CONFRONTING THE NEW BREED OF

Transnational Litigation

ABUSIVE FOREIGN JUDGMENTS

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INTRODUCTION

At the same time that globalization has increased the frequency of transnational litigation, new tactics from the U.S. plaintiffs' bar have dramatically increased the stakes of foreign judgments for U.S. companies.[1] Several recent high-profile cases involving both plaintiffs and judgments emanating from outside the United States have demonstrated the effectiveness of the plaintiffs' bar's political pressure and manipulation of the legal processes in certain foreign countries. These tactics, in turn, can have a significant impact on judgment recognition litigation in the United States. While these are not uniquely American problems, the prominence of American multinational corporations and the resourcefulness of U.S. legal practitioners make these issues exceptionally important to U.S. corporations.[2] And because many of these foreign judgments emanating from politicized and corrupt environments are intended to, and do, end up in litigation in the United States, a searching and realistic scrutiny by U.S. courts is imperative.

Several recent high-profile cases involving both plaintiffs and judgments emanating from outside the United States have demonstrated the effectiveness of the plaintiffs' bar's political pressure and manipulation of the legal processes in certain foreign countries.

A prime example of this new type of abusive litigation is *Osorio v. Dole Food Co.*[3] and the Nicaraguan litigation that gave rise to the recognition and enforcement lawsuit here in the United States. The $97 million Nicaraguan judgment at issue in *Osorio* resulted from a special Nicaraguan law, which evidence suggests U.S. plaintiffs' lawyers coordinated with Nicaraguan attorneys and political officials to pass.[4] This "Special Law 364" discriminated against specifically targeted foreign companies, including Dole Food Company, Inc. and The Dow Chemical Company, by creating an irrefutable presumption of causation, imposing minimum damages amounts far in excess of anything ever seen in Nicaraguan law, and presumed the defendants' guilt.[5] Following the enactment of Law 364, over 10,000 Nicaraguan plaintiffs filed in excess of 200 lawsuits in Nicaragua.[6] Eventually, U.S. plaintiffs' lawyers and their Nicaraguan allies secured over $2 billion in Nicaraguan judgments against Dole Food Company and a handful of other multinational companies.[7] U.S. plaintiffs' lawyers then began bringing recognition and enforcement suits in the United States seeking to recognize the Nicaraguan judgments and arguing that U.S. courts were obligated to recognize the foreign judgments, that they were barred from considering whether Nicaragua afforded fair and impartial tribunals, and that U.S. courts could not consider whether defendants were deprived "of any meaningful opportunity to contest the essential allegation against them," because, they asserted, doing so would offend principles of "comity."[8]

To date, every U.S. court that has had occasion to consider the bona fides of these Nicaraguan judgments has refused to recognize them, often noting their unfair, and even abusive, prov-

1 *See* Hal S. Scott, *What to Do About Foreign Discriminatory Forum Non Conveniens Legislation*, 49 Harv. Int'l L.J. Online 95, 95 (2009); *see also* 56 AM. JUR. *Trials* 529, at § 1 (2011) ("There exists in the world today an unprecedented degree of global economic interdependence. . . . Most commentators acknowledge that as the expanding 'internationalization' of commerce has assumed an increasingly vital economic significance, there has been a corresponding increase in the importance of international commercial law. These developments in international commerce have given rise to enormous challenges in the conduct of transnational litigation."); Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-Of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 473-88 (2011) (some of these new tactics involve out-of-court tactics, including "media tactics, community organizing tactics, investment related tactics, and political tactics" such as "testimony at congressional hearings by plaintiffs or their advocates, alignment with politicians and well-known leaders to garner support and publicity, and pressure for resolutions on local levels."). *Compare* Banco Minero v. Ross, 172 S.W. 711, 713 (Tex. 1915) (Mexican court entered $40,000 judgment, worth approximately $1 million today), *with* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1312 (S.D. Fla. 2009), *aff'd sub nom.* Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011) (Nicaraguan court entered $97 million judgment).

2 *See* Scott, *supra* note 1, at 95-96; Jonathan Cummings et al., *Growth and Competitiveness in the United States: The Role of its Multinational Companies*, McKinsey Global Institute, at 3 (2010), *available at* http://www.mckinsey.com/mgi/publications/role_of_us_multinational_companies/pdfs/MGI_US_MNCs.pdf. *See generally* Drimmer, *supra* note 1, at 473-88.

3 *Osorio*, 665 F. Supp. 2d 1307. The authors of this article were counsel for Dole in *Osorio.*

4 *See, e.g.,* Mejia v. Dole Food Co., Nos. BC 340049, BC 379820, at ¶ 72 (Cal. Sup. Ct. 2009); Henry Saint Dahl, *Forum Non Conveniens, Latin America, and Blocking Statutes*, 35 U. Miami Inter-Am. L. Rev. 21 (2003-04).

5 *Osorio*, 665 F. Supp. 2d at 1351-52.

6 *Id.* at 1312.

7 *Id.*

8 *Id.* at 1332; *see, e.g.*, Franco v. Dow Chem. Co., No. CV 03-5094 NM, 2003 WL 24288299, at *1 (C.D. Cal. Oct. 20, 2003); Brief of Appellant at 34-52, 65-76, Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. July 22, 2010) (No. 10-11143).

Despite this, some commentators have argued that—contrary to these principles—a court's refusal to recognize foreign judgments on the ground that it would violate the U.S. Constitution represents a lamentable "America-centric" approach to the recognition and enforcement of foreign judgments.

enance.[9] Rather than highlighting a need to "defer to" or rubber-stamp such foreign judgments, *Osorio* demonstrates that "a judicial safety valve is needed for cases such as [*Osorio*], in which a foreign judgment violates international due process, 'works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens.'"[10] Indeed, under such circumstances, the "real injustice would be in recognizing [the] judgment," and its enforcement would, among other things, "undermine public confidence in the tribunals of this state, in the rule of law, in the administration of justice, and in the security of individuals' rights to a fair judicial process."[11] *Osorio* (and similar cases discussed in this article) confirm that while principles of comity may permit foreign judgment recognition under the right circumstances they prohibit such recognition when it would work violence to fundamental domestic laws and policies.[12] A court's recognition analysis is—and must always be—informed by the rights secured to all U.S. citizens by the U.S. Constitution, and in particular that of due process, which a U.S. court may no more violate by recognizing and domesticating a foreign judgment than it could render such a fundamentally defective judgment in the first instance.[13]

Despite this, some commentators have argued that—contrary to these principles—a court's refusal to recognize foreign judgments on the ground that it would violate the U.S. Constitution represents a lamentable "America-centric" approach to the recognition and enforcement of foreign judgments.[14] Indeed, they have gone so far as to suggest that U.S. courts are actually "exporting the Constitution" when they refuse to recognize or enforce a foreign judgment that violates the U.S. Constitution.[15] Perhaps worse, recently some U.S. judicial decisions have been held out by transnational litigants as standing for the proposition that state recognition statutes permit recognition of foreign judgments that violate federal and state constitutions.[16]

But these arguments distort the proper understanding of U.S. jurisprudence. Not only do they run contrary to longstanding precedent and legal scholarship, but they are premised on a fundamental misunderstanding of U.S. recognition and enforcement jurisprudence, the territorial limits of sovereignty, the meaning of "comity," and the internationally recognized significance of the constitutions and domestic laws of sovereigns within their own territory.[17] Comity does not "obligate a country to waive its basic constitutional principles," but rather forbids it.[18] As courts throughout the world have recognized, where a foreign judgment contradicts constitutional principles, policies, or individual rights under the protection of the domestic court, recognition

9 *See, e.g.*, *Osorio*, 665 F. Supp. 2d at 1352 ("This Court holds that Defendants have established multiple, independent grounds under the Florida Recognition Act that compel nonrecognition of the $97 million Nicaraguan judgment," including lack of impartial tribunals, lack of due process of law, and to enforce the judgment would be repugnant to public policy); *Dow Chem. Co.*, 2003 WL 24288299, at *6, 8 (granting defendants' motion to dismiss finding that two of the defendants were not parties to the judgment in Nicaragua, and that the Nicaraguan court lacked personal jurisdiction over the third defendant).

10 Order on Motion for Reconsideration at 7, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693).

11 *Id*. at 7-8.

12 *See, e.g.,* Joseph Story, Commentaries on the Conflict of Laws, §§ 29, 32 (Boston, Hilliard, Gray, and Co. 1834); Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, in CELEBRATION LEGAL ESSAYS § 2 (Albert Kocourek ed., 1919); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d 909, 937 n.104 (D.C. Cir. 1984).

13 *Osorio*, 665 F. Supp. 2d at 1351-52; Hilton v. Guyot, 159 U.S. 113, 163-67, 202-03 (1895); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 285, 287-88 (S.D.N.Y. 1999), *aff'd* 201 F.3d 134 (2d Cir. 2000); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410, 1413 (9th Cir. 1995); De Brimont v. Penniman, 7 F. Cas. 309, 309 (C.C.S.D.N.Y. 1873).

14 *See, e.g.*, Mark D. Rosen, *Exporting the Constitution*, 53 Emory L.J. 171, 229 (2004); Timothy Zick, *Territoriality and the First Amendment: Free Speech at – and Beyond – Our Borders*, 85 Notre Dame L. Rev. 1543, 1587-89 (2010).

15 *See, e.g.*, Rosen, *supra* note 14, at 172 (stating that "refusing to enforce such Un-American Judgments is tantamount to imposing U.S. constitutional norms on foreign countries."); Craig A. Stern, *Foreign Judgments and the Freedom of Speech: Look Who's Talking*, 60 Brook. L. Rev. 999, 1036 (1994) (refusal to enforce foreign libel judgments may render the First Amendment "a universal declaration of human rights rather than a limitation designed specifically for American civil government."); Zick, *supra* note 14, at 1589 ("[R]efusal to enforce foreign judgments that do not comport with the First Amendment extend the reach or territorial domain of the First Amendment to some extent.").

16 *See, e.g.*, Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 14, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) (arguing that U.S. recognition law only permits an "examination . . . focus[ed] on the due process afforded by the Nicaraguan system, and due process in the context of a foreign country enforcement proceedings is 'distinguish[ed] from the complex concept that has emerged in American case law.').

17 *See* Story, *supra* note 12, at §§ 29, 32; Huber, *supra* note 12, at § 2.

18 Ayelet Ben-Ezer & Ariel L. Bendor, *Conceptualizing Yahoo! v. L.C.R.A.: Private Law, Constitutional Review, and International Conflict of* Laws, 25 Cardozo L. Rev. 2089, 2133 (2004) (comity does not "obligate a country to waive its basic constitutional principles"); *see also Hilton*, 159 U.S. at 164-65, 193; Story, *supra* note 12, at §§ 31-38; Huber, *supra* note 12, at § 2.

of a foreign law or judgment can—and should—be denied.[19] Our nation's courts—like those of many other sovereigns—are, after all, subject to the constraints imposed by the governing constitution, and at most comity requires balancing the interests of foreign sovereigns with those of the forum and its citizens—it never requires blind enforcement of foreign law regardless of whether enforcement vitiates fundamental domestic principles or regardless of the cost to the individual rights under the protection of the domestic court.[20] This follows directly from the United States' basic constitutional structure, and is necessary to give voice to fundamental constitutional principles when they are most urgently needed.

This article demonstrates why comity—when properly understood—requires that U.S. courts deny recognition and enforcement to foreign judgments that violate the U.S. Constitution and other deeply rooted domestic principles. Adhering to these constitutional norms and the fundamental protections afforded by domestic law in the recognition context does not place U.S. courts outside the global mainstream; quite the contrary. The notion that "comity" could somehow render a nation's most fundamental domestic laws a nullity is untenable, and courts around the world regularly deny recognition to foreign laws or judgments that do violence to the rights of their citizens or otherwise violate fundamental domestic laws.[21] This is a principle that flows "from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws; and to refuse its aid to carry into effect any foreign laws, which are repugnant to its own interests and polity."[22] In the context of today's transnationally litigious world, U.S. companies and courts ignore this basic precept at their increasing peril, especially given the new breed of fundamentally unfair judgments that are the product of highly charged, politicized, and discriminatory proceedings overseas.[23] Indeed, now—more than ever—it is essential that courts understand recognition and enforcement jurisprudence and not be misled into weakening and reducing the protections guaranteed by the U.S. Constitution through state recognition statutes and imprudent interpretations of comity.

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I. The New Era of Transnational Litigation

Traditionally, the United States has been among the most preferred jurisdictions for plaintiffs from a global perspective.[24] Contingent-fee arrangements, strict liability rules, large jury awards, and the availability of punitive damages attracted a staggering amount of lawsuits in the latter half of the 20th century.[25] And if a plaintiff could satisfy jurisdictional requirements and convince a court that the forum was not too inconvenient, filing suit in the United States was an enticing option, regardless of where the claimed injury supposedly occurred.[26] U.S.-based suits are all the more attractive because of the substantial number of multinational corporations holding significant assets in the United States.[27]

Transnational litigation filed in U.S. courts has placed substantial burdens on U.S. courts and defendants, and has presented challenges to the truth-seeking process by often putting critical evidence beyond the compulsory power of the courts, making potentially dispositive evidence difficult—if not impossible—to access.[28] For example, in *Tellez v. Dole Food*

19 *See* § IV, *infra*.
20 Story, *supra* note 12, at §§ 29, 31-38; *see also* Huber, *supra* note 12, at § 2; *Hilton*, 159 U.S. at 164-65.
21 *See* § IV, *infra*.
22 Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F. 2d 909, 937 n.104 (D.C. Cir. 1984) (quoting Story, *supra* note 12, at § 32).
23 *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000); Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla 2009), *aff'd sub nom. Osorio v.* Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011).
24 *See* Cassandra Burke Robertson, Transnational Litigation and Institutional Choice, 51 B.C. L. REV. 1081, 1087–88 (2010); Scott, *supra* note 1, at 96; Robert A. Leflar, Choice of Law for Products Liability: Demagnetizing the United States Forum, 52 Ark. L. REV. 157, 162 (1999); David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond* Reyno, 64 Tex. L. Rev. 193, 196–204 (1985).
25 *See* Scott, *supra* note 1, at 96; Leflar, *supra* note 24, at 162; Boyce, *supra* note 24, at 196–204.
26 *See* Scott, *supra* note 1, at 96.
27 *See* Cummings, *supra* note 2, at 3 (asserting that U.S. multinationals hold 60 percent of their assets in the United States).
28 *See* Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis LTDA., 906 F.2d 45, 52 (1st Cir. 1990).

Transnational plaintiffs have made clear that, whether or not the multinational corporations targeted by these types of suits maintain significant assets in the jurisdictions where laws and courts can be manipulated against these companies, they will nevertheless pursue litigation in the forum that best suits their agenda and subsequently bring recognition and enforcement actions where the corporate assets are located—typically the United States.

Co. and *Mejia v. Dole Food Co.*, the court found discovery was arduous, costly, and inherently limited for several reasons.[29] First, there was "no formal process by which th[e] Court [could] enforce orders to compel discovery from a resident of Nicaragua."[30] Thus, although the court sought the assistance of the plaintiffs' attorneys, the Nicaraguan attorneys simply refused to cooperate in discovery.[31] Second, some plaintiffs' attorneys/agents, by means of direct threats, created an atmosphere of intimidation and fear preventing witnesses from coming forward voluntarily or safely with information.[32] There were even threats against Dole investigators making it unsafe to continue to collect evidence in Nicaragua.[33] Under the best circumstances these conditions alone can make it impossible to have a fair trial. If foreign plaintiffs try to leverage these conditions during trial, as the Court explained in *Tellez*: the misconduct can be "so widespread and pervasive" that it becomes "impossible to determine, in accordance with the fair application of law, what the truth is and who should prevail on the merits in th[e] controversy."[34]

But a new—and more complex—problem is on the rise. While the availability of punitive damages and other plaintiff-friendly laws still attract significant U.S. litigation (transnational or otherwise),[35] the difficulties of litigating in the United States, including successful *forum non conveniens* motions by defendants, have motivated certain litigants to seek an easier path to favorable and sizeable verdicts.[36] Plaintiffs have turned to filing suits in countries where they are not "hampered" with U.S. laws, or where they can target corrupt or manipulable systems, sometimes going so far as seizing upon and perhaps orchestrating the passage of laws that discriminate against foreigners, multinationals, or even U.S. citizens in particular.[37]

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29 Tellez v. Dole Food Co., No. BC 312852, at ¶¶ 10-13, 104, 127 (Cal. Sup. Ct. 2011); Mejia v. Dole Food Co., Nos. BC 340049, BC 379820, at ¶ 59 (Cal. Sup. Ct. 2009).

30 *Tellez*, No. BC 312852, at ¶¶ 12, 104; *Mejia*, Nos. BC 340049, BC 379820, at ¶ 59.

31 *Tellez*, No. BC 312852, at ¶¶ 12, 127; *Mejia*, Nos. BC 340049, BC 379820, at ¶ 59.

32 *Tellez*, No. BC 312852, at ¶¶ 104-09, 127; *Mejia*, Nos. BC 340049, BC 379820, at ¶ 58.

33 *Mejia*, Nos. BC 340049, BC 379820, at ¶ 58.

34 *Tellez*, No. BC 312852, at ¶ 127.

35 *See, e.g.*, Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009); Turedi v. Coca-Cola Co., No. 06-5464-cv, 343 Fed. Appx. 623, 2009 WL 1956206 (2d Cir. July 7, 2009); Doe v. Cisco Sys., Inc., No. 5:11-cv-02449 (N.D. Cal. 2011); Daobin v. Cisco Sys., Inc., No. 8:11-cv-01538 (D. M.D. 2011); *In re* Chiquita Brands Int'l, Inc., No. 08–01916-MD, 2011 WL 2163973 (S.D. Fla. June 3, 2011); Palacios v. Coca-Cola Co., 757 F. Supp. 2d 347 (S.D.N.Y. 2010); *In re* Fosamax Prods. Liab. Litig., No. 1:06-cv-5087, 2009 WL 3398930 (S.D.N.Y. Oct. 21, 2009).

36 *See generally* Scott, *supra* note 1, at 99 (arguing that because U.S. courts have been dismissing suits by foreign plaintiffs on *forum non conveniens* grounds, foreign plaintiffs have "turned to their own governments," introducing laws with "various sources of bias against foreigners").

37 *See id.* at 99–102 (discussing recent laws in Guatemala and Nicaragua that severely disadvantage foreign defendants); *accord* Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009), *aff'd sub nom.*Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011); William E. Thomson, Perlette M. Jura & Michael W. Seitz, *Forum Non Conveniens and Foreign-Judgment Recognition: Different Sides of Different Coins*, DRI Today (2011), http://www.dritoday.org/feature.aspx?id=79; Henry Saint Dahl, *Forum Non Conveniens, Latin America, and Blocking Statutes*, 35 U. Miami Inter-Am. L. Rev. 21, 22-24 (2003-04).

38 *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) (denying recognition of a Liberian judgment because Liberia was suffering from corruption and incompetence and was embroiled in civil war and a state of chaos where regular judicial proceedings were not followed); Bank Melli Iran v. Pahlavi, 58 F.3d 1406 (9th Cir. 1995) (seeking recognition of Iranian judgment rendered without defendant being able to expect fair treatment from Iranian courts, personally appear in Iran, obtain legal representation in Iran, or obtain local witnesses on her behalf); *Osorio,* 665 F. Supp. 2d 1307 (denying recognition of a Nicaraguan judgment because of Nicaraguan law that blatantly disadvantage foreign defendants); Franco v. Dow Chem. Co., No. CV 03-5094 NM, 2003 WL 24288299 (C.D. Cal. Oct. 20, 2003) (Nicaraguan judgment against multinational corporations based on discriminatory foreign law).

the recognition of foreign judgments.[39] As a result, in the last few decades, there has been a significant increase in the number of actions seeking recognition and enforcement of foreign judgments in the United States.[40]

At its most extreme, those seeking to represent transnational plaintiffs can find a jurisdiction in which corruption and/or general judicial and political dysfunction will virtually guarantee them a favorable verdict—regardless of the evidence.[41] Thus, for example, in *Osorio v. Dole Food Co.*, the judgment, in the words of the U.S. district court, "purport[ed] to establish facts that do not, and cannot, exist in reality. As a result, the law under which this case was tried stripped Defendants of their basic right in any adversarial proceeding to produce evidence in their favor and rebut the plaintiffs' claims."[42] Once such a "judgment" is secured, it is simply a matter of persuading one U.S. court to recognize and enforce it, which foreign plaintiffs regularly argue that U.S. courts are obligated to do absent the most extreme circumstances.[43]

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The very design of this new breed of transnational litigation threatens to circumvent the full and fair adversary proceeding, poses a grave threat to the constitutional rights of American citizens and corporations, and puts effective globalization in jeopardy.

II. Challenges Posed by the New Transnational Litigation for Recognition and Enforcement

The increase in suspect foreign judgments being imported into the United States underscores the importance of a proper application of recognition and enforcement standards. In general, the contours are clear enough: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived," and the "extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"[44] When confronted by manipulated "judgments" from judicially weak or corrupt foreign countries, application of these general principles according to the constitutional protections that U.S. courts are obligated to guarantee to all litigants is essential.

Under traditional U.S. jurisprudence, recognition can be accorded only to a foreign country judgment that "grants or denies recovery of a sum of money" (not a tax, fine, penalty or criminal

39 *See* Lucien J. Dhooge, *Aguinda v. Chevrontexaco: Mandatory Grounds for the Non-Recognition of Foreign Judgments for Environmental Injury in the United States*, 19 J. Transnat'l L. & Pol'y 1, 2 (2009) ("The United States is perhaps the most receptive of any state to the recognition of foreign judgments.").

40 Indeed, nearly 90% of all cases and sources that reference the Supreme Court's seminal recognition and enforcement analysis in *Hilton v. Guyot*, 159 U.S. 113 (1895) are from the past 30 years. *See* http://web2.westlaw.com/find/default.wl?rs=WLW11.07&rp=%2ffind%2fdefault.wl&vr=2.0&fn=_top&mt=Westlaw&cite=159+us+113&sv=Split (showing that of the 4237 citing references to *Hilton v. Guyot*, 3837 have come down since 1980); *see also* Jonathan Drimmer, *Think Globally Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. Chamber Institute for Legal Reform, at 4 (2010) ("A growing number of notable actions also have been filed in foreign courts, with the plaintiffs seeking to obtain judgments they can enforce in the United States."); Ayelet Ben-Ezer & Ariel L. Bendor, *The Constitution and Conflict-Of-Laws Treaties: Upgrading the International Comity*, 29 N.C. J. Int'l L. & Com. Reg. 1, 16 (2003) (noting recognition and enforcement of foreign judgments in the United States "has become increasingly relevant in the age of globalization, in which there are ever more multi-jurisdictional claims."); Barb Dawson et al., *Global Impact on Arizona Soil: Recognition and Enforcement of Foreign Judgments in Arizona*, Arizona Attorney, Feb. 2007, at 24 ("As a result of this growth in international business, companies with assets in Arizona are frequently involved in disputes before courts in other countries. Increasingly, such disputes result in efforts to obtain recognition and enforcement of the foreign court's judgment in Arizona."); James Podgers, *Ethics 20/20 Commission Proposes to Remove More Barriers to Cross-Border Practice* (Sept. 9, 2011), http://www.abajournal.com/news/article/ethics_20_20_commission_proposes_remove_barriers_to_cross-border_practice/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email. *See generally* Hon. James J. Brown, Judgment Enforcement, Table of Cases (Aspen 2010) (cataloguing more than 2500 domestic and foreign enforcement cases, the majority of which were decided in the last 30 years).

41 *See, e.g.*, *Osorio*, 665 F. Supp. 2d 1307.

42 *Id*. at 1351.

43 *See* Scott, *supra* note 1, at 95 ("Foreign plaintiffs . . . hope to . . . bootstrap these bad foreign laws into judgments that are enforceable in U.S. courts.").

44 Hilton v. Guyot, 159 U.S. 113, 163 (1895).

In response, Pahlavi explained that she "could not expect fair treatment from the courts of [the foreign sovereign], could not personally appear before those courts, could not obtain proper legal representation in [the foreign state], and could not even obtain local witnesses on her behalf.

judgment).[45] In addition, courts are prohibited from recognizing a foreign country judgment if "the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law" or the foreign court did not have jurisdiction over the defendant.[46] Finally, a court need not recognize a foreign country judgment if "the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend"; "the judgment was obtained by fraud"; "the judgment or the [cause of action] . . . on which the judgment is based is repugnant to the public policy of this state or of the United States"; "the judgment conflicts with another final and conclusive judgment"; "the proceeding in the foreign court was contrary to an agreement between the parties"; "the foreign court was a seriously inconvenient forum for the trial of the action"; "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"; or "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[47]

Thus, for example, in *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408, 1413 (9th Cir. 1995), two Iranian banks served the sister of the former Shah of Iran ("Pahlavi") by publication in Iran and obtained default judgments against her totaling $32,000,000. The banks instituted an action in California to enforce the judgments pursuant to the Algerian Accords and the California Uniform Foreign Money-Judgments Recognition Act. In response, Pahlavi explained that she "could not expect fair treatment from the courts of [the foreign sovereign], could not personally appear before those courts, could not obtain proper legal representation in [the foreign state], and could not even obtain local witnesses on her behalf." As the Ninth Circuit explained in denying recognition to the Iranian judgment, "[t]hose are not mere niceties of American jurisprudence. They are ingredients of 'civilized jurisprudence.' They are ingredients of basic due process."

Likewise, in *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 281-82 (S.D.N.Y. 1999), *aff'd* 201 F.3d 134 (2d Cir. 2000), a Liberian corporation sued Citibank in Liberia over a deposit liability, and obtained orders from the courts effectively requiring Citibank to pay Bridgeway *twice* for the same deposit liability. After Bridgeway secured the unfair judgment in Liberia, it filed suit in New York to have the judgment recognized and enforced in the United States, where it could attach or otherwise access Citibank's assets. After Citibank demonstrated that Liberia failed to afford fair and impartial tribunals or procedures compatible with due process of law, the New York court refused to recognize the judgment and the Second Circuit affirmed.[48]

Franco v. Dow Chem. Co., No. CV 03-5094 NM, 2003 WL 24288299, at *3-4 (C.D. Cal. Oct. 20, 2003) and *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1324, 1351 (S.D. Fla. 2009), *aff'd* sub nom. *Osorio v. Dow Chem. Co.*, 635 F.3d 1277 (11th Cir. 2011), both cases arising out of Nicaragua in the last ten years, present even more egregious examples of cases arising out of circumstances rife with corruption and blatant attempts to import wholly unfair and improper "judgments" into U.S. courts.

45 *See, e.g.*, *id.*; *see also* Uniform Foreign-Country Money Judgments Recognition Act, U.L.A. F.C. Money J.M.T. § 3(a) (2005). Indeed, courts customarily refuse to enforce the municipal or public laws and judgments of foreign sovereigns, most commonly exemplified by the revenue rule and penalty cases. *See* Restatement (Third) of Foreign Relations Law § 483 ("Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."); Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199, 1219 (9th Cir. 2006) ("the common law rule against the enforcement of penal judgments is venerable and widely-recognized" and penal judgments are "those intended 'to punish an offense against the public justice of the [foreign] state.'"); Her Majesty the Queen In Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161, 1163-65 (9th Cir. 1979) (denying recognition and enforcement in Canada's action to enforce Canadian tax judgment); *accord* Republic of Honduras v. Philip Morris Companies, Inc., 341 F.3d 1253, 1261 (11th Cir. 2003) (dismissing RICO cases brought on behalf of the Republic of Honduras, Belize and Ecuador through which plaintiffs sought to enforce alleged violations of foreign tax laws).

46 U.L.A. F.C. Money J.M.T. § 4(b); *see also Hilton*, 159 U.S. at 202-03, 205.

47 U.L.A. F.C. Money J.M.T. § 4(c). Although the Supreme Court has long recognized that a guiding federal statute or country-specific treaties on recognition and enforcement would be preferable, recognition has nevertheless largely been left to the states to regulate. *See Hilton*, 159 U.S. at 163. While states generally have adopted similar standards, the lack of federal guidance (and the fact that the Supreme Court has remained silent on the issue for more than a century) has caused unnecessary variations in standards, burdens of proof, and clear guidance on the intersection between the U.S. Constitution, state constitutions, recognition and enforcement statutes, and common law recognition and enforcement. *E.g., compare* N.Y. C.P.L.R. § 5304 *with* Cal. Civ. Proc. Code § 1716.

48 Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287-88 (S.D.N.Y. 1999), *aff'd* 201 F.3d 134 (2d Cir. 2000).

In *Franco*, in May 2003, U.S. counsel for Nicaraguan plaintiffs filed an action seeking recognition of a $489 million judgment based on a "suspect" notary affidavit from Nicaragua, which was later proven to be a falsified document.[49] The U.S. district court granted defendants' motion to dismiss finding that two of the defendants were not parties to the judgment in Nicaragua, and that the Nicaraguan court lacked personal jurisdiction over the third defendant.[50] In the related case, *Shell Oil Co. v. Franco*, the U.S. district court held that the Nicaraguan court lacked personal jurisdiction over Shell Oil, and granted declaratory relief preventing the recognition and enforcement of the Nicaraguan judgment in the United States.[51] Ultimately, after extensive special master proceedings, in July 2010, two U.S. lawyers in the *Franco* action were suspended by the Ninth Circuit for making false representations "knowingly, intentionally, and recklessly" in connection with their appeal of that ruling.[52]

Osorio, already mentioned as an example of an abusive foreign judgment, grew out of a $97 million judgment issued against, among others, Dole Food Company, Inc. in Nicaragua, based on a special Nicaraguan law (Law 364) that "deliberately tilt[ed] the scales of justice in the plaintiffs' favor" by "unfairly discriminat[ing] against a handful of foreign defendants with extraordinary procedures and presumptions found nowhere else in Nicaraguan law."[53] Among its more onerous provisions, Law 364 requires a defendant to deposit approximately $15 million simply to appear and defend itself; imposes conclusive presumptions of guilt, causation, and minimum damages that far exceeded anything else found in Nicaraguan law; mandates a special summary proceeding that totals 14 days from complaint to judgment; and retroactively strips protections afforded to defendants by applicable statutes of limitation.[54] Ultimately, the court held that, in addition to suffering from several other insurmountable defects, Law 364 and the Nicaraguan judicial system did not afford procedures compatible with international due process and that the Nicaraguan judicial system did not have impartial tribunals.[55]

U.S. courts have largely denied recognition and enforcement to foreign judgments that either contravene international standards and/or run afoul of U.S. constitutional principles.

III. Neither Comity nor International Law Renders the United States Constitution a Nullity in the Recognition and Enforcement Context

As the above cases demonstrate, U.S. courts have largely denied recognition and enforcement to foreign judgments that either contravene international standards and/or run afoul of U.S. constitutional principles.[56] Nevertheless, in the recognition and enforcement context, some scholars and litigants argue that consideration of U.S. constitutional principles (as opposed to merely international ones) amounts to an improper "exporting [of] the Constitution," or an example of American parochialism.[57] This is incorrect.[58] More importantly, such arguments are predicated on the demonstrably false assumption that U.S. courts can ignore the U.S. Constitution when deciding to give the full force and effect of a U.S. judgment to a foreign judgment, despite the fact that

49 *See* Franco v. Dow Chem. Co., No. CV 03-5094 NM, 2003 WL 24288299, at *2-4 (C.D. Cal. Oct. 20, 2003); *In re* Girardi, 611 F.3d 1027, 1030-32 (9th Cir. 2010).
50 *Dow Chem. Co.*, 2003 WL 24288299, at *6, 8.
51 Shell Oil Co. v. Franco, No. CV 03-8846 NM, 2005 WL 6184247, at *13 (C.D. Cal. Nov. 10, 2005).
52 *In re Girardi*, 611 F.3d at 1034, 1039-40.
53 Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1324, 1351 (S.D. Fla. 2009), *aff'd sub nom.* Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011).
54 *Id.* at 1314-15.
55 *Id.* at 1351-52.
56 *See, e.g.*, Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287-88 (S.D.N.Y. 1999), *aff'd* 201 F.3d 134 (2d Cir. 2000); Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1413 (9th Cir. 1995); *Osorio*, 665 F. Supp. 2d at 1351-52; Montré D. Carodine, *Political Judging: When Due Process Goes International*, 48 Wm. & Mary L. Rev. 1159, 1223–46 (2007).
57 *See* Rosen, *supra* note 14, at 171, 229–30; *see also* Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. Pa. L. Rev. 1819, 1870–72 (2005).
58 In fact, the alternative argument could be made that the enforcement of foreign judgments that violate the U.S. Constitution and public policy would cause national values to suffer when "bad laws" are effectively exported into the United States. *See* Jonathan A. Franklin & Roberta J. Morris, *International Jurisdiction and Enforcement of Judgments in the Era of Global Networks: Irrelevance of, Goals For, and Comments on the Current Proposals*, 77 Chi.-Kent L. Rev. 1213, 1275 (2002). Recognition and enforcement of foreign judgments should not result in "having the most lax or restrictive national law become the global norm." *Id.*

Specifically, [litigants] have argued that the Recognition Act precludes U.S. courts from inquiring into whether the specific proceedings that gave rise to the foreign judgment actually violated due process.

they cannot do so when rendering their own judgments or deciding whether to recognize and enforce sister state judgments.[59]

A. Upholding the U.S. Constitution Is Not a Sign of "American Parochialism"

There are two arguments commonly advanced by those who suggest that U.S. constitutional standards should not play a role in U.S. recognition and enforcement cases, one that tries to characterize judgment recognition and enforcement as something less than state action, another that argues that a corporation that does business outside of the United States implicitly "contracts" away constitutional protections (in the foreign country and the United States). Recently, litigants have started to breathe life into these and similar arguments by urging courts to "rubber stamp" foreign judgments.[60] Specifically, they have argued that the Recognition Act precludes U.S. courts from inquiring into whether the specific proceedings that gave rise to the foreign judgment actually violated due process.[61] Instead, they argue that U.S. courts are only permitted to look at the foreign system as a whole, and only where a judgment debtor can show that an entire foreign system fails to afford procedures compatible with due process can the debtor block recognition on due process grounds and argue that international due process replaces U.S. due process for the purpose of a recognition and enforcement inquiry.[62] None of these arguments have merit.

1. State Action

First, some argue that recognition and enforcement of a foreign judgment by a U.S. court does not constitute "state action" implicating the Constitution,[63] and therefore U.S. constitutional protections are not triggered.[64] But this argument evaporates in light of cases like *Lugar v. Edmondson Oil*.[65] In *Lugar*, Edmonson Oil filed suit to recover on a debt it was owed, and sought prejudgment attachment of petitioner's property on that debt.[66] A writ of attachment was issued ex parte and

59 *See* Ben-Ezer & Bendor, *supra* note 40, at 19 ("Application of foreign laws or the recognition and enforcement of foreign judgments in conflict with the Constitution may be regarded by the United States as a violation of both its own fundamental principles and of basic universal principles.").

60 *See, e.g.,* Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law at 31, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) (arguing that U.S. recognition law only permits an "examination . . . focus[ed] on the due process afforded by the Nicaraguan system"); *see also* Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 14, 17, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) (arguing for the same limited analysis and concluding that because "Defendants had the ability to appear, assert defenses, provide evidence, and appeal the judgment," this was enough to show "that the Nicaraguan judicial system offers fair procedures compatible with the requirements of due process"); *see also* Plaintiffs' Motion for New Trial, For Reconsideration and/or Rehearing, Pursuant to F.R.C.P. 59, 60 and Other Provisions of F.R.C.P. at 7, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (No. 07-22693) (stating that the central issue in the case is "one of 'comity' and it is clear that this Nicaraguan Judgment is entitled to comity by any and all American courts" and advocating for "comity" analysis devoid of a meaningful inquiry as to how and where the foreign judgment was rendered); Plaintiff's Objection to Motion for Plenary Hearing and Incorporated Memorandum of Law at 8, Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573 (Me. 2008) (No. CV-06-183) ("Defendant would have this Court delve into the question of whether the proceedings giving rise to the judgments at issue conform to the specifics of the American doctrine of due process. By employing the term 'system,' however, the Recognition Act specifically precludes this untenable approach."); Brief of Plaintiffs-Respondents at 26-28, CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408 (N.Y. App. Div. 2002) (No. 602149/00) ("Finally, it is inappropriate for defendants to attempt to craft new proposed grounds for non-recognition that are not found within Article 53, as they do in arguing that their individual complaints about particular English procedures and rulings should defeat recognition.").

61 *See supra* note 60.

62 *See, e.g.*, Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 14-15, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) ("[D]ue process in the context of a foreign country enforcement proceedings is 'distinguish[ed] from the complex concept that has emerged in American case law.' Due process in this context 'refer[s] to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.' The uniform enforcement statute requires only that the foreign procedure be '*compatible* with the requirements of due process of law,' and this has been interpreted 'to mean that the foreign procedures are fundamentally fair and do not offend against basic fairness.'") (quoting Society of Lloyd's v. Ashenden, 233 F.3d 473, 476-77 (7th Cir. 2000)). Ironically, the same judgment creditors then argue that any judgment debtor that tries to show a foreign system fails to comport with due process is offending international comity. Brief of Appellants at 74, Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011) (No. 10-11143-J) ("The court obviously believed that Law 364 could have been better, and the trial could have been conducted even more like our American trials. But, here again, Osorio respectfully submits that the court should not have expected perfection and, more important, the court should have exercised comity."); Appellants' Reply Brief at 9, *Dow Chem. Co.*, 635 F.3d 1277 (No. 10-11143-J) ("With all due respect, the district court seems to have strayed away from the principles of comity and set itself up as the 'Appellate Court of Nicaragua' and passed judgment, up and down the line, on every facet of this litigation. It seems clear that the district court completely ignored international comity."); *id.* at 10-11 ("It is clear to the Appellants that the district court *did not* exercise 'comity' but, instead, 'relitigated' issues that should have been left to the Nicaragua trial and appellate courts.") (emphasis in original).

63 *See* Rosen, *supra* note 14, at 188 ("the enforcement of Un-American Judgments does not raise constitutional issues"); Berman, *supra* note 57, at 1871.

64 *See* Rosen, *supra* note 14, at 186-88; Berman, *supra* note 57, at 1872.

65 457 U.S. 922 (1982).

66 *Id.* at 924.

a hearing was held thirty-four days later, during which the state trial judge dismissed the attachment.[67] Petitioner subsequently filed a complaint alleging that Edmonson Oil had acted jointly with the State in depriving him of his property without due process.[68] The Supreme Court held that the "petitioner was deprived of his property through state action."[69] The Court noted that it "has consistently held that constitutional requirements of due process apply to garnishment and prejudgment attachment procedures whenever officers of the State act jointly with a creditor in securing the property in dispute. . . . Necessary to that conclusion is the holding that private use of the challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment."[70]

Thus, when a court takes a foreign judgment with "no force or effect" in the United States and enters an order converting it to a U.S. judgment, giving it the full force and effect of a U.S. judgment and the judgment creditor the legal title to seize, garnish, and/or attach the property of the judgment debtor—including the commensurate enforcement power that comes with it—it is taking state action, consistent with the holding in *Lugar*.

2. Contract Theory

The second argument often advanced by those who seek to minimize the Constitution's relevance in recognition proceedings is that a corporation that elects to operate outside of U.S. borders effectively contracts away any protections guaranteed by the U.S. Constitution.[71] Using a fiction of consent based on the judgment debtor's contacts with the foreign sovereign, some argue that Americans who travel abroad have simply entered into a contract to be governed by the foreign laws of the nations where they do business.[72] They then argue that under this contract theory, a foreign court's judgment is no different than a U.S. court's judgment enforcing a contract that involves surrender of a constitutional right. But even assuming *arguendo* that the fiction of consent/fictional contract approach is correct,[73] the argument is unconvincing and the notion that U.S. corporations tacitly agree to waive all U.S. constitutional guarantees *within U.S. borders* when they elect to do business abroad turns fundamental concepts of sovereignty and domestic law on its head.

Few would dispute that an individual or company that elects to do business in a foreign country—for example Italy, Egypt, or Singapore—under the right circumstances can vest the courts of that country with jurisdiction and may be subject to suit based on violation of the local law.

Few would dispute that an individual or company that elects to do business in a foreign country—for example Italy, Egypt, or Singapore—under the right circumstances can vest the courts of that country with jurisdiction and may be subject to suit based on violation of the local law. And one could argue that such an individual or company should reasonably expect that any assets he brings to that jurisdiction may be seized by the local courts if a judgment is ultimately entered against him and upheld in that nation's courts—whether or not he believes he was treated properly. But it does not follow that this individual or company has *also* consented with respect to or on behalf of U.S. courts to recognize and enforce foreign laws and judgments in the United States regardless of whether those judgments violate U.S. domestic laws and/or policies simply because a U.S. citizen may have done business in that foreign nation.[74]

First, it is doubtful whether a person could bindingly consent to violations of such basic constitutional rights, and even more doubtful that consent could be given on behalf of the U.S. court that is

67 *Id.* at 924-25.
68 *Id.* at 925.
69 *Id.* at 942.
70 *Id.* at 932-33.
71 *See* Rosen, *supra* note 14, at 206-09.
72 *See*, e.g., Robert L. McFarland, *Please Do Not Publish This Article In England: A Jurisdictional Response to Libel Tourism,* 79 Miss. L.J. 617, 663 (2010) ("[W]here the American author or publisher purposefully avails herself of the protections and benefits of the foreign jurisdiction, then there is no reason why the author or publisher should expect an American court to step in to protect the speaker from substantive liabilities arising in that jurisdiction.").
73 And, of course, the idea of an implied waiver of fundamental due process rights cannot possibly be correct.
74 *See, e.g.*, Reid v. Covert, 354 U.S. 1, 6 (1957) ("[T]he shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.").

While violations of international law might be a reason to deny recognition, international law does not necessarily provide sufficient protection to the rights guaranteed by the U.S. Constitution.

tainted by enforcing such judgments.[75] Second, even assuming consent of such a variety is possible, surely it cannot be *implied*. "Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."[76] And third, it is difficult to see how two individuals could by contract obligate U.S. courts (or the United States) to recognize and enforce foreign laws and judgments that do violence to the constitutional order. Thus, for example, even if an American citizen contracted into slavery in Italy and could be subject to legal action in Italy's courts if he breached his agreement, the judgment requiring him to return to slavery or compensate his "master" for breaching his agreement could not be forcibly recognized in the United States simply because the U.S. citizen elected to contract into slavery in Italy—even presuming it was lawful there.

Nor does it solve the problem to argue that it is permissible to ignore the U.S. Constitution so long as a U.S. court denies recognition where international norms were violated. While violations of international law might be a reason to deny recognition, international law does not necessarily provide sufficient protection to the rights guaranteed by the U.S. Constitution—for example, the significant chilling of what the United States regards as important, constitutionally protected speech. No U.S. court would enforce a gag order in the United States that violated fundamental constitutional free speech protections simply because it is not prohibited by international law.[77]

3. State Recognition Statutes and the U.S. Constitution

Finally, recent cases reflect an attempt by transnational judgment creditors to convince U.S. courts that U.S. courts are powerless to consider and afford the protections guaranteed by the U.S. Constitution.[78] Among other things, judgment creditors have argued that the Recognition Act precludes U.S. courts from inquiring into whether the specific proceedings that gave rise to the foreign judgment actually violated due process (maintaining that U.S. courts are only permitted to look at the foreign system as a whole and cannot consider the specific proceedings). They have also argued that U.S. courts cannot consider the requirements of U.S. due process, but can consider only what transnational plaintiffs are characterizing as less demanding "international due process" standards.[79] But a careful analysis of these arguments reveals that they hinge on misunderstandings of U.S. jurisprudence and fail to address the revisions to the Model Recognition Act ("Model Act" or "Act"), which confirms that the Act does not foreclose case-specific inquiries into fairness and procedures compatible with due process. And more importantly, as discussed in section III.B, *infra*, regardless of how litigants seek to characterize state recognition statutes, U.S. courts are required to deny recognition and enforcement to foreign judgments where their recognition would violate the U.S. Constitution or other deeply rooted domestic principles—state statutes cannot and simply do not change this.[80]

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75 For example, the constitutional requirement of a fundamentally fair hearing is of equal or greater constitutional stature than prohibitions on application of another jurisdiction's criminal laws, but even *express* consent to the violation of the most minor criminal law is not effective to bar recovery in tort (to say nothing of the state's power to prosecute) when, as with due process, the law was enacted to protect the person giving consent. RESTATEMENT (SECOND) OF TORTS § 892C (1979).

76 Edelman v. Jordan, 415 U.S. 651, 673 (1974), *overruled on other grounds by* Will v. Mich. Dep't of State Police, 491 U.S. 58 (1989).

77 *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1194 (N.D. Cal. 2001) ("[T]he First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet."), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006); Matusevitch v. Telnikoff, 877 F. Supp. 1, 4 (D.D.C. 1995) (In the United Kingdom, "a libel defendant would be held liable for statements the defendant honestly believed to be true and published without any negligence. In contrast, the law in the United States requires the plaintiff to prove that the statements were false and looks to the defendant's state of mind and intentions."); Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992) ("The protection to free speech and the press embodied in [the First] [A]mendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.").

78 *See, e.g.*, Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law at 31, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693) (arguing that U.S. recognition law only permits an "examination . . . focus[ed] on the due process afforded by the Nicaraguan system"); *see also* Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 14, 17, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) (arguing for the same limited analysis and concluding that because "Defendants had the ability to appear, assert defenses, provide evidence, and appeal the judgment," this was enough to show "that the Nicaraguan judicial system offers fair procedures compatible with the requirements of due process"); Plaintiffs' Motion for New Trial, For Reconsideration and/or Rehearing, Pursuant to F.R.C.P. 59, 60 and Other Provisions of F.R.C.P. at 7, *Osorio*, 665 F. Supp. 2d 1307 (No. 07-22693) (stating that the central issue in the case is "one of 'comity' and it is clear that this Nicaraguan Judgment is entitled to comity by any and all American courts" and advocating for "comity" analysis completely devoid of a meaningful inquiry as to how and where the foreign judgment was rendered).

79 *See, e.g.*, *supra* note 62.

80 *See* §§ III.B and IV, *infra*.

Transnational litigants that try to limit U.S. court analyses in recognition actions to considering whether a *foreign system* (as opposed to what happened in a particular case) is fair or afforded due process, typically rely on two basic premises. First, they focus on the fact that the 1962 version of the Model Act (and state laws based thereon) bar recognition of judgments produced in a foreign "system" that does not afford procedures compatible with due process;[81] second, they characterize cases like *Society of Lloyd's v. Ashenden* as standing for the proposition that U.S. courts cannot look at what happened in a specific case even if constitutional concerns are implicated by a recognition action. Both premises lack merit, as does the overarching legal argument they are offered in support of.

With respect to the 1962 Model Act, The National Conference of Commissioners addressed this issue when they drafted the 2005 Model Act. The Commissioners expressly stated that the 2005 Act would not "depart from the basic rules or approach of the 1962 Act," but was needed, in part, "to clarify and . . . expand upon the grounds for denying recognition in light of differing interpretations of those provisions in the current case law."[82] Specifically, the 2005 Act added two new provisions for non-recognition, permitting recognition to be denied where: "the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment"; or where "the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[83] Thus, for example, under the 2005 Act, a court may deny recognition of a judgment where a judgment debtor is unable to show "that there has been such a breakdown of law and order in the particular foreign country that judgments are rendered on the basis of political decisions rather than the rule of law throughout the judicial system," but can nevertheless prove "that for political reasons the particular party against whom the foreign-country judgment was entered was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment."[84]

Those who maintain that constitutionally-relevant case-specific inquiries are beyond the court's reach because of state statutes that are still based on the 1962 Model Act and/or the Seventh Circuit's ruling in *Society of Lloyd's v. Ashenden* are likewise incorrect.[85] The argument that U.S. courts cannot consider the requirements of U.S. due process in the recognition act context, but only what they claim are lesser standards imposed by "international due process" fares no better and fails for similar reasons.

First, as the 2005 Model Act confirms, the updated Act clarified (rather than modified) existing law, and expressly states that courts can consider due process both at the systemic level and the case specific level.[86] The Commissioners even expressly mentioned that determining whether the non-recognition grounds apply "requires the forum court to look behind the foreign-country judgment," because there is a risk that "foreign-country courts will [not] follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will [not] apply laws viewed as substantively tolerable by U.S. standards."[87]

The Commissioners even expressly mentioned that determining whether the non-recognition grounds apply "requires the forum court to look behind the foreign-country judgment" because there is a risk that "foreign-country courts will [not] follow procedures comporting with U.S. notions of fundamental fairness and jurisdiction or that those courts will [not] apply laws viewed as substantively tolerable by U.S. standards.

81 *See supra* note 60; UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, U.L.A. F. Money J.M.T. § 4(a)(1) (1962).
82 Preface to Uniform Foreign-Country Money Judgments Recognition Act, U.L.A. F.C. Money J.M.T. (2005).
83 U.L.A. F.C. Money J.M.T. § 4(c).
84 U.L.A. F.C. Money J.M.T. § 4 cmt. 12.
85 *See e.g.*, Plaintiffs' Amended Proposed Findings of Fact and Conclusions of Law at 31, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693) (arguing that U.S. recognition law only permits an "examination . . . focus[ed] on the due process afforded by the Nicaraguan system"); Plaintiff's Objection to Motion for Plenary Hearing and Incorporated Memorandum of Law at 8, Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573 (Me. 2008) (No. CV-06-183) ("Defendant would have this Court delve into the question of whether the proceedings giving rise to the judgments at issue conform to the specifics of the American doc-trine of due process. By employing the term "system", however, the Recognition Act specifically precludes this untenable approach.").
86 *See* Preface to U.L.A. F.C. Money J.M.T.; U.L.A. F.C. Money J.M.T. § 4(c)(7)-(8) & cmts. 11-12. Moreover, any concern for providing a "streamlined, expeditious method for collecting money judgments" cannot trump a party's right to protections guaranteed by the Constitution. Further confirming this, the 2005 Act rejects "the use of any registration procedure in the context of the foreign-country judgments" and establishes a new section ensuring that the issue of recognition must always be raised in a court proceeding. *See id.* at § 6 cmt. 1.
87 U.L.A. F.C. Money J.M.T. § 6 cmt. 1.

A careful study of the decision [in *Ashenden*] makes clear that it cannot work the sea change in U.S. jurisprudence that transnational judgment creditors are peddling.

Nor does *Ashenden* (decided in 2000) change this point. In *Ashenden*, the Seventh Circuit was addressing whether to recognize an English judgment awarding money damages for the defendants' failure to pay an assessment under a contract.[88] The plaintiff filed suit in England pursuant to a forum selection clause binding the defendants to litigate in England under English law.[89] In the English court, the defendants argued that two clauses in the contract would deny them due process if enforced. The first clause, the pay now sue later clause, prevented the defendants from exercising their right of set off against a claim of the plaintiff. Instead, the clause required that the defendants bring a separate suit. "The second clause, the conclusive evidence clause, makes [plaintiff's] determination of the amount of the assessment conclusive in the absence of manifest error."[90] Ultimately, the English court rejected the defendants' arguments and entered judgment against the defendants, and the U.S. district court recognized the judgment.[91]

Against this backdrop, the Seventh Circuit held that the Illinois Recognition Act (based on the 1962 version of the Model Act), which provided in pertinent part that a judgment could not be recognized if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," required that a court look at whether the system as a whole comported with due process, and not undertake a potentially burdensome case-specific inquiry. While it is not difficult to see how a superficial reading of *Ashenden* is appealing to transnational judgment creditors seeking to side-step the fundaments of U.S. jurisprudence, a careful study of the decision makes clear that it cannot work the sea change in U.S. jurisprudence that transnational judgment creditors are peddling.

First, the court in *Ashenden* was interpreting the 1962 version (not the 2005 version) of the Model Act, and it was doing so five years before the comments and corresponding revisions to the Model Act. As explained above, those comments and revisions clarify that the Model Act was never intended to be interpreted to prohibit courts from making a case specific inquiry.

Second, *Ashenden* addresses only Illinois' version of that Act (not constitutional claims or obligations operating outside of the state statute) and in fact the judgment debtors disclaimed any challenge to the constitutionality of the Act.[92]

Third, the court in *Ashenden* explained that the judgment debtors had not provided any evidence to suggest that the particular proceeding they were challenging was incompatible with due process or otherwise improper. In contrast, courts applying state statutes implementing the 1962 version of the Model Act have made clear that evidence of due process violations in a specific proceeding gives rise to a basis for denying recognition under the Act.[93] As the court explained in *Films by Jove, Inc. v. Berov*, "it is unnecessary to reach any broad conclusions as to the impartiality and essential fairness of the . . . system as a whole, [because] [p]laintiffs have produced specific evidence . . . of improprieties in the specific . . . court proceedings."[94]

Transnational litigants have also tried to use *Ashenden* to create a standard (the "international due process" standard) that they argue requires less than, and displaces, U.S. due process.[95] This

88 Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 478 (7th Cir. 2000).
89 Soc'y of Lloyd's v. Ashenden, No. 98 C 5335, 1999 WL 284775, at *6 (N.D. Ill. Apr. 23, 1999).
90 *Ashenden*, 233 F.3d at 478 (internal quotation marks omitted).
91 *Ashenden*, 1999 WL 284775, at *10.
92 *See* Brief of Appellant, *Ashenden*, 233 F.3d 473 (No. 99-3195) (disclaiming constitutional challenge and instead arguing only that Illinois's version of the Act "interposes the constitutional due process requirement between an English judgment and enforcement in Illinois.").
93 Films by Jove, Inc. v. Berov, 250 F. Supp. 2d 156, 208 (E.D.N.Y. 2003).
94 *Id.*
95 *See, e.g.*, Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 14-15, Osorio v. Dole Food Co., 665 F. Supp. 2d 1322 (S.D. Fla. 2009) (No. 07-22693) ("[D]ue process in the context of a foreign country enforcement proceedings is 'distinguish[ed] from the complex concept that has emerged in American case law.' . . . Due process in this context 'refer[s] to a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers.' . . . The uniform enforcement statute requires only that the foreign procedure be 'compatible with the requirements of due process of law,' and this has been interpreted 'to mean that the foreign procedures are fundamentally fair and do not offend against basic fairness.'") (quoting *Ashenden*, 233 F.3d at 476-77).

argument is typically based on out of context quotes from dicta in a portion of *Ashenden*. In *Ashenden*, the court explained that, even if it were undertaking a case-specific due process inquiry, the judgment debtors in question would still fail, opining that the case-specific argument could not "possibly avail the defendants here" unless the approach required the foreign court to have adopted and employed "every jot and tittle of American due process," something the court explained "no foreign court system has, to our knowledge, done" and which would mean it would be "sheer accident that a particular proceeding happened to conform in every particular to our complex understanding of due process." In short, the court's point in *Ashenden* was that it did not interpret the Illinois Act to require, as a prerequisite to recognition, proof that the foreign court operated exactly like an American court.

In short, the court's point in *Ashenden* was that it did not interpret the Illinois Act to require, as a prerequisite to recognition, proof that the foreign court operated exactly like an American court.

Instead, relying on the Supreme Court's decision in *Hilton v. Guyot*, the court in *Ashenden* suggested that the inquiry would be whether the foreign procedures were "fundamentally fair" and did not offend against "basic fairness."[96] This concept is what the court referred to as the "international concept of due process." To the extent that *Ashenden* is read as completely displacing U.S. constitutional requirements in favor of the concept of "international due process," this argument fails for several reasons.

First, as previously explained, *Ashenden* did not address a constitutional challenge to the state recognition statute. Second, *Ashenden* was decided before the clarifying comments and modifications to the Model Act were implemented in 2005.[97] And third, and most importantly, state recognitions statute do not and cannot displace the obligations imposed on courts by the U.S. Constitution or strip judgment debtors of the protections guaranteed to them by the Constitution, and *Ashenden* does not hold otherwise. Indeed, the Seventh Circuit has held time and again that state statutes cannot preempt federal law,[98] and the Supreme Court recognized more than a century ago that, while state courts could address recognition and enforcement issues through state law, a guiding federal statute or country-specific treaties on recognition and enforcement are preferable.[99] Moreover, in *Ashenden* the judgment debtors expressly consented to the very procedure they then tried to challenge, and the court even found that the challenged process *did not violate international due process or domestic due process*. Rather, the procedure was "the same procedure used by federal law."[100]

Finally, the judgment at issue in *Ashenden* arose out of a case from England, a "judicial system" the court described as "the very fount from which our system developed; a system which has procedures and goals which closely parallel our own."[101] As the court stressed, "[w]e need not consider what kind of evidence would suffice to show that a foreign legal system 'does not provide impartial tribunals or procedures compatible with the requirements of due process of law' if the challenged judgment had been rendered by Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open

96 *Ashenden*, 233 F.3d at 476-77 (citing Hilton v. Guyot, 159 U.S. 113, 202-03 (1895)).
97 *Ashenden*, 233 F.3d 473.
98 *See, e.g.,* E.E.O.C. v. Illinois, 69 F.3d 167, 169 (7th Cir. 1995) (Posner, J.) ("when a state statute is in conflict with a valid federal statute . . . the state statute is rendered a nullity by the supremacy clause."); Union Pac. R.R. v. Chicago Transit Auth., 647 F.3d 675, 678 (7th Cir. 2011) ("federal law preempts state laws that interfere with, or are contrary to, federal law.").
99 *See Hilton*, 159 U.S. at 163.
100 The court further explained that the challenged procedure had survived due process challenges multiple times. *Ashenden*, 233 F.3d at 479.The court stated that: "[T]he question is not whether Lloyd's accorded due process to the names, but whether the English courts did. All they did was enforce the clause, and they did so on the basis of an interpretation of a provision of the original contract between the names and Lloyd's that authorized Lloyd's to take measures unilaterally to prevent the society from failing." Stated differently, the courts held that the names had waived their procedural rights in advance, thus bringing the case within the rule of D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). That case upheld against a due process challenge similar to that mounted by the names in this case . . . . The English court' interpretation of the original contract with the names as authorizing the pay now sue later clause could not be thought so unreasonable an interpretation of that contract as to take the case out from under Overmyer by demonstrating the absence of a genuine waiver. And this is to assume that reasonableness in contract interpretation could ever be a component of due process[.]
101 *Ashenden*, 233 F.3d at 476.

Far from reflecting "American parochialism," as explained in Section IV, *infra*, U.S. courts keep the company of peer nations around the world in holding that its Constitution and the rights protected thereby are paramount to extranational laws, and even their own subordinate domestic laws.

to serious question . . . as England's are not."[102] The point in *Ashenden* has been echoed by several other courts, including other federal courts asked to address English judgments in the series of cases involving the Society of Lloyd's: "The origins of our concept of due process are English, and United States courts which have inherited major portions of their judicial traditions and procedure from the United Kingdom are hardly in a position to call the Queen's Bench a kangaroo court. This court, in particular, has noted that 'England is a forum that American courts repeatedly have recognized to be fair and impartial'. In short, 'any suggestion that the English system of courts does not provide impartial tribunals or procedures compatible with the requirements of due process of law borders on the risible.'"[103]

As the Society of Lloyd's cases highlight, transnational litigants are not trying to use British judgments and English courts as a vehicle to work an end run around the merits-based inquiry demanded by U.S. jurisprudence. England's system is the basis for our own system. This does not diminish or alter the obligations of U.S. courts to adhere to their obligations under the U.S. Constitution and assure that litigants' rights are not violated through the recognition process, nor does it change the fact that the force and effect of foreign laws and judgments within the bounds of the United States are not ultimately determined by international law when the latter conflicts with or provides a lesser standard of protection than the former.[104] What this highlights, however, is the importance of keeping in mind the fundaments of domestic law when U.S. courts (or any courts, for that matter) are confronted with judgments produced by foreign systems that are dissimilar from their own, or where there is evidence of a break down in the rule of law or the fairness of the judicial process.

B. U.S. Courts Cannot Recognize and Enforce Foreign Judgments When They Violate the U.S. Constitution

Focusing on the bigger picture, the notion that the U.S. Constitution ceases to operate when a U.S. court is considering whether to recognize and enforce a foreign judgment, and that U.S. courts are obligated or empowered by state statute to recognize and enforce a foreign judgment that violates the First Amendment or the Due Process Clauses of the Constitution, is untenable. Far from reflecting "American parochialism," as explained in Section IV, *infra*, U.S. courts keep the company of peer nations around the world in holding that its Constitution and the rights protected thereby are paramount to extranational laws, and even their own subordinate domestic laws.[105]

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102 *Id*. at 477 (citing as examples of situations where the foreign systems may not be analyzed in the same way: Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1411-12 (9th Cir.1995); Choi v. Kim, 50 F.3d 244, 249-50 (3d Cir.1995); Banco Minero v. Ross, 172 S.W. 711, 715 (Tex. 1915); Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 286-88 (S.D.N.Y.1999)).

103 Society of Lloyd's v. Turner, 303 F.3d 325, 330 -31 (5th Cir. 2002) (internal quotation marks and citations omitted); *see also* Haynsworth v. The Corporation, 121 F.3d 956, 967 (5th Cir.1997).

104 For example, in *United States v. Yousef,* the defendant challenged his convictions for conspiracy to bomb commercial airlines and his involvement in the 1993 bombing of the World Trade Center. The defendant argued that customary international law did not grant jurisdiction and that jurisdictional laws of the United States were subordinate to customary international law. The Second Circuit disagreed, holding that "irrespective of whether customary international law provides a basis for jurisdiction . . . United States law provides a separate and complete basis for jurisdiction over each of these counts and . . . United States law is not subordinate to customary international law." 327 F.3d 56, 91 (2d Cir. 2003); *see also* Andrea Bird, Comment, *War Reconstruction and the Establishment Clause: A Framework for Foreign Aid* 13 UCLA J. Int'l L. & Foreign Aff. 407, 415 (2008) ("[I]f customary international law conflicts with the Constitution, the Constitution will prevail."); Norris v. Doniphan, 61 Ky. 385 (4 Met. 385), 1863 WL 2582, at *9 (Ky. 1863) ("The law of nations . . . can not be substituted for the constitution of the United States. . . . [T]he law of nations can not confer upon the government any power, the exercise of which is prohibited by the constitution…"). This is not to say that a forum adjudicating judgment recognition in one country is powerless to affect enforcement proceedings abroad. Indeed, common law courts have historically had the ability in appropriate circumstances (most notably where a judgment was obtained by fraud) to enjoin parties from engaging in vexatious enforcement proceedings in other countries. *See, e.g.*, Weed v. Hunt, 56 A. 980, 981 (Vt. 1904) (enjoining party from "taking any action on said judgment in any court"); Title Ins. & Trust Co. v. Cal. Dev. Co., 171 Cal. 173, 192-210 (1915) (affirming order enjoining party from enforcing a fraudulently obtained Mexican judgment in Mexico); *see also* Annotation, *Injunction Against Enforcement of Judgment Rendered in Foreign Country or Other State*, 64 A.L.R. 1136 (1930). The capacity to issue such injunctions derives from an equity court's power to control the actions of individuals properly before it. *See* Cole v. Cunningham, 133 U.S. 107, 116-19 (1890); Kathryn E. Vertigan, Note, *Foreign Antisuit Injunctions: Taking a Lesson From the Act of State Doctrine*, 76 Geo. Wash. L. Rev. 155, 164 (2007) ("Since Cole, there has been no real question as to a court's authority to issue an injunction against a party properly before it to restrain that party from prosecuting litigation . . . [in] a foreign country.").

105 *See* § IV, *infra*; *see also* Adrian Briggs & Peter Rees, Civil Jurisdiction and Judgments 766 (5th ed. 2009) ("If the recognition of a foreign judgment would have the effect of depriving a party of his right to a fair trial, it may well be that its recognition will be contrary to natural justice, or to substantial justice, or to public policy" and where the European Convention on Human Rights would be infringed by the recognition of a foreign judgment, the court simply lacks any power to recognize the judgment.) (footnote omitted).

Indeed, even judgments handed down by U.S. state courts—which are presumed to have been rendered consistent with the U.S. Constitution and under the protection of the Full Faith and Credit Clause—cannot be recognized or enforced by a sister state if they violate the Constitution in such a manner. As the Supreme Court has explained: "To be valid in the rendition forum, *and entitled to recognition nationally*, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause."[106] And a sister state "judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."[107] Even "[t]he constitutional *requirement* that full faith and credit shall be given in each State to the . . . judicial proceedings of every other [S]tate is necessarily to be interpreted in connection with other provisions of the Constitution."[108] In fact, "an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the [S]tate as it is outside of it,"[109] and "no [S]tate can obtain in the tribunals of other[s] full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law."[110]

The respondent sought recognition of the judgment in the District of Columbia, but the U.S. Supreme Court refused, holding that the Due Process Clause rendered the judgment non-enforceable.

Thus, for example, in *Griffin v. Griffin*, the New York court entered an order and judgment, *ex parte* and without notice to the petitioner, awarding the respondent approximately $25,000.[111] The respondent sought recognition of the judgment in the District of Columbia, but the U.S. Supreme Court refused, holding that the Due Process Clause rendered the judgment non-enforceable.[112] Specifically, the Court held that "[a] judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction."[113] Rather, the Court explained, "due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process," and it "forbids any exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights."[114]

Likewise, in *Karstetter v. Voss*, the Texas Court of Appeals affirmed the trial court's order vacating a Kansas judgment for lack of personal jurisdiction.[115] The court found that the defendants sole contact with Kansas, was "random, isolated and fortuitous," and the interaction between the parties did not cause the defendants to reasonably foresee being haled into a Kansas court.[116] Accordingly, the court held that the minimum contacts requirement was not satisfied and the Kansas court's exercise of jurisdiction offended due process.[117] Similarly, in *W.S. Frey Co. v. Heath*, the Supreme Court of New Jersey denied recognition and enforcement to a Virginia judgment, holding that the method of service utilized against the defendant was "offensive to due process and to fundamental fairness."[118]

U.S. courts are likewise never obliged as a matter of comity or international law to recognize and enforce foreign judgments—which do not enjoy a claim to recognition by operation of the Full Faith and Credit Clause[119]—in violation of the U.S. Constitution when American courts are for-

106 Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 395 (1996) (emphasis added); *see also* Kremer v. Chem. Constr. Corp., 456 U.S. 461, 482 (1982) ("A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.").
107 Griffin v. Griffin, 327 U.S. 220, 228-29 (1946) (citations omitted).
108 Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 15 (1907) (emphasis added).
109 McDonald v. Mabee, 243 U.S. 90, 92 (1917).
110 *McDonough*, 204 U.S. at 15.
111 *Griffin*, 327 U.S. at 224-25.
112 *Id.* at 232.
113 *Id.* at 228.
114 *Id.* at 229, 231.
115 184 S.W.3d 396, 405 (Tex. App. 2006).
116 *Id.*
117 *Id.*
118 729 A.2d 1037, 1040 (N.J. 1999).
119 *See* 3 Ved. P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts § 20:2 (2d ed. 2004) ("Recognition of foreign judgments does not fall under the full faith and credit clause").

The 'chilling' effect [of civil liability forbidden by the First Amendment] is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants.

bidden from recognizing equivalent judgments from their own states.[120] "[I]nternational courtesy … does not obligate the courts to waive basic constitutional principles. This is especially true when sub-constitutional foreign laws confront the Constitution of the United States. It is inconceivable that the Constitution, which precedes and annuls sub-constitutional state laws, should be stripped of that power when confronted by unconstitutional foreign laws."[121] And when U.S. courts have been asked to enforce such unconstitutional foreign judgments, they have respected the Constitution's prohibition.

First Amendment. Foreign defamation laws provide an excellent example of this rule in practice. When a plaintiff that has prevailed in a foreign jurisdiction that applies a standard protective of free speech interests less than is required under the U.S. Constitution asks an American court to enforce the foreign court's judgment, American courts analyze it as a burden on the free speech rights of the judgment debtor.[122] "The 'chilling' effect [of civil liability forbidden by the First Amendment] is no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants."[123]

Equal Protection & Due Process. U.S. courts take the same approach when it comes to the Equal Protection and the Due Process Clauses.[124] Indeed, "[i]t has long been the law of the United States that a foreign judgment *cannot* be enforced if it was obtained in a manner that did not accord with the basics of due process."[125]

Thus, for example, in *Parker v. Parker*, 21 So. 2d 141, 141-42 (Fla. 1945), recognizing that "[g]ood faith and due process is the very bed rock on which our system of jurisprudence is constructed," the court denied recognition to a judgment from Cuba where, although the procedures *may* have complied with the laws of Cuba, they fell short of satisfying even the most basic notions of due process by U.S. standards. In *Banco Minero v. Ross*, 172 S.W. 711, 715 (Tex. 1915), the court denied recognition to a Mexican judgment where the "entire proceeding appear[ed] to have been arbitrary in its nature and summary in its execution." The court explained that, regardless of whether it was permissible under Mexican law, the judgment could not be recognized in the United States because a "full and fair trial" was not afforded in accordance with U.S. concepts of due process.[126] Similarly, in *Aleem v. Aleem*, 947 A.2d 489 (Md. 2008), the Maryland Court of Appeals thought it obvious that "the enforceability of a foreign [religious] divorce provision, . . . where only the male, i.e., husband, has an independent right to utilize [the divorce mechanism] and the wife may utilize it only with the husband's permission, is contrary to Maryland's constitutional provisions."[127]

120 Indeed, courts and commentators squarely presented with the question have even held that, to the extent the 1962 Uniform Act suggests to the contrary, it is unconstitutional. *See* Richard J. Graving & Jon H. Sylvester, *Is the Uniform Foreign Money-Judgments Recognition Act Potentially Unconstitutional—If so, Should the Texas Cure Be Adopted Elsewhere*, 25 Geo. Wash. J. Int'l L. & Econ. 737 (1992). Surprisingly, this argument is not raised in most recognition cases, *see, e.g.*, Brief of Appellant, Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (No. 99-3195) (disclaiming expressly the suggestion they were challenging the constitutionality of the Act and instead arguing that only an Illinois's version of the Act "interposes the constitutional due process requirement between an English judgment and enforcement in Illinois"). Nor is it ever likely to be, as the 2005 Uniform Act, which was adopted in no small part to deal with the interpretations of the 1962 Act that then raised constitutional concerns, does not present the same problems. *See, e.g.*, Richard J. Graving, *The Carefully Crafted 2005 Uniform Foreign-Country Money Judgments Recognition Act Cures a Serious Constitutional Defect in Its 1962 Predecessor*, 16 Mich. St. J. Int'l L. 289 (2007).

121 Ben-Ezer & Bendor, *supra* note 40, at 19.

122 *See* Bachchan v. India Abroad Publ'ns, Inc., 585 N.Y.S.2d 661, 665 (N.Y. Sup. Ct. 1992); *see, e.g.*, S.A.R.L. Louis Feraud Int'l v. Viewfinder, 489 F.3d 474, 481 (2d Cir. 2007); Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1193 (N.D. Cal. 2001), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006); Matusevitch v. Telnikoff, 877 F. Supp. 1, 3-4 (D.D.C. 1995); *accord* Telnikoff v. Matusevitch, 702 A.2d 230, 249-50 (Md. 1997); *see also* Securing the Protection of our Enduring and Established Constitutional Heritage Act, Pub. L. No. 111-223.

123 *Bachchan*, 585 N.Y.S.2d at 664.

124 *See, e.g.*, Ben-Ezer & Bendor, *supra* note 40, at 27 (noting that "discrimination contravenes the U.S. Constitution and it may be reasonably presumed that at least in certain cases, given its universality, it would lead to the invalidation of foreign laws or judgments").

125 Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir. 1995) (emphasis added).

126 Banco Minero v. Ross, 172 S.W. 711, 714-15 (Tex. 1915).

127 947 A.2d 489, 500–01 (Md. 2008); *see also* Tarikonda v. Pinjari, No. 287403, 2009 WL 930007, at *3 (Mich. Ct. App. Apr. 7, 2009) ("To accord comity to a system that denies equal protection would ignore the rights of citizens and persons under the protection of Michigan's laws.").

In *Falcom Manufacturing (Scarborough) Ltd. v. Ames*, 278 N.Y.S.2d 684 (N.Y. Civ. Ct. 1967), the plaintiff brought an action to enforce a Canadian default judgment against a U.S. defendant. The court denied recognition of the judgment because although the Canadian court had jurisdiction pursuant to the Ontario long-arm statute, the defendant's contacts were insufficient to satisfy U.S. due process requirements.[128] The New York court held: "[N]either justice nor equity would support the grant of conclusive effect to a default judgment, concepts of fair play and substantial justice would be violated by such a grant, and additionally, that minimum contact necessary to satisfy the requirements of due process is lacking."[129]

De Brimont v. Penniman, 7 F. Cas. 309 (C.C.S.D.N.Y. 1873), presents another classic example. The plaintiff in *De Brimont* brought an action against his parents-in-law (U.S. citizens residing in the United States) to enforce a French judgment. The French judgment imposed a duty on the parents to support their son-in-law pursuant to French laws.[130] The court found "the judgment . . . hostile to the policy of this country, and in conflict with the only ground upon which orders arbitrarily imposing upon one the burthen of supporting another would be tolerated."[131] Thus, the court held the law must be executed in France "and such decrees can have, and ought to have, no extraterritorial significance."[132] Specifically, the court held ***"[comity] does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens.***"[133]

In short, what no American court may do itself in the first instance, no American court may assist the courts of another country in doing.[134] As the Supreme Court made clear more than a century ago, before a U.S. court may embrace a foreign judgment and give it the force and effect of a U.S. judgment, it must ensure *at a minimum* that the judgment was rendered under a system providing impartial tribunals and procedures compatible with the requirements of due process of law.[135] These considerations require a court to address fundamental "constitutional protections," which "supersed[e]" general principles of comity.[136] And any judgment that is the product of a proceeding that "lacks fundamental due process, personal jurisdiction, or equal justice (fairness) must necessarily be ignored."[137] Just as U.S. judges may not themselves deprive a citizen of due process by entering an unconstitutional judgment, a U.S. judge may not produce the same effect by recognizing or enforcing the judgment of someone not obligated to observe the requirements of American due

As the Supreme Court made clear more than a century ago, before a U.S. court may embrace a foreign judgment and give it the force and effect of a U.S. judgment, it must ensure *at a minimum* that the judgment was rendered under a system providing impartial tribunals and procedures compatible with the requirements of due process of law.

128 278 N.Y.S.2d 684, 687-88 (N.Y. Civ. Ct. 1967).
129 *Id.* at 688.
130 De Brimont v. Penniman, 7 F. Cas. 309, 309 (C.C.S.D.N.Y. 1873).
131 *Id.* at 311.
132 *Id.*
133 *Id.* (emphasis added).
134 Griffin v. Griffin, 327 U.S. 220, 229, 231 (1946) ("Due process forbids *any* exercise of judicial power which, but for the constitutional infirmity, would substantially affect a defendant's rights.") (emphasis added); *see also* Hansberry v. Lee, 311 U.S. 32, 40-41 (1940) ("A [domestic] judgment rendered in such circumstances" as to deny due process is not entitled to full faith and credit, and further "judicial action enforcing [such a judgment] is not that due process which the Fifth and Fourteenth Amendments require" either) (internal citations omitted); Postal Tel. Cable Co. v. City of Newport, 247 U.S. 464, 476 (1918); Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 17 (1907) ("It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court; by which is meant until he has been duly cited to appear, *and has been afforded an opportunity to be heard*. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.") (citations omitted).
135 Hilton v. Guyot, 159 U.S. 113, 163-67, 202-03 (1895); *see also* Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1410 (9th Cir. 1995).
136 *See* Nanda, *supra* note 119, § 20:1; *see also Hilton*, 159 U.S. at 164-67, 202-03; Ben-Ezer & Bendor, *supra* note 18, at 2133 ("Of course, a court's willingness to apply any foreign laws at all, or to recognize any foreign judgments, is a result of a country's voluntary derogation of the application of its own law in certain situations, usually out of a concern for comity. Although such international courtesy may warrant judicial restraint based on treaty commitments or general foreign policy or effectiveness concerns, it does not obligate a country to waive its basic constitutional principles.").
137 Nanda, *supra* note 119, § 20:1; Restatement (Third) of Foreign Relations Law § 481 cmt. a (1987) (recognizing superiority of questions under the "United States Constitution," such as "intrusion into foreign affairs," or "denial of due process of law."); *Hilton*, 159 U.S. at 205 ("It must, however, always be kept in mind that it is the paramount duty of the court before which any suit is brought to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party."); *Griffin*, 327 U.S. at 228-29 ("A judgment obtained in violation of procedural due process is not entitled to full faith and credit when sued upon in another jurisdiction. ***Moreover, due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process***.") (citations omitted) (emphasis added).

The United States is far from alone in recognizing that international comity does not "obligate a country to waive its basic constitutional principles."

process (and who did not).[138] Any alternative would permit the state-action equivalent to money laundering, or "judgment-laundering."[139]

IV. National Courts around the World Likewise Refuse to Recognize Foreign Judgments That Violate Their Fundamental Domestic Laws

The United States is far from alone in recognizing that international comity does not "obligate a country to waive its basic constitutional principles." Courts around the world deny recognition to foreign judgments that offend domestic laws or public policies.

For example, in Europe, the Court of Justice has held that European courts may not recognize or enforce a money judgment, foreign or domestic, if it was rendered in violation of one of the European Union's foundational norms, such as those in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[140] In Australia, a foreign judgment will not be enforced at common law for multiple reasons, including instances where the foreign court acted contrary "to natural justice" or the foreign country acted "perversely" in refusing to apply the appropriate law or the foreign judgment is contrary to Australian public policy.[141]

In Germany, a foreign judgment is not entitled to recognition if it would "clearly conflict with essential principles of German law, in particular if recognition would conflict with civil rights at [a] constitutional level."[142] Thus, "[r]ecognition will not be granted where the court failed to

138 *See* Bass v. Hoagland, 172 F.2d 205, 209 (5th Cir. 1949); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (noting First Amendment can be violated by "a civil lawsuit between private parties").

139 Some transnational plaintiffs have also tried to argue that U.S. courts must recognize and enforce a foreign judgment if the judgment was produced in a foreign system after a *forum non conveniens* (FNC) dismissal. *See, e.g.*, Plaintiffs' Motion for Summary Judgment with Incorporated Memorandum of Law in Support at 10-11, Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (No. 07-22693) ("Nicaragua's judicial system is just as worthy of respect today as it was in 1995 when Defendants requested and won an FNC dismissal in favor of litigation in Nicaragua."); *Osorio*, 665 F. Supp. 2d at 1343-44. But this conflates two distinct legal concepts: that of FNC, a doctrine concerned about "adequate" alternative fora, which forum is most convenient to the parties, and which court offers the easiest and most effective access to evidence, *see* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981) (the "central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient . . . ."), and that of recognition and enforcement of foreign-country judgments, which concerns the standards that must be satisfied before any U.S. court can take a foreign-country judgment with no force or effect in this country and convert it into a U.S. judgment entitled to full faith and credit. *See Hilton*, 159 U.S. at 164-65 ("[N]o nation will suffer the laws of another to interfere with her own to the injury of her citizens . . . whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions . . . [e]very nation must be the final judge for itself"). The differences between FNC and recognition and enforcement are discussed at length in Thomson, et al., *supra* note 37. In short, with the expanding global economy and inherent roadblocks to necessary evidence and witnesses, often times U.S. courts should dismiss suits arising out of alleged wrongdoing that occurred abroad. *Id*. Indeed, in some cases it may be impossible to conduct trial on the foreign-based claims in the United States in a manner that comports with due process simply because of the barriers to evidence. But the fact that U.S. courts dismiss based on FNC does not mean that every judgment produced in a foreign court following a FNC dismissal will be recognizable and enforceable in the United States, nor that it should be. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 809 F.2d 195, 205 (2d Cir. 1987); *Osorio*, 665 F. Supp. 2d at 1343-44. As multiple courts have explained, FNC dismissal occurs before the foreign trial has even happened and the FNC adequacy inquiry typically avoids delving too deeply into foreign systems. *See, e.g.*, Thomson, et al., *supra* note 37. In many ways, the FNC inquiry shows respect for foreign judicial systems by giving them the benefit of the doubt—that the foreign forum where trial is more convenient will satisfactorily try the case. But, a lot can change with the passage of time, and as numerous cases have demonstrated, foreign systems can break down, they can fall victim to corruption, and transnational plaintiffs can seek to take unfair advantage of foreign systems or even perpetrate fraud. *See, e.g.*, *Osorio*, 665 F. Supp. 2d at 1343-44; *Bank Melli Iran*, 58 F.3d at 1413; Thomson, et al., *supra* note 37; *accord In re Union Carbide*, 809 F.2d at 205. If such evidence comes to light, as numerous U.S. courts have held, regardless of whether the case was initially dismissed on FNC, recognition of the judgment in the U.S. will have to be denied. *See, e.g.*, *Osorio*, 665 F. Supp. 2d at 1343-44; *Bank Melli Iran*, 58 F.3d at 1413. This does not mean that dismissal based on FNC was improper, nor does it render the foreign proceeding invalid. Indeed, where recognition in the U.S. is denied, the judgment will still be valid in the rendering foreign jurisdiction. Put simply, differing standards for FNC and foreign-judgment recognition allow U.S. courts to show due respect for foreign judicial systems, while still adequately protecting the rights and interests of U.S. citizens. There is value in legal rules that allow a U.S. court to find that a case should be tried in a foreign jurisdiction without thereby tying its hands and committing itself to embracing what may turn out to be a fundamentally flawed judgment. For these reasons and numerous others, there is no legal basis for transnational plaintiffs to argue that because their case was dismissed based on FNC that they are entitled to recognition and enforcement of *any* subsequent foreign judgment. As the Second Circuit aptly explained in *Union Carbide* in holding that it was reversible error to require consent to recognition and enforcement as a precondition to FNC dismissal, "[a]ny denial by [foreign] courts of due process can be raised by [a judgment debtor] as a defense to the plaintiffs' later attempt to enforce a resulting judgment against [the judgment debtor] in this country." *In re Union Carbide*, 809 F.2d at 205.

140 *See, e.g.*, Case C-7/98, Krombach v. Bamberski, 2000 E.C.R. I-1935 ¶¶ 27, 43-44; Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3055 ¶¶ 31-41; Treaty of Lisbon Amending the Treaty on European Union and the Treating Establishing the European Communities, art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1; Convention for the Protection of Human Rights and Fundamental Freedoms, § 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222; Case C-341/04, *In re* Eurofoods IFSC Ltd., 2006 E.C.R. I-03813 ¶¶ 65-68. *See generally* Clay H. Kaminsky, *The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law*, 85 Tul. L. Rev. 55, 59-62 (2010); Giangiuseppe Sanna, *Article 47 of the EU Charter of Fundamental Rights and Its Impact on Judicial Cooperation in Civil and Commercial Matters*, *in* The EU Charter of Fundamental Rights: From Declaration to Binding Instrument 173 (Di Federico Giacomo ed., 2011).

141 Martin Davies et al., Conflict of Laws in Australia 829-42 (8th ed. 2010).

142 "Germany," *in* Enforcement of Money Judgments, at GER-28-29 (Lawrence W. Newman ed., 2011).

observe the principles of independent decisionmaking and impartiality or where the parties were not afforded due process and the opportunity to be heard."[143] Furthermore, under German law, "no inquiry is made as to whether the rendering court complied with its own procedural rules," instead, "judgments which order the defendant to perform actions which would be in violation of German law (for example, to pay a gambling debt) would be cause for the German court to refuse recognition."[144]

In Brazil, a foreign judgment will be recognized only when it is compatible with the fundamental principles and values adopted by the legal order of Brazil.[145] In Argentina, for a judgment to be enforceable, it "must comply with the fundamental Argentine public policy provisions, and the foreign proceedings must have observed the guaranties of due process of law."[146]

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In Singapore, the registration of the judgment "shall not be ordered if . . . [t]he judgment was in respect of a cause of action which for reasons of public policy . . . could not have been entertained by the registering Singapore Court."[147] In the Philippines, the courts deny recognition to judgments that contravene Philippine laws or moral principles that underlie Philippine social structures and family relations.[148] For instance, a divorce seeking alimony will not be recognized because Philippine law does not recognize divorce.[149]

In South Korea, a judgment will be recognized if it does not "contradict the good customs of the Republic of Korea or other public orders."[150] And in the Arab States, "with virtual unanimity, legal systems refuse to enforce foreign judgments which violate their public policy . . . including, for instance, lack of due notice and fraud."[151] The list goes on.[152]

As the courts in England have long recognized, "[a] foreign judgment whose recognition would conflict with English public policy will not be recognised in England."[153] "The usual colourful examples are an order to pay damages for breach of a contract to kidnap or to sell narcotics, or those based on openly racist laws."[154] But regardless of which examples are used, "[t]he principle of the matter is clear," if a court has a statutory duty to ensure that a person has a right to a fair trial, "it must surely have a statutory duty not to recognise a foreign judgment where recognition, and the making of a judicial order which is consequent upon that recognition, would have the effect of producing the same prohibited outcome."[155]

CONCLUSION

The new breed of transnational litigation seeking to mute the U.S. Constitution and other fundamental domestic policies to secure recognition and enforcement of abusive foreign judgments requires a forceful judicial response. Fortunately, meaningful review of suspect foreign judgments by courts asked to recognize them is in keeping with the true meaning of both sovereign-

143 56 Am. Jur. *Trials* 529, *supra* note 1, at § 29.
144 *Id.*
145 *See* Article 17 of the Introductory Law to the Civil Code (Decree-Law No. 4657/1942); Article 6 of Ordinance No. 9 issued by the Presidency of this Honorable Court.
146 56 Am. Jur. *Trials* 529, *supra* note 1, at § 43.
147 ENFORCEMENT OF MONEY JUDGMENTS, at SIN-12 (Lawrence W. Newman ed., 2011); *accord* United Overseas Bank Ltd v Wong Hai Ong [1999] 1 MLJ 474 (reflecting same rule in Malaysia).
148 "The Philippines," *in* Enforcement of Money Judgments, at PHI-22-23 (Lawrence W. Newman ed., 2011).
149 *Id.*
150 Code of Civil Procedure of Korea, art. 217(3) (Force of Effect of Judgment from a Foreign Country).
151 Harib Mohd & Sharif Al Mulla, *Conventions of Enforcement of Foreign Judgments in the Arab States*, 14 Arab L.Q. 33, 39 (1999).
152 Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 Ind. L.J. 635, 643 (2000) ("Every statute, treaty, model law, or rule concerning recognition of foreign judgments the world over provides an escape hatch termed public policy"); Briggs & Rees, *supra* note 105, at 687 ("The proposition that recognition will be denied where recognition would be manifestly contrary to public policy is a rule to be found, one supposes, in all systems which recognise foreign judgments.").
153 Briggs & Rees, *supra* note 105, at 764.
154 *Id.*
155 *Id.* at 766.

If anything, globalization has only increased the need for U.S. courts to act vigilantly as gatekeepers to protect the U.S. system and its citizens from the tainted fruits of suspect foreign proceedings.

ty and comity. Nations are not inexorably bound to enforce judgments obtained in each other's courts. While violations of international norms may constitute grounds for denying recognition (or good cause for countries to enter into treaties to address judgment-recognition), one of the nearly universal reasons for denying recognition of a foreign law or judgment is where it is contrary to the constitutional principles, policies, or individual rights under the protection of the domestic court.[156]

Against those who would weaken U.S. courts' ability to provide protection to companies facing abusive foreign judgments, in the name of a misguided understanding of "comity," one need only heed the renowned words of Justice Story: "It is difficult to conceive, upon what ground a claim can be rested, to give any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations, or their subjects. It would at once annihilate the sovereignty and equality of the nations, which should be called upon to recognise and enforce them; or compel them to desert their own proper interest and duty in favour of strangers, who were regardless of both. A claim, so naked of principle and authority to support it, is wholly inadmissible."[157] Story's words are as true today as they were a century ago. If anything, globalization has only increased the need for U.S. courts to act vigilantly as gatekeepers to protect the U.S. system and its citizens from the tainted fruits of suspect foreign proceedings.

156 Ben-Ezer & Bendor, *supra* note 18, at 2133; Story, *supra* note 12, at §§ 31-38; Huber, *supra* note 12, at §1-3.
157 Story, *supra* note 12, at § 32; Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F. 2d 909, 937 n.104 (D.C. Cir. 1984) (quoting same).

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