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Judgments Rendered Abroad - State Law or Federal Law

Albert A. Lindner

JUDGMENTS RENDERED ABROAD — STATE LAW OR FEDERAL LAW?

I. INTRODUCTION

In the United States the question of what law governs the recognition and enforcement of judgments rendered by courts of foreign countries has never been conclusively settled. Although the Supreme Court specifically dealt with the problem in 1895 in *Hilton v. Guyot*,[1] that case arose from a lower federal court and did not purport to bind the states. As a result, state court decisions have not been uniform and several states have assumed constitutional freedom to reject the Supreme Court rule. The advent of *Erie R.R. v. Tompkins*[2] further confused the issue since under the *Erie* doctrine the lower federal courts may be bound to follow the judgments law of the forum state. However, the recognition of the pre-eminence of the federal government in international law and foreign relations, coupled with an expanding concept of federal common law, would appear to indicate that in the absence of a federal statute or treaty, the Supreme Court will be the final arbiter of a uniform national policy in this area.

II. THE *Hilton* DOCTRINE

The absence of federal treaties or statutory provisions concerning the recognition and enforcement of foreign judgments has allowed the law in this field to develop by judicial decision. The most detailed exposition of the principles governing this area of the law is contained in the Supreme Court's decision in *Hilton v. Guyot*.[3] Since this decision is the only statement of the Supreme Court on the subject and may be interpreted to be the law of the land a detailed statement of the case is warranted.

The action was brought in a federal court upon a judgment recovered in France against an American defendant. The French court had jurisdiction and the defendant had appeared after being served. The Supreme Court reversed the judgment that had been given below in favor of the judgment creditor. Justice Gray, speaking for a five to four majority, first declared the problem to be one of private international law governed by the doctrine of comity, which he declared to be, "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[4] After concluding that judgments *in rem* or *quasi in rem* rendered by a court of competent jurisdiction upon regular proceedings and notice would be given conclusive effect, regardless of how

1. 159 U.S. 113 (1895).
2. 304 U.S. 64 (1938).
3. 159 U.S. 113 (1895); see Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 790 (1950).
4. Hilton v. Guyot, *supra* note 3, at 164.

the rendering court would treat a similar American judgment,[5] the Court focused on the issue of the effect to be given to *in personam* money judgments. After an exhaustive review of the authorities and judicial trends in both America and England, the Court recognized the general rule to be:

> Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh. . . .[6]

The Court noted that there was an issue of fraud in the case, but found it unnecessary to consider it since there was a separate ground upon which the comity of nations could be held not to require the Court to give conclusive effect to the judgments of the courts of France — the want of reciprocity.[7] The Court found that there was hardly a civilized nation on either continent that allowed conclusive effect to executory foreign judgments for the recovery of money; and since international law is founded upon "mutuality" and "reciprocity," the judgment was not entitled to be considered conclusive.[8] Thus the Court held that a judgment is not conclusive on the merits unless the rendering country would accord the same effect to a judgment rendered in the United States. Otherwise, the foreign judgment will merely constitute "*prima facie* evidence . . . of the justice of the plaintiff's claim."[9] However, it must be noted that the doctrine of reciprocity adopted by the Court in *Hilton* applies only in the situation where an action is brought upon an *in personam* judgment rendered against an American defendant in a foreign court.[10]

Although the doctrine espoused in *Hilton* has never been overruled and should therefore be respected as the rule of the Supreme Court, its

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5. *Id.* at 166–67.
6. *Id.* at 202–03.
7. *Id.* at 210.
8. *But see* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), where the Court withdrew from the proposition that international law is based on reciprocity.
9. 159 U.S. at 227.
10. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 411 (1964); Reese, *supra* note 3, at 792. The doctrine of reciprocity has been severely criticized by commentators, often on the basis of Chief Justice Fuller's dissent, in which he said: "The application of the doctrine of *res judicata* does not rest in discretion; and it is for the government, and not for its courts, to adopt the principle of retorsion, if deemed under any circumstances desirable or necessary." Hilton v. Guyot, 159 U.S. 113, 234 (1895) (dissenting opinion). See 2 BEALE, CONFLICT OF LAWS 1381–89 (1935); GOODRICH, CONFLICT OF LAWS 392 (Scoles ed. 1964); STUMBERG, PRINCIPLES OF CONFLICT OF LAWS 129 (3d ed. 1963); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical — Critical Analysis,* 16 LA. L. REV. 465, 471–74 (1956); Nadelmann, *Reprisals Against American Judgments?,* 65 HARV. L. REV. 1184, 1188 (1952).

validity may be questioned on several grounds. The case came from a lower federal court; it did not involve a federal question concerning which a decision by the Supreme Court is binding upon the states; and the decision itself did not expressly purport to bind the states. Since the case was decided under the reign of *Swift v. Tyson*[11] it may be posited that the decision was an expression of the federal common law of the period, applicable only to the lower federal courts. Furthermore, under *Klaxon Co. v. Stentor Elec. Mfg. Co.*[12] where the Court declared that in diversity cases the federal courts must apply the conflict of laws rules of the forum state under the doctrine of *Erie R.R. v. Tompkins,* it can be argued that the lower federal courts must follow state law on the subject of judgments.

III. STATUS OF THE LAW

Since state statutes concerning the enforcement of judgments are virtually non-existent,[13] the determination of the issue has been left to the common law rules of conflict of laws. The state courts that have considered the question of the respect to be given to judgments rendered abroad have either adopted the reciprocity doctrine of *Hilton,*[14] embraced a principle of unlimited judicial review,[15] or granted the foreign judgments conclusive effect.[16] This last view represents the modern tendency,[17] and the judg-

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11. 41 U.S. (16 Pet.) 1 (1842).

12. 313 U.S. 487, 496 (1941). "We are of the opinion that the prohibition declared in *Erie Railroad v. Tompkins* . . . against such independent determinations by the federal courts, extends to the field of conflict of laws."

13. California is the only state known to have a statute on the enforcement of foreign judgments. CAL. CIV. PROC. CODE § 1915.

14. See, *e.g.,* Ogden v. Ogden, 159 Fla. 604, 33 So. 2d 870 (1948); Northern Aluminum Co. v. Law, 157 Md. 641, 147 Atl. 715 (1929); Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N.W. 735 (1920); *In re* Vanderborght, 57 Ohio L. Abs. 143, 91 N.E.2d 47 (C.P. 1950); Banco Minero v. Ross & Masterson, 196 Tex. 552, 138 S.W. 224 (1911); Union Securities Co. v. Adams, 33 Wyo. 45, 236 Pac. 513 (1925) (dictum).

In *In re* Alexandravicus, 83 N.J. Super. 303, 199 A.2d 662 (1964), the court cited *Hilton* and noted that it had been cited approvingly in *Sabbatino.* However, it is unclear whether this citation is sufficient to indicate that reciprocity is the rule of that state.

Pennsylvania has cited *Hilton* for the proposition that recognition is not a matter of absolute obligation under the principles of comity, but it remains unclear if this would demand reciprocity. See Commonwealth *ex rel.* Thompson v. Yarnell, 313 Pa. 244, 169 Atl. 370 (1933).

15. Tremblay v. Aetna Life Ins. Co., 97 Me. 547, 55 Atl. 509 (1903).

16. Johnston v. Compagnie Générale Transatlantique, 242 N.Y. 381, 387–88, 152 N.E. 121, 123 (1926); Cowans v. Ticonderoga Pulp & Paper Co., 219 App. Div. 120, 219 N.Y. Supp. 284 (1927), *aff'd,* 246 N.Y. 603, 159 N.E. 669 (1927). See Martens v. Martens, 284 N.Y. 363, 366, 31 N.E.2d 489, 490 (1940). Other cases adopting the conclusive doctrine are Adamsen v. Adamsen, 151 Conn. 172, 195 A.2d 418 (1963); Bata v. Bata, 39 Del. Ch. 258, 163 A.2d 493 (Sup. Ct. 1960), *cert. denied,* 366 U.S. 964 (1961) (Delaware refused to apply collateral estoppel but held that otherwise foreign judgments were conclusive); The Succession of Fitzgerald, 192 La. 726, 189 So. 116 (1939); 164 East Seventy-Second St. Corp. v. Ismay, 65 Cal. App. 2d 574, 151 P.2d 29 (Dist. Ct. App. 1944) (adopting their statute on judgments); *cf.* RESTATEMENT (SECOND), CONFLICT OF LAWS § 430(e) (Tent. Draft No. 11, 1965): "A valid judgment rendered in a foreign country after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned."

17. See GOODRICH, *supra* note 10, at 391.

ments of foreign courts having jurisdiction are conclusive, subject only to certain exceptions.[18] Of the states that have assumed constitutional freedom to reject *Hilton,* the position taken by the New York courts is the most noteworthy.[19] Judge Pound, speaking for the New York Court of Appeals in *Johnston v. Compagnie Générale Transatlantique,*[20] held that the question was one of private international law and private rights which the New York courts could determine without reference to rules laid down by the federal courts.[21] In *Cowans v. Ticonderoga Pulp & Paper Co.*[22] the plaintiff sued to recover on a judgment rendered in Quebec, where American judgments are not given conclusive effect, and the defendant argued that the judgment was merely prima facie evidence of liability. The court stated that: "The force and effect which is to be given to a foreign judgment is for each sovereign power to determine for itself. Its policy in this respect is determined by its statutes or by the decisions of its courts."[23]

Prior to *Erie,* federal courts had frequently acknowledged the *Hilton* doctrine,[24] but since that decision in 1938, none have squarely faced the now classical question of whether a federal court sitting in a state which had rejected *Hilton* would have to follow the state rule under *Erie,* or whether as a matter of federal law, both the federal and state courts would be bound by the *Hilton* doctrine.[25]

IV. *Erie* AND THE FEDERAL COMMON LAW

As stated in *Erie:* "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a

18. See *supra* note 6 and accompanying text.

19. It was announced two years before *Hilton,* in Dunstan v. Higgins, 138 N.Y. 70, 71, 33 N.E. 729, 730 (1893), that a foreign judgment is conclusive on the merits and can be impeached only by want of jurisdiction or for fraud.

20. 242 N.Y. 381, 152 N.E. 121 (1926).

21. *Id.* at 386, 152 N.E. at 123.

22. 219 App. Div. 120, 219 N.Y. Supp. 284, *aff'd,* 246 N.Y. 603, 159 N.E. 669 (1927).

23. 219 App. Div. at 120–21, 219 N.Y. Supp. at 286.

24. *E.g., In re* Aktiebolaget Kreuger & Toll, 20 F. Supp. 964 (S.D.N.Y. 1937); Venezuelan Meat Export Co. v. United States, 12 F. Supp. 379 (D. Md. 1935); Strauss v. Conried, 121 Fed. 199, 200 (S.D.N.Y. 1902). Courts have often evaded the *Erie* issue. See Velsicol Chem. Corp. v. Hooker Chem. Corp., 230 F. Supp. 998 (N.D. Ill. 1964), following Gull v. Constam, 105 F. Supp. 107 (D. Colo. 1952). Or, after raising the issue, the courts have failed to decide it. See Compania Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907 (N.D. Tex. 1941), *aff'd,* 131 F.2d 609 (5th Cir. 1942); *cf.* RESTATEMENT (SECOND), CONFLICT OF LAWS § 430(e), comment *e* at 3 (Tent. Draft No. 11, 1965), where it is noted that no federal or state court has ever suggested that the *Hilton* rule of reciprocity is binding.

25. When a transaction is one of private international law, or international conflicts of laws as it may be called, one of three bodies of law may be controlling: state law, federal law or international law. Although the methods and conditions of enforcement of foreign judgments vary greatly, there is no real basis of international complaint, or requirements for recognition in international conflict cases. Therefore the question must be governed by either state law or federal law. See EHRENZWEIG, CONFLICT OF LAWS 169 (1962); Cheatham, *Sources of Rules For Conflict of Laws,* 89 U. PA. L. REV. 430, 431, 436 (1941).

matter of federal concern. There is no federal general common law."[26] While Justice Brandeis thus purported to lay to rest the "federal general common law,"[27] on the same day he delivered another opinion which concerned a controversy between two states over the waters of a river in which he stated that: "Whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."[28]

Thus at the same time that the Court declared the supremacy of state law with regard to all matters not governed by the Constitution or federal statute or treaty, it also stimulated the development of a body of federal common law that is binding upon the state and federal courts alike.[29] The next year federal law was applied to override a state law in a suit to recover taxes and interest thereon erroneously collected from an Indian ward.[30] In 1942 the Court held that "federal decisional" law was controlling in a suit by the Federal Deposit Insurance Corporation on a note transferred by a state bank as collateral.[31] Justice Jackson, in a concurring opinion, stated that federal common law implements the federal constitution and statutes, and that in such cases the federal courts are free to draw upon all the sources of the common law.[32] However, the doctrine of the new federal common law was first fully enunciated in *Clearfield Trust Co. v. United States,*[33] where the question presented was whether state or federal law governed recovery on a guarantee of endorsements on a government check. The Court found that the *Erie* doctrine did not apply and since transactions in commercial paper issued by the United States will commonly occur in several states, "the application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain."[34]

In *United States v. Standard Oil Co.,*[35] the *Clearfield* doctrine was applied to a tort claim by the United States. *Erie* was held to have no

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26. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
27. Hinderlider v. LaPlatz River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).
28. *Id.* at 110.
29. See Friendly, *In Praise of Erie — and of the New Federal Common Law,* 39 N.Y.U.L. REV. 383, 405, 407 (1964). Thus, where Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), had only been binding in the federal forum, the new body of law, under the supremacy clause, was binding in every forum in areas of national concern thereby creating true uniformity. Friendly, *supra* at 405.
30. Board of County Comm'rs v. United States, 308 U.S. 343 (1939).
31. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942).
32. *Id.* at 472. This concurring opinion is well known for its misleading implications that *Erie* is limited to diversity cases. *Id.* at 466–68, 471–72.
3. 318 U.S. 363 (1943), 43 COLUM. L. REV. 520 (1943). For criticism of the Court's reasoning in *Clearfield,* see Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. PA. L. REV. 797, 828–32 (1951).
34. 318 U.S. at 367.
35. 332 U.S. 301 (1947). Hart, *The Relations Between State and Federal Law,* 54 COLUM. L. REV. 489, 533–34 (1954).

effect on matters that were "exclusively federal" whether they were made so by constitutional or congressional command or on other matters, "so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings."[36] The Court went on to state that the federal judiciary had power to deal with "essentially federal" matters, "even though Congress has not acted affirmatively about the specific question."[37] The Court went on to limit the *Erie* doctrine, stating that it would not be applied when it would result in, "substantially diversified treatment where uniformity is indicated as more appropriate, in view of the nature of the subject matter and the specific issues affecting the Government's interest."[38] The scope of this federal interest has been expanded to include patent and copyright law,[39] federal labor statutes, and federal statutes in general.[40]

The above illustrates that where uniformity of law is required, whether in interstate matters, federal fiscal problems, or implementation of federal statutes, *Erie* may be pre-empted. However, while the development of exceptions to *Erie* has expanded the scope of the new federal common law, a separate line of cases has developed in another area, similarly within the federal domain — the field of foreign relations.[41] The Court has broadly stated that, where foreign relations are concerned, local laws and policies become irrelevant and the "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."[42] This declaration of exclusive federal power has its roots in the famous dictum by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,[43] where he deemed the federal power over foreign relations inherent in the sovereignty of the United States as a nation in contradistinction to a power delegated by the Constitution. Under this theory, federal law would be applied, not as an exception to *Erie,* but because it is an area over which state policies and law can have no jurisdiction. However, these foreign relations cases were based on actions by the Executive. Although there is little ambiguity in the broad powers claimed in Justice Sutherland's dictum, it can be rationally argued that the power of the judiciary in extranational matters is limited to subjects concerning which there has been some action by the

36. 332 U.S. at 307.

37. *Ibid.*

38. *Id.* at 309.

39. See Solo Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173, 175–76 (1942). See also DeSylvia v. Ballentine, 351 U.S. 570, 580–81 (1956).

40. Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963) (§ 10(b) of the Security Exchange Act and rule X-10b-5 of the SEC); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957) (NLRA). See generally Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case,* 71 HARV. L. REV. 1 (1957); Friendly, *supra* note 29, at 412–13.

41. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

42. United States v. Belmont, *supra* note 41, at 331.

43. 229 U.S. 304 (1936).

political branches of the federal government. An answer to this argument might be found in *Banco Nacional de Cuba v. Sabbatino,*[44] where the most recent expansion of the federal common law was joined with the latest enunciation of the federal judiciary's role in foreign affairs. In reaching the conclusion that the *act of state doctrine,* a non-statutory rule, was "intrinsically federal" and therefore binding upon state and federal courts as a matter of federal common law, Mr. Justice Harlan, speaking for an eight to one majority, first addressed himself to the legal basis of the doctrine. He found that the doctrine was not compelled by "the inherent nature of sovereign authority," nor by some rule of international law.[45] Mr. Justice Harlan, however, made clear that the conduct of foreign relations is not committed solely to the executive and legislative departments as an aspect of the separation of powers, and that the judiciary is therefore not precluded from acting in this area without prior authorization from the political branches. Having laid this groundwork, the Court then found that the act of state doctrine, although not required by the Constitution, does have "constitutional" underpinnings. "It arises out of the basic relationships between branches of government in a system of separation of powers," and, "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[46] These constitutional underpinnings are in "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."[47] The Court appears to state that in the area of foreign relations, which is uniquely federal and in need of a uniform rule, it is the Court that is exercising the federal authority.[48]

As to the question of whether state law or federal law was applicable, the Court said that even though New York law was similar to federal decisions:

> [W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins.*[49]

Having declared the power of the Court to create law in the absence of authority from the political branches, Justice Harlan turned to the body of federal common law for support. Recognizing that many of the "uniquely federal" interests protected by this judicial law were based upon federal

44. 376 U.S. 398 (1964).
45. *Id.* at 421.
46. *Id.* at 423.
47. *Ibid.*
48. 376 U.S. at 425; see Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino,* 64 COLUM. L. REV. 805, 819 (1964).
49. 376 U.S. at 425.

statutes he said, "perhaps more directly in point are the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters."[50] Emphasizing the private nature of these questions, he found the apportionment problems and problems surrounding the act of state doctrine both to be "intrinsically federal."[51] Although it may be questioned just how "directly in point" these cases are to an establishment of "intrinsically federal" power in the foreign relations area,[52] it appears quite clear that the Court has so decided. Whether the constitutional basis for this power lies in the nature of the subject or arises from the inter-relationships of competency within the separation of powers, the net effect, for our present purposes, is the same. The question then becomes whether foreign judgments rise to the level of foreign relations or whether the question is so uniquely federal as to require exclusive federal control.

V. LEGAL STATUS

The question is not what law should govern on the basis of the merits of the competing interests, but what law appears to be controlling from an examination of the developments to date. *Sabbatino* settled some of the questions as to the scope of the federal common law. It is now clear that the doctrine as enunciated in *Clearfield* is not limited to situations where the federal government is a party and where there is a grant of federal jurisdiction over the action (as where a federal statute is involved). Judge Pound's argument for holding *Hilton* inapplicable to a state action was based on a distinction between private and public rights in the field of international conflicts.[53] The *Sabbatino* Court, in relying heavily on the water apportionment cases, noted that a federal interest cannot be undermined by the states on the basis that they are dealing with private parties.[54] Furthermore, the action before the Court in *Sabbatino* was likewise between private individuals involving the local question of ownership of property.[55] This would seem to indicate that it is not the public or private nature of the individual case that is controlling, but rather the federal nature of the function involved or the need for uniformity in an area of national concern. The case was based on "pure diversity" jurisdiction since no federal statute was involved, and the Court noted that it was unnecessary to reach the federal question issue.[56]

It has been suggested that there was a basis in Justice Sutherland's dictum in *Curtiss-Wright* for the theory that decisions of the Supreme

50. *Id.* at 426.
51. *Id.* at 427.
52. Henkin, *supra* note 48, at 817. Henkin notes that the power of the Court to create law is clear where interstate boundaries and waters are involved since the law of neither of the states before the Court should govern the controversy.
53. See text accompanying note 21 *supra*.
54. 376 U.S. at 426-27.
55. The suit in *Sabbatino* was between a commodity broker and a financial agent of the government of Cuba over the title to a quantity of sugar. 376 U.S. 398 (1964).
56. 376 U.S. at 421 n.20.

Court should govern the question of conclusiveness of judgments throughout the country.[57] However, since this dictum has not been followed, the states will remain free to adopt their own conditions for recognition until the Supreme Court assumes wider authority in this field.[58] The assumption of authority by the Court in *Sabbatino* would seem to lend support to an argument that the Court is ready to exercise more authority in this area. There is little question that the area of foreign judgments could be treated as the subject of a treaty.[59] Recognition of this fact alone admits to the proposition that the subject is within the scope of federal power. However, the traditional argument against this line of reasoning has been that state authority in this area may be pre-empted only by an act of the *political branches* of the federal government.[60] Perhaps the most important aspect of *Sabbatino* with respect to this issue is the Court's apparent assumption of the authority to make federal common law where the federal government has power to act but where the political branches have not yet done so. Any uncertainty as to the constitutional underpinnings of *Sabbatino* lies not in the Court's assumption of judicial power in this area but only as to its scope. The fact that the Court has already exercised authority in the area of foreign relations would seem to indicate that the Court's power extends to at least this area. It may therefore be argued that the issue of the enforcement of foreign judgments will be deemed a proper subject for federal common law as a result of its effect on our foreign relations.[61]

It should also be kept in mind that in *Hilton* the Court has already spoken in the judgments area so that all that would be required would be a reaffirmation of that decision in light of the new federal common law. An examination of the status of that decision may help to determine if such a reaffirmation is likely. Since *Hilton* was decided under the reign of *Swift v. Tyson* and may be considered as binding only the federal courts as part of the conflicts rules of those courts, it can be argued that the principles espoused therein, including the reciprocity doctrine, may have died with the advent of *Erie* and *Klaxon*. However, the same situation faced the Court with the act of state doctrine in *Sabbatino*. There the Court stated that the pre-*Erie* act of state cases were not mere interpretations of common law under *Swift v. Tyson*, and that the language in those cases suggested that the states were not free to formulate their own doctrines.[62] It may be argued that the *Hilton* decision, in light of the thoroughness of its exposition and its emphasis on international aspects, both public and private,[63] should be considered a matter of binding national policy in the same manner as the early act of state cases. Furthermore, the *Hilton*

57. EHRENZWEIG, CONFLICT OF LAWS 164 (1962).
58. *Ibid.*
59. EHRENZWEIG, *op. cit. supra* at 166; Nadelmann, *Reprisals Against American Judgments*, 65 HARV. L. REV. 1184, 1188–91 (1952); *cf.* Lenhoff, *Reciprocity — The Legal Aspect of a Perennial Idea*, 49 NW. U.L. REV. 752, 768 (1952).
60. Lenhoff, *supra* note 59, at 762.
61. See Reese, *supra* note 3, at 788.
62. 376 U.S. at 426.
63. 159 U.S. 113, 163 (1895).

doctrine was given new life by *Sabbatino*; for in answer to the argument that the reciprocity doctrine applied to the issue of standing in that case, Justice Harlan reiterated the *Hilton* position noting that reciprocity applied only to the conclusiveness of judgments and then only in certain limited circumstances.[64] As to the argument that *Klaxon* would control an action brought in a federal court, it must be noted that in that case the Court held only that the federal courts may not go their own way in diversity actions. The Court said nothing about the obligations or authority of the federal courts in dealing with foreign law.[65] It would seem that when the law or judgment of a foreign country is involved the question is hardly one of local policy or concern since it is an international conflicts question impinging on national interests and the foreign relations of the United States.[66]

If the basis of the *Erie* decision was the attainment of uniformity between state and federal courts so as to avoid forum shopping,[67] what is the effect of finding a question like act of state or foreign judgments a matter of federal common law? Under Judge Friendly's "so beautifully simple, and so simply beautiful"[68] conception of the new federal common law the much desired uniformity is not lost, for in local matters a state will have its way and its decisions are binding in federal courts through *Erie*; and in matters of national concern federal policy is supreme and state courts must follow. There will be diversity in local issues among the states as may be expected in federalism, and where national issues are involved there will be uniformity as is implied in federal supremacy. But on all issues the substantive law will be the same in the federal courts and state courts within a given state.[69] If such is the status of the law, the question then becomes what is the price to be paid for this uniformity?

VI. WHAT LAW SHOULD BE CONTROLLING

> National action has thus always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. This point of view cuts even deeper than the concept of the central government as one of granted, limited authority, articulated in the Tenth Amendment. National power may be quite unquestioned in a given situation; those who would advocate its exercise must nonetheless answer the preliminary question why the matter should not be left to the states. Even when Congress acts, its tendency has been to frame enactments on an *ad hoc* basis to accomplish limited objectives, supplanting state-created norms only

64. 376 U.S. 398, 411–12 (1964). See In Direction der Disconto-Gesellschaft v. United States Steel Corp., 300 Fed. 741, 747 (S.D.N.Y. 1924) (cited by the *Sabbatino* Court).

65. See Henkin, *supra* note 48, at 820 n.51: "As to such choice of law, the Supreme Court held, in effect, that the federal courts may not go their own way and make law for themselves in diversity cases; the Court held and said nothing about the obligations or authority of the federal courts in dealing with foreign law."

66. *Ibid.*

67. See United States v. Standard Oil Co., 332 U.S. 301, 307 (1947).

68. Friendly, *supra* note 29, at 422. However, Judge Friendly would limit the application of the new federal common law to "subjects within national legislative power where Congress has so directed." *Ibid.*

69. See Henkin, *supra* note 48, at 814.

> so far as may be necessary for the purpose. Indeed, with all the centralizing growth throughout the years, federal law is still a largely interstitial product, rarely occupying any field completely, building normally upon legal relationships established by the states.[70]

It may be assumed for purposes of the present discussion that the question of foreign judgments falls within the scope of federal power and that there are solid legal grounds for an application of a uniform federal rule such as that espoused in *Hilton v. Guyot.* We are concerned in this instance with the competing policies and the practicalities involved in deciding whether such a rule should be applied.

Of primary consideration is whether this is the type of issue that the Supreme Court can consider without being unduly burdened with litigation as a result. It has been suggested that the whole field of private international law is within the scope of federal common law, but that the expansion in this area will be limited to matters of high federal concern due to the reluctance of the Court to interfere with the developing character of conflict of laws.[71] Although the Court thoroughly considered the question of foreign money judgments in *Hilton,* there are unsettled areas as to the requirements for recognition which would demand action by the Supreme Court as the questions arose.[72] But it would seem that the existence of uncertainties in an area where international transactions are involved is precisely the kind of situation that requires a uniform rule. Since there is a dearth of decisions in most of these areas, it is not likely that there would be a flood of litigation as a result of reaffirming a view already followed by many jurisdictions; and any decisions that the Court would have to make would serve a practical purpose.

But of further consideration are the interests involved. To make a realistic appraisal of what the states would lose as a result of a change to a contrary federal policy, certain facts must be kept in mind. The statement of the law in *Hilton* is the general rule, except for the doctrine of reciprocity which applies only in limited circumstances. Therefore, a conflict arises only when a state court following the New York view wishes to recognize as conclusive upon the merits a judgment in a situation where the reciprocity requirement is not met. It is in these situations that a state's policy interests come into play. As might be expected, the strongest interests in enforcement will be found in the states most involved in international transactions,[73] for example, New York and California,[74] where a

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70. Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,* 54 COLUM. L. REV. 543, 544–45 (1954).

71. Cheatham, *Does Federal or State Law Apply in International Transactions?,* 23 N.Y. COUNTY B. BULL. 200, 202 (1966).

72. Since foreign judgments are not protected by the full faith and credit clause, Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185 (1912), and foreign courts are not bound by our due process requirements, it is unsettled as to what circumstances may substantiate a denial of enforcement. See Reese, *supra* note 3, at 796–97, 800.

73. Lenhoff, *supra* note 59, at 763.

74. The California statute was passed "with the evident object of assuring the execution of judgments rendered in California, against foreign, especially German,

policy of reciprocity might do damage to American creditors whose foreign claims would have to be retried here or abroad. It should be noted that when a state court ignores reciprocity to give effect to a judgment, it is actually extending greater rights to the judgment holder then he would be entitled to under the *Hilton* doctrine. This is converse to the situation in *Sabbatino* where the Court limited judicial inquiry into the validity of an act of state. To refuse the state the right to restrict its examination of judgments, an argument must be made for the policy of retorsion, a position seldom defended, since the main purpose of the policy was apparently the protection of Americans who had been sued in foreign courts.[75] The issue, of course, is what national interests are to be pitted against the local economic policies of the individual states? American interests abroad are in constant growth. In international conflicts it appears that a foreign country would prefer American common law to a choice between the laws of the several states.[76] It has been suggested that the insistence upon formulas general enough to cover problems of both international and interstate conflicts may have hindered the development of rules that would have appropriately dealt with situations peculiar to the field of international transactions.[77] If this is the case, it may be in the national interest to create uniform law in at least selective areas of international conflicts. The merits of reciprocity aside, when the doctrine was adopted a majority of countries adhered to it and many continue to do so.[78] Basic misunderstandings of the various judicial systems have hindered the development of a workable relationship.[79] Although the conclusion of bilateral treaties might be the ideal solution to this problem, such a result is unlikely in the near future. In any event, if progress is to be made in this area, national uniformity would appear to be a necessity.

The argument for individual state policies previously has been considered in the foreign relations cases. In *Belmont v. United States,* where the public policy of New York would have refused effect to a confiscation decree over tangible property within its situs, the Court stated that it would not even pause to inquire whether there was any policy of the state to be infringed when the external powers of the United States are being exercised.[80] In *Pink v. United States,* decided after *Erie,* the doctrine of *Belmont* was reaffirmed and the policy of New York was again rejected where it would have refused recovery to the United States acting as an assignee of Russian claims under the Litvinov Assignment.[81]

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insurance companies in consequence of the earthquake." Lorenzen, *The Enforcement of American Judgments Abroad,* 29 YALE L.J. 188, 204 n.129 (1919).

75. Reese, *supra* note 3, at 792.

76. *Cf.* EHRENZWEIG, *supra* note 57, at 25.

77. EHRENZWEIG, *supra* note 57, at 20.

78. Lenhoff, *supra* note 59, at 763.

79. The fact that the United States does not execute a foreign judgment but only allows a suit to be brought on that judgment has given reason to foreign countries requiring reciprocity to decline to give effect to American judgments. Lorenzen, *The Enforcement of American Judgments Abroad,* 29 YALE L.J. 204, 205 (1919).

80. 301 U.S. 324, 327, 331 (1937).

81. 315 U.S. 203, 223-25 (1942).

The attitude of the Court concerning the role of state policy interests where international relations are concerned seems to have been reaffirmed in *Sabbatino*. An examination of the problem from the local viewpoint of the state interests in enforcing or denying enforcement of the judgment is not sufficient. Foreign courts look to American policy, not to state policy. The various interests involved are broad, involving a mutual international understanding of complex problems. Individual state law is incapable of developing such an understanding, and local interests should not be permitted to hinder its development, particularly where adequate safeguards are provided for individual interests.

VII. CONCLUSION

In view of the expansion of federal common law into the area of international relations, and the assumption of power by the federal judiciary to make decisional law in this area without prior authorization from the political branches, it seems that the enforcement of foreign judgments will be considered a matter of federal law, binding on federal and state courts alike. However, the developments which lead to this conclusion suggest broader implications. The Court may be ready to accept a more active role in the development of international conflict of laws rules that would appropriately deal with situations peculiar to international transactions. Although the Court may be reluctant to interfere with the developing character of these rules, the Court's action seems inevitable where individual state policies nurture diverse solutions to international questions. It is submitted that federal power over international matters having been firmly established, the Supreme Court will next deem that the national interest requires a uniform policy rather than a system of diverse state laws.

Albert A. Lindner