NOTES

IMPLEMENTING THE HAGUE JUDGMENTS CONVENTION

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A specter is haunting The Hague—the specter of American federalism. On July 2, 2019, the Hague Conference on Private International Law finalized the Hague Judgments Convention. The Convention seeks to establish a global floor for judgment recognition and promote seamless recognition and enforcement of judgments between signatories. Although virtually all observers in the United States recognize the value and importance of ratifying the Convention, stakeholders cannot agree on how to implement it: by federal statute or by uniform state law. Proponents of a so-called "cooperative federalism" approach to implementation, principally led by the Uniform Law Commission (ULC), have previously derailed U.S. ratification of the Hague Convention on Choice of Court Agreements (COCA) by insisting that principles of federalism required implementation through uniform state law. This argument is wrong as a matter of doctrine and policy. It is time to put it to rest once and for all.

This Note is the first piece of scholarship to squarely address the "cooperative federalism" argument as applied to the Hague Judgments Convention. It makes two principal arguments. First, it identifies the principles that ought to guide the implementation of a treaty on foreign judgments recognition and concludes that federal implementing legislation optimizes these interests. Implementation primarily by uniform state law is inferior and poses serious disadvantages. Second, the ULC's primary legal objection to the implementation proposal for the COCA outlined by the State Department—that the doctrine of Erie Railroad Co. v. Tompkins *prohibits federal courts sitting in diversity jurisdiction from applying federal rules of decision prescribed by federal statute—was meritless in 2012, and it is meritless now. If any objections remain to implementing the Judgments Convention by federal statute, they are about turf and ideology. To the extent that the relevant stakeholders want to accommodate those political objections, this Note concludes by briefly outlining areas for compromise.*

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Introduction

In the early 1990s, the United States initiated an effort at the Hague Conference on Private International Law to craft a multilateral treaty providing for global rules of jurisdiction and judgment recognition in most civil cases.[1] Rapidly expanding transnational business relations—and therefore litigation—have placed increasing pressure

[1] *See* Letter from Edwin D. Williamson, Legal Adviser, Dep't of State, to Georges Droz, Sec'y Gen., Hague Conf. on Priv. Int'l L. (May 5, 1992), https://2009-2017.state.gov/documents/organization/65973.pdf [https://perma.cc/6WHM-W8NQ].

on regimes for judicial jurisdiction and judgment recognition that were formulated principally with domestic litigation in mind. The United States and other countries that engage in substantial international commerce therefore saw a need for simple and predictable rules regarding where litigants could sue and be sued and how they could get their judgments recognized and enforced.[2]

Then, as now, the United States' principal concern was that judgments rendered by its courts were not receiving recognition and enforcement abroad, despite the very liberal treatment foreign judgments received in U.S. courts.[3] A judgment from an American court against a Chinese product manufacturer or Swiss bank sometimes is only as valuable as the paper it is printed on when the foreign judgment debtors lack assets in the United States and foreign courts are unwilling to recognize U.S. judgments.[4] And despite the relative generosity of American rules regarding foreign judgments recognition and enforcement, the patchwork state-law framework that currently governs this area has cost American companies international business because foreign counterparts lack certainty about whether they will be able to recover damages against their American partners efficiently.[5] As U.S. negotiators no doubt understood, increased predictability in

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[2] *See id.* ("The United States is a party to no convention or treaty dealing with the recognition and enforcement of judgments.").

[3] Stephen B. Burbank, *Federalism and Private International Law: Implementing the Hague Choice of Court Convention in the United States*, 2 J. PRIV. INT'L L. 287, 288 (2006) [hereinafter Burbank, *Federalism and Private International Law*]; *see also* RONALD A. BRAND, FED. JUD. CTR., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS 2 (2012) [hereinafter BRAND, RECOGNITION AND ENFORCEMENT], https://www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf [https://perma.cc/D4N6-57YQ] ("U.S. courts have been quite liberal in their recognition and enforcement of foreign judgments."); Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 173 (2008) ("[O]n average, U.S. judgments face more obstacles in Europe than do European judgments in the United States."). Although foreign countries have become increasingly willing to recognize and enforce American judgments in recent years, foreign courts are, in the main, still much less likely to recognize and enforce judgments rendered by U.S. courts than the other way around. *See generally* Sarah E. Coco, Note, *The Value of a New Judgments Convention for U.S. Litigants*, 94 N.Y.U. L. REV. 1209 (arguing that domestic curtailment of general jurisdiction, growing foreign acceptance of punitive damages, and liberalization of certain foreign reciprocity requirements have resulted in greater recognition and enforcement of American judgments abroad).

[4] *See* BRAND, RECOGNITION AND ENFORCEMENT, *supra* note 3, at 1 (noting that the most common case in which a U.S. court will encounter an action to recognize a foreign judgment is where "the judgment creditor seeks to enforce a foreign money judgment through access to local assets of the judgment debtor").

[5] *See* S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 50 (2014) ("The current U.S. approach to recognition and enforcement of foreign judgments involves a great deal of cost, complexity, and uncertainty . . . .").

enforcing U.S. judgments could save American business tremendous amounts of money.[6]

The jurisdiction and recognition project ultimately ran into insuperable obstacles. The United States had little to offer on the judgments front exactly because its recognition and enforcement regime was already comparatively generous. To make concessions on the judgments issue, negotiators from the other Hague Conference delegations expected the United States to agree to curtail some forms of judicial jurisdiction that they perceived as exorbitant.[7] The United States' negotiators were unwilling to do so, and negotiations foundered in 2001.[8]

Instead, the parties eventually agreed to pursue a less ambitious piecemeal approach to salvage portions of the negotiations over which there was consensus.[9] On June 30, 2005, the first treaty to emerge from this project was the Hague Convention on Choice of Court

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[6] *Cf. Commission Staff Working Document, Impact Assessment Report Accompanying the Document Proposal for a Council Decision on the Accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, at 28, COM (2021) 388 final (July 16, 2021), https://ec.europa.eu/info/sites/default/files/1_en_impact_assessment_part1_v2.pdf [https://perma.cc/WL49-NRN4] ("With the EU accession to the Judgments Convention, the average cost for proceedings related to the recognition and enforcement of foreign judgments is expected to decrease because of the enhanced legal certainty achieved through clear rules and standardised procedures.").

[7] *See* Eric Porterfield, *A Domestic Proposal to Revive the Hague Judgments Convention: How to Stop Worrying About Streams, Trickles, Asymmetry, and a Lack of Reciprocity*, 25 DUKE J. COMPAR. & INT'L L. 81, 84 (2014) (noting that the reasons "commonly given for this disparate treatment of American judgments [include] exorbitant bases of personal jurisdiction (for example, long arm 'doing business' jurisdiction, or physical presence, also known as 'tag' jurisdiction)"). It is worth noting that after *Daimler AG v. Bauman*, 571 U.S. 117 (2014), U.S. courts may exercise general jurisdiction only where the corporate defendant is "at home," *id.* at 139 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)), which has brought American jurisprudence in this area toward the global mainstream.

[8] *See* Ronald A. Brand, *The 1999 Hague Preliminary Draft Convention Text on Jurisdiction and Judgments: A View from the United States*, *in* THE HAGUE PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND JUDGMENTS 3, 8–9 (Fausto Pocar & Costanza Honorati eds., 2005) (commenting that "the U.S. delegation had almost no hope of selling" the preliminary text proposed in the negotiations to the U.S. Senate); *see also* Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Court Convention*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 131, 134 (Paul B. Stephan ed., 2014) [hereinafter Trooboff, *Implementing Legislation*] ("We learned through several years of difficult negotiations that working out differences with other Hague Conference delegations was an insurmountable task.").

[9] *See* Trevor Hartley & Masato Dogauchi, *Explanatory Report*, *in* PROCEEDINGS OF THE TWENTIETH SESSION, 14 TO 30 JUNE 2005, TOME III: CHOICE OF COURT 784, 785, 787 (Permanent Bureau of the Hague Conf. on Priv. Int'l L. ed., 2010) (describing how the Hague Convention on Choice of Court Agreements emerged from the failed earlier Jurisdiction and Judgments project).

Agreements (COCA).[10] This convention established jurisdictional rules and standards of recognition for business disputes governed by exclusive forum-selection clauses. On January 19, 2009, the United States became the first party to sign the COCA.[11]

Ironically, the trouble this time was not in reaching international consensus on the terms of the convention[12]—it was in implementing it domestically.[13] Although treaty implementation historically has been a matter of federal law, certain private international law issues, such as the enforcement of forum-selection clauses and the recognition of judgments resulting from them, have traditionally been governed by state law.[14] Several stakeholders,[15] principally led by the Uniform Law Commission (ULC), insisted that the United States implement the COCA primarily by state law. Despite extensive negotiation,[16]

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[10] Hague Conference on Private International Law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294, https://www.hcch.net/upload/conventions/txt37en.pdf [https://perma.cc/Z8ZN-RWMV].

[11] Convention of 30 June 2005 on Choice of Court Agreements, Hague Conference on Private International Law (Mar. 3, 2021), https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [https://perma.cc/4NU8-77PB].

[12] *See* Trooboff, *Implementing Legislation*, *supra* note 8, at 134 (noting that the COCA "would focus on the one base of jurisdiction on which there seemed nearly universal agreement among The Hague Conference delegations—namely, consent of the parties").

[13] All domestic stakeholders appear to support the substantive terms of the COCA. *See, e.g.*, *Recommendation Adopted by the House of Delegates*, AM. BAR ASS'N (Aug. 7–8, 2006), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2006/2006_am_123a.pdf [https://perma.cc/EV7R-V99A]; Keith Loken, *The Current U.S. Judgments Agenda*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 118, 123 (Paul B. Stephan ed., 2014) (noting that "there is no identifiable domestic opposition" to the COCA).

[14] *See* RESTATEMENT (SECOND) OF CONFLICT OF L. § 98 cmt. c (AM. L. INST., amended 1988) (noting a "consensus" among state and federal courts that recognition and enforcement of foreign judgments in non-federal question cases are governed by state law). Most states currently have adopted one of two uniform statutes developed by the Uniform Law Commission. *See* Ronald A. Brand, *The Continuing Evolution of U.S. Judgments Recognition Law*, 55 COLUM. J. TRANSNAT'L L. 277, 295 (2017) (noting that nearly three dozen states have enacted one of the two uniform Recognition Acts).

[15] I use the term "stakeholders" throughout this Note to refer to the various parties interested in the negotiation and implementation of the Judgments Convention—the U.S. government and its negotiators at the Hague Conference; lawyers and law firms that frequently participate in transnational litigation, or organizations that represent them; and scholars of private international law, to name a few.

[16] *See* OFF. OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, STATE DEPARTMENT WHITE PAPER, APRIL 16, 2012 (2012) [hereinafter STATE DEPARTMENT WHITE PAPER] (proposing a default federal statute to implement the COCA, but with the option for states to opt out conditional upon enacting a substantively identical uniform state law); *see also* Stephen B. Burbank, *A Tea Party at The Hague?*, 18 SW. J. INT'L L. 629, 643 (2012) [hereinafter Burbank, *A Tea Party at The Hague?*] ("The Legal Adviser to the State Department has devoted a substantial amount of time to the implementation of the Choice of Court Convention in an effort to find acceptable compromise positions. Compromise has usually been one-sided, and that side is not the ULC.").

domestic stakeholders were unable to agree on a method of implementing the COCA.[17] Despite signing the COCA fifteen years ago, the United States still has not ratified it.

On July 2, 2019, the Hague Conference on Private International Law finalized its second effort to emerge from the failed 1990s jurisdiction and judgments project: the Hague Judgments Convention.[18] The Convention seeks to establish a global floor for the recognition of certain commercial judgments and promote seamless recognition and enforcement of eligible judgments between signatories. Once again, the nettlesome issue is not whether the United States should ratify the Judgments Convention, but how it should implement it. And the specter of federalism continues to haunt. Proponents of "cooperative federalism"[19] have again proposed implementation of the Judgments Convention primarily by uniform state law, as they did with the COCA. They argue both that this approach is optimal as a matter of policy and that *Erie Railroad Co. v. Tompkins*[20] requires that federal courts sitting in diversity look to state law on foreign judgment recognition.[21]

This Note is the first piece of scholarship to directly address the "cooperative federalism" argument as applied to the Hague Judgments Convention. It makes two principal arguments. First, the United States should implement the Judgments Convention by federal

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[17] *See* U.S. Dep't of State, Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Court Agreements (Jan. 19, 2013), https://2009-2017.state.gov/documents/organization/206865.pdf [https://perma.cc/9UXV-G9Z5] (describing the negotiations over COCA implementation as "at an impasse").

[18] Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, *opened for signature* July 2, 2019 [hereinafter Judgments Convention] (not yet in force), https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf [https://perma.cc/7HLZ-5NJU].

[19] In the context of implementing the COCA and Judgments Convention, cooperative federalism refers specifically to a proposal under which "the states would be required by . . . federal law to adopt the ULC model as state law; if they do not do so, then the federal legislation would preempt existing state law to the extent inconsistent and become state law." Peter D. Trooboff, *Proposed Principles for United States Implementation of the New Hague Convention on Choice of Court Agreements*, 42 N.Y.U. J. INT'L L. & POL. 237, 246 (2009).

[20] 304 U.S. 64 (1938).

[21] *See, e.g.*, Letter from Michael Houghton, President, Unif. L. Comm'n, to Harold Hongju Koh, Legal Adviser, U.S. Dep't of State 2 (May 22, 2012) [hereinafter Michael Houghton May 22 Letter], https://2009-2017.state.gov/documents/organization/211371.pdf [https://perma.cc/M7KP-PQ3P] (objecting to the State Department's proposal to implement COCA on the ground that applying a federal default statute in federal diversity actions would "change the existing federal/state balance by altering a core principle that has governed questions of federal/state jurisdiction since the landmark decision of *Erie v. Tomkins*[] [sic] in 1938").

statute. Across-the-board federal implementing legislation would ensure the uniform development of the relevant substantive law, provide clarity to foreign and domestic judgment creditors and debtors, and address the sticky issue of reciprocity.[22] This approach is superior to implementation primarily through uniform state law, as proposed by the ULC, and it avoids many of the complexities that approach would entail.

Second, the primary legal objection to a federal implementing statute advanced by the ULC—that *Erie* or other constitutional principles of federalism prevent Congress from prescribing rules regarding recognition and enforcement that apply in federal diversity cases and state courts—is meritless. *Erie* has no application when a federal statute governs the case. And even in the absence of a federal statute, the subject matter sufficiently implicates the federal government's interest in managing foreign relations that federal courts would be justified in formulating special rules of federal common law in this area. The ULC's argument has deprived the United States of the fruits of one important treaty on private international law[23] and threatens to do so again. It is time to put this theory to rest once and for all. To the extent any objections remain to implementing the Judgments Convention by federal statute, they are ideological, not legal, and cloaking them in the garb of *Erie* unhelpfully obfuscates the terms of the debate.

This Note proceeds in four parts. Part I provides background on historical and contemporary law regarding the recognition and enforcement of foreign judgments in the United States as well as an explanation of how the Judgments Convention would change the current regime. Part II identifies the principles that ought to guide treaty implementation, argues that along every dimension, federal implementing legislation is superior to implementation by uniform state law, and concludes that the policy arguments in favor of cooperative federalism are unpersuasive. Part III examines the legal objection that derailed the implementation of the COCA and that still looms large over the domestic debate over implementation of the Judgments

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[22] *See generally* Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 101 (Paul B. Stephan ed., 2014).

[23] Domestic support for the COCA from informed observers has been essentially unanimous. *See supra* note 13 and accompanying text. However, for recent criticism of the substance of the COCA, see Gary B. Born, *Why States Should Not Ratify, and Should Instead Denounce, the Hague Choice-of-Court Agreements Convention, Part II*, KLUWER ARB. BLOG (June 17, 2021), http://arbitrationblog.kluwerarbitration.com/2021/06/17/why-states-should-not-ratify-and-should-instead-denounce-the-hague-choice-of-court-agreements-convention-part-ii [https://perma.cc/6NRB-6J3N].

Convention: that the *Erie* doctrine prevents Congress from enacting federal implementing legislation that supplies rules of decision in federal diversity cases. It goes on to explain why, as a doctrinal matter, this argument is meritless. Political arguments remain, however, and to the extent stakeholders want to accommodate them, Part IV will briefly outline potential areas for compromise.

I
The Law of Foreign Judgments Recognition in the United States and the Hague Judgments Convention

To understand the objections that hindered implementation of the COCA and that seem poised to do the same to the Judgments Convention, it is important to understand how foreign judgments recognition currently works in the United States and how the Judgments Convention would change the landscape. This Part outlines the basic framework for the law of recognition and enforcement of foreign judgments in the United States.[24] Section I.A surveys the historical development of foreign judgments recognition in the United States. Section I.B provides a brief primer on the current principal source of law on the recognition of foreign judgments: the ULC's two uniform acts. Section I.C surveys the core components of the Hague Judgments Convention. Finally, Section I.D describes how ratifying the Judgments Convention would change domestic law. It notes that several key features of the Judgments Convention potentially leave room for the operation of state law, even if implemented by federal statute.[25]

A. Recognition and Enforcement of Foreign Judgments in the United States

The Full Faith and Credit Clause of the United States Constitution guarantees that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[26] Congress has implemented the Full Faith and

[24] There is a distinction between the terms "recognition" and "enforcement," even though they are invariably used together. Recognition is a cousin to preclusion. It refers to acceptance by the selected court of the legal and factual determinations of the court that rendered the judgment. Enforcement, by contrast, refers to the ability of the selected court to provide relief based on the judgment from the rendering court. *See* Peter Hay, Advanced Introduction to Private International Law and Procedure loc. 5.6–.7 (2018) (ebook) (describing recognition and enforcement).

[25] *See infra* Part IV.

[26] U.S. Const. art. IV, § 1.

Credit Clause through 28 U.S.C. § 1738, which provides that courts of one state shall recognize and enforce the judgments of sister states. This statute has been subject to a few very narrow exceptions.[27] The Full Faith and Credit Clause does not, however, encompass the recognition and enforcement of foreign judgments,[28] and Congress has (with one notable but cabined exception[29]) never addressed this issue.

Instead, U.S. law regarding the recognition of foreign judgments finds its origins in federal common law. The Supreme Court first grappled with the issue in *Hilton v. Guyot*.[30] In that case, a French creditor tried to have their French judgment recognized and enforced by a U.S. court against a U.S. judgment debtor. The Court held that, as a general matter, foreign final judgments are presumptively enforceable in U.S. courts as a matter of "comity," subject to certain grounds for nonrecognition.[31] The Court ultimately declined to recognize the French judgment, however, partially because France would not treat American judgments reciprocally under like circumstances.[32]

Although the principles of international comity articulated in *Hilton* remain highly influential, foreign judgment recognition is now

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[27] *See, e.g.*, Adam v. Saenger, 303 U.S. 59, 62 (1938) (noting the lower court's reasoning that lack of personal or subject-matter jurisdiction is a grounds for declining recognition and enforcement of sister-state judgments); Kremer v. Chem. Const. Corp., 456 U.S. 461, 482 (1982) ("[S]tate proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law."). A judgment debtor can collaterally attack the judgment of a sister-state rendering court only if the rendering court did not consider and reject the proposed ground for refusal. *Cf.* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525–26 (1931) (extending res judicata "where one voluntarily appears, presents his case and is fully heard, and . . . [receives] the judgment of the tribunal to which he has submitted his cause"); Harrah's Club v. Van Blitter, 902 F.2d 774, 777 (9th Cir. 1990) (noting that though *Baldwin* established that "the Full Faith and Credit Clause does not apply to successive actions in federal courts . . . , the underlying principle of that clause does apply through the doctrine of res judicata").

[28] *See* RESTATEMENT (SECOND) OF CONFLICT OF L. §§ 98, 102 cmt. b (AM. L. INST. 1971) (stating rules regarding the recognition of foreign national judgments and comparing them to "the granting of such recognition . . . required by full faith and credit" between the states).

[29] *See* Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, Pub. L. No. 111-223, 124 Stat. 2380, 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105) (seeking to "prohibit recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services").

[30] 159 U.S. 113, 162 (1895).

[31] *See id.* at 202–03 (holding that a case should not "be tried afresh, . . . upon the mere assertion of the party that the judgment was erroneous" if "there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction" with "regular proceedings, after due citation or voluntary appearance of the defendant," and "impartial administration of justice between the citizens of [the different] countries," unless there is prejudice, fraud, or another special reason).

[32] *Id.* at 228–29.

governed by state law, not federal common law. Even before *Erie*, state courts rejected *Hilton*'s reciprocity requirement on the ground that foreign judgments recognition is a matter of state law.[33] After *Erie*, it is well-settled that federal courts exercising diversity jurisdiction apply state substantive law on the recognition and enforcement of foreign judgments.[34]

B. The Uniform State Acts

Today, the principal sources of U.S. law on the recognition and enforcement of foreign judgments are the ULC's two uniform acts: the 1962 Uniform Foreign Money Judgments Recognition Act (the 1962 Uniform Act)[35] and the 2005 Uniform Foreign-Country Money Judgments Recognition Act (the 2005 Uniform Act).[36] As of the time of writing, more than thirty states have adopted some version of one of the two uniform acts.[37] Both are limited to "money judgments"[38] and expressly exclude judgments involving taxes, fines, penalties, and

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[33] *See e.g.*, Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (holding that *Hilton* does not control the recognition of foreign judgments in New York courts).

[34] *See, e.g.*, DeJoria v. Maghreb Petroleum Expl., S.A. 804 F.3d 373, 378 (5th Cir. 2015) (applying "Texas law regarding the recognition and enforcement of foreign judgments" in a diversity case); Phillips USA, Inc. v. Allflex USA, Inc., 77 F.3d 354, 359 (10th Cir. 1996); Seetransport Wiking v. Navimpex Centrala Navala, 989 F.2d 572, 582 (2d Cir. 1993); Success Motivation Inst. of Japan, Ltd. v. Success Motivation Inst., Inc., 966 F.2d 1007, 1009–10 (5th Cir. 1992); Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435, 440 n.8 (3d Cir. 1971); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 481 cmt. a & Reporters' Note 1 (AM. L. INST. 2018) ("The recognition and enforcement of foreign judgments in the United States are generally governed by State law."). The preclusive effect of foreign judgments with respect to federal-law claims is governed by federal law, however. *Id.* § 487 Reporters' Note 1. A number of scholars have argued that notwithstanding historical practice, the recognition of foreign judgments ought to be a matter of federal special common law, given the close relationship between foreign judgment recognition, international commerce, and foreign relations. *See infra* Section III.B.

[35] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 1962) [hereinafter 1962 UNIFORM ACT].

[36] UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. L. COMM'N 2005) [hereinafter 2005 UNIFORM ACT].

[37] Unif. L. Comm'n, *A Few Facts About the Uniform Foreign-Country Money Judgments Recognition Act*, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=01cd580f-1853-19c5-1133-51e5f26df93b&forceDialog=0 [https://perma.cc/83S9-V9E2]. For a comprehensive overview of the uniform acts, see generally GEORGE A. BERMANN, WILLIAM S. DODGE & DONALD EARL CHILDRESS III, TRANSNATIONAL LITIGATION IN A NUTSHELL 353–69 (2d ed. 2021).

[38] The scope of the uniform acts is limited to money judgments, but state courts may apply the principles outlined in the uniform acts to non-money judgments as well. BERMANN ET AL., *supra* note 37, at 353.

domestic relations.[39] Like the common-law rules in *Hilton*, both uniform acts create a default presumption that foreign judgments that are "final and conclusive and enforceable where rendered"[40] are "conclusive between the parties to the extent that [they] grant[] or den[y] recovery of a sum of money."[41]

The statutes recognize both mandatory and discretionary grounds for nonrecognition. Under both uniform acts, the mandatory grounds for nonrecognition include lack of systematic due process in the foreign country's judicial system,[42] lack of subject-matter jurisdiction by the rendering court,[43] and lack of personal jurisdiction by the rendering court.[44] U.S. courts uniformly determine whether the rendering court lacked jurisdiction with reference to U.S. constitutional standards, not just the law of the rendering court.[45] Both uniform acts, though, provide a jurisdictional "safe harbor": six circumstances under which the selected forum may not find personal jurisdiction lacking.[46] Both uniform acts also include discretionary grounds for nonrecognition.[47] The 2005 Uniform Act added two additional discretionary

[39] 1962 Uniform Act, *supra* note 35, § 1(2); 2005 Uniform Act, *supra* note 36, § 3.

[40] 1962 Uniform Act, *supra* note 35, § 2; *see also* 2005 Uniform Act, *supra* note 36, § 3. The law of the rendering court will determine when a foreign judgment is final and enforceable. It is therefore possible that a judgment may be final, even when an appeal is still pending. Both acts provide, however, for U.S. courts to stay proceedings until either the appeal has concluded or the time for appeal has expired. *See* 1962 Uniform Act, *supra* note 35, § 6; 2005 Uniform Act, *supra* note 36, § 8; *see also* Restatement (Fourth) of Foreign Relations Law § 481 cmt. e ("Although a judgment is final, conclusive, and enforceable under the law of the country in which it was rendered, the existence of a planned or pending appeal in the foreign jurisdiction may justify a decision to stay an action to obtain recognition of a foreign judgment.").

[41] 1962 Uniform Act, *supra* note 35, § 3; 2005 Uniform Act, *supra* note 36, § 3.

[42] 1962 Uniform Act, *supra* note 35, § 4(a)(1); 2005 Uniform Act, *supra* note 36, § 4(b)(1). The touchstone is not the U.S. constitutional test for due process, but "international due process." *See, e.g.*, Society of Lloyd's v. Ashenden, 233 F.3d 473, 478–79 (7th Cir. 2000).

[43] 1962 Uniform Act, *supra* note 35, § 4(a)(3); 2005 Uniform Act, *supra* note 36, § 4(b)(3).

[44] 1962 Uniform Act, *supra* note 35, § 4(a)(2); 2005 Uniform Act, *supra* note 36, § 4(b)(2).

[45] Restatement (Fourth) of Foreign Relations L. § 483 cmt. e (Am. L. Inst. 2018). "The prevailing view is that, even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of American concepts of jurisdiction to adjudicate." Ronald A. Brand, International Business Transactions Fundamentals 386 (2d ed. 2018).

[46] 1962 Uniform Act, *supra* note 35, § 5; 2005 Uniform Act, *supra* note 36, § 5.

[47] They are: 1. Extrinsic fraud in obtaining the judgment; 2. Violation of the selected forum's public policy; 3. Lack of notice; 4. Violation of an exclusive forum-selection clause; 5. Conflict with another final judgment; 6. Serious inconvenience of the foreign forum where judicial jurisdiction over the defendant is based only on personal service. 1962

grounds for nonrecognition.[48] Unlike *Hilton*, neither uniform act includes lack of reciprocity as a ground for nonrecognition.[49]

In the remaining states that have not adopted either uniform act, common law governs the recognition and enforcement of foreign judgments. Most states that have retained a common-law approach follow the framework laid out in the Fourth Restatement of Foreign Relations Law. Drawing on *Hilton*, and like the two uniform acts, the Restatement provides that final foreign judgments are, as a matter of international comity, presumptively entitled to recognition and enforcement in U.S. courts,[50] subject to certain mandatory[51] and discretionary[52] grounds for nonrecognition.

C. The Hague Judgments Convention

The Hague Judgments Convention is the second treaty to emerge from the Hague Conference on Private International Law's failed effort to draft a convention on both judicial jurisdiction and judgment recognition. The Judgments Convention avoids the pitfalls of the earlier project by taking a more modest tack, focusing only on indirect jurisdiction at the recognition and enforcement stage.[53]

It is worth digressing briefly to draw a conceptual distinction between direct and indirect jurisdictional rules. Direct jurisdiction refers to the rules that govern whether the rendering court could exercise judicial jurisdiction over the dispute in the first instance.[54] Indi-

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UNIFORM ACT, *supra* note 35, § 4(b)(1)–(6); 2005 UNIFORM ACT, *supra* note 36, § 4(c)(1)–(6).

[48] The discretionary grounds for nonrecognition include situations in which there is "substantial doubt about the integrity of the rendering court with respect to the judgment" and where the specific proceeding did not comport with the requirements of due process. 2005 UNIFORM ACT, *supra* note 36, § 4(c)(7)–(8).

[49] Six states have added lack of reciprocity as a ground for nonrecognition: Arizona, Florida, Maine, Massachusetts, Ohio, and Texas. *See* ARIZ. REV. STAT. ANN. § 12-3252 (2015); FLA. STAT. § 55.065 (2012); ME. REV. STAT. ANN. tit. 14, § 8505 (2019); MASS. GEN. LAWS ANN. ch. 235, § 23A (West 2022); OHIO REV. CODE ANN. § 2329.92 (West 2011); 2 TEX. ADMIN. CODE § 36A.004 (2017).

[50] RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 481 (AM. L. INST. 2018) ("Except as provided in §§ 483–484 and § 489, a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States.").

[51] *Id.* § 483.

[52] *Id.* § 484.

[53] Recall that earlier efforts at negotiating a double convention on judicial jurisdiction and foreign judgments recognition failed because the United States was not willing to limit certain grounds for direct jurisdiction. *See supra* note 8 and accompanying text.

[54] *See* Ralf Michaels, *Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions* (defining direct and indirect jurisdiction), *in* CONFLICT OF LAWS IN A GLOBALIZING WORLD 36 (Eckart Gottschalk, Ralf Michaels, Giesela Rühl & Jan Von Hein eds., 2009).

rect jurisdiction, by contrast, refers to the rules used by the selected court to determine whether the ground of jurisdiction exercised by the rendering court over the dispute was sufficient to sustain the judgment.[55] Direct jurisdiction is a matter for the rendering court whereas indirect jurisdiction is a matter for the selected court, which can pass judgment on the rendering court's exercise of judicial jurisdiction only *indirectly* at the judgment recognition stage. Fora can have different direct and indirect jurisdictional rules. For instance, a forum may have expansive rules for direct jurisdiction yet refuse to recognize and enforce foreign judgments that rely on those same jurisdictional grounds because its rules for indirect jurisdiction are narrower.[56] Because U.S. courts determine indirect jurisdiction by reference to the U.S. constitutional standard—the same test they use for determining the outer limits of their direct jurisdiction—there is generally no gap between direct and indirect jurisdiction for purposes of recognizing and enforcing foreign judgments in the United States.[57]

The Judgments Convention sets out a three-pillar regime: scope, eligibility, and refusal. First, it identifies the types of matters that fall within its scope: judgments regarding civil or commercial matters, with certain exceptions. Article 1(1) explicitly excludes judgments resulting from actions regarding "revenue, customs or administrative matters."[58] Article 2 then lays out a laundry list of specific subject matter that falls outside the scope of the Convention. Article 2(3) categorically excludes arbitration proceedings,[59] which are covered by the New York Convention.[60] Because the Judgments Convention is meant to be a package deal with the COCA, it does not encompass the rec-

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[55] *See id.* (same).

[56] The United Kingdom is an example of a country with a so-called "jurisdiction gap": its rules for direct jurisdiction are much broader than its rules for indirect jurisdiction. Practice Direction 6B lays out twenty-one possible grounds for effecting service abroad. By contrast, U.K. courts follow the "Dicey Rule" for indirect jurisdiction over foreign judgments. That test provides only four grounds for indirect jurisdiction. *See* Ronald A. Brand, *The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?*, 82 PITT. L. REV. 847, 869–73 (2021) [hereinafter Brand, *Judgments Convention in the United States*].

[57] *Id.* at 869 ("U.S. courts have uniformly interpreted this provision of the Uniform Act . . . to mean the foreign court must have had jurisdiction according to U.S. tests of personal jurisdiction.").

[58] Judgments Convention, *supra* note 18, art. 1(1).

[59] *Id.* art. 2(3).

[60] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]; *Status: New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention")*, UNITED NATIONS TREATY COLLECTION, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 [https://perma.cc/WT65-WSHS].

ognition and enforcement of judgments rendered by fora chosen by exclusive forum-selection clauses.[61]

Second, the Judgments Convention determines which judgments that fall within its scope are eligible for recognition by reference to a list of required bases of indirect jurisdiction; it has nothing at all to say about direct jurisdiction. Article 5(1) enumerates thirteen universally accepted bases of jurisdiction that make judgments within the scope of the Convention eligible for recognition and enforcement.[62] They roughly encompass three traditional bases of judicial jurisdiction: connection between the rendering court and defendant, connection between the rendering court and the controversy, and consent.[63] Article 15 clarifies that the Convention does not prevent members from using more expansive bases of jurisdiction if they decide to establish a more generous domestic regime.[64]

Finally, the Convention enumerates several permissible grounds[65] and one mandatory ground for nonrecognition.[66] Article 7(1) identifies the general permissible grounds. They largely track the permissible grounds for nonrecognition under the uniform state acts.[67] Article 7(2) also recognizes the failure by a second forum to defer to ongoing parallel litigation in a forum first "seised" with a "close con-

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[61] Judgments Convention, *supra* note 18, art. 5(1)(m); *see also* Linda J. Silberman, *The 2019 Judgments Convention: The Need for Comprehensive Federal Implementing Legislation and a Look Back at the ALI Proposed Federal Statute* 10 (Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 21-19, 2019) [hereinafter Silberman, *The 2019 Judgments Convention*] ("[B]ecause the Hague Conference negotiators viewed the 2005 Choice of Court Convention and the 2019 Judgments Convention as a 'package,' the Judgments Convention did not include consent to jurisdiction via an exclusive choice of court agreement within the list of jurisdictional filters eligible for recognition and enforcement.").

[62] Judgments Convention, *supra* note 18, art. 5(1). Article 5 does not include one common ground for judicial jurisdiction in other countries: the place where the tort injury occurred. This is probably because the fact of injury in the forum is not sufficient to establish specific jurisdiction under U.S. law. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

[63] *See* Ning Zhao, *Completing a Long-Awaited Puzzle in the Landscape of Cross-Border Recognition and Enforcement of Judgments: An Overview of the HCCH 2019 Judgments Convention*, 30 SWISS REV. INT'L & EUR. L. 345, 355 (2020) ("The [jurisdictional] filters in the Convention generally reflect three traditional jurisdictional conditions based on: connections between the State of origin and the relevant person, consent, and connections between the State of origin and the claim.").

[64] Judgments Convention, *supra* note 18, art. 15.

[65] *Id.* art. 7. The grounds for refusal identified in Article 7 are all discretionary. The Convention only identifies one mandatory ground for nonrecognition: Judgments that rule on rights in rem in immovable property may be recognized and enforced only in the forum where the property is located. *Id.* art. 6.

[66] *Id.* arts. 6 & 7(1)–(2).

[67] These are 1. Inadequate notice, 2. Extrinsic fraud, 3. Public policy, 4. Choice-of-court agreements, and 5. Inconsistent judgments. *Id.* art. 6.

nection" to the dispute as a permissible ground for nonrecognition of a judgment issued by the second forum.[68]

Article 6 lays out the only mandatory ground for nonrecognition for in rem proceedings. The selected court may recognize a judgment resulting from an in rem proceeding if and only if the property is situated in the forum.[69] Courts of member states must recognize and enforce judgments that are eligible for circulation if none of the grounds for refusal applies.

D. How the Judgments Convention Would Change the Current Framework

So how would the Judgments Convention change U.S. law? It turns out that, with some exceptions discussed below, it would not change much.[70] This may seem surprising, but it should not be. The U.S. interest in ratifying the Judgments Convention is not in changing or harmonizing domestic law on foreign judgment recognition.[71] It is in "expand[ing] the pool of [U.S.] judgments that would be recognized" abroad.[72]

First, the laundry list of subject matter excluded from the scope of the Convention is extensive and therefore the Judgments Convention, at least of its own force, would not necessarily change current law regarding the recognition and enforcement of those kinds of judgments at all.

Second, because most U.S. courts adopt a "mirror image" approach to indirect jurisdiction[73]—if the base of jurisdiction meets the court's test for direct jurisdiction, then for recognition purposes, it will be sufficient to establish that the rendering court had jurisdiction—there will usually be no "jurisdiction gap" between direct and

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[68] *Id.* art. 7(2).

[69] *Id.* art. 6.

[70] *See* Silberman, *The 2019 Judgments Convention*, *supra* note 61, at 10 ("[I]f one surveys existing law in the United States on recognition and enforcement, one will find that little would need to be done to ensure that the U.S. is in compliance with the treaty.") (footnote omitted).

[71] Although this is not an important consideration for deciding whether to join the Convention, it is when deciding *how* to implement it. *See infra* Section II.B.

[72] *See* Coco, *supra* note 3, at 1212; *see also* Silberman, *The 2019 Judgments Convention*, *supra* note 61 (emphasis omitted) ("U.S. interest in this Convention is not about harmonizing U.S. law on recognition/enforcement but rather about ensuring that U.S. judgments are enforced in other countries that have had significantly more restrictive regimes on recognition generally and/or are hostile to U.S. judgments in particular."). The benefits to U.S. litigants from such an expansion are obvious.

[73] *See* Silberman, *supra* note 22, at 106 n.24.

indirect jurisdictional rules.[74] Subject to the grounds for nonrecognition, if a foreign judgment is final and enforceable in the rendering court and the jurisdictional ground relied upon in the rendering court would have satisfied the U.S. test for direct jurisdiction, then it is entitled to recognition and enforcement in U.S. courts. Because the U.S. constitutional test for direct jurisdiction is more expansive than the jurisdictional filters enumerated in Article 5(1), and Article 15 permits contracting states to adopt more generous rules for recognition and enforcement, implementing the Judgments Convention will not change the governing law, at least with respect to eligibility—it will merely "lock in" a certain floor that all U.S. states already meet.[75]

Third, there is not much daylight between the grounds for nonrecognition recognized in the two current uniform laws and the exclusive grounds laid out in Article 7(1) of the Judgments Convention. And although Article 7(1) does not separately provide for nonrecognition when the specific proceeding before the rendering court was inconsistent with due process, Article 7(1)(c) includes within its public policy exception "situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State . . . ."[76]

Implementing the Judgments Convention would, however, require at least three changes. First, Article 6 would prohibit recognition and enforcement of foreign in rem judgments when the property is located outside the forum.[77] Second, Article 13(2) would prohibit U.S. courts from exercising forum non conveniens at the recognition and enforcement stage, at least for judgments within the scope of the Convention.[78] And third, Article 7 does not permit refusal on the ground that the judicial system of the rendering court generally fails to comport with due process. Article 29 does, however, permit member states to opt out of treaty relations with particular signatories at the

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[74] *See supra* notes 54–57 and accompanying text. Some U.S. courts take the view that they must look to the forum state's long-arm statute rather than the constitutional test. *Compare* Koster v. Automark Indus., Inc., 640 F.2d 77 (7th Cir. 1981) (applying the U.S. constitutional standard to determine if a foreign rendering court has jurisdiction), *with* Monk Own, Ltd. v. Monastery of Christ in Desert, 168 P.3d 121 (N.M. 2007) (applying the state long-arm statute). That approach could theoretically result in a gap in states whose long-arm statutes do not reach the constitutional limit. In those states, the Convention may require courts to recognize judgments that rest on jurisdictional grounds that would not be sufficient to establish judicial jurisdiction under state law.

[75] *See* Brand, *Judgments Convention in the United States*, *supra* note 56.

[76] Judgments Convention, *supra* note 18, art. 7(1)(c).

[77] *Id.* art. 6.

[78] *Id.* art. 13(2).

threshold.[79] The political branches could instead identify nations whose judicial systems are problematic, rather than relying on courts to make relatively unguided determinations.[80]

II
How Should the United States Implement the Judgments Convention?

Virtually all serious U.S. stakeholders agree that the Judgments Convention is valuable and that implementing it would not radically change the domestic landscape. But once again, the relevant stakeholders are struggling to agree on how, not whether, to implement the Judgments Convention. This Part begins in Section II.A by describing the cooperative federalism approach to implementation proposed by the ULC and the attendant policy objections to federal implementation that have stymied ratification of the COCA and which seem poised to do the same to the Judgments Convention. Section II.B goes on to identify the principles that, in the abstract, should guide implementation of a federal treaty on foreign judgments recognition and makes the positive case that a federal statute optimizes each of these interests. Section II.C then considers and rejects specific policy arguments in favor of implementing the Judgments Convention primarily by uniform state law.

A. Federal Implementing Legislation and Its Discontents

When the United States signed the COCA on January 19, 2009, many stakeholders and scholars thought that the obvious model for implementation would be international arbitration. The United States implemented the New York Convention in 1970 by enacting Chapter 2 of the Federal Arbitration Act (FAA).[81] The federal implementing legislation restates the basic obligations of the New York Convention, but not in any detail. It instead primarily addresses issues like venue, jurisdiction, removal, and the procedure for recognizing and enforcing

[79] *Id.* art. 29. This provision has generated some criticism because it appears to permit the United States to opt out of treaty relations with another signatory only at one of two times: within twelve months of notifying the depository that it has ratified the Convention or within twelve months of the time in which the other signatory has notified the depository that it has ratified the Convention. There seems to be no mechanism for opting out of treaty relations with another signatory at a later time.

[80] *See, e.g.*, Shanghai Yongrun Inv. Mgmt. Co. v. Kashi Galaxy Venture Capital Co., Ltd., No. 54, slip op. at 4 (N.Y. Sup. Ct. Apr. 30, 2021) (declining to recognize Chinese judgment because it was "rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law").

[81] Federal Arbitration Act, 9 U.S.C. §§ 201–208.

arbitral awards.[82] The implementing legislation created concurrent federal question jurisdiction over actions to enforce international arbitration agreements and recognize foreign arbitral awards.[83] Instead of a bare-bones approach, some stakeholders saw an opportunity to implement general legislation on foreign judgments recognition, along the lines of the American Law Institute's proposed statute on this subject.[84]

Key stakeholders—namely the ULC—offered a different approach rooted in federalism concerns: The United States should implement the COCA primarily through uniform state law. Proponents of this view raised several arguments in support of their position. First, both choice-of-court agreements and foreign judgments recognition have historically been matters of state law, and state governments are especially sensitive to the possibility of federal preemption in zones of traditional state control. On this view, it is better to harmonize federal treaties with surrounding state law and minimize disruption.[85] Second, uniform state laws, whose language and structure state judges are already familiar with, would facilitate implementation in state courts.[86] Third, proponents of this view argue that principles of subsidiarity weigh in favor of local implementation: Legal issues, including issues of private international law, should be addressed by the level of government that is most familiar with them.[87]

In 2007, the ULC initiated a study committee to evaluate and draft a uniform act to implement the COCA. The study committee formulated a "conditional preemption" approach to implementation that depended on parallel enactment of federal and state legislation. Under this method, Congress would first enact default implementing

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[82] *Id.*

[83] *Id.* § 203.

[84] AM. L. INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter PROPOSED ALI STATUTE].

[85] *See* Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 312–17 (2005) (discussing the benefits of the soft law approach, which encourages developing international text to mirror domestic legislation for easy incorporation).

[86] Loken, *supra* note 13, at 125 ("[The cooperative federalism] approach was largely inspired by . . . the belief that it would facilitate implementation of the COCA in state courts if the Convention were translated into state law, in some cases using terminology more readily understandable by U.S. judges.").

[87] *See* Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1065 (2008) (arguing that "local and state governments are much more likely to deal with recognition questions" and therefore "state-level implementation of international rules for recognition makes practical sense").

legislation. States would then have the opportunity to opt out, conditional upon adopting a substantively identical uniform state law.

In an effort to broker a compromise, the State Department issued a White Paper in April 2012 outlining a cooperative federalism approach to implementation.[88] The White Paper proposed the same default federal statute and opt-out mechanism advanced by the ULC. It did not expressly create federal question jurisdiction for actions to recognize and enforce judgments resulting from exclusive choice-of-court agreements; instead, it retained ordinary rules for diversity jurisdiction and removal.[89] It provided, however, that federal courts sitting in diversity were required to look to the federal implementing statute, rather than state law.[90] The ULC objected to the applicable law proposal, again citing federalism concerns.[91] Specifically, the ULC argued that the *Erie* doctrine prohibited federal courts from applying federal statutory law when sitting in diversity.[92] Without support from the ULC, implementation efforts floundered.[93] The United States still has not implemented the COCA. The federalism objection appears to apply with equal force to the Judgments Convention, and therefore deserves careful evaluation.

B. Federal Implementing Legislation Optimizes the Relevant Interests

Most people agree that federalism is important in the United States.[94] But it is not the only relevant interest, particularly with

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[88] STATE DEPARTMENT WHITE PAPER, *supra* note 16.

[89] *Id.* at 4 ("[W]e now propose to restore normal diversity rules for federal court jurisdiction, with the normal rules on removal. This approach will limit federal court jurisdiction to cases involving complete diversity, and has the virtue of reducing complexity.").

[90] *Id.* ("[W]e have concluded that, on balance, the policy interests of the U.S. government are best served by having federal courts apply federal law, while leaving administration of uniform law issues to state courts . . . .").

[91] *See* Michael Houghton May 22 Letter, *supra* note 21 and accompanying text.

[92] *Id.* (arguing that the applicable law proposal violated *Erie* because "when an action is brought in federal court only under diversity jurisdiction, the federal court will apply *state* substantive law in deciding the dispute"). Section III.B explores this argument in greater depth.

[93] *See* U.S. Dep't of State, Memorandum of the Legal Adviser Regarding United States Implementation of the Hague Convention on Choice of Court Agreements (Jan. 19, 2013), https://2009-2017.state.gov/s/l/releases/2013/206657.htm [https://perma.cc/9UXV-G9Z5] ("With the continuing impasse over the acceptability of the White Paper proposals, progress on a cooperative federalism approach remains stalled.").

[94] *See, e.g.*, Burbank, *Federalism and Private International Law*, *supra* note 3, at 308–09 ("Federalism is important in the United States. It is also important that the United States be able to participate effectively in a global economy and that those charged with the conduct of the country's foreign affairs be able to make . . . international agreements . . . designed to facilitate transnational commercial activity.").

respect to the implementation of international treaties. Any satisfactory approach to implementing the Judgments Convention must account not only for federalism concerns, but also for values like administrability, certainty and predictability for litigants, compliance with international obligations, and the U.S. interest in promoting reciprocal treatment of its judgments abroad.[95] Notwithstanding the federalism concerns raised by the ULC, implementing the Judgments Convention by federal statute optimizes each of these relevant interests, including the interest in maintaining an appropriate balance between state and federal interests.

First, federal legislation would be far superior to uniform legislation in promoting judicial administrability of the Judgments Convention. At least with respect to the areas covered by the Convention that require autonomous interpretation,[96] reference to a single statute whose interpretation is reviewable by the Supreme Court would facilitate the development of clear doctrine. This approach will spare federal courts sitting in diversity jurisdiction[97] the cumbersome task of looking to the uniform state law as interpreted by the state high court, determining if the state high court's interpretation of the uniform law conflicts with the federal default statute, and if so, whether the federal default statute preempts the state law.[98]

Second, and for similar reasons, federal implementing legislation would minimize uncertainty for foreign judgment debtors and credi-

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[95] *Cf.* STATE DEPARTMENT WHITE PAPER, *supra* note 16, at 2 (noting that the principles governing implementation of the COCA included "[a]ssurance that the implementation approach taken by the United States will result in U.S. compliance with its international obligations[;] [t]aking into account the historical allocation of relevant federal and state interests[;] [p]roviding certainty in transactions[;] [p]romoting transparency[;] [and t]aking into account the views of potential treaty partners regarding implementation").

[96] *See, e.g.*, FRANCISCO GARCIMARTÍN & GENEVIÈVE SAUMIER, CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS: EXPLANATORY REPORT art. 1, ¶ 1 cmt. 32 (2020) [hereinafter GARCIMARTÍN & SAUMIER, EXPLANATORY REPORT] (noting that courts of the selected forum autonomously determine what constitutes a judgment resulting from a "commercial or civil matter[]").

[97] Even if Congress does not expressly provide for federal question jurisdiction in the implementing legislation, it seems likely that an action to recognize and enforce a judgment within the scope of the Judgments Convention would "arise under" federal law for purposes of 28 U.S.C. § 1331.

[98] *See* STATE DEPARTMENT WHITE PAPER, *supra* note 16, at 5 ("Applying only federal law would greatly simplify the task for federal courts, which will have the straightforward task of construing a federal statute."); *see also* Burbank, *A Tea Party at The Hague?*, *supra* note 16 at 643 ("What, after all, is so difficult to understand about the proposition that . . . the complexity of an implementation regime which required consulting . . . a federal statute, a state version of a uniform act, and case law interpreting the state statute would drive transactional lawyers to arbitration and drive litigators to drink?").

tors about whether a judgment within the Convention's scope will be recognized and enforced in U.S. courts. Litigants would not need to evaluate whether bringing a recognition action in Massachusetts instead of Arkansas would result in costly litigation over preemption. Additionally, bare-bones federal default legislation may permit different states to take different approaches to areas of foreign judgments recognition that the Convention does not speak to directly but that bear on predictability. For example, there is currently variation, and therefore uncertainty from the perspective of judgment debtors, about whether raising a defense on the merits in the rendering court after raising a jurisdictional objection constitutes consent to jurisdiction.[99] A federal statute that provides the rule in all circumstances would provide much-needed predictability for foreign parties who might be wary of conducting business with American businesses due to fear that the complexity of the U.S. regime will prevent efficient litigation.[100] It is true that a federal default statute could include these kinds of gap-filling measures, but again, it is inevitable that state courts' interpretation of the gap-filling measures in accompanying uniform state laws will over time balkanize and generate costly and confusing preemption litigation.

Third, a federal statutory approach to implementation minimizes the risk that the United States will fail to comply with the terms of the Convention. Even if the Supreme Court could ultimately review state-law deviations from the federal default statute as a matter of federal preemption,[101] it is both undesirable and costly for the Supreme Court to devote significant attention to this issue, given the likelihood that interpretation by possibly more than fifty state courts over time will result in substantial deviation. Additionally, it is likely that the Supreme Court will not grant certiorari on every preemption issue

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[99] *See* GARCIMARTÍN & SAUMIER, EXPLANATORY REPORT, *supra* note 96, art. 5, ¶ 1(f) cmt. 169. *Compare* CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 792 N.E.2d 155 (N.Y. 2003) (holding that by raising defense in foreign proceeding, defendant made a voluntary appearance and therefore consented to judicial jurisdiction in the rendering court), *with* Nippon Emo-Trans Co. v. Emo-Trans, Inc., 744 F. Supp. 1215 (E.D.N.Y. 1990) (concluding that raising merits defense in rendering court after failed jurisdictional objection does not constitute consent if the foreign jurisdictional ground was inconsistent with U.S. constitutional standards). It is not clear whether the Judgments Convention speaks directly to this issue. The text of the Convention itself is silent, but the *travaux preparatoire* indicates that raising a merits defense after losing a jurisdictional challenge does not constitute consent to jurisdiction for purposes of Article 5(1)(f).

[100] *See* Strong, *supra* note 5, at 51.

[101] With one minor and Delphic exception, federal preemption does not provide a basis for removal to federal court. *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 207 (2004) (discussing the doctrine of complete preemption). It does, however, constitute a federal issue reviewable by the Supreme Court on a petition for certiorari from the state high court under 28 U.S.C. § 1257(a). *See* 28 U.S.C. § 1257(a).

raised under the Convention. Permitting variation to linger could harm the ability of the United States to satisfy its international obligations under the Convention and undermine the confidence of our foreign partners.

Fourth, implementation by uniform state law inadequately serves the United States' ultimate interest in enacting the Judgments Convention: increasing the number of American judgments that are recognized and enforced abroad. A patchwork approach by states with respect to reciprocity risks severely undermining the U.S. interest in promoting reciprocal treatment of American judgments.[102] Federal legislation could impose a general reciprocity requirement for foreign judgments that fall within the scope of the Convention but are rendered by courts of non-signatories.[103] Of course, the Judgments Convention already functions as a general reciprocity requirement between signatories.[104] But if foreign states know that many U.S. state regimes will recognize judgments falling within the scope of the Convention, regardless of whether they ratify the Convention, then they will have less incentive to join it.[105] A federal implementing statute that imposes a reciprocity requirement for at least judgments falling within the scope of the Convention is necessary to avoid this freeriding problem.[106]

Federal implementing legislation could also create some formal and tailored mechanism for staying U.S. proceedings in deference to foreign parallel litigation. Article 7(2) of the Judgments Convention allows a signatory with a close connection to a dispute to decline recognition of foreign judgments on the ground that the rendering court did not defer to parallel proceedings first commenced in its courts.[107] The United States currently does not recognize a formal doctrine of lis pendens, and the available mechanisms are crude at best for this pur-

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102 *See* Silberman, *The 2019 Judgments Convention*, *supra* note 61, at 14 (noting that one "consequence of allowing parallel state and federal regimes would be to permit recognition or enforcement of a foreign judgment within the scope of the treaty even if that country had not joined the Convention"). Most states currently do not have any reciprocity requirement for the recognition and enforcement of foreign judgments. *See* Restatement (Fourth) of Foreign Relations Law, § 484 cmt. k, Reporters' Note 10.

103 *See* Silberman, *The 2019 Judgments Convention*, *supra* note 61, at 14–15.

104 *See id.*

105 *See id.* at 14.

106 A serious lingering question is whether Congress should require reciprocity for judgments *outside* the scope of the Convention. If so, Congress will have to federalize judgments recognition at least partly beyond the scope of what the Convention requires. If not, however, we will be left with a bizarre situation in which judgments falling outside the scope of the Convention receive more generous treatment—because most states do not currently require reciprocity as a matter of state law as a precondition for recognition—than judgments falling within the scope of the Convention.

107 *See* Judgments Convention, *supra* note 18, art. 7(2).

pose.[108] It is therefore possible that foreign courts may not recognize U.S. judgments that are otherwise eligible for recognition under the Convention, but which were not stayed or dismissed in deference to foreign parallel proceedings.[109] Federal implementing legislation that creates some formal mechanism for staying domestic proceedings in deference to pending litigation abroad could prevent U.S. courts from wasting judicial resources on issuing judgments that may not be recognized abroad because of Article 7(2).

Finally, there are several countervailing federalism interests that weigh against implementation by uniform state law. Although it is true that the recognition and enforcement of foreign judgments traditionally has been a matter of state law, this is more a matter of historical anomaly than sound reasoning from first principles.[110] After all, the recognition and enforcement of foreign judgments implicates both foreign relations and international commerce.[111] That courts, rather than the executive branch, are primarily responsible for overseeing these proceedings does not somehow eliminate the foreign policy implications inherent in foreign judgments recognition.[112] If there is a strong federal interest with respect to the recognition and enforcement of foreign judgments generally, then a fortiori, there is a strong federal interest when the federal government seeks to enact an international treaty on this subject.

Even accepting, for the moment, the federalism arguments advanced by proponents of cooperative federalism, it is still not obvious that implementation of the Judgments Convention by state

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[108] *Lis alibi pendens* is a mechanism primarily found in civil law countries that permits a court to decline to exercise jurisdiction in deference to parallel litigation first commenced in another forum. *See generally* Linda J. Silberman, *Lis Alibi Pendens*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW (Jürgen Basedow, Giesela Rühl, Franco Ferrari & Pedro de Miguel Asensio eds., 2017). To the extent the existence of foreign parallel litigation factors at all into their decision to decline to exercise jurisdiction, it is through forum non conveniens, or the inchoate doctrine of international comity abstention.

[109] *See* Silberman, *The 2019 Judgments Convention*, *supra* note 61, at 13 ("[F]ederal implementing legislation could include a provision for the declination of jurisdiction when a prior foreign action is pending, thus eliminating the unnecessary burdens of parallel litigation in situations where enforcement of the U.S. judgment abroad might be necessary.").

[110] *See* Loken, *supra* note 13, at 125 (noting that proponents of a federal statute "tend to believe that it was a historical anomaly that recognition and enforcement of foreign judgments developed as state law").

[111] *See* Burbank, *A Tea Party at The Hague?*, *supra* note 16, at 629 ("Transnational judgment recognition and enforcement law and practice are, inescapably, aspects of a country's foreign policy.").

[112] *See id.* at 629–30 (arguing that federal courts are, and are perceived abroad as, "expositors and formulators of national policy" and that "such salience is easier to miss in the United States than elsewhere because of the absence of federal statutory rules and the prominent default role that state law has been allowed to assume").

law is necessary to accommodate state interests. As Professor Stephen Burbank has noted, implementation by federal statute can protect certain especially strong areas of state interest by borrowing relevant state law.[113] If the core of the federalism objection is that state substantive law should govern certain areas of foreign judgments recognition, it does not logically follow that the United States should implement the treaty through state law. It is possible to implement a treaty by federal statute and, where federalism concerns justify doing so, borrow state-law principles.[114] In the context of the COCA, for instance, there was consensus, even by proponents of a federal statutory approach to implementation, that state law would govern questions like whether a choice-of-court agreement was null and void[115] within the meaning of the Convention.[116] Federal implementing legislation for the Judgments Convention could similarly borrow state law for issues where federalism concerns are especially strong, like whether the public policy defense applies.[117]

C. Rejecting Cooperative Federalism for the Judgments Convention

There are no persuasive arguments for implementing the Judgments Convention by a patchwork of state laws rather than by federal statute. Furthermore, implementation of the Judgments Convention by state legislation would needlessly increase litigation costs for foreign judgment creditors and debtors, increase the "litigation premium" that U.S. businesses pay to transact with foreign companies, and utterly befuddle our foreign partners. None of this is to say that cooperative federalism is never an appropriate method for implementing treaties on private international law. It might be desirable, for instance, when there are strong federalism concerns weighing

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113 Burbank, *Federalism and Private International Law*, *supra* note 3, at 301 ("[T]here is no necessary connection between the process used to implement [a] treaty and the source of the rules to which resort is made for that purpose.").

114 *See, e.g.*, *infra* Section IV.

115 Article 5(1) requires a forum selected by a choice-of-court agreement to exercise jurisdiction over the dispute, unless the agreement is "null and void under the law of that State." *See* Hague Conference on Private International Law, *supra* note 10. Curiously, the COCA's reference to "the law of the State" refers to the *whole* law, including the state's conflicts rules. *Id.* So, to be precise, the first inquiry would be which internal law applies under the choice-of-law rules of the forum. But the bottom-line point is that the substantive contract law that would ultimately apply if the relevant choice-of-law rules pointed to the United States would be *state* law, not federal law.

116 *See* Trooboff, *Implementing Legislation*, *supra* note 8, at 140 ("To be clear, every participant in this complex exercise of designing COCA implementation shares the ULC position that state law governs today and should always govern exclusively many of the issues that will arise under any approach to COCA's implementation . . . .").

117 *See infra* Section IV.B.

in favor of allowing states to retain the lead role in overseeing the area of law in question. In those circumstances, the interest in minimizing disruption and promoting harmony with surrounding state law is strong. It is, however, an especially poor method of treaty implementation in the field of foreign judgments recognition.

Three policy arguments generally underlie the cooperative federalism argument. First, recognition and enforcement of foreign judgments has historically been a matter of state law, and it is therefore desirable to implement the treaty in such a way that minimizes disruption and promotes harmonization with surrounding state law.[118] Second, uniform state laws would more smoothly facilitate implementation of the Judgments Convention because state courts are already familiar with them.[119] And third, principles of subsidiarity make state-level implementation more practical because state governments and courts more frequently deal with these issues.[120] This Section will evaluate each argument in turn.

First, it is true as a descriptive matter that the recognition and enforcement of foreign judgments has been a matter of state law. That is not an independent normative argument in support of the proposition that state law should continue to control this area. As some scholars have argued, the fact that state law, rather than federal common law, came to govern foreign judgments recognition is a historical anomaly.[121] During the first half of the twentieth century, the United States had taken an isolationist posture with respect to private international law.[122] It was during this period that the principle of state control over foreign judgments recognition emerged and crystallized, particularly after *Erie*.[123]

Many of the historical conditions that led to this consensus no longer apply. As the United States became part of a global economy, it reversed course on its isolationism and joined the Hague Conference on Private International Law in 1964.[124] Over the next

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118 *See, e.g.*, Reitz, *supra* note 85, at 312–17.

119 *See, e.g.*, Loken, *supra* note 13, at 125 (noting that the cooperative federalism approach to implementing the COCA "was largely inspired by . . . the belief that it would facilitate implementation of the COCA in state courts if the Convention were translated into state law, in some cases using terminology more readily understandable by U.S. judges").

120 *See, e.g.*, Ku, *supra* note 87, at 1065.

121 *See* Loken, *supra* note 110 and accompanying text; *see also infra* Section III.B.1.

122 *See* Burbank, *Federalism and Private International Law*, *supra* note 3, at 296 (noting that "isolationism and arguments about state prerogatives combined to prevent the United States from joining the Hague Conference, and thus from participating in any private international lawmaking . . . until 1964").

123 *See supra* notes 33–34 and accompanying text.

124 *See* Burbank, *Federalism and Private International Law*, *supra* note 3, at 296.

several decades, the United States ratified several private international law treaties, including the New York Convention,[125] the Hague Service Convention,[126] and the Hague Evidence Convention.[127] As Professor Burbank has argued, the framers understood the interrelationship between interstate commerce and judgments recognition, which is why the Constitution clearly provides that the recognition and enforcement of sister-state judgments is a matter of federal law.[128] As foreign commerce has become equally, if not more, important to the U.S. economy than interstate commerce, naturally "federal leadership in *international* judgment recognition and enforcement practice would appear at least as strong today as was the case for federal control of *interstate* practice in 1787."[129]

Second, the argument that cooperative federalism is vital to ensuring effective implementation of the Judgments Convention because states are more comfortable with uniform laws fails to grapple seriously with the fact that federal implementation of the New York Convention has been very successful.[130] Under the FAA, state courts have concurrent jurisdiction over actions to recognize and enforce foreign arbitral awards.[131] There has been virtually no serious effort, however, to argue that implementing the New York Convention by federal statute somehow frustrated its implementation in state courts. Proponents of the cooperative federalism approach have argued that the FAA case is distinguishable because the historic hostility of state courts to arbitration justified federal intervention.[132] This misses the point. Congress's decision to implement the New York Convention by federal statute may have been motivated in part by a desire to prevent state courts from undermining the terms of the

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125 *See generally* New York Convention, *supra* note 60.

126 *See generally* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

127 *See generally* Convention on Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

128 *See* Burbank, *Federalism and Private International Law*, *supra* note 3, at 297.

129 *Id.*

130 Trooboff, *Implementing Legislation*, *supra* note 8, at 143 n.19 ("I have never understood why this historical argument relating to arbitration, which fully concedes that there has been highly successful effort to implement the New York Convention through a single federal statute and self-executing convention, supports the ULC position . . . .").

131 *See* Federal Arbitration Act, 9 U.S.C. § 203 (providing for general federal question jurisdiction on a concurrent rather than exclusive basis); *Tafflin v. Levitt*, 493 U.S. 455, 462 (1990) (stating that unless a federal statute creates exclusive federal subject matter jurisdiction, state courts are presumed to have concurrent jurisdiction).

132 *See* Trooboff, *Implementing Legislation*, *supra* note 8, at 143 n.19 (noting that the "ULC has pointed out that Congress adopted the provisions in the Federal Arbitration Act implementing the New York Convention at a time when the courts, especially a number of state courts, were less receptive to upholding arbitration agreements").

treaty. But no one seriously disputes that state courts have very successfully enforced the New York Convention, even though Congress implemented it by federal statute rather than uniform state law. Ironically, the argument that state implementing legislation is important to facilitate smooth implementation of the Convention in state courts gives too little credit to state judges, who are perfectly capable of interpreting and applying the terms of the Judgments Convention and federal implementing legislation.[133]

Finally, implementing the Judgments Convention by uniform state law, whatever its virtues, will also pose serious disadvantages. It is inevitable that parallel state and federal default legislation would generate added litigation expenses, particularly if the applicable law in federal diversity actions is the uniform state law. Federal courts would need to consider how the relevant state high court has interpreted the uniform state law, whether that interpretation deviates from the federal default legislation, and whether the federal default legislation preempts the state law. Resolving these complex questions would take up valuable judicial resources. The complexity of getting foreign judgments recognized in U.S. courts may cause foreign businesses to impose a "litigation premium" on American partners.[134] And finally, Article 20 of the Judgments Convention provides that "[i]n the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application."[135] The cooperative federalism approach advanced by the ULC and others is likely inscrutable to negotiators from other Hague Conference delegations.[136]

To be sure, federalism concerns can justify novel and collaborative approaches to treaty implementation. But the burden is on proponents of cooperative federalism to establish why these drawbacks are strong enough to justify an approach that will bewilder allies, frustrate American commerce, and consume valuable judicial resources. They have not done so.

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133 *See* Trooboff, *Implementing Legislation*, *supra* note 8, at 143 n.19.

134 *See* Strong, *supra* note 5, at 51.

135 Judgments Convention, *supra* note 18, art. 20.

136 *See* David P. Stewart, *Implementing the Hague Choice of Court Convention: The Argument in Favor of "Cooperative Federalism*," in FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 147, 159 (Paul B. Stephan ed., 2014) ("State-by-state implementation would remain confusing to those unfamiliar with the U.S. system and act as a deterrent to their willingness to agree to litigate disputes in U.S. courts.").

III
LAYING THE *ERIE* OBJECTION TO REST

Part II establishes that federal implementing legislation optimizes the interests that ought to guide the implementation of the Judgments Convention, that the policy concerns that underlie cooperative federalism are unavailing, and that implementation by uniform state law poses serious disadvantages. That does not settle the implementation question, however. This Part addresses the principal legal objection to implementation of the Judgments Convention by federal statute: that the *Erie* doctrine requires federal courts sitting in diversity jurisdiction to use state law on foreign judgment recognition. Section III.A begins by fleshing out the details of the *Erie* objection that the ULC has previously raised in response to federal implementing legislation for the COCA. Section III.B seeks to debunk this argument conclusively. First, there is a strong argument that federal courts on their own could create federal special common law regarding foreign judgments recognition. Second, and more to the point, *Erie* has no application when Congress has validly prescribed a rule of decision by statute. To the extent any objections remain to implementation of the Judgments Convention by federal statute, they are political, not legal. Whatever the merits of these political objections, cloaking them in the garb of *Erie* confounds more than it clarifies.

A. The Erie *Objection*

In a 2012 letter to then State Department Legal Advisor Harold Hongju Koh, Michael Houghton, the President of the ULC, wrote that the ULC could not support the implementation proposal for the COCA outlined in the State Department White Paper. According to Houghton, the proposed applicable law rule—that the federal default statute, rather than uniform state laws, would apply in federal diversity actions—violated *Erie*.[137] "The compromise proposed is troubling," Houghton wrote, "in that it does change the existing federal/state balance by altering a core principle that has governed questions of federal/state jurisdiction since the landmark decision of *Erie v. Tomkins*[] [sic] . . . ."[138]

Houghton's point seemed to be that because foreign judgments recognition is a matter of state "substantive" law, federal courts sitting in diversity must apply it. This is true, Houghton reasoned, even when Congress wants to supply the rule of decision by federal statute. The letter goes on to identify three further, quasi-legal arguments vaguely

[137] *See* Michael Houghton May 22 Letter, *supra* note 21, at 2–3.
[138] *Id.* at 2.

related to *Erie*: that the proposed applicable law rule would result in forum shopping between federal and state court, that it would be seen as unfair to defendants, and that applying federal law in diversity actions is "without precedent."[139] Professor Koh responded by arguing, among other things, that the State Department and Office of Legal Counsel both considered and rejected the *Erie* argument.[140] The ULC was not mollified. In his response letter, Houghton reiterated "the many reasons that the ULC objects to this unnecessary and, in our view, radical departure from the long-standing doctrine of *Erie v. Tompkins*."[141]

Although it does not seem the ULC has publicly made similar legal objections to federal implementation of the Judgments Convention, these arguments should apply with equal force to any implementation strategy that would require federal courts to look to federal law in diversity actions. Because these arguments are meritless and, frankly, destructive, it is important to nip them in the bud early. And while it would be desirable to avoid the *Erie* issue altogether by expressly providing for federal question jurisdiction over proceedings brought under the federal implementing legislation,[142] there is reason to think that this approach might meet stiff political resistance.[143]

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[139] *Id.* at 3–5.

[140] Letter from Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, to Michael Houghton, President, Unif. L. Comm'n, at 2 (July 2, 2012), https://2009-2017.state.gov/documents/organization/211371.pdf [https://perma.cc/NWJ8-N2TG].

[141] Letter from Michael Houghton, President, Unif. L. Comm'n, to Harold Hongju Koh, Legal Advisor, U.S. Dep't of State (Sept. 4, 2012), https://2009-2017.state.gov/documents/organization/211371.pdf [https://perma.cc/NWJ8-N2TG].

[142] It is not clear that an express grant of jurisdiction is even necessary for federal question jurisdiction to lie. Actions to recognize and enforce judgments within the scope of the Judgments Convention probably arise under federal law for general federal question jurisdiction purposes under 28 U.S.C. § 1331. *See supra* note 97 and accompanying text.

[143] Both the state and federal judiciary opposed liberalizing federal jurisdiction over actions to recognize and enforce foreign judgments resulting from exclusive choice-of-court agreements under the COCA, either by creating federal question jurisdiction or expanding removal jurisdiction. *See, e.g.*, CONF. OF CHIEF JUSTS., RESOLUTION 2: URGING THE UNITED STATES GOVERNMENT TO RESPECT STATE POLICIES AND PRINCIPLES OF FEDERALISM WITH REGARD TO ENACTING LEGISLATION TO IMPLEMENT THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS (2010), https://ccj.ncsc.org/__data/assets/pdf_file/0018/23706/06282010-urging-the-united-states-government-to-respect-state-policies-and-principles.pdf [https://perma.cc/PL9J-X2MW] (implicitly endorsing the ULC's "cooperative federalism" approach, which provided for ordinary rules of diversity and removal jurisdiction); *see also* JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14 (2010), https://www.uscourts.gov/sites/default/files/2010-03.pdf [https://perma.cc/5AXT-X3SP]. Other observers have argued that the concern that liberalizing jurisdictional rules would overwhelm federal courts is overstated and lacks empirical foundation. *See, e.g.*, Trooboff, *Implementing Legislation*, *supra* note 8, at 138–39.

B. Rejecting the Erie *Objection*

There is no serious *Erie*-based objection to implementation of the Hague Judgments Convention by federal statute.

First, *Erie* stands for the proposition that federal courts cannot generate *general* common law; *Erie* and its progeny have unambiguously recognized a role for federal courts in devising federal common law in areas of distinct federal interest, such as foreign relations.[144] So it is not even obvious that, as a matter of first principles, federal courts sitting in diversity should apply state law on foreign judgments recognition. Second, and more to the point, *Erie* simply has no application when a federal statute supplies the applicable law,[145] even in diversity actions.[146] And finally, even proponents of the cooperative federalism approach concede that any implementation strategy that gives states the lead depends on a federal default statute that would apply in the event that some states fail to adopt the uniform state implementing legislation.[147] To the extent any material differences would arise in interpreting the federal default statute and the uniform state acts, the federal default legislation would preempt. The federalism concerns underlying *Erie* simply do not apply where the federal and state statutes are designed to be identical and where substantive law will preempt in the event of deviation.

1. Federal Courts Can Still Formulate Federal Common Law Regarding Areas of Unique Federal Interest

If there is one thing law students remember about the *Erie* doctrine from their first-year procedure course, it is that when federal courts are exercising diversity jurisdiction, they look to state substan-

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144 *See generally* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). *See also* Burbank, *A Tea Party at The Hague?*, *supra* note 111 and accompanying text; Willis L.M. Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 788 (1950) ("[S]ince the effect of [foreign] judgments in this country clearly affects our relations with other nations, the question would seem properly to fall within the federal sphere.").

145 *See* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 705 (1974) ("*Erie* did not fence off a 'local law field' constitutionally immune to federal influence; it was quite clear that exclusive state power takes up only where federal power leaves off.").

146 *See* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 25 n.32 (1983); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967) ("[T]he question is whether Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative.").

147 *See* Loken, *supra* note 13, at 126 ("As the international obligations of the United States would be implicated by the implementing legislation, it was recognized that, in the event that application of a state law created an inconsistency with those obligations, preemption must be available.").

tive law, not general federal common law, for the rule of decision.[148] The Supreme Court has been unequivocal, however, in recognizing that the *Erie* doctrine does not entirely displace federal common law. As Justice Brandeis acknowledged in a decision released on the same day as *Erie* itself, federal courts may still formulate *specialized* federal common law on issues of uniquely federal interest.[149]

Scholars and judges generally agree that federal courts have common lawmaking power in the realm of international law and related issues implicating foreign relations.[150] Shortly after the Court announced its decision in *Erie*, Professor Philip Jessup argued that "any attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court."[151] The Supreme Court expressly accepted Professor Jessup's argument in *Banco Nacional de Cuba v. Sabbatino*.[152] In that case, the Supreme Court held that the act-of-state doctrine[153] is a matter of federal common law. Allowing each state to devise its own rule on this issue, the Court reasoned, could undermine foreign relations with other countries.[154] The Court recognized "the potential dangers were *Erie* extended to legal problems affecting international relations"[155] and,

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148 *E.g.*, JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 201 (5th ed. 2015) (explaining that *Erie* stands for the proposition that "federal courts in diversity actions must apply judicially announced state-created substantive law").

149 *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (concluding that interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive"); *see also* Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (noting that federal courts may still formulate federal common law in certain areas implicating "uniquely federal interests").

150 *See Boyle*, 487 U.S. at 508 n.4 (noting that for federal common lawmaking purposes, there is a "distinctive federal interest in . . . 'the exterior relation of this whole nation with other nations and governments'" (quoting Hines v. Davidowitz, 312 U.S. 52, 66 (1941))); *see also* Koh, *supra* note 144, at 1825, 1835 (noting that it is a "hornbook rule" that "international law, as applied in the United States, must be federal law"). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that federal courts should not have common lawmaking power over international law without authorization from the federal political branches).

151 Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 741–43 (1939).

152 376 U.S. 398, 425 (1964) (citing Jessup, *supra* note 151).

153 The act-of-state doctrine provides that the courts of one country will not sit in judgment of the acts of another sovereign within its own territory.

154 *See Banco Nacional de Cuba*, *supra* note 152, at 425 (explaining that in order to maintain the competence and function of the National Executive and its relationships with other members of the international community, the court must treat issues concerned with the act-of-state doctrine "exclusively as an aspect of federal law").

155 *Id.*

drawing on Jessup's point, noted that "rules of international law should not be left to divergent and perhaps parochial state interpretations."[156]

Everyone agrees that as a matter of current doctrine, foreign judgments recognition is a matter of state "substantive" law for *Erie* purposes.[157] However, as this Note has emphasized repeatedly, this state of affairs is a matter of historical anomaly; it is arguably unsound when reasoning from first principles.[158] The decision whether to recognize a foreign judgment unavoidably implicates international relations concerns.[159] This is especially true when the asserted ground for nonrecognition is, for instance, that the judicial system of the rendering court fails to comport with due process.[160]

The "uniquely federal" concerns underlying the act-of-state doctrine, as well as the possibility of conflict between state and federal interests, apply equally to the foreign judgments recognition context. If the act-of-state doctrine is about showing respect to the decisions of other sovereign governments, recognition of judgments is about showing respect to the decisions of other sovereign judicial systems. The strength of the federal interest in creating uniform law about how U.S. courts will evaluate the acts of foreign judicial systems seems at least as strong as the federal interest in supervising how U.S. courts evaluate the acts of foreign sovereigns. Although no U.S. court has relied on this reasoning to formulate a general federal rule of foreign judgments recognition, courts, scholars, and the American Law Institute have recognized the force of this argument.[161]

To be clear, the point is not that federal courts should generate a federal common law of foreign judgments recognition. Indeed, as between a federal statute and federal common law on the issue, a fed-

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156 *Id.*

157 *See supra* notes 33–34 and accompanying text.

158 *See supra* notes 110 and 121 and accompanying text.

159 *See supra* note 144 and accompanying text.

160 *See* Silberman, *supra* note 22, at 110 ("Many of the traditional defenses that can be raised to resist recognition or enforcement of a foreign country judgment underscore the sensitivity of that relationship.").

161 Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1003 n.1 (5th Cir. 1990) ("Commentators have argued that the enforceability of a foreign judgment in United States' courts should . . . be governed by reference to a general rule of federal law."); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011 (E.D. Ark. 1975) ("[S]uits of this kind necessarily involve to some extent the relations between the United States and foreign governments and for that reason perhaps should be governed by a single uniform law."); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (AM. L. INST. 1988) ("[I]t seems probable that federal law would be applied to prevent application of a State rule on the recognition of foreign nation judgments if such application would result in the disruption or embarrassment of the foreign relations of the United States.").

eral statute is vastly superior.[162] The point is that countervailing federalism concerns are so strong that they potentially justify federal common law in this area. If that is right, then even in the absence of a federal statute on point, it is not clear that state courts, let alone federal courts sitting in diversity, should apply state law.

2. Erie *Does Not Apply When Congress Supplies a Rule of Decision by Statute*

Even if foreign judgments recognition is validly a matter of state substantive law, rather than federal common law, it does not follow that state law must apply in federal diversity actions when there is a federal statute on point. The heart of the ULC's legal objection to the State Department White Paper was that federal "substantive" law cannot apply in diversity actions.[163] This misunderstands the doctrine. *Erie* stands for the proposition that federal courts sitting in diversity are not permitted to formulate general common law instead of applying state common law. This rule rests on two grounds. First, the Rule of Decision Act's[164] reference to "[t]he laws of the several states" encompasses state common law.[165] Second, the Constitution does not authorize federal general common lawmaking.[166] By its own terms, the Rule of Decision Act does not apply "where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide,"[167] so any barrier *Erie* poses to federal implementing legislation that applies in diversity actions must be constitutional.

Erie, however, simply does not stand for the proposition that certain areas of law are exclusively left to states. The ambiguity surrounding *Erie*'s constitutional grounding no doubt created reasonable confusion on this point. The Supreme Court in *Bernhardt v. Polygraphic Co. of America*, relying on the canon of constitutional avoidance, determined that section 3 of the Federal Arbitration Act (*not* the portion implementing the New York Convention) did not apply to contracts that involve only intrastate commerce.[168] A con-

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162 *See* Silberman, *supra* note 22, at 112–17.

163 *See generally* Michael Houghton May 22 Letter, *supra* note 21.

164 28 U.S.C. § 1652.

165 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73 (1938) (explaining that the proper construction of the Rules of Decision Act holds that "federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written").

166 *Id.* at 77–78 (holding that "the unconstitutionality of the course pursued [in *Swift v. Tyson*] has now been made clear").

167 28 U.S.C. § 1652.

168 350 U.S. 198 (1956).

trary interpretation "would invade the local law field," and so the Court "read § 3 narrowly to avoid that issue."[169]

But *Erie* does not prevent Congress from legislating on areas of "local law" if Congress validly enacts the legislation under its Article I legislative authority. *Erie* itself was "quite clear that exclusive state power takes up only where federal power leaves off."[170] And indeed, the Court seemed to reach this realization in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*[171] In that case, unlike in *Bernhardt*, the underlying contract clearly implicated interstate commerce, and therefore section 3 of the Federal Arbitration Act applied.[172] The Court squarely confronted the question whether applying it in a federal diversity action was constitutional.[173] Notwithstanding *Bernhardt*, the Court determined that the Federal Arbitration Act could apply, even in a diversity action: "[I]t is clear beyond dispute that the federal arbitration statute is based upon and confined to the incontestable federal foundations of 'control over interstate commerce and over admiralty.'"[174] If the Federal Arbitration Act can supply valid rules of decision in federal diversity actions when it applies only to matters within the scope of the Commerce Clause power, then it does not take much more argumentation to establish that Congress could supply valid rules of decision in federal diversity actions when it applies only to matters within the scope of the Foreign Commerce Clause. And in case any doubt remains, the Court has since clearly explained in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* that, although unusual, Congress can require federal courts sitting in diversity to apply "federal substantive law" without creating federal question jurisdiction.[175]

It seems clear that Congress could implement the Judgments Convention under one or several of its heads of legislative authority.[176] If Congress validly enacts federal implementing legisla-

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169 *Id.* at 202.

170 Ely, *supra* note 145, at 705.

171 388 U.S. 395 (1965).

172 *Id.* at 401–02.

173 *Id.* at 404–05.

174 *Id.* at 405.

175 460 U.S. 1, 25 n.32 (1983).

176 *See* Burbank, *supra* note 3, at 293–94 ("There can be no serious doubt about the power of Congress to enact legislation prescribing uniform federal rules for the recognition and enforcement of foreign-country judgments, and hence no doubt at all about the validity of a treaty, whether self-executing or not, that has the same effect."); Loken, *supra* note 13, at 125 n.24 ("Constitutional authority for implementation of the COCA through federal legislation exists under the Treaty Power, Article II, section 1, and the Foreign Commerce Clause, Article I, section 8."); Trooboff, *Implementing Legislation*, *supra* note

tion that provides federal rules of decision under some head of legislative authority—most likely some combination of the Foreign Commerce Clause,[177] the Treaty power,[178] and the Necessary and Proper Clause[179]—then *Erie* is simply inapplicable, even if Congress declines to extend federal question jurisdiction to the subject matter.[180]

3. *The Policies Underlying* Erie *Do Not Apply When Federal and State Law Are Identical by Design*

Erie is doctrinally irrelevant when Congress has supplied a rule of decision under a valid head of legislative authority. But even if *Erie* were relevant, the principles underlying the doctrine do not apply when federal and state law are identical by design. The so-called "twin aims" of *Erie* are to discourage vertical forum shopping and to prevent the inequitable administration of laws as between in-state and out-of-state defendants.[181] But there is no opportunity for vertical forum shopping when the federal and state rules are identical. Even under a cooperative federalism approach to implementing the Judgments Convention, the federal default statute would preempt contrary state laws. Thus, because the federal default statute would preempt any deviation in the uniform state acts, there would be no possibility of discrimination as between in-state and out-of-state defendants as a result of differences in the applicable law.

IV
Accommodating Political Objections to Federal Implementing Legislation

There is no plausible legal objection grounded in *Erie* or constitutional principles of federalism that stands in the way of federal implementing legislation for the Judgments Convention.[182] And non-legal

8, at 136 ("There is also no serious disagreement that Congress, exercising its authority to regulate foreign commerce, could, as it had for the New York Convention, enact legislation to implement COCA and could do so by federal statute that would be binding on federal and state courts.").

177 U.S. Const. art. I, § 8, cl.3.

178 *Id.* art. II, § 2, cl. 2.

179 *Id.* art. I, § 8, cl. 18.

180 Again, even if Congress is silent on this matter, an action to recognize a foreign judgment under the Judgments Convention—essentially a federal cause of action—would likely fall within the general grant of federal question jurisdiction in 28 U.S.C. § 1331, unless Congress were expressly to withdraw federal question jurisdiction. *See supra* notes 97 and 142 and accompanying text.

181 Hanna v. Plumer, 380 U.S. 460, 468 (1965).

182 *See supra* Section III.B.

federalism-inspired policy arguments are not persuasive.[183] If there are remaining objections to federal implementing legislation, they have to do with "political ideology and institutional turf."[184] Put bluntly, the ULC's apparent motive is to ensure that its statutes continue to govern the question of foreign judgment enforcement regardless of their content.

Whether the relevant stakeholders should accommodate these kinds of objections is a matter of political negotiation better left to policymakers who are more familiar with the kinds of compromises necessary to ratify the Judgments Convention. Still, this Part seeks to aid them by outlining some areas of potential compromise. First, state law could continue to maintain indirect jurisdictional rules more generous than the Convention requires. Second, the public policy ground for nonrecognition could look to state law rather than federal law. Third, Congress might implement the Convention by federal statute only where the Convention deviates from existing state law. Each of these solutions is worse than a uniform federal statute. But we should not let the perfect be the enemy of the good—even an imperfect ratification of the Convention is better than the present framework.

A. State Law and Eligibility for Recognition

Recall the discussion about the jurisdiction gap in Section I.D. Under the law of all states, there is probably no so-called "jurisdiction gap" between direct and indirect jurisdictional rules.[185] Because the U.S. test for direct jurisdiction is more expansive than the grounds for eligibility enumerated in Article 5(1), and Article 15 permits signatories to adopt more generous eligibility rules, implementing the Judgments Convention will *not* change the governing law, at least with respect to eligibility—it will merely "lock in" a certain floor that all U.S. states already meet.[186]

This point is critical to appreciate. At least with respect to eligibility—with the exception of the mandatory restriction on indirect jurisdiction over in rem proceedings outlined in Article 6—state law could continue to operate seamlessly.[187] A federal implementing statute could permit state law to govern the question of eligibility and

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[183] *See supra* Section II.C.

[184] Burbank, *A Tea Party at the Hague?*, *supra* note 16, at 112.

[185] *See* Brand, *Judgments Convention in the United States*, *supra* note 56, at 869.

[186] *See id.* at 878 ("Because of the complex nature of the thirteen indirect bases of jurisdiction stated in Article 5(1), it will simply make no sense in U.S. litigation to waste the time of counsel and courts trying to understand and apply those provisions when Article 15 provides a fast track to recognition and enforcement.").

[187] *Id.* at 856–57.

indirect jurisdiction, provided that it covers at minimum the grounds outlined in the Convention. And to the extent practitioners are more comfortable operating under current state-law regimes, this approach would allow them to continue doing so, with the added benefit of knowing that at a minimum, judgments falling within Article 5(1) will be presumptively recognized.

B. State Law and Public Policy

The public policy ground for nonrecognition is another area where state law may continue to operate, even with federal implementing legislation. The American Law Institute's proposed statute on foreign judgment recognition is a model for this approach.[188] For judgments arising from matters traditionally governed by state law, whether the public policy defense applies to recognition could look to state-law principles.[189] If Congress took this approach, federal implementing legislation would need to include a federal choice-of-law rule for determining which state's law governs the public policy issue. The ALI statute proposes using the law of the place with the predominant interest in the controversy and parties.[190] This rule theoretically tethers the applicable law for the public-policy defense to the applicable substantive law. A contrary rule in which the law of the selected forum automatically governs the public-policy defense could lead to forum shopping by judgment creditors.[191]

C. Federal Implementation Only Where the Convention Deviates from Existing State Law

A final compromise would take advantage of the fact that existing state substantive law, in the main, satisfies the requirements of the Judgments Convention.[192] This approach would involve implementation primarily through state law. Congress would enact federal implementing legislation only to the extent necessary to harmonize

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188 PROPOSED ALI STATUTE, *supra* note 84, § 5(a)(vi) (stating that a foreign judgment that is repugnant to United States public policy or to the public policy of a particular state shall not be recognized or enforced in a United States court).

189 *Id.* § 5 cmt. h (advocating that, in areas of regulation that are "a function of state law, the public policy is to be determined by reference to the state with the predominant interest in the events and . . . parties in question," thus "[w]hen the public-policy defense is raised, the substantive standard and the relevant public policy should be the same in every court").

190 *Id.*

191 *Id.*; *see also* Silberman, *supra* note 22, at 115 ("More importantly, the relevant state law should be the one with the predominant interest in the events and the parties in question, thereby ensuring that the substantive standard and the relevant public policy will be the same in every court such that forum shopping is avoided.").

192 *See supra* Section I.D.

state law with the Judgments Convention. Because both uniform state laws generally track the requirements of the Judgments Convention, Congress would only need to provide that the Convention is self-executing and supply gap-filling measures where the Judgments Convention and state law currently conflict.

This compromise would require a more granular identification of the discrepancies between the Judgments Convention and the two uniform acts. This Note identifies three big-picture differences.[193] But there are probably more, and any serious attempt to pursue this approach to implementation would require a more comprehensive comparison.

The chief virtue of this approach is that it is more responsive to the ULC's concern with preserving its own authority. Appraised neutrally, it is clearly worse than a uniform federal statute. It undermines judicial administration—especially in federal court—by requiring reference to state law on most issues of foreign judgments recognition that fall within the scope of the Convention. State law currently seems to track the requirements of the Judgments Convention well, but if it balkanizes or deviates over time, courts will be required to waste judicial resources considering questions of federal preemption. And the federal interest in regulating foreign judgments within the scope of a federal treaty is still sufficiently strong that Congress would be justified in wanting to regulate more than accoutrements like the availability of forum non.

These compromises, directed as they are at special interest concerns, are necessarily imperfect. All of them address the ULC's stated objections, but none fully satisfies ULC's actual goal: ensuring that its state uniform statutes continue to govern this area of law.[194] The Hague Judgments Convention fundamentally implicates American foreign relations with other signatories. Its implementation can and should take account of legitimate federalism concerns. But where such concerns do not genuinely exist, there is nothing to be gained by accommodating them. The ULC barely even tries to prove that its concerns—doctrinally wrong and practically misguided—justify an approach that will bewilder allies, frustrate American commerce, and consume valuable judicial resources. At the same time, as it did with COCA, the ULC refuses to make meaningful concessions on key issues. Policymakers should at last dispel the specter of American federalism and ratify the Convention.

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193 *Id.*

194 Burbank, *A Tea Party at the Hague?*, *supra* note 16, at 112.

Conclusion

Virtually everyone agrees that the United States has much to gain from ratifying the Judgments Convention. Yet once again, the ULC and other proponents of cooperative federalism threaten to deprive the United States of the benefits of a valuable treaty by insisting on implementing it through uniform state law. This Note has sought to debunk the federalism arguments supporting this approach once and for all. First, based on the abstract principles that should guide treaty implementation, a federal statutory approach is vastly superior to implementation by uniform state law along every dimension. The federalism-inspired policy arguments that the ULC and others have advanced are unpersuasive. Second, there is no serious legal argument that prevents implementation of the Judgments Convention by federal statute. The *Erie* argument that the ULC raised in response to the State Department's proposal for implementing the COCA was meritless in 2012, and it is meritless now.

By stripping the ULC's proposal of its federalism and *Erie* façade, this Note has tried to expose what's really underlying the cooperative federalism approach: politics and turf. This Note does not speak to what stakeholders should do with this information—they are better prepared to make those kinds of political determinations—but it does identify some ground for compromise.