JUDICIAL PAROCHIALISM AND COSMOPOLITANISM: FOREIGN JUDGMENTS IN U.S. COURTS

Samuel P. Baumgartner[*] *& Christopher A. Whytock*[**]

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ABSTRACT

Under U.S. law, there is a general rule favoring recognition and enforcement of foreign country judgments, an approach animated by concerns about excessive judicial parochialism. Recently, however, business-oriented interest groups, along with a number of lawyers and scholars, have argued that U.S. courts are too willing to enforce foreign court judgments—that they are, in effect, too cosmopolitan—and that this approach harms businesses. They have therefore proposed legal changes to make the approach to foreign judgments more restrictive. Others argue that these concerns may be overblown, driven by a few high profile cases, and that the need for change has not been demonstrated.

The problem is that this debate has unfolded in the absence of systematic empirical evidence of actual judicial practice. We therefore created an analyzed a dataset of 380 foreign judgment recognition and enforcement decisions by U.S. state and federal courts. Our results suggest that U.S. courts are moderately cosmopolitan in their foreign judgment decisionmaking. On the one hand, we find that U.S. courts recognize and enforce foreign country judgments more often than not; that recognition and enforcement rates may be lower in state courts than in federal courts, but only slightly; and that U.S. courts are not less likely to recognize and enforce foreign country judgments when the party seeking recognition and enforcement is a foreign party rather than a U.S. party. On the other hand, we find that U.S. courts are more likely to recognize and enforce foreign judgments from more familiar countries than less familiar countries, and less likely to recognize and enforce in family law matters, which tend to have a higher level of cultural salience.

[*] Professor of Law, University of Zurich Law School.

[**] Professor of Law and Political Science, University of California, Irvine School of Law. For comments on earlier drafts, the authors thank []. For research assistance, the authors thank [].

Our findings also suggest that U.S. courts are not excessively cosmopolitan—they discriminate against foreign judgments from countries with low levels of rule of law or poor control over corruption—and that businesses may actually disproportionately benefit from the current approach to foreign judgments. In short, the evidence suggests the U.S. courts do a decent job with foreign judgment decisionmaking, and we uncover no evidence that clearly suggests that law reform is needed.

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INTRODUCTION

Do U.S. courts behave parochially? Do they, as some argue, unduly favor U.S. parties over foreign parties, U.S. courts over foreign and international courts, or U.S. law over foreign and international law?[1] Or, as other charge, are U.S. courts instead too cosmopolitan? Do they give too much weight to the interests of foreign parties and foreign nations or undue consideration to foreign and international law?[2]

This debate is both normative (how parochial or cosmopolitan should courts be?) and empirical (how parochial or cosmopolitan are courts in practice?).[3] It crosses multiple fields of law and practice, including civil procedure,[4] conflict of laws,[5] international law,[6] foreign relations law[7] and constitutional law.[8] And the debate is particularly salient in an era when the U.S. Supreme Court has been reshaping the law in ways that are likely to profoundly affect how—and how much—the United States will play a role in transnational dispute resolution and in transnational judicial governance in general, and the extent to which the United States will cede global influence to other nations.[9]

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[1] See, e.g., Kimberly A. Moore, Xenophobia in American Courts, 97 Nw. U. L. Rev. 1497, 1520 (2003) ("Our empirical results . . . substantiate the existence of xenophobic bias in the American courts with American juries in patent suits."); see also Utpal Bhattacharya, Neal Galpin & Bruce Haslem, The Home Court Advantage in International Corporate Litigation, 50 J. L. & Econ. 625, 629 (2007) ("Our article supports the conclusion of [Kimberly A.] Moore (2003): foreign firms are disadvantaged in U.S. courts."). But see Kevin M. Clermont & Theodore Eisenberg, Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11, 4 J. Empirical L. Stud. 441, 464 (2007) (finding that foreigners have higher win-rates than domestic parties, and concluding that "the data offer no support for the existence of xenophobic bias in U.S. courts"). [need to add foreign law cites]

[2] See [].

[3] See generally Maggie Gardner, Parochial Procedure, 69 Stan. L. Rev. XXX (2017); Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. Rev. 719 (2009) (empirically analyzing and discussing policy implications of potential bias in international choice-of-law decisionmaking).

[4] See, e.g., [].

[5] See, e.g., [].

[6] See, e.g., [].

[7] See, e.g., [].

[8] See, e.g., [].

[9] See generally Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081 (2015); Christopher A. Whytock, The Evolving Forum Shopping System, 96 Cornell L. Rev. 481 (2011); Marcus S. Quintanilla & Christopher A. Whytock, The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law, 18 Sw. J. International Law 31 (2011).

One area of law where the debate over judicial parochialism and cosmopolitanism has been intensifying is the law governing the recognition and enforcement of foreign court judgments.[10] Foreign judgment problems may arise if a plaintiff obtains a court judgment in a foreign jurisdiction (thus becoming a "judgment creditor"), and the defendant (now a "judgment debtor") lacks assets there. In that case, the plaintiff will be unable to collect the judgment unless she obtains an enforcement order from a court in a jurisdiction where the defendant does have assets.[11] If that jurisdiction is the United States, the judgment creditor's ability to satisfy the judgment will depend on whether a U.S. court orders enforcement.[12] Foreign judgment problems may also arise if the non-prevailing party in foreign proceedings—whether a plaintiff or defendant—attempts to re-litigate the same claim or issue in a U.S. court in search of a more favorable outcome. The prevailing party can only prevent this if the U.S. court recognizes the foreign judgment.[13]

In general, U.S. law governing foreign court judgments is based on a general rule favoring recognition and enforcement, and several mandatory and discretionary grounds for refusing recognition or enforcement.[14] At the origins of this standard approach is a concern about excessive parochialism in U.S. courts based on an understanding that an unwillingness to recognize and enforce foreign judgments would undermine the values of comity, efficiency, and access to justice.[15]

Recently, however, business-oriented interest groups, along with a number of lawyers and scholars, have argued that U.S. courts have gone too far in the other direction, that they are too willing to enforce foreign court judgments, even when the judgments are against U.S. corporations.[16] Specifically, they argue that plaintiffs' lawyers routinely engage in so-called "tort tourism"—that they file lawsuits in foreign countries that lack rule of law or are corrupt, obtain large anti-business judgments there, and then enforce them in U.S. courts.[17] They argue on that basis that legal changes are needed to add new grounds for courts to refuse recognition and enforcement.[18]

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[10] See generally [].
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[12]
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[15] See [].
[16] See [].
[17] See [].
[18] See [].

The stakes of this debate are high. Excessive restrictions on foreign judgment recognition and enforcement risk undermining the goals of comity (by implying disrespect for the legal systems of other countries), efficiency (by requiring re-litigation of claims or issues in U.S. courts that already were litigated in foreign courts) and access to justice (by denying an effective remedy to the prevailing party in the foreign court).[19] But without sufficient safeguards, there is a risk that a U.S. court may recognize or enforce against a party a foreign court judgment that is a result of corruption or violations of due process.[20]

The problem is that this debate has so far unfolded in the absence of systematic empirical evidence of actual judicial. In this paper, we aim to enhance the debate by providing such evidence. By doing so, we also hope to shed empirical light on broader debates about parochialism and cosmopolitanism in U.S. courts.

To undertake this task, we created a dataset of 380 foreign judgment recognition and enforcement decisions by U.S. state and federal courts. Based on our analysis of this data, we find that U.S. courts are moderately but not excessively cosmopolitan. On the one hand, we find that U.S. courts recognize and enforce foreign country judgments more often than not; that recognition and enforcement rates may be lower in state courts than in federal courts, but only slightly; and that U.S. courts are not less likely to recognize and enforce foreign country judgments when the party seeking recognition and enforcement is a foreign party than when it is a U.S. party. On the other hand, we find that U.S. courts are more likely to recognize and enforce foreign judgments from more familiar countries than less familiar countries, and less likely to recognize and enforce in family law matters, which have a higher level of cultural salience on average.

Contrary to the "tort tourism" claim, we find that few judgments in our dataset are from courts in countries that lack rule of law or have poor control over corruption and that when such judgments are brought to the United States, U.S. courts have a strong tendency to refuse their enforcement. Our evidence also suggests that businesses may actually benefit disproportionately from foreign judgment decisionmaking in U.S. courts. In short, the evidence suggests U.S. courts do a decent job making foreign judgment decisions—and we uncover no evidence that clearly suggests a need for changes to the law governing foreign judgments.

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The paper proceeds as follows. In Part I, we explain the current debate over judicial parochialism and cosmopolitanism in foreign judgment recognition and enforcement. In Part II, we present our empirical strategy for assessing these competing claims. In Part III, we present and discuss our findings. In the conclusion, we lay out the broader implications of our analysis for the recognition and enforcement of foreign judgments and for judicial decisionmaking in transnational litigation more generally.

I. THE FOREIGN JUDGMENTS DEBATE

To introduce the foreign judgments debate, this Part first explains how foreign judgment issues arise. It next presents the leading arguments against parochialism in foreign judgment decisionmaking and provides an overview of the standard approach to the law governing foreign judgments that these arguments inspired. Finally, this Part presents the opposing position that the standard approach is too cosmopolitan—that is, too open to the recognition and enforcement of foreign judgments—and that a more restrictive approach is needed.

A. How Foreign Judgment Issues Arise

Foreign judgment issues typically arise in one of two situations: recognition and enforcement.[21] First, Party 1 (who may be either a plaintiff or a defendant), if dissatisfied with a decision of a Country A court favoring Party 2, may attempt to re-litigate the same issue or claim in a Country B court, hoping for a better outcome. Party 2, who benefits from the Country A court's decision, may argue that principles of issue or claim preclusion should bar Party 1 from getting "a second bite at the apple" in Country B. For that argument to succeed, however, the Country B court must first recognize the Country A decision. In this situation, the issue is whether the Country B court will recognize (for issue or claim preclusion purposes) the Country A court's judgment (which is, from the perspective of Country B, a foreign judgment).

[21] See Restatement (Third) Foreign Relations Law § 481 cmt. b (1987) ("The judgment of a foreign state may not be enforced unless it is entitled to recognition. Whether a foreign judgment should be recognized, may be in issue, however, not only in enforcement…, but in other contexts, for example where the defendant seeks to rely on a prior adjudication of a controversy (res judicata), or where either side in a litigation seeks to rely on prior determination of an issue of fact or law.").

Second, a plaintiff may sue a defendant in a Country A court and the Country A court may enter a final judgment in the plaintiff's favor. But the defendant (now a judgment debtor) will not necessarily voluntarily comply with the judgment. In that case, the plaintiff (now a judgment creditor) may ask the Country A court to order enforcement. But if the judgment debtor is no longer present in Country A or lacks assets there, enforcement in Country A may be impossible. The judgment creditor may then ask a court in a country where the defendant is present or does have assets—say, Country B—to enforce the Country A judgment. The issue becomes whether the Country B court will enforce the Country A court's judgment (which is, from the perspective of Country B, a foreign judgment).[22]

B. Challenging Parochialism: The Argument for Recognition and Enforcement

How should these foreign judgment issues be resolved? One possibility is a parochial one: give no deference to the judgments of other countries' courts. The early approach in the United States had a heavy dose of such parochialism: "a foreign judgment could be received in later litigation in a new forum, but it was there to be treated only as prima facie evidence of the matters earlier adjudged" and the new forum "was not precluded from a complete re-examination of the merits of the underlying cause of action."[23] The U.S. approach thereafter evolved, with a "general direction of change…toward giving foreign adjudication a more conclusive effect."[24] But why should a court ever recognize or enforce foreign judgments? What are the policies underlying a more cosmopolitan approach to foreign judgments? The rationales include comity; efficiency and finality, as reflected in the principles of res judicata; and access to justice.

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[22] Of course, foreign judgment issues arise in courts around the world, not only in U.S. courts. See, e.g., Samuel P. Baumgartner, []. In this paper, however, we focus on foreign judgment issues in U.S. state and federal courts. We will ordinarily refer to recognition *and* enforcement. However, recognition does not necessarily entail enforcement if only preclusive effect is sought for the foreign judgment. For its part, enforcement may, in theory, entail recognition—after all, if a foreign judgment must be recognized to give it preclusive effect, it should also be recognized before enforcing it. But in practice, U.S. courts tend not to separately analyze whether to recognize separately from analyzing whether to enforce because, under U.S. law, the substantive legal requirements for enforcement are generally the same as for enforcement.

[23] Courtland H. Peterson, Res Judicata and Foreign Country Judgments, 24 Ohio St. L.J. 291, 291 (1963).

[24] Courtland H. Peterson, Res Judicata and Foreign Country Judgments, 24 Ohio St. L.J. 291, 291 (1963).

1. Comity

One rationale for recognition and enforcement of foreign judgments is comity, which is the deference that one country give's to the legal acts of another country that are within the latter's jurisdiction.[25] According to this rationale, the authority that a country has under international law to adjudicate suits within its jurisdiction means that resulting judgments should be recognized and given effect elsewhere, even if there is no obligation under international law to do so.[26] Comity was the rationale for the U.S. Supreme Court's approach to foreign judgments in *Hilton v. Guyot*, and it defined the concept as follows: "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[27]

Comity advances the practical aim of fostering a coherent transnational legal order.[28] Although problems and disputes routinely cross borders, the jurisdiction of national legal systems remains primarily defined territorially. The law of jurisdiction helps allocate among countries the authority to adjudicate transnational disputes, but such an adjudication by any country would often be fruitless if not recognized by other countries. Thus, as von Mehren and Trautman argue, an approach favoring recognition and enforcement furthers the "interest in fostering stability and unity in an

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[25] [Dodge]

[26] See Joseph Story, Commentaries on the Conflict of Laws § 585, at 809 (8th ed. 1883) (discussing Vattel's argument that under international law "it is the province of every sovereignty to administer justice in its own territory and under its own jurisdiction"; that "[o]ther nations ought to respect this right"; that "[t]o undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign who has passed it"; and that "in consequence of this right of jurisdiction" there should be a "general rule that…the decision made by the judge of the place within the extent of his authority ought to be respected, and to take effect, even in foreign countries"). Some theorists went further than comity, arguing that there is an international legal obligation to enforce foreign judgments. See Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 Am. J. Comp. L. 1, 9-10 (1988) ("Several seventeenth century cases espoused the view that the law of nations required courts of different countries to aid one another in the administration of justice.").

[27] Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

[28] [Halliday & Shaffer; Whytock PIL TLO]

international order in which many aspects of life are not confined to any single jurisdiction."[29]

2. Res Judicata: Efficiency and Repose

The policies underlying the principle of res judicata provide further support for a general rule favoring recognition and enforcement.[30] These policies include efficiency and repose. It is inefficient to duplicate in one country the litigation of an issue or claim already litigated in another.[31] Efficiency is closely related to the principle of repose, which emphasizes "the need to put to rest quarrels and disputes that have arisen so that the energies of individuals and the resources of society can be devoted to more constructive tasks."[32] By reducing the likelihood and extent of re-litigation in U.S. courts of issues and claims already decided in foreign courts, a presumption in favor of recognition and enforcement promotes efficiency and repose.

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[29] Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1604 (1968).

[30] See Baldwin v. Iowa State Travelling Men's Ass'n, 283 U.S. 522, 525 (1931) (stating that the policy underlying res judicata "dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the context, and that matters once tried shall be considered forever settled as between the parties"). As Reese argues, "[T]he policy behind res judicata certainly applies to all judgments, whether local or foreign." Willis L. M. Reese, The Status in this Country of Judgments Rendered Abroad, 50 Colum L. Rev. 783, 784 (1950).

[31] See Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 Am. J. Comp. L. 1, 4 (1988) ("To retry cases that have been authoritatively decided violates fundamental tenets of judicial economy….Such duplication is…wasteful…and exacts a toll from international commerce."); Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1603 (1968) (arguing that one policy favoring recognition and enforcement of foreign judgments is "a desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated").

[32] Arthur T. Von Mehren, 'Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements,' 167 Recueil des Cours, at 20-22 (1981). See also Hans Smit, International Res Judicata and Collateral Estoppel in the United States, 9 UCLA L. Rev. 44, 56 (1962) (noting policy that "there must be an end to litigation and that nobody should be allowed to vex his opponent twice"); Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1603-04 (1968) (noting "concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent").

3. Access to Justice

As one of us has argued elsewhere, comity, efficiency and repose can be understood as among the "governance values" that underlie the law of foreign judgments and conflict of laws more generally.[33] But there are also "rights values" that favor the recognition and enforcement of foreign judgments,[34] one of which is access to justice.[35] Access to justice requires not only court access, but also a remedy when a person is legally entitled to one.[36] A plaintiff may be able to obtain court access in Country A to pursue a claim against a defendant. But if the Country A court issues a judgment in the plaintiff's favor, the defendant refuses to satisfy the judgment and only has assets in Country B, and Country B refuses to enforce the judgment, then the plaintiff may lack a remedy altogether and thus be denied meaningful access to justice. Moreover, in some cases a plaintiff—for either legal or practical reasons—may lack access to the Country B court where the prospective judgment debtor has assets. If Country B both fails to provide court access and refuses to enforce a Country A judgment, the result may be a transnational access-to-justice gap.[37] When Country B enforces a Country A judgment, Country B helps complete the plaintiff's access to justice rights by providing a legal remedy.[38] As von Mehren and Trautman put it, "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial

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[33] Christopher Whytock, Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments, 7 Erasmus L. Rev. 113, 120 (2014).

[34] Christopher Whytock, Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments, 7 Erasmus L. Rev. 113, 120 (2014).

[35] Christopher A. Whytock, Enforcement of Foreign Judgments: Governance, Rights, and the Market for Dispute Resolution Services, in The Transformation of Enforcement: European Economic Law in Global Perspective 47, 52 (Hans-W. Mickitz & Andrea Wechsler eds.) (2016).

[36] See Christopher A. Whytock, Foreign State Immunity and the Right to Court Access, 93 Boston U. L. Rev. 2033, [] (2013) (); Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 Colum. L. Rev. 1444, 1472 (2011) ().

[37] See Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 Colum. L. Rev. 1444, 1472 (2011) ().

[38] See Xandra E. Kramer, Cross-Border Enforcement and the Brussels I-Bis Reg: Towards a New Balance Between Mutual Trust and National Control Over Fundamental Rights, 60 Netherlands Int'l L. Rev. 343, 367 (2013) ("The abolition of exequatur has … been justified by the desire to enhance access to justice and the right to an effective remedy, as guaranteed by Art 47 of the EU Charter and Arts 6 and 13 of the ECHR. … From the perspective of the judgment creditor, the interests are evidently to enforce his rights as a result of a judgment in an efficient way.").

interests, injustice would result and the normal patterns of life would be disrupted."[39] Indeed, an excessively parochial approach to foreign judgments could render some defendants essentially judgment proof.[40]

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Friedrich Juenger nicely summarizes the case against a parochial approach to foreign judgments: "The consequences of a narrow-minded attitude toward recognition are deplorable. To retry cases that have been authoritatively decided violates fundamental tenets of judicial economy. Moreover, it is presumptuous for the courts of one country to review the judgments of another….Such duplication is not only wasteful; it punishes private litigants and exacts a toll from international commerce."[41] As Andreas Lowenfeld puts it, a more cosmopolitan approach, in contrast, helps "to establish the security of contracts, promote commercial dealings, and generally further the rule of law among states that are interdependent as well as independent."[42]

C. The Law Governing Foreign Judgment Issues: The Standard Approach

These and other concerns about excessive parochialism underlie the standard approach to foreign judgment issues in the United States. This approach takes the form of a general rule favoring recognition and enforcement, subject to a limited number of enumerated grounds for refusing recognition and enforcement, with those enumerated grounds generally understood as being exclusive.[43] An early version of this approach is expressed in the U.S. Supreme Court's 1895 opinion in *Hilton v. Guyot*:

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[39] Arthur T. von Mehren & Donald T. Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L. Rev. 1601, 1603 (1968).

[40] See Michael Traynor, The Corruption Defense to the Recognition of a Foreign Judgment: A Cautionary Note, 34 U. Pa. J. Int'l L. 755, 761 (2013) (expressing concern that with a proposed new ground for refusing recognition and enforcement could "effectively make the defendant judgment proof in the United States").

[41] Friedrich K. Juenger, The Recognition of Money Judgments in Civil and Commercial Matters, 36 Am. J. Comp. L. 1, 4 (1988).

[42] Andreas F. Lowenfeld, International Litigation and the Quest for Reasonableness: General Court on Private International Law, 245 Recueil des Cours, at 109 (1994).

[43] See Restatement of the Law (Fourth), The Foreign Relations Law of the United States § 404 cmt. l (Tentative Draft No. 1 2014) ("The defenses listed in this Section as grounds for not recognizing a foreign judgment, along with the mandatory grounds covered by §§ 403 and 409 (dealing with penal and tax judgments), are the only permissible bases for a decision not to recognize a foreign judgment. Courts do not have general discretion under State law to withhold recognition.").

> [W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, 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.[44]

Hilton v. Guyot continues to be cited by both state and federal courts.[45] But today the law governing foreign judgment issues is primarily state law, which federal courts sitting in diversity are required to apply.[46] Two uniform acts have had a particularly strong influence.[47] Most states—31 states plus the District of Columbia and the U.S. Virgin Islands—initially adopted legislation based on Uniform Foreign Money-Judgments Recognition Act, drafted by the National Conference of Commissioners on

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[44] Hilton v. Guyot, 159 U.S. 113, 202-203 (1895). *See also id.* at 205-206 ("When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.").

[45] We found citations to Hilton v. Guyot in 92 (24.8%) of the opinions in our sample, including in 26 (13.7%) of state court opinions and 66 (36.5%) of federal court opinions.

[46] See Restatement of the Law (Fourth), The Foreign Relations Law of the United States § 403 cmt. h (Tentative Draft No. 1 2014) ("The SPEECH Act, 28 U.S.C. §§ 4101-4105, bars the enforcement of foreign defamation judgments rendered in jurisdictions that provide less protection to freedom of speech and press than does the United States, unless the person opposing recognition of the foreign judgment would have been found liable under the standards applicable to U.S. suits. The Act does not apply to judgments not based on defamation, but defines defamation broadly to include any legal proceeding that seeks compensation for injury caused by speech.").

[47] In addition to the uniform acts, courts occasionally refer to the Restatement of the Law (Third), The Foreign Relations Law of the United States, and the Restatement of the Law (Second), Conflict of Laws. For example, we found citations to the Restatement (Third) of Foreign Relations Law in 45 (12.2%) of the opinions in our sample and to the Restatement (Second) of Conflict of Laws in 30 (8.1%) of the opinions in our sample.

Uniform State Laws and approved by it in 1962 (1962 Act).[48] Section 3 of the 1962 Act states a general rule favoring recognition and enforcement, providing that "[e]xcept as provided in section 4, a foreign judgment…is conclusive between the parties to the extent that it grants or denies recovery of a sum of money." Section 4 then enumerates a series of mandatory and discretionary grounds for refusing recognition and enforcement:

> (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.
>
> (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] 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.[49]

Section 4(a)(1)'s mandatory ground for refusal is a systemic, not case-specific, due process ground.[50] In other words, it gives the court the

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[48] See Uniform Law Commission, Legislative Fact Sheet—Foreign Money Judgments Recognition Act (http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign%20Money%20Judgments%20Recognition%20Act) (listing Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, Washington).

[49] 1962 Act § 4. The Restatement (Third) of Foreign Relations roughly follows the 1962 Act's approach. See Restatement (Third) of the Foreign Relations Law of the United States §§ 481-482 (1987) (general rule that U.S. courts recognize and enforce foreign judgments, subject to specified exceptions).

[50] The focus of inquiry when determining whether this ground for refusal applies is not whether the foreign legal system is different from the U.S. legal system, but rather on the foreign legal system's basic fairness. See 2005 Act § 4 note 5 (explaining its analogous ground for refusal as follows: "The focus of inquiry is not whether the procedure in the rendering country is similar to U.S. procedure, but rather on the basic fairness of the

discretion to refuse enforcement if the foreign legal *system* "does not provide impartial tribunals or procedures compatible with the requirements of due process of law," not if there was a lack of impartiality or due process in the *specific proceedings* leading to the foreign judgment at issue.[51] This approach is logically sound. If a foreign legal system does "provide impartial tribunals [and] procedures compatible with the requirements of due process of law," then case-specific failures of impartiality or due process should be rare and, when they occur,[52] the foreign legal system itself should be able to correct them on rehearing or appeal.[53] By not

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foreign-country procedure."); Society of Lloyd's v. Ashenden, 233 F.3d 473, 476-77 (7th Cir. 2000) ("[W]e cannot believe that the Illinois statute [based on the 1962 Act] is intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts regarding, for example, the circumstances under which due process requires an opportunity for a hearing in advance of the deprivation of a substantive right rather than afterwards. It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law; and so we interpret 'due process' in the Illinois statute (which, remember, is a uniform act, not one intended to reflect the idiosyncratic jurisprudence of a particular state) to refer to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers. The statute requires only that the foreign procedure be 'compatible with the requirements of due process of law,' and we have interpreted this to mean that the foreign procedures are 'fundamentally fair" and do not offend against "basic fairness.'") (citations omitted); Restatement (Third) of the Foreign Relations Law of the United States § 482 cmt. b ("Evidence that the judiciary was dominated by the political branches of government or by an opposing litigant, or that a party was unable to obtain counsel, to secure documents or attendance of witnesses, or to have access to appeal or review, would support a conclusion that the legal system was one whose judgments are not entitled to recognition.").

[51] See Society of Lloyd's v. Ashenden, 233 F.3d 473, 477-78 (7th Cir. 2000) ("Rather than trying to impugn the English legal system en gross, the defendants argue that the Illinois statute [based on the 1962 Act] requires us to determine whether the particular judgments that they are challenging were issued in proceedings that conform to the requirements of due process of law as it has come to be understood in the case law of Illinois and other American jurisdictions. The statute, with its reference to 'system,' does not support such a retail approach….") (citations omitted).

[52] As the Restatement of the Law (Fourth), The Foreign Relations Law of the United States notes, "Even when a foreign legal system functions adequately, particular judicial proceedings may represent a serious miscarriage of justice." Restatement of the Law (Fourth), The Foreign Relations Law of the United States § 403 cmt. e (Tentative Draft No. 1 2014).

[53] See Christopher A. Whytock & Cassandra Burke Robertson, Forum Non Conveniens and the Enforcement of Foreign Judgments, 111 Colum. L. Rev. 1444, 1502 (2011) (arguing that "[i]f…the [foreign] judiciary is systemically adequate, then the case-specific inquiry should be unnecessary at the enforcement stage, because [the foreign judiciary] should be able to address case-specific inadequacies internally, through its own rehearing or appellate processes"). See also Theodore J. Folkman, Two Modes of Comity, 34 U. Penn. J. Int'l L. 823, 824 (2013) ("A simple and attractive answer…[is that if] the foreign judiciary as a whole is systemically adequate, then we should trust it to correct

allowing re-litigation of matters already litigated in a foreign legal system with impartial tribunals and due process, this approach also advances the interests of comity, efficiency, repose, and access to justice.[54] In short, there is no obvious reason why a party that has already had an opportunity to challenge the proceedings leading to an adverse judgment in one legal system that provides impartial tribunals and procedures compatible with the requirements of due process should be permitted to challenge the proceedings again in another legal system—especially since the legal system where the initial proceedings took place would seem much better positioned to assess the adequacy of those proceedings.[55]

D. Too Cosmopolitan? The Evolution of the Law Governing Foreign Judgment Issues

On the other hand, the U.S. Chamber of Commerce, lawyers associated with it, and some scholars have argued that the standard approach is too "liberal" and that new grounds for refusing recognition and enforcement are necessary.[56] They claim that plaintiffs' lawyers routinely engage in so-

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errors that occur in particular proceedings."); Michael Traynor, The Corruption Defense to the Recognition of a Foreign Judgment: A Cautionary Note, 34 U. Pa. J. Int'l L. 755, 760-61 (2013) (suggesting that courts will be skeptical about case-specific corruption as a ground for refusing recognition and enforcement "[i]f, as will often be the case, the defendant lost an appeal in the appellate courts of the foreign jurisdiction that rendered the judgment").

[54] See Society of Lloyd's v. Ashenden, 233 F.3d 473, 477-78 (7th Cir. 2000) ("The [1962 Act], with its reference to 'system,' does not support…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, thus converting every successful multinational suit for damages into two suits (actually three, as we'll see at the end of this opinion). But that is the implication of the defendants' argument. They claim to be free to object in the collection phase of the case to the procedures employed at the merits phase, even though they were free to challenge those procedures at that phase and indeed did so.") (citations omitted). See also American Law Institute, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006) (explaining that the Act does not adopt a case-specific due process exception because "[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement policy of this Act").

[55] For example, the legal system where the proceedings took place would ordinarily have more complete access to information about those proceedings and to the actors involved in those proceedings, than another legal system. In addition, language differences are less likely to pose difficulties in the legal system where the proceedings took place than in another legal system. Moreover, overcoming the information and language barriers entailed by review in one legal system of another legal system's court proceedings is not assured, and even when achieved, it is costly.

[56] See, e.g., William E. Thomson & Perlette Michèle Jura, Confronting the New Breed

called "tort tourism," which they say is "an explicit strategy to pursue tort lawsuits abroad in weak or corruptible foreign courts in order to secure large awards against defendant companies [and] then seek to collect those judgments" in countries like the United States that have "liberal rules favoring recognition of foreign judgments."[57] They claim that "many…foreign judgments emanating from politicized and corrupt environments"—so-called "abusive foreign judgments"—are brought to U.S. courts for recognition and enforcement.[58] For this reason, they argue, a more restrictive approach is needed, one that incorporates new case-specific grounds for refusing recognition and enforcement of foreign judgments.[59]

Obviously, the rights of parties against whom foreign judgments are issued should be among the central considerations animating the law of foreign judgments.[60] There does not appear, however, to be evidence that these rights are being left unprotected. Commentators calling for a more restrictive approach to foreign judgment enforcement point to "several high-profile cases" (Nicaraguan judgments against Dole Food Company and Dow Chemical Co., and an Ecuadorian judgment against Chevron Corporation).[61] But more than anecdotal evidence should be required before

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of Transnational Litigation: Abusive Foreign Judgments, U.S. Chamber Institute for Legal Reform, Oct. 2011, at [] (available at); John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at [] (available at).

[57] John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at 3 (available at). See also Gregory H. Shill, Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States, 54 Harv. Int'l. L. J. 459, 462 (2013) ("Plaintiffs now routinely litigate the merits phase of such disputes in foreign forums, where they benefit from newly favorable substantive law and sometimes from a politicized or corrupt judiciary, and then come to American courts to collect on their judgments, where they enjoy a tradition of hospitality to foreign judgments.").

[58] William E. Thomson & Perlette Michèle Jura, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments, U.S. Chamber Institute for Legal Reform, Oct. 2011, at 3 (available at).

[59] John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at 27 (available at).

[60] See Christopher Whytock, Faith and Scepticism in Private International Law: Trust, Governance, Politics, and Foreign Judgments, 7 Erasmus L. Rev. 113, 120 (2014) ("In the judgment enforcement context, rights values may account for both the interests of judgment debtors against the enforcement of judgments that are inconsistent with their substantive or procedural rights, and the interests of judgment creditors in the enforcement of judgments under which they have rights.").

[61] John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at 16

changing the law of foreign judgments in ways that may undermine the other policies that animate it, including comity, efficiency, repose and access to justice.[62] In any event, contrary to suggesting there is a problem with the U.S. law of foreign judgments, the cases given as examples suggest that the law works as it should: no U.S. court has recognized or enforced any of the judgments in these cases, and in the Chevron case, the plaintiffs have not even attempted to obtain recognition and enforcement in the United States, presumably because they are well aware that such an attempt would be unsuccessful.[63]

Moreover, as one of us has argued elsewhere, there is little evidence of actual "tort tourism"—in fact, the cited examples are cases where *the plaintiffs sued in U.S. courts*, and filed claims in foreign courts only after *defendants moved to dismiss the suit in favor of a foreign court* on forum non conveniens grounds (making these cases better examples of attempted "defense tourism" than tort tourism).[64] In addition, the existing legal hurdles to such a strategy are so numerous that defendants should be able to defeat it easily based on current law—and, in any event, it is far from clear that the "weak or corruptible foreign courts" supposedly pursued by so-called "tort tourists" are more likely to favor plaintiffs than large multinational corporations (indeed, the opposite would seem every bit as likely—in fact, even more likely in countries that depend heavily on, and wish to attract, foreign investment).[65]

Nevertheless, the law governing foreign judgment issues in the United States is already evolving in a more restrictive—and seemingly more parochial—direction. In 2005, the National Conference of Commissioners on Uniform State Laws approved the Uniform Foreign-Country Money Judgments Recognition Act (2005 Act), intended as replacement for the 1962 Act.[66] Already, 21 states plus the District of Columbia have adopted

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(available at).

[62] See Christopher A. Whytock, Some Cautionary Notes on the "Chevronization" of Transnational Litigation, 1 Stanford J. Complex Lit. 467, 485-86 (2013) (arguing that judges and policymakers should be cautious about drawing lessons from these cases).

[63] See Christopher A. Whytock, Some Cautionary Notes on the "Chevronization" of Transnational Litigation, 1 Stanford J. Complex Lit. 467, 481 (2013).

[64] Christopher A. Whytock, Is There Really Judgment Arbitrage, Harvard International Law Journal Online Symposium, Opinio Juris, Apr. 2, 2014 (available at http://opiniojuris.org/2014/04/02/hilj-online-symposium-really-judgment-arbitrage/).

[65] Christopher A. Whytock, Is There Really Judgment Arbitrage, Harvard International Law Journal Online Symposium, Opinio Juris, Apr. 2, 2014 (available at http://opiniojuris.org/2014/04/02/hilj-online-symposium-really-judgment-arbitrage/).

[66] See Uniform Law Commission, Why States Should Adopt UFCMJRA (http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%

legislation based on the 2005 Act (in many cases to replace prior legislation based on the 1962 Act).[67] Like the 1962 Act, the 2005 Act states a general rule in favor of recognition and enforcement,[68] then enumerates mandatory and discretionary grounds for refusal. But the 2005 Act adds two new discretionary case-specific grounds for refusal:[69]

> (7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
>
> (8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

The notes to the 2005 Act elaborate on the intent and rationale of the new discretionary exceptions:

> [Subsection 4(c)(7)] requires a showing of corruption in the particular case that had an impact on the judgment that was rendered. This provision may be contrasted with subsection 4(b)(1), which requires that the forum court refuse recognition to the foreign-country judgment if it was rendered under a judicial system that does not provide impartial tribunals. Like the comparable provision in subsection 4(a)(1) of the 1962 Act, subsection 4(b)(1) focuses on the judicial system of the foreign country as a whole, rather than on whether the particular judicial proceeding leading to the foreign-country judgment was impartial and fair. On the other hand, subsection 4(c)(7) allows the court to deny recognition to the foreign-country judgment if it finds a lack of impartiality and fairness of the tribunal in the individual proceeding leading to the foreign country judgment. Thus, the difference is that between showing, for example, that corruption and bribery is so prevalent throughout the judicial

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20UFCMJRA) (describing the revisions).

[67] See Uniform Law Commission, Legislative Fact Sheet—Foreign-Country Money Judgments Recognition Act (http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act) (listing Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Virginia, Washington). Plus introduced for possible adoption in four additional states (Massachusetts, New Jersey, North Dakota, Texas).

[68] See 2005 Act § 4(a)

[69] The Restatement of the Law (Forth), The Foreign Relations Law of the United States, follows the 2005 Act by including the two new case-specific grounds for refusal. See Restatement of the Law (Forth), The Foreign Relations Law of the United States § 404 (Tentative Draft No. 1 2014) ("To the extent provided by applicable law, a court in the United States need not recognize a judgment of a court of a foreign state if:…(g) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; [or] (h) the specific proceeding in the foreign court leading to the judgment was not compatible with fundamental principles of fairness….").

> system of the foreign country as to make that entire judicial system one that does not provide impartial tribunals versus showing that bribery of the judge in the proceeding that resulted in the particular foreign-country judgment under consideration had a sufficient impact on the ultimate judgment as to call it into question.[70]

> Subsection 4(c)(8)…allows the forum court to deny recognition to the foreign-country judgment if the court finds that the specific proceeding in the foreign court was not compatible with the requirements of fundamental fairness. Like subsection 4(c)(7), it can be contrasted with subsection 4(b)(1), which requires the forum court to deny recognition to the foreign-country judgment if the forum court finds that the entire judicial system in the foreign country where the foreign-country judgment was rendered does not provide procedures compatible with the requirements of fundamental fairness. While the focus of subsection 4(b)(1) is on the foreign country's judicial system as a whole, the focus of subsection 4(c)(8) is on the particular proceeding that resulted in the specific foreign-country judgment under consideration. Thus, the 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.

The basic rationale for the case-specific exceptions is, like the access-to-justice rationale for favoring recognition and enforcement, a rights value. Specifically, the concern is about protecting the rights of a judgment debtor or other person against whom a foreign judgment has issued. According to this theory, the mandatory systemic due process ground for refusal is insufficient because judges are reluctant to invoke it for fear of offending foreign countries,[71] and because even a systemically adequate legal system may, in particular cases, produce unfair judgments.[72]

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[70] 2005 Act § 4, note 11.

[71] See Restatement of the Law (Fourth), The Foreign Relations Law of the United States § 404 reporters' note 10 (Tentative Draft No. 1 2014) ("In practice, however, almost every court to consider the issue [of systemic adequacy] has assessed not only the soundness of the foreign legal system as a whole, but the quality of the particular proceeding in question.").

[72] See Restatement of the Law (Fourth), The Foreign Relations Law of the United States § 404 cmt. i (Tentative Draft No. 1 2014) ("Even though a foreign legal system may not suffer from systemic deficiencies, a particular proceeding may reflect the influence of improper pressure or inducements on the courts.") and § 404 cmt. j ("Foreign law also may impair particular proceedings without infecting the entire legal system.").

II. THE FOREIGN JUDGMENTS DATASET

The stakes are high in foreign judgments debate. On the one hand are values that tend to favor a robust presumption in favor of recognition and enforcement, including comity, the res judicata values of efficiency and repose, and access to justice for judgment creditors and other beneficiaries of foreign judgments. From this perspective, the standard approach is satisfactory, and more restrictive approaches would risk undermining these values. On the other hand are equally important values about fairness to judgment debtors and other parties against whom foreign judgments have been issued. A more restrictive approach to foreign judgments might be needed to protect those values if—as business-oriented interest groups and some scholars have claimed—plaintiffs' lawyers now routinely engage in "tort tourism,"[73] obtaining court judgments against businesses in countries that lack rule of law or are corrupt, and if U.S. courts under the standard approach then recognize and enforce them. The problem is that this debate has unfolded based almost solely on theory and anecdotes, and without the benefit of systematic empirical evidence about how U.S. courts actually decide foreign judgment issues. In this Part, we describe an original dataset of foreign judgment decisions in U.S. courts that we created as a step toward remedying this deficiency that we hope might improve the quality of the debate.

A. Search

We began by attempting to find all U.S. state and federal court opinions since 2000 that are available in Westlaw and mention a foreign judgment issue—that is, an issue whether to recognize or enforce a foreign judgment.[74] To that end, we searched two Westlaw databases: (1) the "All

[73] See, e.g., William E. Thomson & Perlette Michèle Jura, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments, U.S. Chamber Institute for Legal Reform, Oct. 2011, at [] (available at); John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at [] (available at).

[74] Because we conducted our search in 2013, we limited our results to opinions before 2013 by adding this Westlaw search language: "& DA(AFT 1999) & DA(BEF 2013)". We believe the results of our search would not have been significantly different if we had used Lexis. See Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 134 (2007) (finding that "Lexis and Westlaw were highly consistent in the cases they reported"). Ideally, we would have liked to draw our sample from PACER, which includes a more comprehensive set of unpublished decisions. However, this was not practicable for our study because PACER is not able to perform the full-text searches of opinions needed to identify foreign judgment issues.

State Cases (ALLSTATES)" database and (2) the "All Federal & State Cases (ALLCASES)" database.[75] These searches yielded 1,515 potentially relevant opinions in U.S. state courts and 1,171 potentially relevant opinions in the U.S. federal courts (for a total of 2,686 opinions).

B. Screening

We defined the search terms to be over-inclusive so as to minimize the number of opinions mentioning foreign judgment issues that our search would fail to identify. This means, however, that our results picked up many opinions that do not actually mention a foreign judgment issue. Therefore, we analyzed each potentially relevant opinion to identify those opinions, and dropped them from our dataset. The result of this screening process was a dataset containing 643 opinions mentioning foreign judgment issues.

Our analysis in this paper focuses on how U.S. courts decide foreign judgment issues. However, many of the 643 opinions mentioning foreign judgment issues do not include a foreign judgment decision—that is, an actual decision on the issue of whether to recognize or enforce the foreign judgment. We therefore performed a second screening process to distinguish those opinions from opinions that do include a foreign judgment decision. The result was 380 opinions with a foreign judgment decision.

C. Coding

Once we identified those opinions containing foreign judgment decisions, our basic strategy was to collect data for each opinion to test the observable implications of judicial parochialism and cosmopolitanism in foreign judgment decisionmaking.[76] That is, we asked ourselves: What would we expect to observe if U.S. courts, in their foreign judgment decisions, were parochial (or cosmopolitan)? We then created variables to indicate whether, for each opinion, our actual observations are (or are not) consistent with those expectations. This method allows us to draw

[75] We used the following search query: (228K830 ((RECOGNI! ENFORC! DOMESTICAT! CONVERS!) /7 FOREIGN /7 (JUDGMENT ORDER DECREE INUNCTION DECISION)) (HILTON /5 GUYOT) (REST! /10 CONFLICT /10 (SEC! +5 98)) (REST! /10 "FOREIGN RELATIONS" /10 (SEC! +5 (481 482))))

[76] See Gary King, Robert O. Keohane & Sidney Verba, Designing Social Inquiry: Scientific Inference in Qualitative Research 28-29 (1994) (emphasizing importance of collecting data based on observable implications of a theory). Our analysis in this paper is focused on outcomes. We do not attempt to make causal claims in this paper. In a related paper, we plan to use multivariate statistical analysis to probe the plausibility of hypotheses about the determinants of foreign judgment issue decisionmaking.

inferences about the extent of parochialism and cosmopolitanism in foreign judgment decisionmaking. Details about how we coded these variables are presented below. Descriptive statistics are presented in the Appendix.

D. The Concept of Parochialism

To help us derive observable implications, we distinguish different types of parochialism. First, parochialism may be attitudinal or decisional. Attitudinal parochialism is a preference for the local and more familiar and an aversion to the foreign and less familiar (whereas attitudinal cosmopolitanism is openness to, interest in, and ease with the foreign and unfamiliar).[77] Decisional parochialism is a quality of decisions: parochial decisions disproportionately favor the local and more familiar over the foreign and unfamiliar (whereas cosmopolitan decisions do not). Attitudinal parochialism and decisional parochialism may, of course, be related. Other things being equal, one might expect a decisionmaker with parochial attitudes to make more parochial decisions on average than cosmopolitan judges. Because the foreign judgments debate is about the outcomes of foreign judgment decisionmaking, this paper focuses on decisional parochialism.

As applied to judicial decisionmaking, there are at least two dimensions of parochialism: an institutional dimension and a party dimension. The institutional dimension relates to laws and to legal institutions, such as courts (and the decisions made by them). Judicial parochialism on this dimension is a preference for local over foreign laws and courts, or for laws and courts of more familiar foreign countries over those of less familiar countries. Other things being equal, a judge with parochial attitudes may be more likely than a cosmopolitan judge to apply forum over foreign law, to refuse to consider foreign law and foreign legal experience when making decisions, to favor the jurisdiction of domestic courts over foreign courts, or to decline to recognize or enforce a judgment issued by a foreign court.

The party dimension relates to the parties to a lawsuit. Judicial parochialism on this dimension is a preference for local over foreign parties, or for parties from more familiar foreign countries over parties from less familiar countries. Other things being equal, a judge with parochial attitudes

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[77] See Oxford Dictionaries, "Parochialism") (defining "parochialism" as "[a] limited or narrow outlook, especially focused on a local area; narrow-mindedness") (https://en.oxforddictionaries.com/definition/parochialism); id., "Cosmopolitan" (defining cosmopolitan as "[f]amiliar with and at ease in many different countries and cultures") (https://en.oxforddictionaries.com/definition/us/cosmopolitan).

may be more likely than a cosmopolitan judge to make decisions that favor these preferred parties over other parties. We attempt to derive observable implications of parochialism along both the institutional dimension and the party dimension.

E. Limitations

Before presenting our results, we want to alert readers to several limitations of our analysis. First, we searched for U.S. court opinions in Westlaw. The advantage of Westlaw is that it allows the full-text searches that we relied upon to identify relevant opinions. However, Westlaw does not include all U.S. court opinions (although it does includes all opinions published in the standard reporters as well as many so-called "unpublished" opinions).[78] It is possible that the opinions in our dataset are not representative of opinions not available in Westlaw. Fortunately—as we discuss in more detail below—we are able to take advantage of the fact that Westlaw includes both opinions published in reporters as well as many unpublished opinions to make inferences about the direction and extent of differences between opinions in our dataset and opinions not available in Westlaw at all. In any event, although foreign judgment decisions not available in Westlaw are of course important to the parties affected by those decisions, we believe that decisions that are available in Westlaw are especially worthy of study. Because those decisions are publicly available, they are more likely to influence the strategic behavior of litigants and other transnational actors, and also more likely to shape common law, than decisions not available in Westlaw at all.[79]

Second, our search terms might not have captured all opinions in Westlaw containing foreign judgment issues.[80] Therefore, we cannot guarantee that our dataset is perfectly comprehensive. However, given our use of very broad search terms and a subsequent screening process, we are confident that our dataset is not significantly under-inclusive of the foreign judgments decisions available in Westlaw. In addition, we are aware of no

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[78] See Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, [] (2007) ().

[79] Christopher A. Whytock, Domestic Courts and Global Governance, 84 Tul. L. Rev. 67, 119 (2009) ("[b]eyond the litigants in particular lawsuits, transnational actors are unlikely to have knowledge of unpublished decisions. For domestic court decisions to affect the strategic behavior of transnational actors, those actors must have knowledge of those decisions. Therefore, the published decisions of domestic courts are likely to have broader global governance implications than those that are unpublished.").

[80] [ADD RESULTS OF RE-CODING OF RANDOM SAMPLE TO PROVIDE ESTIMATE OF OVER/UNDER-SAMPLING]

reason why our search terms would be correlated with foreign judgment recognition and enforcement rates or with variables influencing foreign judgment recognition and enforcement—and for that reason, we do not believe that our search strategy introduced systematic bias into our dataset.

Third, we do not attempt to make any causal claims in this paper about the determinants of foreign judgment decisionmaking. Our goal instead is to assess decisionmaking outcomes in different settings and to empirically test the observable implications of judicial parochialism and cosmopolitanism in foreign judgment decisionmaking.

III. PAROCHIALISM AND COSMOPOLITANISM IN FOREIGN JUDGMENT DECISIONMAKING

This Part presents our findings as they relate to the institutional and party dimensions of judicial parochialism. It also presents findings that we believe shed light on the claim that there is excessive cosmopolitanism in foreign judgment decisionmaking in U.S. courts.

A. The Institutional Dimension

1. Overall Recognition and Enforcement Rates

One observable implication of judicial parochialism on the institutional dimension would be that U.S. courts do not tend to recognize and enforce foreign judgments. To test this implication, we created the variable *Decision* and for every opinion in our dataset we coded it as "No" (0) if the court did not recognize or enforce the foreign judgment and "Yes" (1) if the court did recognize or enforce the foreign judgment.

TABLE 1
OVERALL FOREIGN JUDGMENT RECOGNITION AND ENFORCEMENT RATES

Decision	*Frequency*	*Percentage*
No	158	41.6% [37.5, 45.8]
Yes	222	58.4% [54.2, 62.5]
Total	380	100.0
Notes: This table presents the overall foreign judgment recognition and enforcement rate in our sample. The 90% confidence intervals for the percentage estimates are in [brackets].		

The result (Table 1) is not consistent with this implication. To the contrary, U.S. courts faced with foreign judgments recognize or enforce them more often than not—at an estimated rate of 58.4% [54.2, 62.5]. The overall recognition and enforcement rate is at best a rough measure of how U.S. courts approach foreign judgments. But this result, at least taken alone, suggests neither undue parochialism nor excessive cosmopolitanism in foreign judgment decisions.

2. Published and Unpublished Opinions

If U.S. courts are parochial, then their routine and ordinary decisions would be decisions not to recognize or enforce, and their exceptional decisions would be decisions to recognize or enforce foreign judgments. One way to roughly distinguish routine from exceptional decisions is to determine whether they are published in a reporter. This is because some (but not most) court opinions are published in a reporter—such as the *Federal Reporter* for U.S. circuit court opinions, the *Federal Supplement* for U.S. district court opinions, and regional reporters (such as the *Pacific Reporter* or *Atlantic Reporter*) for state court opinions;[81] and because it is widely understood that "unpublished" court opinions (i.e., those not published in a reporter) contain more routine or ordinary decisions than those that are published in a reporter.[82]

Thus, an observable implication of judicial parochialism would be that the recognition and enforcement rate in opinions not published in a reporter should be lower in unpublished opinions than in opinions published in a reporter. To test this observable implication, we created the variable *Opinion Published in Reporter* and for every opinion in our dataset we coded it as "No" (0) if the opinion was not published in a reporter and "Yes" (1) if the opinion was published in a reporter.

[81] See Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 130 (2007) (finding that only 12% of a random sample of suits terminated by summary judgment in several federal judicial districts in 2000 and identified in the Federal Judicial Center's Integrated Data Base were published in a federal reporter).

[82] See Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 146 (2007) (noting that summary judgment grants published by U.S. district courts disproportionately exclude "mundane applications of the law" and "straightforward" issues").

TABLE 2
RECOGNITION AND ENFORCEMENT RATES IN UNPUBLISHED AND PUBLISHED OPINIONS

		Opinion Published in Reporter		
		No	Yes	Total
Decision	No	39 32.5%	119 45.8%	158 41.6%
	Yes	81 67.5% [60.1, 74.1]	141 54.2% [49.1, 59.2]	222 58.4%
	Total	120 100.0%	260 100.0%	380 100.00

Notes: This table compares the foreign judgment recognition and enforcement rates in "unpublished" and "published" opinions. Pearson chi-squared=0.015. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

The results (Table 2) are again not consistent with judicial parochialism. To the contrary, the estimated foreign judgment recognition and enforcement rate is higher in unpublished than published opinions, suggesting that decisions to recognize or enforce are the more routine decisions and the decisions to refuse recognition or enforcement are the more exceptional decisions. This is further evidence that U.S. courts—at least when deciding whether to recognize or enforce foreign judgments—are not excessively parochial.

Although Westlaw includes all opinions published in reporters, it does not include all "unpublished" opinions.[83] This means that our sample cannot provide direct evidence of recognition and enforcement rates in those opinions that are neither published in official reporters nor only in Westlaw. Our intuition, however, is that the differences between recognition and enforcement rates in those opinions and in opinions published in reporters is should be in the same direction (and likely more pronounced) than differences between opinions only in Westlaw and opinions published in reporters.

[83] See Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 Wis. L. Rev. 107, 109 (2007) (finding that less than half of summary judgment dismissals found in a random sample of U.S. district court docket sheets were available in Lexis or Westlaw).

3. State and Federal Courts

While the charge of judicial parochialism has been leveled against both U.S. state and federal courts, it is frequently directed at state courts in particular.[84] Do litigants actually perceive that state courts are more parochial than federal courts? And does the evidence suggest that state courts are in fact more parochial?

One observable implication of a perception that litigants perceive that state courts are more parochial than federal courts is that parties seeking recognition or enforcement will, when they can, tend to do so in federal court, either by filing in federal court or by removing the action to federal court. They can only do this if the federal court has subject matter jurisdiction. The principal source of federal subject matter jurisdiction in foreign judgment enforcement actions is diversity jurisdiction—more precisely, alienage jurisdiction under 28 U.S.C. § 1332(a)(2), which provides subject matter jurisdiction in actions between a citizen of a U.S. state and a citizen of a foreign country.[85] Thus, when the party seeking recognition or enforcement is a U.S. citizen and the party opposing it is a citizen of a foreign country (or vice versa), one would expect the action to be in federal court more often than not.

To test this observable implication, we created two variables. First, we created the variable *Federal Court* and for every opinion in our dataset we coded it as "No" (0) if the opinion is a state court opinion and "Yes" (1) if the opinion is a federal court opinion. Second, we created the variable *Potential Alienage Jurisdiction* and for every opinion in our dataset we coded it as "Yes" (1) if the party seeking recognition and enforcement is a U.S. citizen and the party opposing it is a foreign citizen (or vice versa), and "No" (0) otherwise.[86]

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[84] See S.I. Strong, Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities, 33 Rev. Litig. 45, 59 (2014) ("Most foreign parties involved in U.S. litigation prefer to be in federal court, since federal judges are perceived as being less prone than state judges to bias based on nationality.").

[85] See 28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—…(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;….).

[86] Our measure of potential alienage jurisdiction is imperfect for two reasons. First, due to insufficient information in the opinions in our dataset, we are unable to determine whether the amount-in-controversy requirement is satisfied. This inability could lead to

TABLE 3
WHERE RECOGNITION AND ENFORCEMENT DECISIONS ARE MADE WHEN THERE IS POTENTIAL ALIENAGE JURISDICTION

		Potential Alienage Jurisdiction		
		No	Yes	Total
Federal Court	No	71 65.1%	47 41.6% [34.2, 49.3]	118 53.2%
	Yes	38 34.9%	66 58.4% [50.7, 65.8]	104 46.9%
	Total	109 100.0	113 100.0	222 100.0

Notes: This table presents estimates of the percentage of opinions with foreign judgment recognition and enforcement decisions in federal court and state court when it appears that subject matter jurisdiction may exist under 28 U.S.C. § 1332(a)(2) (alienage jurisdiction). Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Potential Alienage Jurisdiction* (Yes) are in [brackets].

The results (Table 3) are consistent with this observable implication of litigant perceptions of parochialism in state courts. When there appears to be potential alienage jurisdiction, recognition and enforcement actions are in federal court more often (58.4% [50.7, 65.8]) than not (41.6% [34.2, 49.3]). This evidence suggests that parties seeking recognition or enforcement may indeed perceive that they are more likely to obtain their desired result in federal court than in state court.

But beyond perceptions, what about actual decisions? Are state courts in fact parochial in the sense that they are less likely than federal courts to recognize and enforce foreign judgments? The results (Table 4) suggest that the answer may be yes, but not to a dramatic extent. The estimated recognition and enforcement rate in federal courts (63.4% [57.4, 69.0]) is indeed higher than in state courts (52.9% [46.9, 58.7]) by about 10 percent;

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either over- or under-inclusiveness of potential alienage jurisdiction cases. Second, potential § 1332(a)(3) or (4) jurisdiction not picked up by our measure. Our intuition, however, is that the number of such cases is relatively small. Nevertheless, to the extent we are missing such cases, our measurement of potential subject matter jurisdiction would be under-inclusive.

but state courts do appear to recognize and enforce as often as they refuse to do so. Moreover, the 90% confidence intervals for the two estimates slightly overlap, suggesting that the differences might not be statistically significant.

TABLE 4
RECOGNITION AND ENFORCEMENT IN STATE AND FEDERAL COURTS

		Federal Court		
		No	Yes	Total
Decision	No	90 47.1%	67 36.6%	157 42.0%
	Yes	101 52.9% [46.9, 58.7]	116 63.4% [57.4, 69.0]	217 58.0%
	Total	191 100.0%	183 100.0%	374 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates in state and federal courts. Pearson chi-squared=0.040. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

4. Issue Salience

If U.S. courts have a parochial reluctance to recognize or enforce foreign judgments, one might expect this parochialism to be stronger when the issues at stake are more culturally salient. Our intuition is that one area of law that is particularly culturally salient is family law. There is considerable cross-national variation in other areas of law, too, such as tort law and contract law, and some of this variation may, of course, be due to cultural differences. But we believe that on average, the issues at stake in, say, transnational tort or contract cases are not as culturally salient as in transnational family law cases.

An observable implication of this manifestation of parochialism would be that the recognition and enforcement rate is lower for family law judgments than other judgments. To test this observable implication, we created the variable *Family Law Judgment* and for every opinion in our dataset we coded it as "Yes" (1) if the judgment decided a family law issue (including marriage, dissolution, child custody, child support, spousal support, and legal recognition or not of non-marriage relationships), and "No" (0) otherwise.

TABLE 5
RECOGNITION AND ENFORCEMENT FOR FAMILY LAW AND OTHER JUDGMENTS

		Family Law Judgment		
		No	Yes	Total
Decision	No	87 35.5%	67 55.4%	154 42.1%
	Yes	158 64.5% [59.3, 69.3]	54 44.6% [37.4, 52.1]	212 57.9%
	Total	245 100.0%	121 100.0%	366 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for family law judgments and other judgments. Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

The results (Table 5) are consistent with this observable implication. The estimated enforcement rate for family law judgments is lower (44.6% [37.4, 52.1]) than the enforcement rate for other types of judgments (64.5% [59.3, 69.3]). Thus, even if the results so far have provided little evidence of a parochial reluctance of U.S. courts to recognize or enforce foreign judgments in general, these findings provide some evidence that is suggestive of a more limited form of parochialism that is conditioned on the cultural salience of the issue facing the court.

5. Familiarity of Foreign Legal System

Another non-generalized type of judicial parochialism in transnational litigation might be a parochial bias not against the judgments of all foreign countries, but of those countries that are less familiar to judges on average. An observable implication of this type of bias would be that the recognition and enforcement rate is higher for the judgments of more familiar countries than for other countries. To test this observable implication, we created the variable *Familiar Foreign Country* and for every opinion in our dataset we coded it as "Yes" (1) if the foreign judgment is a judgment of a court in Canada France, Germany, Mexico or the United Kingdom, and "No" (0) otherwise. The five countries we use for this coding rule are the only five countries in our broader dataset of opinions in which foreign judgment

issues are mentioned (N=643) that account for more than 4% of the total number of countries represented.

TABLE 6
RECOGNITION AND ENFORCEMENT FOR JUDGMENTS FROM FAMILIAR COUNTRIES AND OTHER COUNTRIES

		Familiar Foreign Country		
		No	Yes	Total
Decision	No	116 54.0%	41 25.0%	157 41.4%
	Yes	99 46.1% [40.5, 51.7]	123 75.0% [69.0, 80.1]	222 58.6%
	Total	215 100.0%	164 100.0%	379 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for judgments of courts in familiar foreign countries (Canada, France, Germany, Mexico or the United Kingdom) and judgments in courts of other countries. Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

The results (Table 6) are consistent with this more selective form of parochialism. The estimated recognition and enforcement rate for judgments of courts in countries other than the five familiar countries is lower (46.1% [40.5, 51.7]) than for judgments from the familiar countries (75.0% [69.0, 80.1]). However, even for the less familiar countries, U.S. courts recognize or enforce almost half of the time, which does not suggest extreme parochialism. Moreover, based on this result alone, we are unable to reach any firm conclusion about whether the difference in recognition and enforcement rates is due to familiarity (or lack of it), which would be consistent with parochialism, or instead due to other factors (such as perceptions of judicial independence or rule of law in the foreign country) that may be strongly correlated with the countries we have identified as familiar.

[NOTE: We plan to add data on each foreign country's legal system using either legal origin data (English legal origin dummy), or a traditional common law dummy (e.g. Zeigert & Kötz civil law, common law, far-Eastern law, Islamic law, and Hindu law families), as we believe these may more accurately get at questions of familiarity.]

B. The Party Dimension

1. Citizenship of Party Seeking Recognition or Enforcement

Another observable implication of judicial parochialism would be that U.S. courts tend to favor U.S. parties and disfavor foreign parties when making recognition and enforcement decisions. To test this implication, we created two variables. First, we created the variable *U.S. Seeking Party* and for every opinion in our dataset we coded it as "Yes" (1) if the party or parties seeking recognition or enforcement were all U.S. parties, and "No" (0) otherwise. Second, we created the variable *Foreign Seeking Party* and for every opinion in our dataset we coded it as "Yes" (1) if the party or parties seeking recognition or enforcement were all foreign parties, and "No" (0) otherwise.

The results (Tables 7 and 8) are not consistent with this implication of parochialism. To the contrary, there is not much of a difference in recognition and enforcement rates overall or in federal courts between U.S. and foreign seeking parties. In fact, our estimates indicate that in state courts, recognition or enforcement is less likely when the seeking party is a U.S. party (37.0% [26.3, 49.1]) than when it is not (60.4% [52.0, 68.2]) (Table 7); and more likely when the seeking party is a foreign party (60.9% [52.3, 68.8]) than when it is not (38.0% [27.6, 49.6]) (Table 8).

TABLE 7
U.S. SEEKING PARTY

		Overall		*Federal Court*		*State Court*		
		U.S. Seeking Party		*U.S. Seeking Party*		*U.S. Seeking Party*		
		No	Yes	No	Yes	No	Yes	Total
Decision	No	77 37.2%	37 50.0%	39 36.1%	8 29.6%	38 40.0%	29 63.0%	114 40.6%
	Yes	130 62.8%	37 50.0%	69 63.9%	19 70.4%	58 60.4% [52.0, 68.2]	17 37.0% [26.3, 49.1]	167 59.4%
	Total	207 100.0%	74 100.0%	108 100.0%	27 100.0%	96 100.0%	46 100.0%	281 100.0%
	Pearson Chi2	0.054		0.527		0.009		

Notes: This table presents estimates of foreign judgment recognition and enforcement rates when the party seeking recognition or enforcement is not ("No") and is ("Yes") a U.S. party. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

TABLE 8
FOREIGN SEEKING PARTY

		Overall		*Federal Court*		*State Court*		
		Foreign Seeking Party		*Foreign Seeking Party*		*Foreign Seeking Party*		
		No	Yes	No	Yes	No	Yes	Total
Decision	No	39 48.2%	75 37.5%	8 26.7%	39 37.1%	31 62.0%	36 39.1%	114 40.6%
	Yes	42 51.9%	125 62.5%	22 73.3%	66 62.9%	19 38.0% [27.6, 49.6]	56 60.9% [52.3, 68.8]	167 59.4%
	Total	81 100.0%	200 100.0%	30 100.0%	105 100.0%	50 100.0%	92 100.0%	281 100.0%
	Pearson Chi2	0.100		0.288		0.009		

Notes: This table presents estimates of foreign judgment recognition and enforcement rates when the party seeking recognition or enforcement is not ("No") and is ("Yes") a foreign party. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

What might explain this finding? We doubt that state courts are biased against U.S. litigants. There is a more plausible explanation: litigation selection effects. Prior empirical studies of anti-foreigner bias in U.S. courts in other transnational litigation contexts have produced results that are similar to ours.[87] Kevin Clermont and Theodore Eisenberg theorize that because foreign litigants expect bias against them in U.S. courts (and because litigating abroad entails additional costs compared to litigating at home), foreign parties litigate in U.S. courts only when they perceive that they have a particularly high probability of winning.[88] Because U.S.

[87] Kevin M. Clermont & Theodore Eisenberg, Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11, 4 J. Empirical L. Stud. 441, 464 (2007) (finding that foreigners have higher win-rates than domestic parties, and concluding that "the data offer no support for the existence of xenophobic bias in U.S. courts"); Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. Rev. 719, 774 (2009) (presenting empirical evidence challenging claim that U.S. courts are biased against foreign parties in international choice-of-law decisionmaking).

[88] See Kevin M. Clermont & Theodore Eisenberg, 4 J. Empirical L. Stud. 441, 443-44 (2007) ("From these results, we, of course, did not conclude that xenophilia prevails within the U.S. courts. Instead, we embraced a case-selection explanation. 'We believe that the most plausible and powerful explanation for the foreigner effect is that foreigners are reluctant to litigate in America for a variety of reasons, including the apprehension that American courts exhibit xenophobic bias and the pecuniary and nonpecuniary distastes for litigating in a distant place.' The foreigners' fear of U.S. litigation makes them selective in choosing strong cases to pursue to judgment. 'Foreigners abandon or satisfy most claims and, presumably, persist in the cases that they are most likely to win. Thus, cases involving

litigants do not have the same expectations of bias (or the same additional costs), they do not engage in an equally rigorous litigation selection process. As a result, the probability of prevailing on issues and claims brought by foreign parties in U.S. courts is systematically higher than for U.S. parties, resulting in higher win-rates—in our case, higher rates of success when seeking recognition and enforcement of foreign judgments. This theory suggests not only that our findings are not evidence of anti-U.S. party bias, but that, notwithstanding our findings, there may be (perceived) parochial anti-foreigner bias in U.S. courts that is rendered invisible in decision data by these selection effects.[89]

2. Type of Party

A specific concern of some scholars and business-oriented interest groups is that businesses are burdened by the recognition and enforcement of foreign judgments in U.S. courts.[90] To shed some empirical light on this concern we created two variables. First, we created the variable *Type of Seeking Party* and for every opinion in our dataset we coded it as "Yes" (1) if a party seeking recognition or enforcement was a business entity, and "No" (0) if it was an individual. Second, we created the variable *Type of Opposing Party* and for every opinion in our dataset we coded it as "Yes" (1) if a party opposing recognition or enforcement was a business entity, and "No" (0) if it was an individual. This approach allows us to both estimate the recognition and enforcement rates for foreign judgments when the seeking (or opposing) party is a business entity and to compare them to the rates for foreign judgments when the seeking (or opposing) party is an individual.

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a foreign litigant, as plaintiff or defendant, are usually cases in which the foreigner has the stronger hand.' When the foreigners in actuality encounter less than the expected bias, they see elevated rates of success, whether as plaintiff or defendant.") (citations omitted).

[89] The different result for federal courts (no statistically significant difference in recognition and enforcement rates between U.S. and non-U.S. seeking parties) is consistent with this theory. If, as our results above (Table 3) suggest, parties indeed perceive federal courts to be less parochial than federal courts, than one would not expect to observe this selection effect in federal courts (at least not to the same extent as in state courts).

[90] See, e.g., [].

TABLE 9
RECOGNITION AND ENFORCEMENT RATES FOR INDIVIDUAL AND BUSINESS SEEKING PARTIES

		Type of Seeking Party		
		Individual	Business	Total
Decision	No	97 52.4%	44 29.3%	141 42.1%
	Yes	88 47.6% [41.6, 53.6]	106 70.7% [64.2, 76.4]	194 57.9%
	Total	185 100.0%	150 100.0%	335 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for judgments when the seeking party is an individual and when the seeking party is a business entity. Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

Regarding the type of seeking party, the results (Table 9) suggest that contrary to being burdened, business entities benefit from a 70.7% [64.2, 76.4]) rate of recognition and enforcement when they are a seeking party. This rate is higher than both the estimated overall rate (57.9%) and the rate when the seeking party is an individual (47.6% [41.6, 53.6]).

TABLE 10
RECOGNITION AND ENFORCEMENT RATES FOR INDIVIDUAL AND BUSINESS OPPOSING PARTIES

		Type of Opposing Party		
		Individual	Business	Total
Decision	No	79 40.1%	64 48.1%	143 43.3%
	Yes	118 59.9% [54.1, 65.5]	69 51.9% [44.8, 58.9]	187 56.7%
	Total	197 100.0%	133 100.0%	330 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for judgments when the opposing party is an individual and when the opposing party is a business entity. Pearson chi-squared=0.149. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

Regarding the type of opposing party, the results (Table 10) suggest that U.S. courts enforce foreign judgments against businesses at a rate (51.9% [44.8, 58.9]) that is lower than both the estimated overall rate (56.7%) and the estimated rate when the opposing party is an individual (59.9% [54.1, 65.5]). Both the chi-2 statistic (0.149) and the overlap between the 90-percent confidence intervals for the estimates for individual and business parties indicate that the apparent relationship between recognition and enforcement rates and the type of opposing party is not statistically significant. Nevertheless, these results suggest that business entities are not disproportionately burdened as opposing parties by the recognition and enforcement of foreign judgments by U.S. courts.

C. Excessive Cosmopolitanism?

As discussed above, some scholars and business-oriented interest groups imply that U.S. courts are too cosmopolitan. They argue that U.S. courts are too willing to recognize and enforce foreign judgments, including judgments against U.S. corporations issued by courts in countries that are corrupt or lack due process.[91] Specifically, they claim that plaintiffs' lawyers routinely engage in so-called "tort tourism," which they describe as "an explicit strategy to pursue tort lawsuits abroad in weak or corruptible foreign courts in order to secure large awards against defendant companies [and] then seek to collect those judgments" in countries like the United States that have "liberal rules favoring recognition of foreign judgments."[92] They claim that U.S. courts face "many…foreign judgments emanating from politicized and corrupt environments"[93] and that a more restrictive approach to foreign judgments, including additional case-specific grounds for refusing recognition and enforcement, is therefore necessary.

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[91] See supra Part I.D.

[92] John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at 3 (available at). See also Gregory H. Shill, Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States, 54 Harv. Int'l. L. J. 459, 462 (2013) ("Plaintiffs now routinely litigate the merits phase of such disputes in foreign forums, where they benefit from newly favorable substantive law and sometimes from a politicized or corrupt judiciary, and then come to American courts to collect on their judgments, where they enjoy a tradition of hospitality to foreign judgments.").

[93] William E. Thomson & Perlette Michèle Jura, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments, U.S. Chamber Institute for Legal Reform, Oct. 2011, at 3 (available at).

To assess these claims, we created two variables. First, we created the variable *Low Rule of Law* and for every opinion in our dataset we coded it as "Yes" (1) if court producing the foreign judgment is in a country that is in the bottom 25th percentile of the World Bank's rule of law indicator, and "No" (0) otherwise. Second, we created the variable *Low Control of Corruption* and coded it as "Yes" (1) if the court producing the foreign judgment is in a country that is in the bottom 25th percentile of the World Bank's control of corruption indicator, and "No" (0) otherwise.

We make no attempt to empirically measure due process violations or corruption in individual cases—indeed, we do not believe it would be feasible to do so, not simply because of the difficulty of collecting reliable data, but also because of the legal uncertainty about and subjectivity of determining when there has been a due process violation or corruption in a particular case. However, the *Law Rule of Law* and *Low Control of Corruption* variables do allow us to estimate the number of foreign judgments from "weak or corruptible foreign courts." And for two reasons, these variables allow us to indirectly assess the likelihood of judgments that are the product of proceedings tainted by due process violations or corruption. First, courts where there is rule of law and low levels of corruption are unlikely to produce foreign judgments that are a result of due process violations or corruption. If there is a significant problem with such judgments, it is most likely to exist in countries with low levels of rule of law and high levels of corruption. Second, even if a lower court were to produce such a judgment, procedures for rehearing and appellate review will ordinarily be able to correct any such deviations in countries with higher levels of rule of law and low levels of corruption. This is less likely to be the case in countries with low levels of rule of law or high levels of corruption.

TABLE 11
RECOGNITION AND ENFORCEMENT RATES FOR FOREIGN JUDGMENTS FROM LEGAL SYSTEMS WITH LOW RULE OF LAW

		Low Rule of Law		
		No	Yes	Total
Decision	No	132 39.2%	23 76.7%	155 42.2%
	Yes	205 60.8% [56.4, 65.1]	7 23.3% [13.0, 38.1]	212 57.8%
	Total	337 100.0%	30 100.0%	367 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for foreign judgments from courts in countries that are ("Yes") and are not ("No") in the bottom 25th percentile of the World Bank's rule of law indicator. Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

Regarding rule of law, the results (Table 11) suggest that U.S. courts have a strong tendency not to recognize or enforce foreign judgments from courts in countries that have low levels of rule of law. In only 7 out of the 367 opinions in this analysis did a court recognize or enforce a foreign judgment from a court in a country that has low levels of rule of law.[94] The results also suggest that U.S. courts are only infrequently confronted with such foreign judgments (only 30 out of the 367 opinions in this analysis). Although our data cannot confirm this, the pattern may be the result of selection effects: since judgment creditors do not expect U.S. courts to enforce foreign judgments from countries with low rule of law (a reasonable expectation, given the traditional systemic due process ground for refusal), they may be unlikely to bother seeking recognition and enforcement in U.S. courts in the first place. Even if such selection effects are at work, they do not produce the 50% recognition and enforcement rate that selection effects theory would suggest. Instead, the estimated recognition and enforcement rate for these judgments is 23.3% [13.0, 38.1].

[94] We [will] analyze these opinions as part of our more detailed analysis in a separate paper. See [].

TABLE 12
RECOGNITION AND ENFORCEMENT RATES FOR FOREIGN JUDGMENTS FROM LEGAL SYSTEMS WITH LOW CONTROL OF CORRUPTION

		Low Control of Corruption		
		No	Yes	Total
Decision	No	121 37.9%	34 70.8%	155 42.2%
	Yes	198 62.1% [57.5, 66.4]	14 29.2% [19.7, 40.9]	212 57.8%
	Total	319 100.0%	48 100.0%	367 100.0%

Notes: This table presents estimates of foreign judgment recognition and enforcement rates for foreign judgments from courts in countries that are ("Yes") and are not ("No") in the bottom 25th percentile of the World Bank's control of corruption indicator. Pearson chi-squared=0.000. 90% confidence intervals for the percentage estimates for *Decision* (Yes) are in [brackets].

The results are similar regarding corruption. The results (Table 12) suggest that U.S. courts have a strong tendency not to recognize or enforce foreign judgments from courts in countries that have low control of corruption. In only 14 out of the 367 opinions in this analysis did a court recognize or enforce a foreign judgment from a court in a country that has low control of corruption.[95] The results also suggest that U.S. courts are only infrequently confronted with such foreign judgments (only 48 out of the 367 opinions in this analysis). Although our data cannot confirm this, the pattern may again be the result of selection effects: since judgment creditors do not expect U.S. courts to enforce foreign judgments from countries with low control of corruption (a reasonable expectation, given the traditional systemic due process ground for refusal), they may not bother seeking recognition and enforcement in U.S. courts in the first place. And again, even if such selection effects are at work, they do not produce the 50% recognition and enforcement rate that selection effects theory would suggest. Instead, the estimated recognition and enforcement rate for these judgments is 29.2% [19.7, 40.9].

[95] We [will] analyze these opinions as part of our more detailed analysis in a separate paper. See [].

We reiterate that our data does not allow us to provide evidence that particular foreign judgments were (or were not) the result of due process violations or corruption. Nevertheless, these results suggest that such judgments are unlikely to be recognized or enforced by U.S. courts. U.S. courts tend not to recognize or enforce foreign judgments from courts in countries that have low rule of law or low control over corruption. The higher a country's rule of law and control of corruption, the less likely its courts are to produce such judgments and—when they do—the more likely they are to invalidate them there, before they ever reach a U.S. court.

CONCLUSION

Animated by the values of comity, efficiency, repose and access to justice, the standard approach to foreign judgment issues under U.S. law seeks to limit judicial parochialism. But some argue that the law has allowed U.S. courts to go too far in the cosmopolitan direction, recognizing and enforcing foreign judgments even when they are produced by courts in legal systems that lack due process or are corrupt. They argue that changes in the law—such as the 2005 Act's new case-specific grounds for refusing recognition and enforcement—are therefore needed. Others argue that the anecdotal evidence presented by critics of the standard approach fail to show that a more restrictive approach is needed.

Our findings suggest that U.S. courts are moderately cosmopolitan in their foreign judgment decisions. We find that U.S. courts recognize and enforce foreign country judgments more often than not; that recognition and enforcement rates may be lower in state courts than in federal courts, but only slightly; and that U.S. courts are not less likely to recognize and enforce foreign country judgments when the party seeking recognition and enforcement is a foreign party than when it is a U.S. party. However, there is some evidence of parochialism. We find that U.S. courts are more likely to recognize and enforce foreign judgments from more familiar countries than less familiar countries, and less likely to recognize and enforce in family law matters, which have a higher level of cultural salience on average.

More specifically, our findings challenge the claim that plaintiffs' lawyers are routinely engaging in "tort tourism" by filing claims in foreign countries that lack rule of law or are corrupt, obtain judgments there, and then enforce them against businesses in the United States.[96] We find that

[96] See William E. Thomson & Perlette Michèle Jura, Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments, U.S. Chamber Institute for Legal

U.S. courts very strongly disfavor judgments from foreign countries with low rule of law or poor control of corruption. Indeed, very few cases in our sample involve foreign judgments from countries in the bottom quartile of the World Bank's rule of law and control of corruption ratings, which is unsurprising, since the beneficiary of such a judgment would likely assume (and, as our evidence suggests, *correctly* assume) that the probability that a U.S. court would recognize or enforce it is too low to justify the costs of the effort. To the contrary, there is some evidence that businesses benefit—perhaps disproportionately, compared to individuals—from the U.S. approach to recognition and enforcement of foreign judgments.

Of course, our findings cannot resolve the foreign judgments debate. But the evidence does suggest that U.S. courts do a decent job deciding foreign judgment issues under current U.S. law, and we uncover no evidence that clearly suggests that change is needed to reign in excessively cosmopolitan judges.

Our analysis also implies that states should think carefully before adopting the 2005 Act's new case-specific grounds for refusing recognition or enforcement of a foreign judgment. Our evidence suggests that there may be little to gain by adopting the new exceptions because they are not necessary to protect the rights of judgment debtors against "tort tourism"[97] and, as argued above, the systemic due process exception should preclude recognition and enforcement of foreign judgments from legal systems that are incapable of internally addressing case-specific defects in court proceedings.[98]

On the other hand, there may be much to lose. The new exceptions risk undermining the value of comity by withholding respect for the judgments even of legal systems which, like the United States, "provide impartial tribunals or procedures compatible with the requirements of due process of law." They also risk undermining the values of efficiency and repose by encouraging potentially time consuming and costly litigation in U.S. courts at the recognition and enforcement stage after there has already been a trial in a legal system with impartial tribunals and procedures consistent with

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Reform, Oct. 2011, at 3 (available at); John B. Bellinger, III, Taming Tort Tourism: The Case for a Federal Solution to Foreign Judgment Recognition, U.S. Chamber Institute for Legal Reform, Sept. 2013, at 3 (available at); Gregory H. Shill, Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States, 54 Harv. Int'l. L. J. 459, 462 (2013). See also supra Part I.D.

[97] See supra Part III.C.

[98] See supra Part I.C.

due process. This is what Judge Posner warned of when he criticized case-specific due process review of foreign proceedings as "inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions" because it "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, thus converting every successful multinational suit for damages into two suits…."[99]

The new exceptions may also undermine access-to-justice values, particularly when the judgment debtor has significantly more litigation resources than the judgment creditor. They give judgment debtors new opportunities—beyond those available under the 1962 Act—to aggressively litigate (or threaten to litigate) in a U.S. court issues they already litigated (or could have litigated) in a foreign legal system with impartial tribunals and procedures consistent with due process.[100] This could increase the "enforcement discount" the judgment debtor will be able to extract from the judgment creditor in post-judgment settlement discussions or, in some cases, could increase the costs of enforcement to an amount that exceeds the amount of the foreign judgment.[101]

But the 2005 Act ship has already sailed. A growing number of states—at last count, 21 plus the District of Columbia—have already adopted legislation based on it.[102] In those states, and other states that are likely to adopt the 2005 Act, an implication of our analysis is that judges should be careful to manage litigation costs under the new case-specific exceptions and should ordinarily apply a strong presumption against exercising their

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[99] Society of Lloyd's v. Ashenden, 233 F.3d 473, 477 (2000) (citations omitted).

[100] If the foreign legal system lacked impartial tribunals or procedures compatible with due process, recognition and enforcement of the foreign judgment would be precluded under the mandatory systemic due process exception.

[101] Cf. Michael McIlwrath & John Savage, International Arbitration and Mediation: A Practical Guide 344 (2010) (noting that it is not uncommon for an arbitral award debtor to offer a settlement with an "enforcement discount" allowing the creditor to "collect at least a portion of the amount awarded and to avoid the cost, effort, and uncertainty associated with actions to challenge and enforce the award").

[102] See Uniform Law Commission, Legislative Fact Sheet - Foreign-Country Money Judgments Recognition Act (http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Foreign-Country%20Money%20Judgments%20Recognition%20Act) (listing Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, Virginia, Washington). Plus introduced for possible adoption in four additional states (Massachusetts, New Jersey, North Dakota, Texas).

discretion to refuse recognition or enforcement on those grounds, keeping in mind that if the foreign court has impartial courts and rules consistent with due process of law, then that courts should be best able to assess any case-specific objections of the judgment debtor.

Finally, our analysis has implications for broader discussions about parochialism in U.S. courts. Several scholars have insightfully noted a parochial trend in U.S. civil procedure and a closely related "litigation isolationism" in U.S. courts.[103] This paper's findings suggest that U.S. courts so far have for the most part avoided these tendencies in foreign judgment decisionmaking. The trend toward a more restrictive approach to foreign judgments means, however, that this may be changing.

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[103] [Gardner "Parochial Procedure" and Bookman "Litigation Isolationism"]