pahlavi* and *Bridgeway* were comfortable passing judgment on the judicial and political systems of Iran and Liberia, respectively. The courts in both of these cases ruled against the judgment creditors at the summary judgment stage, and the court in *Bridgeway* even entered summary judgment sua sponte.[87]

Both of these cases are remarkable in that the courts never really required the judgment debtors to make the case that the courts in the foreign proceedings *actually* denied them due process. For

79. *Id.*

80. *Id.* (quoting the U.S. State Department's 1994 Country Report for Liberia).

81. *Id.* at 141.

82. *Id.*

83. *Id.*

84. *Id.* ("Defending a suit where one has been haled into court, and suing where jurisdiction and venue readily exist do not constitute assertions that the relevant courts are fair and impartial. Accordingly, we do not view Citibank's voluntary participation in Liberian litigation, even as a plaintiff, as *clearly contradictory* to its present position.").

85. Bridgeway Corp. v. Citibank, 91 F. App'x 727, 728-30 (2d Cir. 2004).

86. *Id.*

87. *Bridgeway*, 201 F.3d at 137.

example, the court in *Pahlavi* easily found that the Shah's sister could not have received due process, but it never required her to make the case that she did not.[88] In fact, the evidence that the court relied on dealt largely with the treatment of Americans, and from this the court drew the inference that Pahlavi could not have received due process.[89] In both cases, the courts' narratives never detailed the specifics of the individual proceedings. Instead, the courts told us the story of these countries' political conflicts and internal turmoil.[90] The focus on the politics of the countries is particularly striking in *Bridgeway* because Citibank actually litigated the case discussed above as well as several others, often as plaintiffs.[91] On a related point, the court in *Pahlavi* gave short shrift to the bank's estoppel arguments even though Pahlavi had, in a previous case, argued to have a case dismissed for forum non conveniens because Iran, she argued, was the appropriate forum.[92] But the bank's estoppel argument was actually quite strong. In one forum non conveniens case, the court asserted that a defendant would be estopped from using the due process provision of the Uniform Act to challenge the fairness of the Russian system once that defendant argued that Russia was the appropriate forum.[93]

At any rate, it would seem that a thorough analysis would include, and in fact make prominent, a detailing of the actual proceedings. One is left to wonder whether the actual proceedings in both cases would have belied the condemnation of these judicial systems and supported the enforcement of their judgments.

Courts across the country have cited both *Pahlavi* and *Bridgeway* approvingly in their interpretations of the impartial tribunals/fair procedures exception under the Uniform Act and the Restatement.[94]

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88. *See supra* notes 45-47 and accompanying text.

89. *See supra* notes 54-62 and accompanying text.

90. *See Bridgeway*, 201 F.3d at 138; Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408, 1411-12 (9th Cir. 1995).

91. *See supra* note 82 and accompanying text.

92. *See supra* note 53 and accompanying text.

93. Pavlov v. Bank of N.Y. Co., 135 F. Supp. 2d 426, 429, 435 (S.D.N.Y. 2001), *vacated on other grounds*, 25 F. App'x 70 (2d Cir. 2002).

94. *See* Soc'y of Lloyd's v. Turner, 303 F.3d 325, 330 n.15 (5th Cir. 2002); Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1142 (9th Cir. 2001); Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000); Van Den Biggelaar v. Wagner, 978 F. Supp. 848, 858 (N.D. Ind. 1997); Kam-Tech Sys. Ltd. v. Yardeni, 774 A.2d 644, 650 n.4 (N.J. Super. Ct. App. Div. 2001); CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408, 414-15 (N.Y. App. Div.

Apparently many courts consider it largely acceptable to refuse to recognize a foreign judgment obtained in a "bad" country regardless of what actually went on in the individual proceedings that resulted in the judgment. More importantly, it is acceptable to many courts to condemn other countries' political and judicial systems. Indeed, under the *Pahlavi* and *Bridgeway* analysis, it is unnecessary, and irrelevant, to address the particulars if a wholesale determination can be made regarding the fairness of the entire country. This analytical framework raises the interesting question of what courts should do when "bad" things—procedures raising serious due process and fairness concerns—occur in the judicial proceedings of perceived "good" countries.

C. "Good Country" Cases: The Lloyd's Cases

What if a judgment debtor raised, as a defense to recognition and enforcement, a serious argument that she was denied due process in the United Kingdom, whose judiciary is well respected in the United States? Should courts be satisfied just knowing that as a general matter the British judiciary is considered fundamentally fair and that the political system is stable? Can courts, as a constitutional and institutional matter, ignore the judgment debtor's due process challenges that she was denied a meaningful opportunity to be heard and other basic procedural safeguards in her individual proceedings? Across the country, American judgment debtors have raised these issues involving the Lloyd's of London foreign judgment cases. The leading and most prominent of those cases is *Society of Lloyd's v. Ashenden*.[95] The following section discusses *Ashenden* in detail but also provides general background applicable to all of the Lloyd's cases.

In *Ashenden*, the Seventh Circuit, with Judge Posner writing for a three-judge panel, was faced with a large-scale scandal involving Lloyd's of London.[96] Lloyd's defrauded thousands of investors, including American investors, and ultimately successfully obtained money judgments against the very people whom they defrauded.[97]

2002).

95. 233 F.3d 473.

96. *Id.* at 475.

97. *Id.*; *see infra* note 100.

The Seventh Circuit cast a blind eye to Lloyd's misdeeds and recognized these British judgments.[98] The court's analysis reveals that it did so—despite strong arguments that there were due process violations in the British courts—because of the United States's political relationship with the United Kingdom.[99] This is a blatant display by the Seventh Circuit, and the courts that followed its analysis, of outright bias for the British judgments.

1. The Lloyd's Scandal[100]

The underlying facts in *Ashenden*, which were largely undisputed in the trial court, arose from a large-scale scandal involving Lloyd's that came to a head in the 1990s. Lloyd's of London "provides the facilities for and is the regulator of an English insurance market," which is among the world's most prominent.[101] Lloyd's began in the late 1600s as a "voluntary association" that provided insurance largely for marine risks.[102] Since then, Lloyd's has expanded the categories of risks that it insures and now has virtually no limitations on such risks.[103] Contrary to popular belief, however, Lloyd's is not an underwriter of insurance.[104] Rather, it is a "society" of "Names" who underwrite insurance but do not actively engage in the insurance industry.[105] Instead, Names underwrite risks via

98. *Ashenden*, 233 F.3d at 481.

99. *Id.* at 476-77.

100. The scandal involving Lloyd's of London, which gave rise to *Ashenden*, is well documented. The disgruntled American Names Association (ANA) provides an account on its website of the events that gave rise to the litigation. Am. Names Ass'n, Truth About Lloyd's Homepage, http://www.truthaboutlloyds.com (last visited Jan. 24, 2007). Obviously, this website is entirely from the perspective of the ANA. Nevertheless, many of its claims use, or are based on, undisputed facts found in *Ashenden* and the other Lloyd's judgment recognition cases. Professor Courtland Peterson gives an account of the events surrounding the Lloyd's litigation. Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 LA. L. REV. 1259 (2000); *see also* Courtland H. Peterson, *Limits on the Enforcement of Foreign Country Judgments and Choice of Law and Forum Clauses*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (detailing the Lloyd's litigation).

101. Soc'y of Lloyd's v. Ashenden, No. 98 C 5335, 1999 WL 284775, at *1 (N.D. Ill. Apr. 23, 1999).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

"managing agents." "Syndicates," which consist of Names, take on the underwriting of bigger risks and underwrite specific types of risks.[106] Names make their profits from premiums and investments on the premium trust fund.[107]

A Name's individual liability is several rather than joint, and, therefore, each Name is individually accountable for her own risks.[108] There is no limit on their potential losses—except in accordance with the underwriting itself.[109] To prevent unlimited liabilities, syndicates procure reinsurance.[110] Syndicates are dissolved after a year, and their remaining liabilities are reinsured with a subsequent syndicate.[111]

Prior to 1982, Names were essentially self-governing, having the authority to pass their own bylaws and rules.[112] The Lloyd's Act of 1982 took this power from the Names and gave it to the Council of Lloyd's, which the Act created.[113] The Council is made up of both managing agents and members. The managing agents, however, hold the deciding vote.[114] Significantly, the Lloyd's Act authorized the Council to appoint "substitute agents," who would have the power "to act on behalf of members for the proper regulation of the business of insurance at Lloyd's."[115]

In the 1980s and early 1990s, Lloyd's experienced over $12 billion in losses largely because of liabilities resulting from "long tail" cases, like those involving asbestos and other exposure.[116] Ultimately, attempting to save Lloyd's and secure its future, the council devised a settlement plan called "Reconstruction and Renewal."[117] Under this plan, Lloyd's and the Names "exchange[d] mutual releases."[118] The council also created an independent entity, named Equitas, that reinsured the problem risks from the pre-1992

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at *2.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*

period.[119] Equitas was funded by the Lloyd's Central Fund and from the Names' reinsurance payments.[120] The majority of the Names accepted the Reconstruction and Renewal plan in June 1996.[121] In accordance with the plan, the Names, including those who rejected the settlement, were provided with reinsurance.[122] Those Names refusing to settle, however, were not included in the "mutual waiver of claims."[123]

Significantly, there were provisions in the Reconstruction and Renewal Plan that shielded Lloyd's from being tangled in extended litigation. Specifically, Names could not claim any offset against Lloyd's and could not dispute the amount of their reinsurance premiums in any lawsuits brought by Lloyd's to collect the reinsurance premiums.[124] To ensure that these provisions were enforceable even against the nonsettling Names, the Council had a "substitute agent" sign the Equitas reinsurance contract on behalf of the nonsettling Names.[125] The Council was able to appoint this substitute agent pursuant to a bylaw it had enacted in 1983, which authorized the appointment of substitute agents.[126] In 1995, when the Council enacted the Reconstruction and Renewal Plan, it also enacted a bylaw that authorized substitute agents to sign the Equitas reinsurance contract for the Names.[127] Lloyd's asserted the authority to do so pursuant to the 1982 Lloyd's Act, which gave it the power to make bylaws "to further the objectives of the Society."[128]

Nonsettling Names brought test cases in the United Kingdom to challenge Lloyd's ability to enact the Reconstruction and Renewal Plan and specific provisions of the reinsurance contract.[129] The British courts affirmed Lloyd's power to enact the Plan.[130] The

119. *Id.*
120. *Id.* at **2-3. The Lloyd's Central Fund was earlier created by Lloyd's to deal with the huge losses and to which Names contributed. *Id.* at *2.
121. *Id.*
122. *Id.* at *3.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

British courts also upheld the validity of the "pay now, sue later" clause, which prevented "the Names from claiming any set-offs, including damages for fraud," from the reinsurance premium.[131] Additionally, the British courts upheld the "conclusive evidence" clause of the reinsurance contract; under that clause, whatever Lloyd's determined the premium amount to be was conclusive evidence between the Names and Equitas.[132]

2. Society of Lloyd's v. Ashenden

The defendants in *Ashenden* were a husband and wife, both residents of Illinois.[133] James Ashenden became a Name in 1977, and Mary Jane Ashenden became a Name in 1984.[134] The Ashendens were recruited to join Lloyd's by R.W. Sturge & Co., a managing agent for the association, and initially invested £70,000 after Sturge lured the Ashendens into Lloyd's by assuring them that Lloyd's was an esteemed and time-honored institution that only invested in "conservative risks."[135] For years, Sturge continued to reassure the Ashendens regarding the security of their investment in Lloyd's.[136] Sturge never informed them that they faced tremendous losses because of asbestos claims.[137] At Sturge's urging, they invested even more in Lloyd's.[138]

In 1991, Lloyd's called on the Ashendens to help cover increasing losses sustained by the syndicates.[139] The losses mostly stemmed from insurance policies with "general liability" and no "aggregation limits" that "had been successively reinsured without adequate reserves."[140] Some of the liability policies dated back as far as the 1930s.[141] Lloyd's covered the Ashendens' "continuing underwriting liabilities" with their letters of credit. The Ashendens and forty-

131. *Id.*
132. *Id.*
133. *Id.* at *4.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

three other Illinois Names ultimately sued Lloyd's and several of its agents in Illinois state court.[142] The Names argued that the defendants violated Illinois securities and consumer protection laws.[143] Lloyd's removed the case, and the district court dismissed because of choice of law and forum clauses that the Names had previously signed.[144]

Subsequently, Lloyd's sent the Ashendens the settlement plan, which included "finality statements" that set forth demands from each of them for the balance that they owed from their underwriting liabilities and from their shares of the Equitas reinsurance premium.[145] Lloyd's demanded £179,430 from James Ashenden and £222,668 from Mary Jane Ashenden. Their individual liabilities would be reduced to £100,000 if they executed the mutual releases.[146] The Ashendens refused the settlement offer, and they instructed their agent not to sign the reinsurance agreements for them.[147] But Lloyd's made the reinsurance payments for the non-settling Names, like the Ashendens, who refused to sign the reinsurance contract. Equitas assigned its claims against those Names to Lloyd's.[148] Lloyd's then sued those Names, including the Ashendens, in the United Kingdom.[149] Lloyd's had no problem winning at the summary judgment stage because of the "pay now, sue later" and "conclusive evidence" clauses.[150] The British court denied the Names leave to appeal; the British judgment was final, valid, and enforceable.[151]

Writing for the Seventh Circuit, Judge Posner began his analysis by outlining Illinois's version of the Uniform Foreign Country Money-Judgments Recognition Act, which renders a foreign judgment unenforceable if rendered by a court outside the United States if the judgment was "rendered under a *system* which does not provide impartial tribunals or procedures compatible with the

142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*

requirements of due process of law."[152] The court found the word "system" fatal to the Ashendens' position.[153] Judge Posner noted that the judgments against the defendants were obtained in Great Britain's High Court, "which corresponds to our federal district courts; they were affirmed by the Court of Appeal, which corresponds to the federal courts of appeals; and the Appellate Committee of the House of Lords, which corresponds to the U.S. Supreme Court, denied the defendants' petition for review."[154] Judge Posner asserted that "[a]ny suggestion that this system of courts 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' borders on the risible."[155] Posner boldly and unequivocally declared that "[t]he courts of England are fair and neutral forums."[156] He further asserted that British courts "are highly regarded for impartiality, professionalism, and scrupulous regard for procedural rights."[157]

The Seventh Circuit concluded that the relevant Illinois act provided that only the system under which a foreign judgment was entered be "*compatible* with" American notions of due process, not identical.[158] The foreign system's procedures need only be "fundamentally fair" and not offend "basic fairness."[159] Posner called this notion the "international concept of due process,"[160] a concept much different "from the complex concept that has emerged from American case law."[161] According to Judge Posner, there was no "serious question" that the United Kingdom's judicial system comports with the international concept of due process.[162] In another rather bold and audacious assertion, Posner declared that had the judgment at issue "been rendered by Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and

152. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 476 (7th Cir. 2000) (emphasis in original) (quoting 735 ILL. COMP. STAT. 5/12-621).

153. *Id.*

154. *Id.*

155. *Id.* (quoting Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992)).

156. *Id.* (quoting *Riley*, 969 F.2d at 958).

157. *Id.*

158. *Id.* at 477 (emphasis in original).

159. *Id.* (internal quotation marks omitted).

160. *Id.* (internal quotation marks omitted).

161. *Id.*

162. *Id.*

commitment to the norm of due process are open to serious question," the court may have considered the type of evidence needed to show a denial of international due process.[163] Presumably, this may have included the type of evidence that the courts in *Pahlavi* and *Bridgeway* considered.

The Seventh Circuit next rejected the Ashendens' argument that the court should examine the particular proceedings in which Lloyd's obtained the judgments against them instead of looking only at the British judicial system generally.[164] Because of the Uniform Act's focus on the "system," Posner concluded that the Act did not call for "a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the judgment creditor a further appeal on the merits."[165] Judge Posner emphasized that "[t]he process of collecting a judgment is not meant to require a second lawsuit, thus converting every successful multinational suit for damages into two suits."[166]

Moreover, the Seventh Circuit concluded that, assuming the "retail approach" were justified, there would be no requirement that a foreign court utilize procedures that "conform[ed] to the specifics of the American doctrine of due process."[167] Consequently, the court found that "even the retail approach, in order to get within miles of being reasonable, would have to content itself with requiring foreign conformity to the international concept of due process."[168] Thus, Judge Posner's ideal international due process analysis only looks at the entire system from which the judgment originated. And he also indicated that if a retail approach were permissible, which he seriously doubted, even that approach would be a watered-down, weak notion of due process.[169]

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* (internal citations omitted).

167. *Id.* at 478.

168. *Id.*

169. *See id.* ("Even if the retail approach is valid—and we want to emphasize our belief that it is not—it cannot possibly avail the defendants here unless they are right that the approach requires subjecting the foreign proceeding to the specifics of the American doctrine of due process.").

Though stressing that it was unnecessary, for the "sake of completeness," the Seventh Circuit considered whether the particular foreign proceedings in which Lloyd's obtained the judgment against the Ashendens comported with this watered down notion of due process.[170] The court found no due process violations under international or domestic standards.[171] The court recognized that the pay now, sue later and conclusive evidence provisions "curtail[ed] the [N]ames' procedural rights"; but the court also pointed out that "due process is not a fixed menu of procedural rights. How much process is due depends on the circumstances."[172] The circumstances relevant to the court were that Lloyd's was in danger of folding and adopted the pay now, sue later clause to fund Equitas fully.[173] According to the court, the fund benefited the Names by providing them with reinsurance.[174] The court found the pay now, sue later clause was "reasonable" in exchange for the reinsurance.[175] Additionally, the court asserted that without the clause, "many other [N]ames might have forced Lloyd's into collection litigation as well."[176] The court found nothing improper about the clause or the British court's enforcement of the clause.[177] The British court merely enforced the clause "on the basis of an interpretation of a provision of the original contract between the names and Lloyd's that authorized Lloyd's to take measures unilaterally to prevent the society from failing."[178] In other words, "the [N]ames had waived their procedural rights in advance."[179] At any rate, the court found it doubtful that mere "contract interpretation" could form the basis for a due process challenge.[180]

The court analyzed the conclusive evidence clause similarly, although it noted that this clause "extinguishes [the Names' rights] by shrinking [their] entitlement to a right to the rectification of only

170. *Id.* at 478-79.
171. *Id.*
172. *Id.* at 479 (citing Gilbert v. Homar, 520 U.S. 924, 930-31 (1997); Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.*

those errors that leap out from the assessment figure itself with no right to pretrial discovery to search out possible errors in the actuarial or other assumptions that generated the figure."[181] This might be an issue, the court found, if there was a "substantive component" to the international due process inquiry.[182] The rationale for the conclusive evidence clause, and for the denial of full discovery regarding the accuracy of the premium assessment, was that "the funding of Equitas would be delayed."[183] The court found that the one substantive ground for nonrecognition under the Uniform Act was the public policy exception, which the plaintiffs had abandoned.[184] Again, the court found that the key question was not the fairness of the Lloyd's measures but the fairness of the English court in holding that Lloyd's was authorized by its contract with the Names to appoint agents to negotiate a contract that would bind the Names without the Names' consent.[185] The court found that this interpretation of the contract was not so unreasonable that it could be thought of as a denial of international due process, even if international due process had a substantive component.[186]

It is important to note that the Seventh Circuit's international due process rule outlined the parameters of the *procedural* due process inquiry required for foreign judgments. Notwithstanding what happened in the individual proceedings, there was no procedural due process problem in the court's view because as a matter of law British courts are generally fair. And while this Article is mostly concerned with critiquing the international *procedural* due process analysis that Judge Posner and other judges have formulated, in Part III I will return to the substantive due process issue that Judge Posner raised with respect to the conclusive evidence clause.[187] In Part III, I address the free speech foreign

181. *Id.* at 480.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 476 (emphasizing that the proper inquiry is into the fairness of the English court system).

186. *Id.* at 479 ("In these circumstances the clause did not violate international due process or, we add unnecessarily, domestic due process.").

187. "[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinermon v. Burch, 494 U.S. 113, 125 (1990) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). The Due Process Clause also guarantees "fair procedure." *Id.* "In

judgment cases; and I will demonstrate that, contrary to the Seventh Circuit's suggestions, the state action doctrine mandates that there must also be a substantive component to the due process analysis of foreign judgments.

The Seventh Circuit's watered down international due process analysis ignored the fact that the British court entered a judgment against the Ashendens for the Equitas reinsurance premiums even though the Ashendens never had any real opportunity to contest the Lloyd's assessment of those premiums or to claim any set off.[188] In fact, the district court, applying American due process law, found that the British courts did not afford the Names an adequate hearing so that the Names "were not allowed seriously to challenge the claims brought against them by Lloyd's."[189] By focusing on the Ashendens' contract with Lloyd's, however, the Seventh Circuit enforced a judgment that the British court entered without affording the Ashendens a meaningful opportunity to be heard. As the court saw it, the Names waived their procedural due process rights when they initially contracted with Lloyd's to become Names. The court, however, failed to point to any provision in the standardized Lloyd's contract where the Names agreed to be bound by a settlement with Lloyd's signed by substitute agents, and to have no meaningful opportunity to assert fraud claims against Lloyd's. The Seventh Circuit's focus on the contract was specious, and it ignored the essence of the Names' argument. The Names claimed—and there is ample undisputed evidence to support them—that Lloyd's

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procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Id.*

188. *Compare* Soc'y of Lloyd's v. Ashenden, No. 98 C 5335, 1999 WL 284775, at *4, *7 (N.D. Ill. Apr. 23, 1999) (noting that the British court granted Lloyd's summary judgment), *with Ashenden*, 233 F.3d at 478-80 (failing to mention that the British court granted Lloyd's summary judgment).

189. *Ashenden*, 1999 WL 284775, at *7. The district court found that the British courts did indeed deny the Ashendens a "pre-deprivation hearing." *Id.* But the court found that this denial was not necessarily in violation of due process if there was an "effective post-deprivation remedy." *Id.* The district court's analysis is somewhat more satisfying than the Seventh Circuit's analysis because it at least recognized that the British courts failed to provide the Ashendens with a meaningful hearing. *Id.* But the district court's ultimate conclusion that the Names had an effective postdeprivation remedy in that they could file separate suits for fraud in the United Kingdom, *id.*, is doubtful given the history of the Lloyd's litigation. *See supra* note 100.

never disclosed the tremendous losses that had accrued and were continuing to accrue when they signed their contracts with Lloyd's and became investors. It seems fundamentally unfair, and contrary to common sense, to interpret the standardized contracts that they signed when they became Names to mean that Lloyd's could appoint substitute agents to waive the Names' rights unilaterally to contest the very fraud that led them to become Names. It is highly doubtful, and the court did not really suggest, that the Names understood Lloyd's authority to appoint substitute agents would result in their current predicament—having no meaningful opportunity to contest a settlement agreement entered on their behalf and specifically against their wishes and no meaningful opportunity to raise their fraud claims or any other defenses against Lloyd's.

Whether one ultimately agrees or disagrees that the British courts failed to afford the Names due process is not so much the point here. This case is significant for the international procedural due process analysis that it embraced. After all, the court's "analysis" of the individual proceedings was merely dicta. Indeed, the case stands for the proposition that the individual proceedings in the foreign system are irrelevant. It matters only whether the entire judicial system is, in the court's view, fundamentally fair.[190] Such a rule encourages—indeed requires—courts to look the other way when presented with questionable judgments from favored countries.

Across the country, other federal courts have taken the Seventh Circuit's lead in embracing "international due process" and enforcing the British judgments against the American Names.[191] The

190. *See, e.g.*, Kreditverein Der Bank Austria v. Nejezchleba, Civil No. 04-72 (JRT/JSM), 2006 WL 1851129, at *2 (D. Minn. June 30, 2006) (citing *Ashenden* and finding that "[t]he 'due process' ground for nonrecognition in the Uniform Act is distinct from, and less demanding than, the concept of 'due process' as it has been defined in American case law. Rather than requiring that a foreign country's legal system conform to the specific nuances of American law, the requirement of 'due process' in the Uniform Act simply means that the foreign country's system of law is 'fundamentally fair' and does not offend against 'basic fairness'" (internal citation omitted)).

191. *See* Soc'y of Lloyd's v. Siemon-Netto, 457 F.3d 94, 105-06 n.12 (D.C. Cir. 2006) (citing *Ashenden* with approval); Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 994 (10th Cir. 2005), *cert. denied*, 126 S. Ct. 366 (2005) (agreeing with *Ashenden* and noting "[o]ur courts have long recognized that the courts of England are fair and neutral forums" (quoting Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 958 (10th Cir. 1992))); Soc'y of Lloyds v. Borgers, 127 F. App'x 959, 960 (9th Cir. 2005) (declaring that the British system "comports with our

Seventh Circuit's decision raises numerous concerns regarding the role of the judiciary generally and, in particular, in dealing with judgments from foreign countries. Following the Seventh Circuit's lead, courts can pass judgment on other judicial systems with little or no evidentiary bases for their assessments. After all, Judge Posner just assumed the fairness of the British system with no real analysis.[192] Likewise, he advocated that courts can label other countries as fundamentally unfair or "uncivilized" with no real analysis.[193]

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standards of due process" and citing *Ashenden*); Soc'y of Lloyd's v. Edelman, No. 03 Civ.4921 (WHP) 2005 WL 639412, at *3 (S.D.N.Y. Mar. 21, 2005) (citing *Ashenden* and finding that "[i]t is incontrovertible that the English judicial system provides impartial tribunals and 'procedures compatible with the requirements of due process of law'"); Soc'y of Lloyds v. Webb, 156 F. Supp. 2d 632, 638-40 (N.D. Tex. 2001) (citing *Ashenden* and asserting that "[g]iven the structure of the English system, which is substantially similar to our own, Webb's suggestion that the English court system does not provide tribunals compatible with due process in [sic] not tenable"). In *Society of Lloyd's v. Turner*, 303 F.3d 325 (5th Cir. 2002), the Fifth Circuit decided a case brought by other Names involving the same facts. *See id.* at 326-29. The Fifth Circuit basically adopted the Seventh Circuit's analysis and found that the British system was fundamentally fair. *Id.* at 330-31. In a footnote, the court stated that it "need not speculate on the outcome of th[e] case" had the Names shown that their individual proceedings were fundamentally unfair because the British courts had applied typical British contract law. *Id.* at 331 n.22. Interestingly, however, the court cited to an old Texas Supreme Court case called *Banco Minero v. Ross*, 172 S.W. 711 (Tex. 1915), in which the court refused to enforce a Mexican judgment because the particular proceedings, and not the Mexican system as a whole, were unfair. *Turner*, 303 F.3d at 331 n.22. In *Banco Minero* the Texas Supreme Court applied the *Hilton* rule to determine whether a Mexican judgment should be recognized. *Banco Minero*, 172 S.W. at 714-15. The court stated that "the chief requisite for the recognition of a foreign judgment necessarily is that an opportunity for a full and fair trial was afforded." *Id.* at 714. The court found that the proceedings in the Mexican court were "wanting in these essential elements." *Id.* at 715. According to the court, the judgment debtor pleaded a "good defense, yet ... he was denied the right to present it," and the Mexican court rendered the judgment "upon no proof whatever." *Id.* In *Turner* the Fifth Circuit sidestepped the issue of whether *Banco*'s approach—which analyzed the fairness of particular proceedings as opposed to the much more general look at the entire legal system of the foreign country—was correct. *Turner*, 303 F.3d at 331 n.22. In *Society of Lloyd's v. Mullin*, 255 F. Supp. 2d 468, 470-73 (E.D. Pa. 2003), the Eastern District of Pennsylvania also enforced the Lloyd's judgments against yet another Name, J. Edmund Mullin. *Id.* The court adopted the Seventh Circuit's analysis and stated that its inquiry was restricted to "a panoramic examination of the English judiciary, [or], the English 'system.'" *Id.* at 472. An evaluation of the particulars of the British court decisions was not required. *Id.* at 472.

192. *See Ashenden*, 233 F.3d at 476-78.

193. *See id.*

II. "NAKED POLITICAL JUDGMENTS": A SEPARATION OF POWERS CRITIQUE OF INTERNATIONAL DUE PROCESS

In his Foreword to the *Harvard Law Review* in November 2005, Judge Posner harshly criticized Justice Kennedy's opinion in *Roper v. Simmons*,[194] calling it a "naked political judgment":

> Strip *Roper v. Simmons* of its fig leaves—the psychological literature that it misused, the global consensus to which it pointed, the national consensus that it concocted by treating states that have no capital punishment as having decided that juveniles have a special claim not to be executed (the equivalent of saying that these states had decided that octogenarians deserve a special immunity from capital punishment)—and you reveal a naked political judgment.[195]

Judge Posner argued that *Roper v. Simmons* and *Lawrence v. Texas*[196] represented "aggressive political judging" on the part of the Court, the type of decision making in which a legislature would engage.[197] He urged the Supreme Court to adopt a "modest judge" approach to constitutional review, which would have no room for reliance on foreign precedent to establish American constitutional norms.[198] But the international due process analysis that Posner established in the Lloyd's cases is a form of aggressive political judging, much more so than *Roper* and *Lawrence*. Indeed, if you strip the Lloyd's cases of their fig leaves, of which there are very few, you reveal naked political judgments—the type of decision making in which the executive branch should engage.[199]

This Part argues that the international due process analysis is beyond the competence of state and federal judges. The international due process analysis requires action that is unsuitable for judges, who are obligated to settle disputes between individuals and not to formulate international policies. The international due

194. 543 U.S. 551 (2005).
195. Posner, *supra* note 4, at 90.
196. 539 U.S. 558 (2003).
197. Posner, *supra* note 4, at 54-60, 84-90.
198. *Id.* at 54.
199. *See infra* Part II.B.

process analysis requires judges to reach beyond their constitutionally delineated roles and make foreign policy.

First, this Part addresses the ability of state judges to engage in the international due process analysis. Whereas federal courts sitting in diversity are the usual forums for foreign judgment recognition cases,[200] state courts still have the power to preside over such cases.[201] Should state court judges engage in the international due process analysis, they too will be impermissibly making foreign policy, violating the dormant foreign affairs doctrine.[202] The majority of this Part, however, is devoted to the separation of powers problem posed by federal judges engaging in the international due process analysis. In exploring the limited role of the judiciary in foreign relations, this Part will draw from the principles underlying the political question doctrine, which one scholar recently dubbed the "heartland of judicial abstention."[203] The doctrine is most viable in foreign relations cases, as courts apply it most often in such cases.

After establishing the courts' limitations in the foreign relations arena, this Part provides a separation of powers critique of the international due process exception to foreign judgment recognition. Specifically, it argues that U.S. courts lack the institutional competence to undertake the international due process analysis. It also argues that, should courts continue to apply this analysis, there will be an increasing potential to embarrass the executive branch in its foreign relations efforts. Moreover, it argues that the type of inherent value judgment required of courts applying the international due process analysis is, at best, unsuitable for courts and, at worst, highly political and unduly susceptible to the prejudices and biases of individual judges.

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200. *See, e.g.*, Sw. Livestock & Trucking Co. v. Ramón, 169 F.3d 317, 320 (5th Cir. 1999) ("Our jurisdiction is based on diversity of citizenship. Hence, we must apply Texas law regarding the recognition of foreign country money-judgments."); Guinness PLC v. Ward, 955 F.2d 875, 880, 882 (4th Cir. 1992) (interpreting the Maryland Uniform Foreign Money-Judgments Recognition Act); Corporacion Salvadorena de Calzado, S.A. v. Injection Footwear Corp., 533 F. Supp. 290, 295 (S.D. Fla. 1982) ("Plaintiff is seeking to domesticate this foreign judgment under the law of the State of Florida and jurisdiction of this Court is predicated solely on diversity.").

201. *See infra* Part II.A.

202. *Id.*

203. Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943 (2004).

A. State Courts and International Due Process

Undoubtedly, the international due process analysis involves the conduct of foreign policy: the Supreme Court has struck down a state statute containing an almost identical analysis because it violated the federal foreign affairs doctrine.[204] In *Zschernig v. Miller*, the Court found that an Oregon statute unconstitutionally permitted states to establish their own foreign policy.[205] Under the statute, a foreign citizen could not inherit property unless he proved to an Oregon court that his home country (1) would grant U.S. citizens a "reciprocal right" to take property on the same terms as its own citizens; (2) assured U.S. citizens the right to receive payment here of funds originating from estates in that country; and (3) gave its own citizens the benefits, use, and control of property received from an Oregon estate "without confiscation."[206]

The *Zschernig* Court found that the "history and operation of [the] statute ma[de] clear that [it was] an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[207] It also noted that under such statutes,

> various states ha[d] 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, whether there is in the actual administration in the particular foreign system of law any element of confiscation.[208]

The Court found that these state court decisions "radiate[d] some of the attitudes of the 'cold war,' where the search [was] for the

204. Zschernig v. Miller, 389 U.S. 429, 432 (1968).
205. *Id.*
206. *Id.* at 430-31.
207. *Id.* at 432.
208. *Id.* at 434.

'democracy quotient' of a foreign regime as opposed to the Marxist theory."[209]

The Supreme Court found that the statute made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[210] In striking down the Oregon statute, the Court held that the law demonstrated the danger involved if each state, speaking through its courts, were permitted to establish its own foreign policy.[211] According to the Court, "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government."[212] The Court noted a state's inability to establish its own foreign policy: "Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there. If there are to be such restraints, they must be provided by the Federal Government."[213] Though it found that the Oregon statute was "not as gross an intrusion in the federal domain as those others might be," it still found that the statute had a "direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems."[214]

Some scholars called *Zschernig* "anomalous,"[215] questioning its vitality and claiming that the Court has neglected it.[216] But the Supreme Court recently relied on *Zschernig* in *American Insurance Ass'n v. Garamendi*, and struck down California's Holocaust Victim Insurance Relief Act on the grounds that it interfered with the

209. *Id.* at 435.

210. *Id.* at 440.

211. *Id.*

212. *Id.* at 441 (quoting Hines v. Davidowitz, 312 U.S. 52, 64 (1941)).

213. *Id.* (citations omitted).

214. *Id.*

215. *See* Jesse H. Choper & John C. Yoo, Essay, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 257 (2006).

216. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1700-01 (1997) (arguing that Supreme Court jurisprudence has undercut *Zschernig*). *But see* Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1847-48 (1998) (conceding that scholars have "appropriately criticized [*Zschernig*] for its failure to delineate" clear standards for determining when a state legislation has such an impact on foreign relations to "be deemed specifically preempted," but arguing that "nothing in that jurisprudence speaks to 'restoring' to the states external foreign affairs powers that were not reserved to them by the Tenth Amendment").

President's conduct of foreign affairs.[217] Even Justice Ginsburg, in her dissent in *Garamendi*, seemed to recognize the problem with state statutes that require courts to pass judgments on foreign countries. Justice Ginsburg, joined by Justices Stevens, Scalia, and Thomas, would not have extended *Zschernig* to invalidate the statute in *Garamendi*. She distinguished the Holocaust statute from the statute in *Zschernig*: "The notion of 'dormant foreign affairs preemption' with which *Zschernig* is associated resonates most audibly when a state action 'reflect[s] a state policy critical of foreign governments and involve[s] sitting in judgment on them.'"[218]

In *Crosby v. National Foreign Trade Council*,[219] a pre-*Garamendi* case which raised questions of federalism and foreign affairs, the Supreme Court struck down a Massachusetts law restricting state purchases from companies doing business in Burma.[220] The lower court relied on *Zschernig* in striking down the law,[221] but the Supreme Court narrowed the holding of the case and based its invalidation of the law on the notion that it conflicted with a federal sanctions law dealing with Burma. Though the Court had an opportunity to overrule *Zschernig*, it did not. It has been argued that the "deeper theory" at play in *Crosby* was the separation of powers.[222] Though the Supreme Court in *Crosby* narrowed the

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217. 539 U.S. 396, 424-25 (2003).

218. *Id.* at 439 (Ginsburg, J., dissenting) (alterations in original) (internal quotation marks omitted) (quoting L. HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 164 (2d ed. 1996)). Prior to *Garamendi*, some scholars had also stated that *Zschernig* was limited to its facts. *See* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1145 (2000) ("Consequently, some believe that *Zschernig* is confined to its facts, and only proscribes state-directed inquiries, particularly by courts, into the nature or operation of foreign governments.").

219. 530 U.S. 363 (2000).

220. *Id.* at 373-74. The statute barred state entities from doing business with persons or businesses on an identified "'purchase list' of those doing business with Burma." *Id.* at 367. The statute exempted certain entities from the boycott, such as those providing medical services or those in Burma solely to report the news. *Id.*

221. Nat'l Foreign Trade Council v. Natsios, 181 F.3d 38, 51 (1st Cir. 1999) (concluding that the Massachusetts Burma Law is unconstitutional under *Zschernig* and emphasizing that *Zschernig* is still binding precedent).

222. John C. Yoo, *Foreign Affairs Federalism and the Separation of Powers*, 46 VILL. L. REV. 1341, 1344 (2001) ("*Crosby* ... is more of a separation of powers case than a federalism case. Much of the Court's language does not emphasize the federal government's powers in foreign relations—instead, it praises the *President*'s powers.").

holding to the conflict of the state law with federal goals, it emphasized the President's role in conducting foreign affairs.[223] While *Zschernig* recognized that the role of foreign policymaking is an area that should be handled on the federal level, *Crosby* at least implicitly recognized that within the federal government, it is the executive that is best suited to make these decisions.[224]

The international due process provision is strikingly similar to the Oregon statute and the Massachusetts statutes in the Burma cases. Interestingly, in his *Zschernig* concurrence, Justice Harlan pointed out that the majority's analysis would invalidate the Uniform Act's provision that a foreign country's judgment is not conclusive if the judgment "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law,"[225] that is, the provision on which the international due process analysis is based.[226] The concurrence was correct to note the similarities between the international due process provision in the Uniform Act and the Oregon statute. Both require state courts to make their own foreign policy and violate the dormant foreign affairs doctrine.

B. The Political Question Doctrine and the Limited Role of the Federal Judiciary in Foreign Affairs

In the federal system, it is a well settled tenet of the separation of powers doctrine that "[t]he conduct of ... foreign relations ... is committed by the Constitution to the Executive and Legislative"

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223. *Crosby*, 530 U.S. at 380-81 ("[T]he state Act is at odds with the President's intended authority to speak for the United States among the world's nations in developing a 'comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma.'" (quoting Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, Pub. L. No. 104-208, § 570(c), 110 Stat. 3009-166 (1996))).

224. Similarly, in both *United States v. Pink*, 315 U.S. 203, 229-30 (1942), and *United States v. Belmont*, 301 U.S. 324, 331-32 (1937), the Supreme Court preempted state law that conflicted with the President's conduct of foreign relations in regard to the Soviet Union.

225. Zschernig v. Miller, 389 U.S. 429, 461 (1968) (Harlan, J., concurring) (quoting Uniform Foreign Money-Judgments Recognition Act § 4(a)(1)).

226. In his concurrence, Justice Harlan stated that "[i]f the flaw in the statute is said to be that it requires state courts to inquire into the administration of foreign law, I would suggest that that characteristic is shared by other legal rules which I cannot believe the Court wishes to invalidate." *Id.*

branches—the "political" branches of government.[227] Though courts have no authority to make foreign policy, interestingly, it is largely up to the courts to ensure that they do not aggrandize themselves in this area. Federal courts have created checks on themselves through judicially created doctrines such as the political question doctrine, the act of state doctrine, and the noninquiry rule. The irony, as one scholar has noted, is that when exercising these doctrines of judicial restraint, courts often engage in the very type of conduct—foreign policymaking—that is constitutionally beyond their authority.[228] Even more disturbing is that courts often fail to invoke doctrines of judicial restraint; in other words, they bypass the issue altogether, and proceed directly to foreign policymaking. This latter phenomenon occurs with respect to the international due process analysis of foreign judgments. Of course, judicial involvement in disputes between parties that may touch on foreign affairs is necessary, particularly in the context of international civil litigation.[229] Judges cannot—and no one suggests that they should —avoid all cases with foreign relations implications. They, nevertheless, lack any legitimate authority to make foreign policy, as recognized by the doctrines of restraint that judges have created.[230]

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227. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918); *see also* Attorney Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 114 (2d Cir. 2001) ("When a foreign nation appears as a plaintiff in our courts seeking enforcement of its revenue laws, the judiciary risks being drawn into issues and disputes of foreign relations policy that are assigned to—and better handled by—the political branches of government."); United States *ex rel.* Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C. Cir. 1981) ("[S]o-called political questions are denied judicial scrutiny, not only because they invite courts to intrude into the province of coordinate branches of government, but also because courts are fundamentally underequipped to formulate national policies or develop standards of conduct for matters not legal in nature.").

228. Jack I. Garvey, *Judicial Foreign Policy-making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461 (1993) (discussing the "phenomenon" of judicial foreign policymaking in the wake of globalization and noting that "[i]n contemporary international litigation ... there is critical foreign policy-making by the courts that cannot be justified, historically or functionally, as within the capacities of the judicial branch").

229. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (explaining that "one of the Judiciary's characteristic roles is to interpret statutes, and [the court] cannot shirk this responsibility merely because [its] decision may have significant political overtones").

230. *See* Ange v. Bush, 752 F. Supp. 509, 513 (D.D.C. 1990) ("The judicial branch, on the other hand, is neither equipped nor empowered to intrude into the realm of foreign affairs where the Constitution grants operational powers only to the two political branches and

One arm of the Supreme Court's separation of powers jurisprudence deals with the nonjusticiability of so-called "political questions."[231] The Supreme Court has long recognized that questions involving foreign relations are inherently political,[232] but there are no hard line rules for determining whether an issue is too political for the courts to address. Indeed, the Supreme Court has said that "[d]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation."[233] The Supreme Court has defined the political question by examining cases in which it has been applied and "infer[ing] from them the analytical threads that make up the political question doctrine."[234]

The doctrine and its underlying policies are applicable to the international due process analysis. Even though under the *Erie* doctrine, a federal court adjudicating state law claims must apply the substantive law of the relevant state,[235] the Supreme Court has made exceptions to this doctrine when deciding cases that specifically affect federal interests.[236] For instance, an exception arises when the federal interest at stake concerns the foreign relations of the United States: "Because our foreign relations could be impaired by the application of state laws, which do not necessarily reflect national interests, federal law applies to these cases even where the court has diversity jurisdiction."[237] Thus, even though foreign judgment recognition law in this country is state law, the political

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where decisions are made based on political and policy considerations.").

231. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210-11 (1962).

232. *Id.* at 211 ("There are sweeping statements to the effect that all questions touching foreign relations are political questions.").

233. *Id.*

234. *Id.*

235. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

236. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1232 (11th Cir. 2004) (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938)). In *Hinderlider*, which the Supreme Court decided the same day as *Erie*, the Court addressed issues regarding state boundaries and the apportionment of interstate waters: "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." 304 U.S. at 110.

237. *Ungaro-Benages*, 379 F.3d at 1232-33 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

question doctrine and its underlying principles are applicable when the foreign relations of the United States could be impaired by the application of state judgment recognition law.[238] The next subsection looks at the origins of the doctrine and its limitations on federal courts' involvement in foreign affairs.

1. Origins of the Doctrine

The origins of the political question doctrine can be traced back to Chief Justice John Marshall. Before joining the Supreme Court, Marshall gave a powerful speech before the House of Representatives in support of President Adams and against efforts to have the President censured. That speech laid the foundation for the political question doctrine and also established the uniqueness of foreign relations in the separation of powers model.

President Adams had ordered the extradition of Thomas Nash to Great Britain. Nash had been accused of murdering a naval officer while aboard a British ship.[239] Adams's opponents submitted a resolution in the House of Representatives censuring Adams for a "dangerous interference of the Executive with Judicial decisions."[240] In his speech, Marshall discussed the role of the judiciary to decide legal issues presented by the parties before them. He stated that "[b]y extending the Judicial power to all cases in law and equity, the Constitution had never been understood to confer on that department any political power whatever."[241] He further stated that "[t]o come within this description [of cases in law and equity], a question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process, and ... whose rights admit of ultimate decision by a tribunal to which they are bound to submit."[242]

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238. *See, e.g.*, *id.* at 1229-33 (applying the federal common law of foreign affairs, including the political question doctrine, to state law claims by plaintiff against two German banks to recover money that they allegedly stole from her family through the Nazi Regime's "Aryanization" program).

239. John Marshall, Address Before the House of Representatives (Mar. 7, 1800), *in* 10 ANNALS OF CONG. 596, 597 (1851).

240. *Id.* at 533.

241. *Id.* at 606.

242. *Id.*

In his speech, Marshall also expounded on the President's role as the sole authority to engage in "external relations":

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.
>
> He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of a nation is to be performed through him.
>
> ...
>
> The Executive is not only the Constitutional department, but seems to be the proper department, to which the power in question may most wisely and most safely be confided.[243]

Marshall understood that certain decisions were simply not within the courts' expertise, but were to be determined by the executive branch, which is uniquely positioned to make those decisions. It is the Executive who is in the best position to determine the state of relations between the United States and other nations; and those relations are subject to change at any time. So, decisions involving external relations necessarily require political discretion. Marshall also understood that there was a distinction to be drawn between political decisions and legal decisions, with only the latter being appropriate for the judiciary.

From a historical perspective, Marshall's speech was not simply rhetoric. The principle that he espoused in that speech—that political issues are beyond the competency of courts—is as firmly rooted in American jurisprudence as the fundamental principle of judicial review that Marshall later espoused in *Marbury v. Madison*.[244] Indeed, three years after his speech, then-Chief Justice Marshall explained in *Marbury* that there is a category of cases, the deciding of which constitutes "political act[s], belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has

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243. *Id.* at 613-14.

244. *See* Schneider v. Kissinger, 412 F.3d 190, 193 (D.C. Cir. 2005) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 164 (1803)).

no remedy."[245] According to Chief Justice Marshall, whether an act was properly allocated to the political branches or the judicial branch "always depend[ed] on the nature of that act."[246] As to the questions beyond the province of the judiciary, Marshall stated that these "subjects are political. They respect the nation, not individual rights."[247] He further stated that "[t]he province of the court is, solely, to decide on the rights of individuals."[248]

Justice Marshall, therefore, believed that political questions included judgments regarding the country's national interests as opposed to judgments involving only individual rights.[249] Though in the oft-quoted statement from *Marbury*, Justice Marshall made clear that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[250] he recognized that there were some issues that, though they arise in the adjudicatory context, require political judgments beyond the judicial realm.[251]

2. Modern Approach to the Doctrine in Foreign Affairs Cases

Since Marshall's speech before Congress and his opinion in *Marbury*, the political question doctrine has developed as a constraint on judicial action in areas committed to the political branches, especially in foreign relations.[252] While the political question doctrine is applicable in domestic cases, most often courts apply it in cases involving foreign relations.[253] In *Oetjen v. Central Leather Co.*, the Supreme Court made the broad statement that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of

245. *Marbury*, 5 U.S. (1 Cranch), at 164.
246. *Id.* at 165.
247. *Id.* at 166.
248. *Id.* at 170.
249. *Id.* at 166.
250. *Id.* at 177.
251. Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 250 (2002).
252. Schneider v. Kissinger, 412 F.3d 190, 193 (D.C. Cir. 2005).
253. *See* THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 4-5 (1992).

what may be done in the exercise of this political power is not subject to judicial inquiry or decision."[254]

Undoubtedly, questions involving foreign relations often require the use of "standards that defy judicial application."[255] To determine if a foreign relations question is beyond its reach, a court must look to "the history of its management by the political branches, ... its susceptibility to judicial handling in the light of its nature and posture in the specific case, and ... the possible consequences of judicial action."[256] In *Oetjen*, the Court refused to determine the validity of the confiscation of property by Mexican revolutionaries who were ultimately successful in taking over the Mexican government.[257] *Oetjen* was based on the act of state doctrine, which is discussed below.[258] But like the political question doctrine, the act of state doctrine is also rooted in separation of powers principles.[259]

In *Baker v. Carr*, the Court noted that there had been "sweeping statements to the effect that all questions touching foreign relations are political questions."[260] Cutting back somewhat on *Oetjen*'s broad language, the *Baker* Court cautioned that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[261] The Court, nevertheless, reiterated that there are certain classes of cases, including some foreign relations cases, that require the resolution of issues that "turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature."[262] Many of those issues, Justice Brennan counseled, "uniquely demand single-voiced statement of the Government's views."[263]

Justice Brennan, in *Baker v. Carr*, provided the modern statement of the political question doctrine, outlining the factors that courts must consider when determining whether a question is beyond the province of the judiciary and better suited for the

254. 246 U.S. 297, 302 (1918).
255. Baker v. Carr, 369 U.S. 186, 211 (1962).
256. *Id.* at 211-12.
257. *See Oetjen*, 246 U.S. at 303.
258. *See id.* at 303-04.
259. *See infra* text accompanying notes 372-74.
260. *Baker*, 369 U.S. at 211 (citing *Oetjen*, 246 U.S. at 302).
261. *Id.*
262. *Id.*
263. *Id.*

political branches.[264] There must be a "discriminating analysis" of the question presented, and the court must determine whether any of the following factors dictate that the question is a political question for the political branches: (1) "textually demonstrable constitutional commitment of the issue to a coordinate political department"; (2) "lack of judicially discoverable and manageable standards for resolving [the issue]"; (3) the "impossibility" of resolving the issue absent an initial policy decision of the type "clearly for nonjudicial discretion"; (4) the impossibility of resolution without showing a "lack of the respect due coordinate branches"; (5) "an unusual need for unquestioning adherence to a political decision already made"; and (6) the potential for "embarrassment from multifarious pronouncements by various departments on one question."[265] Even if only one of these factors is inextricable from a case, there will be grounds for dismissal based on the presence of a nonjusticiable political question.[266]

Justice Brennan provided examples of when courts should invoke the political question doctrine. Though not all foreign relations cases raise political questions, his examples reflect the discriminating analysis necessary to determine whether the issues are appropriate for judicial decision or involve the type of discretion more suited for the political branches, demanding a single-voiced statement of the U.S. government's views.[267] For example, the Court noted that while it would "not ordinarily inquire whether a treaty ha[d] been terminated, ... if there ha[d] been no conclusive 'governmental action,' ... [it would] construe a treaty and may find it provide[d] the answer" to the question presented.[268] In addition, while the "recognition of foreign governments ... strongly defies judicial treatment," once the Executive recognizes a nation's sovereignty over an area, "courts may examine the resulting status and decide independently whether a statute applies to that area."[269] Justice Brennan also provided other examples of political questions: dates

264. *See id.* at 217.
265. *Id.* at 211, 217.
266. *Id.*
267. *Id.* at 211-12.
268. *Id.* at 212.
269. *Id.*

and duration of hostilities, formalities of congressional enactments, status of Indian tribes, and claims under the Guaranty Clause.[270]

Interestingly, though Justice Brennan solidified the applicability of the political question doctrine with respect to foreign relations, *Baker v. Carr* was a domestic case. In *Baker*, the Court found the political question doctrine inapplicable to a challenge to a legislative apportionment scheme in Tennessee.[271] Even so, the Supreme Court has since applied *Baker* in two foreign affairs cases. In one case, the Court found the doctrine applicable to a challenge regarding the training of a National Guard unit.[272] In another case, a plurality of the Court applied the doctrine to a case involving the President's authority to terminate a treaty without Senate approval.[273]

Lower courts regularly apply the political question doctrine in foreign affairs cases. Within the last few years, appellate and district courts have invoked the political question doctrine in a variety of foreign relations disputes: claims against Austria and its instrumentalities for confiscation of property by the Nazis;[274] claims against Japan by women who claimed that they were forced into sexual slavery during World War II;[275] claims against the U.S. government brought by children of a Chilean general claiming that the United States helped kill him along with plotters of a Chilean coup in 1970;[276] claims by parties seeking to recover for forced labor in German camps;[277] and claims by landlords who had leased office space to the former Socialist Federal Republic of Yugoslavia regarding the liability of successor states upon the Republic's disintegration.[278]

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270. *Id.* at 214-18.

271. *Id.* at 226.

272. Gilligan v. Morgan, 413 U.S. 1, 8 (1973).

273. Goldwater v. Carter, 444 U.S. 996, 998-1002 (1979) (Powell, J., concurring).

274. Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 69-75 (2d Cir. 2005).

275. Hwang Geum Joo v. Japan, 413 F.3d 45, 52-53 (D.C. Cir. 2005).

276. Schneider v. Kissinger, 412 F.3d 190, 193-94 (D.C. Cir. 2005).

277. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483-89 (D.N.J. 1999).

278. 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152, 164 (2d Cir. 2000).

3. Textual Support for the Doctrine

Whether the political question doctrine is constitutionally mandated has been subject to some debate among scholars. Professor Herbert Wechsler espoused the view that the only legitimate reason for abstention in a case is that "the Constitution has committed the determination of the issue to another agency of government than the courts."[279] Professor Wechsler's view of the political question doctrine was narrow; it is known as the "classical version of the doctrine."[280] On the other hand, Professor Alexander Bickel argued that the political question doctrine was not constitutionally mandated, but was "greatly more flexible, something of prudence, not construction and not principle."[281] Professor Bickel posited that "only by means of a play on words can the broad discretion that the courts have in fact exercised be turned into an act of constitutional interpretation. The political question doctrine simply resists being domesticated in this fashion."[282]

It seems, however, that Justice Marshall, who laid the foundation for the political question doctrine, deemed it constitutionally mandated. As in his speech before the House of Representatives,[283] in *Marbury*, Marshall emphasized the special role of the president in foreign affairs. He noted that "[b]y the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[284] Therefore, despite arguments to the contrary, the political question doctrine is rooted in the doctrine of separation of powers. As one scholar has said, "[a]lthough its critics believe the [political question] doctrine has no place in a country where judicial review is a fundamental part of the constitutional structure, the classical version of the political question doctrine can trace its

279. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9 (1959).

280. Nzelibe, *supra* note 203, at 948-49.

281. Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 46 (1961).

282. *Id.*

283. *See infra* Part II.B.1.

284. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).

pedigree to the Constitution itself and its original understanding."[285] Courts have also recognized "that 'the political question doctrine is primarily a function of the separation of powers.'"[286] The text of the Constitution commits areas involving foreign policymaking to the political branches.[287]

Moreover, courts have found that the President has "'plenary and exclusive power' in the international arena and 'as the sole organ of the federal government in the field of international relations.'"[288] Admittedly, the judiciary does have some power with respect to foreign relations; but that power is limited to settling disputes in cases presented to them in litigation that are within their jurisdictional authority to hear. Specifically, under Article III, courts can interpret and review the constitutionality of treaties and executive agreements.[289] They can also decide cases involving ambassadors, foreign states and citizens, and consuls.[290] Furthermore, courts have the authority to interpret legislation that involves foreign affairs. Still, courts have jurisdiction only to adjudicate cases involving such disputes and have no authority for policymaking in the foreign relations realm. As the D.C. Circuit recently put it, "[i]t cannot then be denied that *decision-making* in the areas of foreign policy and national security is textually committed to the political branches."[291] Courts cannot exercise their authority in a manner that encroaches on the political branches' role with respect to foreign affairs and they cannot use their judicial authority to aggrandize themselves.

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285. Barkow, *supra* note 251, at 250 (footnote omitted).

286. Schneider v. Kissinger, 412 F.3d 190, 193 (internal quotation marks omitted) (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)).

287. For example, the legislative branch, inter alia, has the power under Article I to "provide for the common Defence ...; regulate Commerce with foreign Nations ...; define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; ... declare War, grant Letters of Marque and Reprisal ...; [and] raise and support Armies." U.S. CONST. art. I, § 8. But it is the executive that largely possesses control over foreign affairs based on the textual commitments in Article II. Specifically, Article II provides, inter alia, that the President is "Commander in Chief of the Army and Navy of the United States," has the power "with the Advice and Consent of the Senate, to make Treaties," and can "appoint Ambassadors, other public Ministers and Consuls." U.S. CONST. art. II, § 2.

288. *Schneider*, 412 F.3d at 195 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)).

289. U.S. CONST. art. III, § 2.

290. *Id.*

291. *Schneider*, 412 F.3d at 195 (emphasis added).

In its recent political question cases, the Supreme Court seemingly has merged the prudential *Baker* factors with its textual commitment analysis.[292] For example, the Supreme Court stated in *Nixon v. United States* that "[a] controversy is nonjusticiable—*i.e.*, involves a political question—where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'"[293] But the Court explained that

> the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.[294]

Appellate courts have similarly merged the prudential *Baker* factors with the textually committed analysis.[295] The current scholarly approach seems to recognize the merger of the classical and prudential strains of the doctrine.[296]

C. Application of Separation of Powers Principles to the International Due Process Analysis

The international due process concept that Judge Posner conceptualized in *Ashenden*[297] violates the separation of powers because it requires federal courts to make foreign policy. As the Supreme Court has recognized, only one of the *Baker* factors need be established to raise separation of powers concerns in the

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292. Nzelibe, *supra* note 203, at 952.

293. 506 U.S. 224, 228 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

294. *Id.* at 228-29.

295. *See, e.g.*, 767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152, 164 (2d Cir. 2000) ("Although prudential considerations may inform a court's justiciability analysis, the political question doctrine is essentially a constitutional limitation on the courts.").

296. *See, e.g.*, Nzelibe, *supra* note 203, at 962 ("Strictly speaking, the notion that there may be a prudential strain of the political question doctrine that is wholly distinct from the constitutional strain no longer reflects the current state of the doctrine.").

297. *See* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).

adjudication of a dispute.[298] This Part focuses on the *Baker* factors that are relevant to the international due process analysis: the lack of institutional competence and judicially manageable standards, and the potential to embarrass foreign relations. But as previously discussed, these factors undergird the principle that foreign policymaking is not in the province of the judiciary.[299]

1. Institutional Competence and Lack of Judicially Manageable Standards

The international due process analysis essentially allows judges, without any legal standards, to determine which countries' judgments are worthy of enforcement without regard to the actual proceedings in which the judgments were obtained. Such determinations are typically embodied in bilateral and multilateral treaties. For example, some time ago, European Union countries decided which countries' judgments are to be recognized as a matter of law by entering into a multilateral treaty, the Brussels Convention, which for years governed recognition and enforcement of member countries' judgments.[300] Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, though it supersedes the Brussels Convention, largely incorporated it into the regulation.[301] The United States has been unsuccessful in entering into any similar treaties with other countries.[302] But under the international due

298. *See, e.g.*, Schneider v. Kissinger, 412 F.3d 190, 194 (D.C. Cir. 1979).

299. *See supra* text accompanying notes 264-70.

300. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1968 O.J. (L 299) 32, *amended by* 1978 O.J. (L 304) 77 (accession of Denmark, Ireland, and United Kingdom), *amended by* 1982 O.J. (L 388) 1 (accession of Greece), *amended by* 1989 O.J. (L 285) 1 (accession of Spain and Portugal) [hereinafter Brussels Convention].

301. *See* European Union Regulation 44/2001 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Mar. 1, 2002, 2001 O.J. (L 12) 1, *amended by*, 2002 O.J. (L 225) 1. Council Regulation No. 44/2001 is binding on all European Union states, with the exception of Denmark, where the Brussels Convention is still effective. *Id.*

302. *See* Recent International Agreement, *Hague Conference Approves Uniform Rules of Enforcement for International Forum Selection Clauses—Convention on Choice of Court Agreements, Concluded June 30, 2005*, 119 HARV L. REV. 931, 932 (2006) ("Although a United Nations convention has successfully regulated enforcement of arbitral contracts and agreements since 1958, the United States, unlike many European countries, is not yet a party to any treaty regarding the enforcement of judgments." (footnotes omitted)).

process analysis, courts are able to express the will of the United States—or a federal judge's perception or misperception of that will—in much the same way that an international treaty would. The problem is that only the Executive has the authority to make treaties, which must in turn be ratified by Congress.[303]

In similar contexts, courts have recognized their lack of institutional competence with respect to judging other countries. For example, under the noninquiry rule, "courts refrain from 'investigating the fairness of a requesting nation's justice system,' and from inquiring 'into the procedures or treatment which await a surrendered fugitive in the requesting country.'"[304] Courts agree that the rule of noninquiry "is shaped by concerns about institutional competence and by notions of separation of powers."[305] Some courts have gone further, saying that the rule is constitutionally mandated. Specifically, the Ninth Circuit has stated that "[u]ndergirding this principle [of non-inquiry] is the notion that courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems."[306] Moreover, courts have declared that the State Department is better able to determine the foreign relations consequences of nonextradition and can use its powers of diplomacy to ensure that the extradited person receives a fair trial.[307]

Likewise, courts refuse to analyze a requesting country's reasons for desiring extradition to determine if its real objective is to try the defendant for political crimes.[308] Those courts have based their refusal to consider the requesting country's motivation on their own lack of institutional competence and the potential for embarrassment should the executive branch come to a different conclusion.[309]

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303. U.S. CONST. art. II, § 2.

304. United States v. Kin-Hong, 110 F.3d 103, 110 (1st Cir. 1997) (citation omitted) (quoting Arnbjornsdottir-Mendler v. United States, 721 F.2d 679, 683 (9th Cir. 1983)).

305. *Id.*

306. *In re* Smyth, 61 F.3d 711, 714 (9th Cir. 1995).

307. Cornejo-Barreto v. Siefert, 379 F.3d 1075, 1084-85 (9th Cir. 2004), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004).

308. Jacques Semmelman, *Federal Courts, The Constitution, and the Rule of Non-inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1238-39 (1991) (discussing Eain v. Wilkes, 641 F.2d 504 (7th Cir. 1981), and Quinn v. Robinson, 783 F.2d 776 (9th Cir. 1986)).

309. *Id.* at 1238.

Regarding the noninquiry rule, the "[s]crutiny of a foreign government's investigative, legal, and penal systems for fairness and humaneness is at least as intrusive as examining the motives underlying a particular extradition request."[310] A determination regarding another country's "fairness" and "humaneness" would necessarily require that courts examine the "actual operation" of and "honesty and integrity" of the requesting foreign government.[311] Courts have found that such determinations, in the extradition context, are beyond the competency of the judiciary.

It is true that in the discretionary doctrine of forum non conveniens, under which the court has the discretion to dismiss a case even if it has jurisdiction and venue is proper, it is common to list, as one of the factors in a dismissal, the availability and adequacy of an alternative forum.[312] To show availability, the defendants have to establish that the foreign court can assert jurisdiction over the case.[313] Courts also require defendants to demonstrate adequacy by showing that the alternative forum can provide some type of relief.[314] But sometimes plaintiffs argue that the alternative forum is inadequate because of extreme inefficiency, impartiality, or corruption in the foreign judicial system. Courts have expressed their reluctance to make such a finding, and refusal to dismiss on these grounds is rare.[315] As one judge stated, "the argument that the alternative forum is too corrupt to be adequate 'does not enjoy a particularly impressive track record.'"[316] Ironically, even the Second Circuit, which decided *Pahlavi*, has stated in the forum non conveniens context that "considerations of comity preclude a court from adversely judging the quality of a foreign

310. *Id.* at 1239.

311. *Id.* (quoting *Eain*, 641 F.2d at 516).

312. *See* Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1177 (9th Cir. 2006); *In re* Bridgestone/Firestone, Inc., 420 F.3d 702, 704 (7th Cir. 2005); Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 671-72 (5th Cir. 2003); PT United Can Co. v. Crown Cork & Seal Co., 138 F.3d 65, 73 (2d Cir. 1998).

313. Leon v. Million Air, Inc., 251 F.3d 1305, 1311 (11th Cir. 2001) (citing Mercier v. Sheraton Int'l, Inc., 935 F.2d 419, 425 (1st Cir. 1991)).

314. *Id.*

315. *Id.* at 1311-12; *see also PT United Can Co.*, 138 F.3d at 73 (noting that a finding that the poor quality of a judicial system renders it an inadequate forum is uncommon).

316. *Leon*, 251 F.3d at 1311-12 (quoting Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1084 (S.D. Fla. 1997)).

justice system"[317] and has repeatedly emphasized that "it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation."[318]

At any rate, though courts should not be in the business of judging the foreign judicial system in the forum non conveniens context, there is a significant distinction between retaining jurisdiction in a case, based on a finding of extreme corruption in the foreign system, and refusing to recognize that judicial system's judgments.[319] The effect of finding a foreign system inadequate in the forum non conveniens context is that the plaintiff will be able to litigate the case in her chosen forum, a court in the United States. The effect of a finding that a system is so fundamentally flawed that its judgments are not worthy of recognition is a complete disregard for that country's judicial decisions.

a. Highly Subjective Determination

Pahlavi, *Bridgeway*, and the Lloyd's cases reveal the wholly subjective nature of the international due process standard.[320] Depending on one's perspective, what happened to the Lloyd's plaintiffs in the English courts was arguably "uncivilized." Certainly, many in this country—from legal scholars to members of Congress—have expressed concern over the Lloyd's scandal and have sympathized with the plight of the Names.[321] In one of the

317. *PT United Can Co.*, 138 F.3d at 73 (citing Flynn v. Gen. Motors, Inc., 141 F.R.D. 5, 9 (E.D.N.Y. 1992)).

318. *Id.* (quoting Chesley v. Union Carbide Corp., 927 F.2d 60, 66 (2d Cir. 1991)).

319. *See, e.g.*, Nzelibe, *supra* note 203, at 973-74 (arguing that courts lack the institutional competency to distinguish between "liberal" and "non-liberal" countries in their application of the political question doctrine and distinguishing the forum non conveniens analysis as a "far cry" from the liberal/non-liberal distinction in political question cases).

320. *See supra* Part I.B-C.

321. *See, e.g.*, Courtland H. Peterson, *Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases*, 60 LA. L. REV. 1259, 1280 (2000) ("I have said some unkind things about Lloyd's, and they needed to be said. But I cannot finish this essay without expressing real sorrow that the historic institution of Lloyd's, as we knew it, with a rock solid reputation for solidity and integrity, has come to such an ignominious end. Insurance is still sold in the Lloyd's market, to be sure, but its reputation has been severely blackened and even its structure has changed."); *see also* Letter from Sen. Mary Landrieu to Sen. Orrin Hatch, Chairman, Comm. on the Judiciary (May 16, 2000), *in* 147 CONG. REC. S2323, S2355 (2001) ("We are writing you regarding an issue of concern to a number of us on both sides of the aisle. As we understand it, you are

Lloyd's cases enforcing the British judgments, the Tenth Circuit even cited its disapproval of Lloyd's actions, acknowledging that it "[found] many of Lloyd's acts to be distinctly distasteful": "There is no question that the New Mexico and Utah Names suffered substantial losses after investing in what had been, for three centuries, a well-regarded institution. There is also no question that Lloyd's was not forthcoming with all the information regarding its substantial financial losses."[322] Nevertheless, the Tenth Circuit and all of the courts who followed its analysis characterized the United Kingdom as having a judiciary that is beyond reproach.[323] The Names would probably beg to differ. The fairness of a judicial system is based on one's own biases and perspective. Moreover, there is no judiciary or legal system that administers justice flawlessly. So any pronouncement that a judicial or legal system is fundamentally fair reflects at least some degree of overreaching.

Judicial systems are much more complex than any one label can reflect. For example, in the criminal context, a common argument of opponents of the death penalty in the United States is that the system that administers capital punishment sends innocent people to death row. In fact, "[s]ince 1973, more than 120 people have been released from death row after being proven wrongfully convicted."[324]

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aware that English courts have entered summary judgments against hundreds of Americans who contend that they were defrauded in the United States by Lloyd's of London. These Americans were deprived of the right in these actions of raising a fraud defense to Lloyd's claims. As a result, they have asked Congress to give them the right to raise their fraud claims in any collection action brought by Lloyd's in the United States. They are merely asking to have their day in court."); Letter from Rep. Henry Hyde to Sen. Jesse Helms, Chairman, Senate Comm. on Foreign Relations (Mar. 5, 2001), *in* 147 CONG. REC. S2355-56 (2001) ("As you are probably aware, a number of Members and Senators on both sides of the aisle, as well as the Securities and Exchange Commission have endeavored to give the Americans who believe they have been defrauded by Lloyd's legal forum in American courts with respect to the representations that were made to them in this country by Lloyd's and its agents"). Legislators sympathetic to the plight of the Names were unable to pass a provision to a bankruptcy reform bill that would have relieved the American Names of their obligations to pay the British judgments. 147 CONG. REC. S2351-52, 57.

322. Soc'y of Lloyd's v. Reinhart, 402 F.3d 982, 993, 1005 (10th Cir. 2005).

323. *Id.* at 1005 ("We must respect the ample process afforded by the English system of justice."); *see also* Soc'y of Lloyd's v. Siemon-Netto, 457 F.3d 94, 105 (D.C. Cir. 2006) ("The Recognition Act ... requires proof that the 'judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.' The defendants do not assert that English courts fall within that category and could not prove it if they did." (citation omitted)).

324. Leonard Pitts, *The Truth About Roger Coleman Hurts*, BUFF. NEWS, Jan. 18, 2006, at

Many of those fortunate enough to be released have already spent many years in prison.[325] Do these failures in the criminal justice system mean that the U.S. judicial system is, as a whole, fundamentally flawed and unfair? The answer depends on whom you ask. From the perspective of the innocent person who spent years of his life behind bars, the answer is likely that the U.S. judicial system is indeed fundamentally flawed. From the perspective of the prosecutor, the answer is likely that the system is indeed fair, which is why the innocent person was ultimately released.

Shifting to an example in the civil context, Congress recently passed the Class Action Fairness Act. In passing this Act, Congress found that for years many state courts had allowed and even perpetuated abuses of the class action device and "undermined public respect for our judicial system," showing bias against out-of-state defendants.[326] To deal with recognized unfairness in state court administration of class actions, the act effectively moved many class action lawsuits to federal court. Congress, therefore, does not even trust state courts to handle most class action lawsuits. What does this congressional distrust of state courts say about the fairness and impartiality of the judicial system in this country?

The point is that there are so many nuances within a judicial system that *no* system is susceptible to one absolute label. Although the international due process analysis provision, which the American Law Institute (ALI) retains in its proposed federal statute dealing with foreign judgments, received relatively little attention

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325. Sheridan Morley, *Shocking Reality of Injustice and Death*, DAILY EXPRESS (London), Feb. 25, 2006, at 46 ("More than a thousand prisoners on Death Row across America have been executed in the past 30 years, and the number of those awaiting execution currently stands at 3,400.... Since 1973 more than 100 people have been released from Death Row after it was shown they were wrongfully convicted.").

326. Class Action Fairness Act, Pub. L. No. 109-2, § 2, 119 Stat. 4 (2005). Congress found that

> Abuses in class actions undermine the National judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States constitution, in that State and local courts are—
>
> (A) keeping cases of national importance out of Federal court;
>
> (B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and
>
> (C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

Id.

during the ALI's drafting process, at least one member expressed concern regarding the breadth of a determination that an entire country's system is fundamentally flawed.[327] Professor Gerhard Casper noted that condemning an entire nation may not be appropriate in certain instances, though it may be acceptable to condemn a particular region of the country:

> I'm saying you cannot really, in the modern world, use a country. You have to come up with a more flexible defintion of what you mean by legal system. There is a countrywide system, there are subsystems, this all is very complex, and the level of unfairness can differ dramatically *within* the given country....[328]

As Professor Casper seemed to recognize, at least implicitly, labeling an entire judicial system as fair or unfair, partial or impartial, is unlikely to capture the true essence of the system. One of the ALI reporters for the foreign judgments project, Professor Andreas Lowenfeld, noted that judges might also be reluctant to label an entire country as unfair: "We wrestled with that. We find judges very reluctant to say Ukraine has no fair justice. They might say it for the ayatollahs and the mullahs in Iran; they would say it about apartheid where you have black litigants; but perhaps not in a commercial case ...."[329]

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327. *Discussion of Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statue*, 82 A.L.I. PROC. 94 (2005). Specifically, Professor Gerhard Casper stated:

> You just talked about the safety valve provided by § 5, and of course one very important one is § 5(a)(i), "the judgment was rendered under a system that does not provide impartial tribunals," etc. So the big question becomes, how do you define "system," and I have looked at Comments and at Reporters' Notes, and I find really very little flash there, because it could be just a legal system as a whole, but in reality, when we look at some of the troubles of countries we deal with, the system as a whole may seem reasonable, but regional systems are in terrible shape. You may be able to get justice in Bucharest but nowhere else in Romania, and I think you need to spell out a little more how we define "system," because the alternative between your definition and more troublesome, more local problems is that you are then really referred to subsection (a)(ii) about circumstances of a particular court, and I think that is an unsatisfactory outcome.

Id.

328. *Id.* (emphasis added).

329. *Id.*

As the international due process cases demonstrate, labeling countries as "good" or "bad" will only distract a judge from the real issues in a judgment recognition case. For example, Judge Posner's exaltation of the British judicial system masked the real issue in *Ashenden*, which was whether U.S. courts should extend comity to judgments that Lloyd's arguably obtained without due process. By labeling the British system as fair, Posner never had to address in any meaningful manner what actually happened to the Ashendens and the other Names in the British court system. Judge Posner's focus on the judicial system of the United Kingdom, essentially labeling it a good system, skewed his entire analysis in *Ashenden*. He touted the virtues of the United Kingdom's system and in the same opinion gratuitously disparaged other judicial systems that had absolutely no connection to the *Ashenden* case. In discrediting the judicial systems of Cuba, Iran, North Korea, and Congo, and uplifting the British judicial system, Judge Posner was able to shift the focus of the case. He played on stereotypes about politically disfavored countries to minimize the significance of the Lloyd's scandal and the failures of the British courts with respect to that scandal.

b. Retaliation Against Foreign Countries

The international due process analysis encourages courts to retaliate against countries whose judicial and political systems are not like our own. For example, Judge Posner listed Cuba, North Korea, Iran, Iraq, and Congo as countries "whose adherence to the rule of law and commitment to the norm of due process are open to serious question" and whose judgments would likely not meet the international due process standard.[330] Of course, the United States has for some time imposed economic sanctions on Cuba, only recently permitting U.S. companies to trade food and agricultural products with the country for cash.[331] Also, around the time that the Second Circuit decided *Pahlavi*, the United States had imposed harsh economic sanctions on Iran.[332] But such retaliatory measures

330. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).
331. 22 U.S.C. § 7207(b)(1) (2000).
332. *See supra* note 38 and accompanying text.

are strictly for the political branches to impose, and courts should not use foreign judgment recognition to retaliate against a country that is at odds politically with the United States.

In fact, many scholars and state legislatures have rejected the reciprocity requirement for foreign judgment recognition and enforcement because of its retaliatory policy. The reciprocity requirement first surfaced in *Hilton v. Guyot*,[333] the landmark Supreme Court case upon which modern day foreign judgment recognition law is based. Recall that in *Hilton*, the Supreme Court refused to recognize a French judgment because, at the time, France would not have recognized a similar judgment had it been obtained in the United States.[334]

In his dissent in *Hilton*, Justice Fuller criticized the majority for adopting the reciprocity requirement and refusing to recognize the French judgment. His criticism was based on separation of powers principles.[335] Justice Fuller argued that the French judgment should have been recognized in accordance with domestic res judicata principles instead of the discretionary doctrine of comity.[336] Specifically, he asserted that "[t]he application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary."[337]

Retorsion is "[a]n act of lawful retaliation in kind for another nation's unfriendly or unfair act."[338] Justice Fuller recognized that retorsion is a political tool to be used by the political branches of government.[339] As Justice Fuller saw it, reciprocity was unsound because foreign judgment cases involved private rights:

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333. 159 U.S. 113 (1895).

334. *Id.* at 210.

335. *Id.* at 234 (Fuller, J., dissenting).

336. *Id.* at 229 ("[I]t seems to me that the doctrine of *res judicata* applicable to domestic judgments should be applied to foreign judgments as well, and rests on the same general ground of public policy that there should be an end of litigation.").

337. *Id.* at 234.

338. BLACK'S LAW DICTIONARY 1342 (8th ed. 2004) ("Examples of retorsion include suspending diplomatic relations, expelling foreign nationals, and restricting travel rights.").

339. *See Hilton*, 159 U.S. at 234 (Fuller, J., dissenting); *see also* Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 303 (2004).

> In any aspect, it is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights acquired under foreign laws. Now the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.[340]

Justice Fuller's dissent aptly exposed a fundamental flaw in a comity-based system of judgment recognition—the likelihood of overreaching by the courts into foreign policymaking and the resulting subordination of individual rights. He, therefore, argued for the application of res judicata principles, applicable to domestic judgments, to foreign judgments: "This application of the doctrine [of res judicata] is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law."[341]

Three other justices joined Justice Fuller's dissent,[342] proving that the comity-based rules for foreign judgment recognition that the majority put forth in *Hilton* were not indubitable. Over one hundred years after *Hilton*, the reciprocity requirement—which Justice Fuller and three other justices considered a violation of the separation of powers—still sparks intense debate among scholars.[343] In fact, whether to include such a requirement was vigorously debated within the ALI as it was drafting a proposed federal statute dealing with foreign judgments. Indeed, the reciprocity issue was the most controversial issue that arose during this project.[344] Under

340. *Hilton*, 159 U.S. at 233 (Fuller, J., dissenting).

341. *Id.* at 229.

342. *Id.* at 235.

343. *See, e.g.*, Miller, *supra* note 339, at 316 (discussing the debate regarding reciprocity and arguing that "[i]ncorporating reciprocity into U.S. judicial practice, contrary to the 'wishful thinking' of those arguing in favor of a reciprocity provision, will result in negative secondary effects on U.S. judgments abroad, U.S. interests in general, and the international legal order" (footnote omitted)).

344. *See* RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7(a) (Proposed Final Draft 2005) [hereinafter ALI PROPOSED

the final draft of the proposed statute, federal courts are required to determine whether a country affords recognition to U.S. courts and refuse recognition if they find that "comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin."[345]

Prior to the adoption of its final draft, one scholar discussed the separation of powers problem inherent in the ALI's reciprocity requirement:

> Given the political nature of the reciprocity doctrine, as well as its administrative difficulties, courts are not proper forums for application of its principles. Reciprocity—as a subset of retorsion—is a diplomatic matter, affecting relations between two countries' courts, and therefore, if appropriate at all, "may be more appropriately pursued by governmental institutions vested with the power to guide foreign relations and make international agreements."[346]

As Justice Fuller aptly pointed out with respect to the reciprocity requirement, courts also lack the institutional competence to pass judgment on the fairness of another country's judicial or political system.[347]

c. Rewarding Foreign Countries

Just as courts lack the institutional authority to retaliate against other countries, they also lack the authority to reward foreign

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FINAL DRAFT]; Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 5-6 n.20 (2004) ("The reciprocity requirement is controversial. It was the focus of much debate at the May 2004 ALI meeting, where a motion to delete the reciprocity portion of section 7 failed."); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 547 n.23 (2005) ("The ALI proposed statute has a more direct effect on the export of judgments by requiring reciprocity for enforcement, a very controversial issue before the ALI membership."); *see also Discussion of International Jurisdiction and Judgments Project*, 81 A.L.I. PROC. 74 (2004) (quoting Director Lance Liebman who noted that the issue of reciprocity "continues to divide serious people in the audience.").

345. ALI PROPOSED FINAL DRAFT, *supra* note 344, § 7(a).

346. Miller, *supra* note 339, at 303 (citation and footnotes omitted) (quoting Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893, 913 (1998)).

347. Hilton v. Guyot, 159 U.S. 113, 234 (1895) (Fuller, J., dissenting).

countries—by recognizing their judgments—because their political and judicial systems resemble those of the United States or because they strive to emulate the United States. Yet the international due process analysis encourages courts to do just that. For example, in *S.C. Chimexim S.A. v. Velco Enterprises Ltd.*,[348] a case involving a judgment obtained under the "reformed" Romanian judicial system, the court praised Romania for its reform efforts and seemed to reward those efforts by recognizing the judgment. While the court's analysis was ostensibly about the fairness of the country's judicial system, it actually turned more on an in depth examination of the country's political regime. Absent from the court's analysis was any real legal standard for assessing the fairness of the judiciary.

In *S.C. Chimexim*, a district court enforced a judgment by a Romanian court.[349] The judgment creditor obtained the judgment in 1996, and the judgment became final after the last appeal in 1999.[350] From a historical perspective, the judgment debtor obtained the judgment just a few years after the ousting of the communist regime in Romania.[351] In assessing the system from which the judgment originated, the court detailed Romania's political history from the Communists' takeover in 1947 to the uprising against the Communist regime and the ousting and execution of President Nicolae Ceausescu.[352] The court further detailed the May 1990 multiparty election in which "Iliescu was elected president, and his party, the National Liberation Front ..., gained control of the legislature."[353] Regarding the adoption of the Romanian Constitution, the court said:

> In December 1991, a new constitution was approved by popular referendum. The constitution declared Romania to be a

348. 36 F. Supp. 2d 206 (S.D.N.Y. 1999).

349. *Id.* at 216. After the district court's decision, the Supreme Judicial Court of Romania vacated the judgment and remanded the case to a lower court for further proceedings. S.C. Chimexim S.A. v. Velco Enter., Ltd., No. 98 Civ. 0142(DC), 2004 WL 330233, at *1 (S.D.N.Y. Feb. 23, 2004). Ultimately the Romanian court again entered judgment in favor of Chimexim, and the United States District Court for the Southern District of New York again enforced the Romanian judgment "[f]or all the reasons stated in the [1999] Opinion." *Id.* Therefore, the court's analysis of the 1999 opinion will be discussed here.

350. *S.C. Chimexim S.A.*, 36 F. Supp. 2d at 216.

351. *Id.* at 208.

352. *Id.*

353. *Id.*

> parliamentary republic and provided for multiple political parties, a separation of powers between branches of government, a market economy, and respect for human rights. Romanian military, police, and intelligence structures eventually were put under civilian control.[354]

The district court also noted the progression of the new government since the revolution.[355] According to the court, in 1996,

> [t]he coalition that had been in power since the revolution was voted out and replaced by a "new reform-minded Prime Minister." The new government "is implementing a very ambitious and aggressive economic program aimed at a rapid culmination of privatization and restructuring of the Romanian economy." Recent new laws include an "Emergency Ordinance" that seeks to encourage investment in Romania by establishing certain protections for foreign investors, a Copyright Law that is designed to conform to the standards of the Berne Convention and the World Trade Organization, and tax laws intended to help Romania adapt to a free market economy.[356]

To a lesser extent, the court also evaluated the Romanian judiciary under the new government. The court found that during the communist regime, "individual justice was subservient to the state's goal of creating a communist society, and judges were merely instruments of the state."[357] But after the overthrow of the communist regime, the judiciary "underwent significant reform."[358] The court found it important that the current Romanian Constitution provided for an independent judiciary with "three levels of courts beneath the Supreme Court."[359] The court also found it significant that the Romanian judges are "typically selected from among the most outstanding recent graduates of the law schools."[360]

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354. *Id.*

355. *See id.*

356. *Id.* (citations omitted).

357. *Id.* (quoting AM. BAR ASS'N CENT. & E. EUROPEAN LAW INITIATIVE, JUDICIAL OVERVIEW OF CENTRAL AND EASTERN EUROPE 1 (1996)).

358. *Id.*

359. *Id.*

360. *Id.* (quoting AM. BAR ASS'N CENT. & E. EUROPEAN LAW INITIATIVE, JUDICIAL OVERVIEW OF CENTRAL AND EASTERN EUROPE 4-5 (1996)).

The *S.C. Chimexim* opinion is laden with politically charged language. The court's findings with respect to Romania's system reveal that the true inquiry under an international due process inquiry will be, "[a]re the foreign country's political values similar to the United States?" Though Romania was once a communist country, the court rewarded the country through the recognition of its judgments because of its "significant reform."[361]

The court's recognition of the judgment also signaled approval of Romania's "ambitious and aggressive" plan for its economy, which "aimed at a rapid culmination of privatization," and, among other things, its adoption of "tax laws intended to help Romania adapt to a free market economy."[362] I am not arguing that the findings are inaccurate. I am arguing, however, that such findings should have nothing to do with whether an American judge will enforce a foreign court's judgment. The findings are politically charged—the type of findings that the executive or legislative branches typically make.

2. Potential To Embarrass

It may at first blush seem appropriate to condemn the countries that Judge Posner listed as having systems whose adherence to the rule of law are doubtful and that the courts in *Bridgeway* and *Pahlavi* condemned. Those countries—Cuba, Iran, Iraq, Congo, North Korea, and Libera—are notorious for their conflicts within and outside of their borders, and particularly because of their political conflicts with the United States. But condemnation of any country by federal or state courts could embarrass the executive branch in conducting relations with those countries.

Indeed, some time ago, Professors Arthur T. von Mehren and Donald T. Trautman made this very point, though somewhat cursorily, in an article surveying approaches to foreign judgment recognition.[363] They published their article in 1968, not long after NCCUSL completed the Uniform Act. In their article, Professors von Mehren and Trautman briefly addressed the due process provision

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361. *See id.*; *see also supra* notes 357-58 and accompanying text.

362. *S.C. Chimexim*, 36 F. Supp. 2d at 208.

363. Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1662 (1968).

in the Uniform Act.[364] Their article is one of the few articles that address this exception at all, other than in passing. After arguing that the utilization of a reciprocity requirement "would normally be more effective and be considered more appropriate as a specific executive or legislative determination," they turned to the due process exception.[365]

Professors von Mehren and Trautman argued that "[t]he problem of what areas of recognition practice should be left to the legislative and executive departments is even more acute in connection with a challenge to the fairness and adequacy of a legal system's procedural arrangements in general."[366] They noted that such a judgment would raise questions about all judgments arising under that legal system.[367] Such an attack "might embarrass international relations *even if unsuccessful*."[368] Moreover, they questioned "whether individual courts should be entrusted with a determination having such serious political implications."[369]

At the time that they wrote their article, such attacks on a judicial system were rare. Nor had any such attack been successful. Today, however, such attacks are no longer rare. Though litigants are often unsuccessful in their arguments, *Pahlavi* and *Bridgeway* signal that courts will entertain these attacks and condemn an entire judicial system. Moreover, *Ashenden* and the other Lloyd's cases further signal that courts are willing to entertain and uphold such attacks and even create their own lists of countries from which they will not accept judgments. More troubling, under the rule that the courts in *Ashenden* and the other Lloyd's cases adopted, is that courts will uphold judgments based on a judge's subjective perception of the fairness of the foreign judicial system despite due process violations in individual proceedings of that foreign court.

As Professors von Mehren and Trautman aptly observed, the international due process concept can affect foreign relations and embarrass the executive branch.[370] First, as a general matter,

364. *See id.* at 1662-63 & n.199.
365. *Id.* at 1662.
366. *Id.*
367. *Id.*
368. *Id.* (emphasis added).
369. *Id.* at 1663.
370. *See id.* at 1662.

foreign judgment recognition is an aspect of the United States's foreign relations with other countries, and scholars have recognized this basic premise.[371] A published judicial opinion that expressly condemns a country's judicial system has the potential to affect adversely any negotiations regarding that country in which the executive might be involved. Indeed, part of the impetus for the ALI's proposed federal statute is that foreign judgment recognition affects foreign relations with other countries, and thus, the nation should speak uniformly regarding the standards for recognizing such judgments.

The potential to embarrass the executive in the conduct of foreign relations is a major underpinning of the act of state doctrine, a close cousin to the political question doctrine. Under the act of state doctrine, courts "generally refrain from judging the acts of a foreign state within its territory."[372] Courts, therefore, will not judge the legality of acts by foreign officials. For example, in the seminal act of state doctrine case, *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court declined to adjudicate the legality of the expropriation of American assets in Cuba by a Cuban instrumentality.[373] The Court found that inquiring into the validity of this expropriation could potentially embarrass the executive in conducting foreign relations.[374]

In some respects, the outright refusal to enforce the judgments of another country, because of a judicial determination that the country's judicial and political system is fundamentally unfair or even uncivilized, is far more troubling than a decision in a particular case that a foreign official acted unlawfully. A finding that an entire country's judicial system is fundamentally flawed is far broader than a judgment regarding a particular act of the govern-

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371. *See* ALI PROPOSED FINAL DRAFT, *supra* note 344, at 1. This draft states that

> [j]ust as the recognition or enforcement of an American judgment in France or Italy is an aspect of the relation between the United States and the country where recognition or enforcement is sought, so a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relation between the United States and the foreign state, *even if the particular controversy that resulted in the foreign judgment involves only private parties.*

Id. (emphasis added).

372. Kadic v. Karadžić, 70 F.3d 232, 250 (2d Cir. 1995) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964)).

373. *Banco Nacional de Cuba*, 376 U.S. at 439.

374. *Id.* at 433.

ment. The international due process analysis permits a wholesale condemnation of a country's government. Such a finding says to the world that, in the view of the United States, that country is unworthy of acceptance in civilized society.

Though the legal effect of a court's refusal to recognize the foreign judgment usually will not directly involve the foreign sovereign, the rationale for the court's decision would directly affect the foreign sovereign's relations with the United States. More specifically, the court's findings in its assessment of the foreign country would directly affect that country's relations with the United States.

This conclusion, that the international due process analysis violates the separation of powers, does not mean that courts should decline altogether to decide due process challenges raised by litigants in defense of foreign judgment recognition. Nor does it suggest that it is desirable for courts to recognize and enforce judgments from countries that wholly fail to provide for procedures compatible with due process of law—if such countries do, in fact, exist. Courts should, however, limit their analysis of foreign judgments, assessing whether the individual proceedings from which judgments originated afforded the litigants due process.

III. RESHAPING THE DUE PROCESS ANALYSIS FOR FOREIGN JUDGMENTS

Any finding that a foreign country's judicial and political systems are so fundamentally flawed that they do not provide for impartial tribunals or fair procedures is inherently political: the international due process analysis is not a legal determination at all. In reality, and as the cases demonstrate, the countries that have and will fail international due process scrutiny are countries that courts perceive as politically disfavored countries—outcasts in the "civilized" world. Conversely, countries that courts perceive as politically favored will pass due process scrutiny even if the individual proceedings at issue failed to afford due process.

This Part proposes an international due process analysis in which courts will not judge the entire political systems of the foreign country but will narrow their focus to the individual proceedings in which the judgment was rendered. First, it outlines the contours of a procedural due process analysis that does not judge the country

but judges the individual proceedings. It draws on analogous examples wherein courts apply due process analyses in enforcing arbitration awards and tribal judgments. Next, it briefly looks at projects by the ALI and NCCUSL that deal with foreign judgment recognition, and demonstrates their failure to address the international due process problem. This Part then addresses arguments from some scholars that American constitutional standards should not be "exported" in the area of foreign judgment recognition. This Part deals in particular with cases that presented substantive objections to foreign law. Specifically, it discusses the free speech/foreign judgment cases in which courts have applied American constitutional standards and which some scholars have criticized. It then argues that courts cannot, under the state action doctrine, recognize foreign judgments that are unconstitutional. Lastly, this Part addresses the substantive due process problem that *Ashenden* raised and argues that the state action doctrine requires that there also be a substantive component of the international due process analysis.

A. How Much Process Is Due?

Because the international due process analysis requires courts to engage in international politics, which can adversely affect U.S. foreign relations and individual rights, courts should consider the particulars of the foreign proceedings when a judgment debtor raises a due process defense to recognition. Courts should not focus on the overall system from which the judgment originated. Of course, if the executive branch believes that a foreign country's judgments are not worthy of recognition, it can clearly state this. Indeed, the State Department could maintain a list of countries from which judgments will not be enforceable in the United States because, in the view of the executive branch, those countries' judicial and political systems are inadequate. This list could be similar to the terrorist country list that the State Department currently maintains.[375] If a country is on the list, then the

375. *See* 22 C.F.R. § 126.1(d) (2006) (listing Cuba, Iran, Libya, North Korea, Sudan, and Syria as countries that have "repeatedly provided support for acts of international terrorism" and stating that exports to those countries are "contrary to the foreign policy of the United States").

courts simply will not enforce that country's judgments; but if the executive branch has not said that a country's judgments are unenforceable, courts must consider whether the court in the foreign proceedings at issue afforded the litigants due process in those proceedings.

In the United States, the most fundamental requirement of procedural due process is "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[376] The international due process analysis refuses judgment debtors the right to raise the denial of this most basic right as a defense to foreign judgment recognition, instead focusing on the overall fairness of a judicial system. In *Ashenden*, Judge Posner stressed the difficulty of employing a "retail approach" to due process, or in other words, looking beyond the fairness of the overall judicial system of a particular country.[377] He expressed doubt that any one country had adopted our "complex" concept of due process or conformed its procedural doctrines to each of the latest twists and turns of American due process jurisprudence.[378] As Part III demonstrated, however, the international due process analysis requires judges to engage in international politics. Indeed, Judge Posner said that the international due process concept refers to the "concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, *our peers*."[379] This analysis allows judges simply to choose which countries they deem "civilized" and "peers" and enforce their judgments with no regard for whether particular proceedings afforded the individual litigants due process. The international due process analysis is constitutionally deficient.

The argument that it is too difficult to apply "complex" American notions of due process in foreign judgment recognition cases is specious. In analogous enforcement cases, courts apply American standards of due process to the particular proceedings from which the judgment came. For example, in *International Transactions, Ltd. v. Embotelladora Agral Regiomontana*, the Fifth Circuit refused to extend comity and recognize a Mexican bankruptcy order

376. City of Los Angeles v. David, 538 U.S. 715, 717 (2003) (internal quotation marks omitted) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

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

378. *Id.*

379. *Id.* at 477 (emphasis added).

because there had not been adequate notice of the proceedings. The Fifth Circuit, which followed *Ashenden*'s international due process analysis in *Society of Lloyd's v. Turner* the year before, stated: "Notice is an element of *our* notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice."[380] The Fifth Circuit cited and applied *Hilton*'s comity principles as well as U.S. due process cases and the U.S. Bankruptcy Code in concluding that the Mexican order violated due process and was entitled to no effect in the United States.[381]

Similarly in other enforcement contexts, courts apply American notions of due process to the particular foreign proceedings. For example under the New York Convention, the party against whom an arbitral award is invoked has a right to raise a due process defense.[382] Specifically, the convention states that the award is not enforceable if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was *otherwise unable to present his case*."[383] Courts have interpreted this provision to mean that the enforcing court is to apply its country's concept of due process.[384] In applying American notions of due process to arbitral award enforcement cases, courts have looked at the particular arbitration proceedings to determine if the objecting party was afforded "the opportunity to be heard at a meaningful time and in a meaningful manner."[385]

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380. Int'l Transactions, Ltd. v. Embotelladora Agral Regiomontana, SA de CV, 347 F.3d 589, 594 (5th Cir. 2003).

381. *Id.*

382. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

383. *Id.* at art. V(1)(b) (emphasis added).

384. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also Ashenden*, 233 F.3d at 477 (noting that the due process provision in the New York Convention "has been interpreted to mean the enforcing jurisdiction's concept of due process"); Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145-46 (2d Cir. 1992) (recognizing that this provision of the Convention "'essentially sanctions the application of the *forum state's standards of due process*,' and that due process rights are 'entitled to full force under the Convention as defenses to enforcement. Under our law '[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner.'" (internal citations and quotation marks omitted) (emphasis added) (alteration in original)).

385. *Iran Aircraft Indus.*, 980 F.2d at 146 (quoting *Mathews*, 424 U.S. at 333 (1976)).

Judge Posner even recognized in *Ashenden* that his international concept of due process was far less rigorous than the test that courts use in deciding whether to enforce arbitral awards under the New York Convention.[386] Indeed, in *Generica Ltd. v. Pharmaceutical Basics, Inc.*, Judge Posner's colleagues on the Seventh Circuit stated that an arbitrator clearly must provide a fundamentally fair hearing and that "'the minimal requirements of fairness' [are] adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[387] Thus, even given the significant differences between arbitration proceedings and judicial proceedings, courts have been able to formulate and apply a due process analysis.

In *Iran Aircraft Industries v. Avco Corp.*, the Second Circuit refused to recognize an arbitral award for over $3 million that the Iran-United States Claims Tribunal awarded in favor of Iranian agencies and instrumentalities and against Avco Corporation.[388] Relying on the due process provision in the New York Convention, Avco argued that the Tribunal did not afford it an opportunity to present its case.[389] Specifically, one of the arbitrators informed Avco's counsel at a prehearing conference that it did not have to produce actual invoices to substantiate its claims, but could rely on audited accounts receivable ledgers.[390] But later, at the hearing on the matter, the Tribunal rejected Avco's claims for failure to produce the actual invoices.[391] The Second Circuit refused to recognize the arbitral award, finding that the Tribunal misled Avco and "denied [the company] the opportunity to present its claim in a meaningful manner."[392] Like the Second Circuit, other courts enforcing arbitration awards have had no difficulty in looking at the particular arbitration proceedings to determine whether due process was afforded.[393]

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386. *Ashenden*, 233 F.3d at 477.

387. Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997) (quoting Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987)).

388. *Iran Aircraft Indus.*, 980 F.2d at 142.

389. *Id.* at 145.

390. *Id.* at 146.

391. *Id.*

392. *Id.*

393. *See, e.g.*, Karaha Bodas Co. v. Perusahaan Pertambangan Minyat Dam Gas Bumi Negara, 364 F.3d 274, 298-99 (5th Cir. 2004) (noting that under the New York Convention, a foreign arbitral award may be denied if obtained in violation of U.S. notions of due process); Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1129-30 (7th Cir. 1997) ("[A]n arbitral

Similarly, in the context of tribal judgments, courts have also considered the fairness of the individual proceedings. Relying on *Hilton*, courts have repeatedly stated that they will not recognize tribal judgments if the tribal courts failed to afford the defendant due process.[394] As with foreign country judgments, the tribal judgment recognition cases also follow *Hilton*'s comity analysis.[395] In other words, they treat the tribal judgments as "foreign judgments."[396]

Remarkably, courts that refused to consider the particulars of the British proceedings in the Lloyd's cases have considered the particulars of tribal judgments.[397] For example, in *Bird v. Glacier Electric Cooperative, Inc.*, the Ninth Circuit applied *Hilton* and refused to enforce a judgment from a tribal court, finding that the judgment creditor's closing argument "offended fundamental fairness and violated due process" by appealing to racial bias,[398] *even though the judgment debtor failed to object in the tribal proceedings or move for a new trial.*[399] According to the court, the plaintiff's argument "link[ed] the [defendant's] behavior to white racism in exploitation of Indians."[400] Applying a plain error analysis because of the failure to object, the court considered whether the appeal to racial prejudice in the closing argument violated due process.[401] The court found that the argument was "irrelevant and unfair" to the defendant and deprived the defendant of a "fair proceeding."[402]

So why should courts refuse to look to the individual fairness of foreign country judgments? Judge Posner and other judges applying

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award should be denied or vacated if the party challenging the award proves that he was not given a meaningful opportunity to be heard as our due process jurisprudence defines it.").

394. *See* MacArthur v. San Juan County, 309 F.3d 1216, 1225 (10th Cir. 2002) (noting that federal courts will not enforce tribal judgments rendered without due process); Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1142 (9th Cir. 2001) ("[O]ur precedents make clear that a district court cannot properly give comity to a tribal court judgment if the tribal court proceedings violated due process."); Wilson v. Marchington, 127 F.3d 805, 810 (9th Cir. 1997) (noting that federal courts must not enforce tribal judgments if "the defendant was not afforded due process of law").

395. *See Marchington*, 127 F.3d at 810.

396. *Id.*

397. *See supra* note 394.

398. *Bird*, 255 F.3d at 1151-52.

399. *Id.* at 1150.

400. *Id.*

401. *Id.* at 1148-52.

402. *Id.* at 1152.

the international due process analysis make much of the complexity of American due process jurisprudence. But as the other enforcement cases discussed above demonstrate, there really is no such difficulty. Indeed the balancing test that the Supreme Court in *Mathews v. Eldridge* outlined for addressing procedural due process claims is not at all difficult to apply.[403] The Court has said that "*Mathews* dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process."[404] According to the Court, "The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if any, of additional or substitute procedural safeguards.'"[405] An American court could easily apply this test to foreign proceedings. Proponents of international due process also assert that applying American standards of due process will not account for differences between the American judicial system and many foreign systems. Many foreign judicial systems, for example, do not have jury trials or do not permit cross-examination of certain witnesses; but American due process standards can account for such differences in procedural systems. In fact, the Supreme Court in *Hilton* contemplated a due process analysis that would involve an individualized assessment of the foreign proceedings to determine if they were fundamentally fair. The Court said that, in the foreign proceedings, there must have been "opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant."[406] The Court said that challenges based on the absence of cross-examination and unsworn testimony were inadequate bases for finding that the foreign proceedings failed to afford due process.[407] But *Hilton* never advocated turning a blind eye to the fairness of the individual proceedings.

403. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
404. Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (quoting *Mathews*, 424 U.S. at 335).
405. *Id.* (quoting *Mathews*, 424 U.S. at 335).
406. Hilton v. Guyot, 159 U.S. 113, 202 (1895).
407. *Id.* at 204-05.

Shortly after *Hilton*, in *Banco Minero v. Ross*, the Texas Supreme Court noted that "the chief requisite for the recognition of a foreign judgment necessarily is that an opportunity for a full and fair trial was afforded."[408] The court found that the Mexican proceedings at issue were "wanting in these essential elements."[409] According to the court, the judgment debtor pleaded "a good defense, yet ... he was denied the right to present it, it not appearing that his offer to support it was unseasonably made."[410] The court further noted that the Mexican court issued the judgment "upon no proof whatever,"[411] and the judgment debtor was denied an appeal on a "frivolous ground."[412] The court, therefore, refused to recognize the Mexican judgment.[413]

At its core, this basic requirement of due process is not difficult to apply to foreign proceedings at all, especially to the foreign judgments of "our peers."[414] *Hilton* envisioned the application of the American concept of due process, at its most fundamental level—notice and a meaningful opportunity to be heard.[415] In fact, the district court in *Ashenden* had no trouble applying American notions of due process. The court did not interpret *Hilton* and the Uniform Act as preventing it from considering whether the British courts had given the Ashendens a meaningful opportunity to be heard.[416] The district court found that the British courts had not afforded the Ashendens this opportunity, and that the British courts had not provided the Ashendens with a predeprivation hearing.[417]

As the Supreme Court has said, "We must bear in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'"[418] The amount of

408. 172 S.W. 711, 714 (Tex. 1915).
409. *Id.* at 715.
410. *Id.*
411. *Id.*
412. *Id.*
413. *Id.*
414. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000).
415. Hilton v. Guyot, 159 U.S. 113, 166-67 (1895).
416. Soc'y of Lloyd's v. Ashenden, No. 98 C 5335, 1999 WL 284775, at **5-6 (N.D. Ill. Apr. 23, 1999).
417. *Id.* at *7.
418. Kremer v. Chem. Constr. Corp., 456 U.S. 461, 483 (1982) (quoting Mitchell v. W.T.

process due truly depends on the circumstances of the individual case. As *Hilton* instructed, in determining whether notice is adequate and whether there is meaningful opportunity to be heard, courts can take into account differences in the foreign legal system.

Again pointing to the tribal context, courts have held that divergence from common law procedures is not a per se violation of due process.[419] In adjudicating matters involving Indian tribes, courts note that they must interpret the due process requirements of the Constitution in a manner that is still respectful of Indian customs and differences in Indian procedures.[420] For example, in *Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe*, the court took into account Indian customs and differences in procedure in defining the contours of due process.[421] In that case, the plaintiffs challenged elections that had been held on a reservation in Minnesota.[422] The plaintiffs also claimed that they had been denied due process in the consideration of their protests at a tribal town meeting held by the Tribal Executive Committee (TEC).[423] The court found that "[t]he 'town meeting' type hearing which was employed by the TEC is the traditional form of tribal hearing and must be measured by the general standard of fundamental fairness."[424] The court also found that the meeting comported with fundamental fairness:

Grant Co., 416 U.S. 600, 610 (1974)).

419. *See, e.g.*, Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1142 (9th Cir. 2001) ("Comity does not require that a tribe utilize judicial procedures identical to those used in the United States Courts. Foreign-law notions are not per se disharmonious with due process by reason of their divergence from the common-law notions of procedure." (quoting Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997))); *Marchington*, 127 F.3d at 811 ("Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance. However, the tribal court proceedings must afford the defendant the basic tenets of due process ...."); MacArthur v. San Juan County, 405 F. Supp. 2d 1302, 1315 (D. Utah 2005) (noting that courts will not enforce tribal judgments if the tribal court did not afford the defendant due process).

420. *See, e.g.*, Randall v. Yakima Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988) (noting that "courts have been careful to construe the term [] due process ... with due regard for the historical, governmental and cultural values of an Indian tribe" (alteration in original) (quoting Tom v. Sutton, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976))).

421. 416 F. Supp. 655, 658-59 (D. Minn. 1976).

422. *Id.* at 656.

423. *Id.* at 659-60.

424. *Id.* at 659.

> All of the protests in all of the elections in issue were heard by the TEC at an open meeting. All who cared to present evidence or argument were allowed to do so. No formal subpoenas or invitations to testify were issued, but all tribe members had notice of the meeting and were given the opportunity to speak.... This court refuses to hold that this time-honored and customary procedure employed by the TEC is so lacking in fundamental fairness as to constitute a denial of due process. All members of the tribe had notice of the meeting, and all who came were given the opportunity to be heard. No fairer procedure could exist.[425]

Accordingly, a foreign judgment violates procedural due process only if the differences in the foreign proceedings are such that the judgment debtor did not receive adequate notice and a meaningful opportunity to be heard. Such a finding does not require an assessment of the politics of the foreign country or pass judgment on the foreign country: it is a legal determination.

Courts following the international due process analysis also raise an argument based on judicial economy. For example, in *Ashenden*, Judge Posner said:

> The statute, with its reference to "system," does not support such a retail approach, which would moreover be inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions—which would in effect give the judgment creditor a further appeal on the merits. The process of collecting a judgment is not meant to require a second lawsuit ....[426]

Even assuming that it would be onerous for a court to consider the particulars of the foreign proceedings, which courts already do in arbitration cases and tribal cases, the proceedings in *Bridgeway* belie the argument that the international due process analysis promotes judicial economy. Recall that in *Bridgeway*, after the court condemned the Liberian judicial system and refused to recognize the Liberian judgment, it allowed the plaintiff to litigate fully the underlying claims. In other words, the court disregarded the

425. *Id.*

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

Liberian judgment and allowed a second trial on the same claims that the Liberian court had adjudicated.[427] On closer examination, the judicial economy argument applies only with respect to judgments from "our peers."[428] At any rate, the rationale is insufficient to justify a court's refusal to consider, in recognition proceedings, due process challenges to the foreign court proceedings.

It is important to remember that foreign judgment recognition in this country is based on principles of comity, and the international due process standard ignores aspects of the comity doctrine on which foreign judgment recognition is based. The comity doctrine was originally meant to take into account the interests of the individual, in addition to the interests of the enforcing country and the interests of the foreign country. The individual interests included due process rights to fairness in the foreign proceedings. In *Hilton*, the Court stated that comity requires that courts give "due regard" to the rights of its own citizens.[429]

B. ALI and NCCUSL Projects and Due Process

The ALI recently completed a six-year project on the recognition and enforcement of foreign judgments. The project culminated in a proposed federal statute, which aims to achieve uniformity and a national approach to foreign judgment recognition.[430] The ALI will soon present this proposed statute to Congress.

The ALI's proposed federal statute is similar to the Uniform Act with respect to most of its limitations on the recognition of foreign judgments. With respect to due process, the ALI follows the current practice of courts, as exemplified in the Lloyd's cases, of imposing a concept of international due process.[431] In fact, the commentary to the draft discusses and approves of Judge Posner's opinion in *Society of Lloyd's v. Ashenden*.[432] The commentary states, in part, that "[a] showing that the judgment debtor was not dealt with fairly in the particular case will not defeat recognition or enforcement ....

427. Bridgeway Corp. v. Citibank, 201 F.3d 134, 137 (2d Cir. 2000).
428. *Ashenden*, 233 F.3d at 477.
429. Hilton v. Guyot, 159 U.S. 113, 164 (1895).
430. *See* ALI PROPOSED FINAL DRAFT, *supra* note 344.
431. *See id.* § 5.
432. *See id.* § 5 cmt. c.

[F]or a judgment to be enforceable, the procedures undertaken in the foreign court must have been fair in the broader international sense."[433] The ALI also added a new mandatory exception to recognition, which deals with corruption in the forum court.[434] This exception states that a judgment shall not be recognized if "the judgment was rendered in circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to the judgment in question."[435] Thus, a judgment debtor might be able to raise due process violations based on its individual proceedings, but only in the context of establishing corruption of the foreign judge. The commentary states that to satisfy his burden, the judgment debtor must show "corruption in the particular case and its probable impact on the judgment in question."[436]

The ALI's draft statute does not go far enough to protect judgment debtors, often American citizens, from due process violations. In fact, by eliminating the phrase "due process" from its draft, the ALI embraces the notion that American constitutional guarantees are inapplicable in foreign judgment recognition proceedings. Perhaps recognizing that corruption of individual judges in foreign countries is a problem that American judgment debtors have faced in foreign courts, the ALI rightly concluded that, where such corruption can be proven, it must serve as ground for nonrecognition.[437] Presently, judgment debtors have no defense to recognition of judgments obtained in proceedings in which the judges were corrupt,[438] but the ALI's draft simply does not go far enough with respect to due process.

The revised Uniform Act still contains the provision on which the international due process provision is based.[439] Thus, NCCUSL still approves of courts engaging in a systemwide analysis of foreign countries. The Uniform Act still does not require courts to assess the particular proceedings, but it does now include a new *discretionary* exception to recognition that permits judges to consider whether the

433. *Id.* (citing *Ashenden*, 233 F.3d at 477).
434. *See id.* § 5(a)(ii).
435. *Id.*
436. *Id.* § 5 cmt. d.
437. *Id.* § 5(a).
438. *See supra* notes 376-78 and accompanying text.
439. *See supra* note 32.

individual proceedings were *compatible* with due process.[440] Specifically, this new exception provides that a state need not recognize a foreign judgment if "the specific proceeding in the foreign court leading to the [foreign-country] judgment was not compatible with the requirements of due process of law."[441] The commentary states the following about the distinction between the international due process provision and this new provision:

> [T]he difference is that between showing, for example, that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system versus a showing that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment.[442]

Also, like the ALI's draft statute, the NCCUSL's Revised Uniform Act contains an exception that deals with corruption of the foreign court.[443] The exception is almost identical to the corruption exception in the ALI's draft.[444] The commentary states the following about both of the new discretionary exceptions:

> [B]oth are discretionary grounds for denying recognition, while [the international due process provision] is mandatory. Obviously, if the entire judicial system in the foreign country fails to satisfy the requirements of impartiality and fundamental fairness, a judgment rendered in that foreign country would be so compromised that the forum court should refuse to recognize it as a matter of course. On the other hand, if the problem is evidence of a lack of integrity or fundamental fairness with regard to the particular proceeding leading to the foreign-country judgment, then there may or may not be other factors in

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440. *See* UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(8) (2005). NCCUSL adopted the new version of the Act in July 2005. No state has adopted it at this point. *See supra* note 32.

441. UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(c)(8) (2005).

442. *Id.* § 4 cmt. 12.

443. *Id.* § 4(c)(7).

444. *See supra* text accompanying notes 433-35.

> the particular case that would cause the forum court to decide to recognize the foreign-country judgment.[445]

At this time no state has adopted the Revised Uniform Act.[446] These new exceptions in the Revised Uniform Act are certainly important steps in the right direction. If approved and later adopted by the thirty states that have enacted the original Uniform Act, they will provide a much needed defense for judgment debtors who never had an opportunity for a full and fair hearing in the foreign proceedings. The exceptions, however, are insufficient. The international due process provision remains a mandatory provision in the Uniform Act.[447] Courts will continue judging other countries' legal systems, and the perceived fairness of the overall system will be a far more dominant factor than what happened in the individual proceedings—indeed it will likely be the only factor.

C. Exporting the Constitution?

In the free speech arena, it has been argued that applying American constitutional norms to foreign judgments constitutes a normatively undesirable exportation of the Constitution.[448] There have been cases in which courts have refused to recognize foreign judgments because to do so would be in violation of the free speech guarantees of the Constitution.[449] The courts in those cases have applied the state action doctrine, as articulated by the Supreme Court in *Shelley v. Kraemer*.[450] *Shelley* established that judicial enforcement can sometimes constitute state action amounting to a constitutional violation.[451] One scholar, criticizing courts' reliance on *Shelley*, argued that the case was anomalous because the Court had not extended *Shelley* to the area of private contract enforcement; he

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445. UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4 cmt. 12 (2005).

446. *See supra* note 32.

447. *See supra* notes 32-33 and accompanying text.

448. *See* Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 173 (2004) [hereinafter Rosen, *Exporting*]; Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 785-87 (2004) [hereinafter Rosen, *"Un-American"*].

449. *See infra* Part III.C.1 (discussing cases in which U.S. courts refused to enforce foreign judgments because of First Amendment concerns).

450. 334 U.S. 1 (1948).

451. *Id.* at 13-14.

then analogized foreign judgments to private contracts.[452] This Part discusses the free speech cases and then argues that the courts are correct to find that *Shelley v. Kraemer* precludes them from enforcing unconstitutional foreign judgments. Courts should also apply the state action analysis in due process cases. Whether a foreign judgment would be in violation of either free speech or due process rights, courts cannot recognize them. While the state action analysis provides additional support for my proposal that courts analyze the particular proceedings in foreign courts to determine whether there was procedural due process, it also demonstrates that there must be a substantive component to the international due process inquiry.

1. The Free Speech Cases

In *Bachchan v. India Abroad Publications Inc.*, a case of first impression, the New York Supreme Court refused to recognize and enforce a British libel judgment because the judgment violated the First Amendment.[453] The judgment, which held a news story to be defamatory, originated from the High Court of Justice in London, England.[454] The jury in the British proceedings awarded the plaintiff £40,000, and the plaintiff sought to enforce the judgment in New York.[455] The defendant argued that the recognition of the judgment would be in violation of the public policy of New York.[456] The public policy exception is a discretionary ground for nonrecognition under New York's version of the Uniform Act.[457] The plaintiff argued that the court could "exercise its discretion to recognize the judgment," but the court stated that it was "doubtful whether this court has discretion to enforce the judgment if the action in which it was rendered failed to comport with the constitutional standards for adjudicating libel claims."[458] According to the court:

452. *See* Rosen, *Exporting*, *supra* note 448, at 198-99, 206-09.
453. *See* 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992).
454. *Id.*
455. *Id.* at 662.
456. *Id.*
457. *See id.*
458. *Id.*

> [I]f, as claimed by defendant, the public policy to which the foreign judgment is repugnant is embodied in the First Amendment to the United States Constitution or the free speech guaranty of the Constitution of this State, the refusal to recognize the judgment should be, and it is deemed to be, "*constitutionally mandatory*."[459]

In the United Kingdom, the defendant has the burden of proving the truth of a statement and establishing that he is entitled to a "qualified privilege for newspaper publications and broadcasters."[460] Interestingly, that privilege will not be granted if the defendant refused to publish an explanation or contradiction provided by the plaintiff.[461] The *Bachchan* court refused to recognize the judgment because of the differences between British and American standards for libel suits by private persons against the media.[462] The court noted that "[p]lacing the burden of proving truth upon media defendants who publish speech of public concern has been held unconstitutional [by the U.S. Supreme Court] because fear of liability may deter such speech."[463] The court held, therefore, that the judgment was unenforceable.[464] In doing so, the court stated:

> It is true that England and the United States share many common law principles of law. Nevertheless, a significant difference between the two jurisdictions lies in England's lack of an equivalent to the First Amendment to the United States Constitution. The protection to free speech and the press embodied in that amendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.[465]

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459. *Id.* (emphasis added).
460. *Id.* at 663.
461. *Id.* at 663 n.1.
462. *Id.* at 665.
463. *Id.* at 664.
464. *Id.*
465. *Id.* at 665.

Similarly, the district court for the District of Columbia refused to recognize and enforce a British libel judgment.[466] In *Matusevitch v. Telnikoff*, the plaintiff brought an action to preclude enforcement of the libel judgment.[467] The court found that the recognition of a judgment rendered under "libel standards that are contrary to U.S. libel standards would be repugnant to the public policies of the State of Maryland and the United States."[468] The court, therefore, refused to recognize the judgment.[469] Quoting *Hilton*, the court stated that comity "forbids [recognition] where such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens."[470]

Following the lead of the courts in *Bachchan* and *Matusevitch*, the Northern District of California in *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*[471] declared a French judgment that required internet company Yahoo! to block its users' access to Nazi material unenforceable in the United States because it was antithetical to the First Amendment.[472] A divided panel of the Ninth Circuit reversed the district court's decision, finding that the court lacked personal jurisdiction.[473] The Ninth Circuit then granted rehearing en banc and recently dismissed the case in a deeply divided opinion.[474] A majority of the court agreed that there was personal jurisdiction, but this was all that they could agree on.[475] Yahoo! did not appeal the district court's First Amendment ruling, but some of the judges discussed it anyway.[476] A three-judge plurality seemed to imply in dictum that it might be possible to enforce foreign judgments that would be unconstitutional if decided by a U.S. court.[477] But five of the judges found this dictum

466. Matusevitch v. Telnikoff, 877 F. Supp. 1, 5-36 (D.D.C. 1995).

467. *Id.* at 1-3.

468. *Id.* at 4.

469. *Id.*

470. *Id.* at 3 (alteration in original) (quoting Hilton v. Guyot, 159 U.S. 113, 164 (1895)).

471. 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

472. *Id.* at 1194.

473. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120, 1126 (9th Cir. 2004).

474. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1201 (9th Cir. 2006).

475. *See id.*

476. *See id.* at 1239-41 (Fisher, J., concurring in part and dissenting in part).

477. *See id.* at 1215 (opinion of Fletcher, Schroeder, & Gould, JJ.) ("Inconsistency with

"troubling."[478] They found no reason why "courts would refuse [in some cases] to enforce a foreign judgment that violated a state statute [based on the public policy exception], yet be willing to enforce a foreign judgment that violates the ... Constitution."[479] According to these five judges, courts are

> to honor foreign judgments unless they "prejudice the rights of United States citizens or violate domestic public policy." The French orders on their face—and by putting Yahoo! at risk of substantial penalties—violate the First Amendment and are plainly contrary to one of America's, and by extension California's, most cherished public policies.[480]

2. The Applicability of Shelly v. Kraemer *and the Uniqueness of Foreign Judgments*

The First Amendment cases relied on the state action doctrine established in the much celebrated case of *Shelley v. Kraemer*.[481] There, the U.S. Supreme Court found that state courts' enforcement of racially discriminatory restrictive covenants violated the Equal Protection Clause of the Fourteenth Amendment.[482] The Court found a constitutional violation even though, standing alone, the covenants did not violate the Equal Protection Clause, as the covenants were not created through "state action."[483] But the Court found that *judicial enforcement* of the discriminatory covenants constituted the necessary state action.[484] *Shelley* established that judicial enforcement can constitute "state action" amounting to a constitutional violation under certain circumstances.

Aside from the First Amendment cases, there is essentially no case law applying the state action doctrine in the foreign judgment context. While invoking *Shelley*, the courts in the First

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American law is not necessarily enough to prevent recognition and enforcement of a foreign judgment in the United States.").

478. *Id.* at 1240 (Fisher, J., concurring in part and dissenting in part).

479. *Id.*

480. *Id.* at 1239 (citations omitted).

481. 334 U.S. 1 (1948).

482. *Id.* at 20.

483. *Id.*

484. *Id.* at 19 ("We have no doubt that there has been state action in these cases in the full and complete sense of the phrase.").

Amendment/foreign judgment cases have offered little analysis of their extension of *Shelley* and the state action doctrine to the area of foreign judgment recognition. For example, in *Yahoo!*, the district court simply stated that "[t]he French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors' viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order."[485] In other words, the court could not itself have ordered Yahoo! to block its users' access to Nazi material, and therefore, it was not at liberty to put its stamp of approval on a French order that did so.

Some scholars have criticized courts' reliance on *Shelley* and the state action doctrine in the First Amendment/foreign judgment cases.[486] *Shelley* was a controversial decision because conceivably, under its theory of state action, all decisions by state courts are state action and private actions are all subject to constitutional scrutiny.[487] In fact, the Supreme Court has limited *Shelley*'s reach in cases involving private contracts outside of the racial discrimination context.[488] But the Court has conspicuously avoided discussing *Shelley* in those cases. Scholars criticizing courts' reliance on *Shelley* in the foreign judgment context analogize foreign judgments to private contracts, arguing that they should be treated the same with respect to the state action doctrine.[489] If they are treated as private contracts, then judgments like the French judgment in *Yahoo!* should be enforced because post-*Shelley* case law has limited the application of the state action doctrine in the private contract area.[490]

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485. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001).

486. *See, e.g.*, Rosen, *Exporting*, *supra* note 448 (arguing that *Shelley* does not apply to foreign judgment recognition and that U.S. courts can enforce judgments that would be antithetical to the Constitution); Rosen, *"Un-American,"* *supra* note 448 (arguing that U.S. courts can enforce foreign judgments that would violate the Constitution, but noting that the decision to do so is a matter of policy best suited for the political branches).

487. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 506-07 (2d ed. 2002).

488. *Id.* at 507-10.

489. *See, e.g.*, Mark D. Rosen, *Exporting*, *supra* note 448, at 206-09.

490. *Id.*

It is true that *Shelley* was anomalous, and it does not help that the Supreme Court has not provided much guidance on the application of *Shelley*'s principles. But foreign judgments also stand as unique creatures in the American judicial system. In fact, it is the uniqueness of these judgments that has prompted so much discourse as to how best to deal with them in the hundred-plus years following *Hilton*, and even prior to *Hilton*.[491] Foreign judgments are readily distinguishable from private contractual rights. First, parties freely and voluntarily enter into private contracts. A foreign judgment is usually obtained after litigation in which the judgment debtor defended unsuccessfully against the claims of the judgment creditor. Under most circumstances, the judgment debtor can hardly be said to have voluntarily agreed to the terms of the foreign judgment. Subsequent limitations on *Shelley* in private contract cases, therefore, really do not shed much light on the applicability of the state action doctrine to foreign judgments.

Moreover, when an American court recognizes a foreign judgment, the judgment effectively becomes an American judgment, subject to the same full faith and credit in state and federal courts as any judgment obtained within the United States. This elevation of judgments that otherwise are meaningless and without effect outside of the rendering country, has always given pause to their enforcement in this country. Indeed, the hesitation with respect to foreign judgments has been present since *Hilton* and even before that case, when scholars outside the United States, like Ulrich Huber, pondered over the effect such judgments should receive outside of the rendering country.[492]

Huber, a seventeenth century Dutch scholar, has been credited with formulating the idea of comity, which ultimately inspired U.S. jurists in conceiving U.S. conflicts principles generally, and foreign judgment recognition law in particular.[493] Huber sought to reconcile the theory of national sovereignty with the needs of a burgeoning global trading system.[494] He wrote a treatise on private interna-

491. *See* Miller, *supra* note 339, at 241-49 (noting the complexity of foreign judgment recognition law before and after *Hilton*).

492. D.J. Llewelyn Davies, *The Influence of Huber's* De Conflictu Legum *on English Private International Law*, 18 BRIT. Y.B. INT'L L. 49, 56-57 (1937).

493. *See* Paul, *supra* note 24, at 14-15.

494. *See id.*

tional law, entitled *De Conflictu Legum*, in which he stated three principles regarding the operation of foreign law within a sovereign's territory.[495] The first was that "[t]he laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond."[496] Second, Huber thought that every person found within the limits of a government's territory was deemed a subject of that government.[497] And third, Huber believed that "[t]hose who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects."[498] So, the recognition of a foreign judgment is based on a country's voluntary decision, out of comity concerns: "Although such international courtesy may warrant judicial restraint ... it does not obligate a country to waive its basic constitutional principles."[499]

In his famous *Commentaries on Conflicts of Law*, Justice Story relied on Huber's three axioms and the comity doctrine to explain the recognition of foreign judgments.[500] Like Huber, Justice Story was always concerned about the interests of the enforcing state, as well as the interests of the individual litigants, particularly U.S. citizens.[501] In fact, during the first half of the nineteenth century,

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495. *Id.* at 15.

496. Davies, *supra* note 492, at 56.

497. *Id.* at 57.

498. *Id.*

499. Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing* Yahoo! v. L.C.R.A.: *Private Law, Constitutional Review, and International Conflict of Laws*, 25 CARDOZO L. REV. 2089, 2133 (2004).

500. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 30, 37 (1934). British jurist Lord Mansfield, who was born a Scot and studied Scottish law, was also influenced by Huber. He drew on Huber's work as a source for resolving conflicts of law issues. Mansfield wanted to facilitate international trade and saw the doctrine of comity as a way to do so. He did not, however, want to sacrifice the public policy of Great Britain. For example, slavery was against the public policy of Britain, and British courts would not apply the proslavery laws of other countries, like the United States. Thus, Mansfield did not view comity as *obligating* deference to the foreign state. Paul, *supra* note 24, at 17-19.

501. Justice Story's interpretation of Huber's maxims focused on the international ramifications of choice-of-law assessments. Story's theory of conflicts was concerned with maintaining amicable relationships with foreign nations; thus, he stressed the importance of extending courtesy to other nations and recognizing their interests. His theory was also concerned with the enforcing forum's interest in making choice-of-law decisions that would promote the development of an effective international system that supported global commerce. Still, Justice Story was concerned with the interests of individual litigants. His theory of

U.S. courts treated foreign judgments as prima facie evidence of a claim, as did British courts. *Hilton* established the comity-based guidelines for judgment recognition, but even in *Hilton*, the Court was concerned with individual rights. Recall that the Court in *Hilton* said that comity

> is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, *and to the rights of its own citizens or of other persons who are under the protection of its laws.*[502]

Moreover, the first guideline that the Court announced regarding foreign judgment recognition was that there was an "opportunity for a full and fair trial abroad before a court of competent jurisdiction."[503]

There has always been a concern for the integrity of a judgment and the proceedings that resulted in the judgment. The *Hilton* court contemplated that a judgment that would violate the U.S. Constitution would not be enforceable. Indeed, shortly after *Hilton*, the Texas Supreme Court refused to recognize a Mexican judgment because the Mexican court did not afford the judgment debtor a full and fair opportunity to present its defenses; in other words, the court denied the judgment debtor due process.[504]

3. Substantive International Due Process

The free speech cases and their reliance on the state action doctrine are instructive in the due process arena. Courts are not at liberty to ignore the particular proceedings that took place in the foreign courts in favor of an overall assessment of the judicial system. That is, they are not at liberty to ignore procedural due process violations in the foreign court. The free speech cases, moreover, are instructive on the substantive due process issue that

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comity, therefore, contained both political and principled legal components. Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 283-85 (1982).

502. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (emphasis added).

503. *Id.* at 202.

504. *See supra* note 191.

the Seventh Circuit raised in *Ashenden*. Of course, *Ashenden* established that international due process is limited to an inquiry into the procedural fairness of the overall judicial system in the country at issue. Recall, however, that the court suggested that the Names would have had a viable *substantive* due process claim, stemming from the conclusive evidence clause, if they had not abandoned their objection to the foreign judgment based on the public policy exception to the Uniform Act.[505] Specifically, the court found that the conclusive evidence clause did not merely "postpone" the Names' objections to the premium assessments, but it "extinguishe[d]" their right to cure errors in the assessment except those that were "manifest."[506] This extinguishing of their rights gave rise to a substantive, not a procedural, due process claim. Judge Posner, however, seriously doubted that international due process had room for a substantive component.

The underlying principle in the free speech cases—that courts are not at liberty to enforce judgments that would violate the U.S. Constitution—dictates otherwise. In those cases, the courts were presented with foreign judgments based on substantive rules that were contrary to American constitutional standards. The *Shelley* rule establishes that these judgments are unenforceable. Likewise, if a judgment debtor demonstrates that the substantive rule on which his judgment is based violates substantive due process, under U.S. constitutional standards, then *Shelley* precludes the enforcement of that judgment as well. *Shelley* and the free speech cases that rely on its principles, therefore, demonstrate that there must indeed be a substantive aspect to the due process analysis of foreign judgments. The court in *Ashenden* ignored the state action problem because of its fixation on internationalizing due process by watering it down to make the British judgments enforceable. Courts, however, cannot constitutionally lower the requirements of due process out of "respect" for other countries.

As two scholars recently stated in a coauthored article regarding the constitutional review and international conflict of laws, "a court adjudicating a claim lacks the institutional authority simply to derogate its governing constitution when treating questions of

505. *See supra* note 184 and accompanying text.

506. Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 480 (7th Cir. 2000).

private law."[507] This is because "the Constitution expresses the fundamental political, social and moral principles of the United States."[508] Enforcing foreign judgments that conflict with the Constitution would go against the fundamental principles of the forum court.[509] After all, how can we justify having a system in which the domestic constitution is supreme over all non-constitutional domestic laws and norms, "but is suddenly shorn of its effectiveness when confronted by non-constitutional foreign laws?"[510]

CONCLUSION

As courts continue to face unprecedented globalization, they must be vigilant in upholding their responsibilities to domestic law. They must safeguard the most fundamental principles that formed the foundation of the U.S. government, which include the separation of powers and the protection of the individual rights embodied in the Constitution. Any conception of due process that requires courts to engage in foreign policymaking fails at these most fundamental levels. Thus, when faced with a due process challenge to a judgment from the court of another country, U.S. courts should consider not the entire judicial system, but the particular proceedings that produced the judgment. Perhaps judges will then find justice in what they thought were some of the most unlikely places, and injustice where they least expected it.

507. Ben-Ezer & Bendor, *supra* note 499, at 2132.
508. *Id.* at 2133.
509. *Id.*
510. *Id.*