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RETHINKING JUDGMENTS RECIPROCITY*

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Scholars have long debated the criteria that U.S. courts should use when deciding whether to recognize and enforce money judgments rendered by foreign courts. One of the proposed criteria—reciprocity—would require proof that the rendering court would enforce a U.S. judgment if the situation were reversed. Advocates of reciprocity claim that it is necessary to create incentives for foreign states to recognize and enforce U.S. judgments. Critics argue that a policy of judgments reciprocity is both costly to administer and highly unlikely to bring about any change in foreign state practice.

This Article makes two original contributions to the debate. First, it draws on historical examples of successful reciprocal legislation to construct an analytical framework for determining the conditions under which such legislation is most likely to be successful in changing foreign state behavior. These examples show that a particular state's response to such legislation will frequently be shaped by the reaction of interest groups within that state. Second, this Article seeks to evaluate how interest groups within specific foreign states—those that currently refuse to enforce U.S. judgments—would be likely to react to a new U.S. policy of judgments reciprocity. Drawing upon a hand-collected dataset of reported cases and federal complaints, it argues that judgment creditors in many of these states are likely to suffer few, if any, economic losses as a result of such a policy.

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In the absence of such losses, these judgment creditors are unlikely to lobby their respective home state governments to change their laws. And in the absence of such lobbying, few (if any) foreign states are likely to change their laws to make it easier to enforce U.S. judgments abroad.

INTRODUCTION

The criteria for determining when a money judgment rendered by a foreign court should be recognized and enforced in the United

States are for the most part uncontroversial.[1] There is general agreement that such judgments should not be enforced if a foreign legal system is not impartial or if the court in question lacked personal jurisdiction over the U.S. defendant.[2] There is also a consensus that the mere fact that a judgment was rendered by a foreign court is not a valid reason for refusing to enforce it.[3] There are, however, certain proposed criteria about which scholars remain bitterly divided. Perhaps the most controversial of these is the suggestion that a court deciding whether to enforce a foreign judgment should first determine whether the rendering court would enforce a U.S. judgment if the situation were reversed. This criterion is generally known as reciprocity.

The debate as to whether U.S. courts should demand proof of reciprocity as a condition of enforcing a foreign judgment has raged for more than a century.[4] Although most U.S. states have (to date) declined to impose such a rule, the issue continues to be raised in discussions at both the state and federal level.[5] Advocates of

1. This Article deals only with foreign money judgments. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 3(a)(1), 13 pt. II U.L.A. 25 (Supp. 2013) (describing a "money judgment" as a judgment that "grants or denies recovery of a sum of money"). Other types of foreign judgments—such as those for child support or divorce—are beyond its scope.

2. *Id.* § 4(b)(1) (citing systemic lack of impartiality as mandatory ground for non-recognition); *id.* § 4(b)(2) (citing lack of personal jurisdiction as mandatory ground for non-recognition).

3. *Id.* § 4(a) ("Except as otherwise provided . . . a court . . . shall recognize a foreign-country judgment.").

4. *See generally* Louisa B. Childs, Note, *Shaky Foundations: Criticism of Reciprocity and the Distinction Between Public and Private International Law*, 38 N.Y.U. J. INT'L L. & POL. 221 (2005) (recounting the long history of the debate). For a sampling of the literature discussing the merits of judgments reciprocity, see Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 281–83 (1991); Katherine R. Miller, *Playground Politics: Assessing the Wisdom of Writing a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 GEO. J. INT'L L. 239, 299–302 (2004); Kurt H. Nadelmann, *Non-Recognition of American Money Judgments Abroad and What To Do About It*, 42 IOWA L. REV. 236, 249–57 (1957); Willis L. M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 790–93 (1950); Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1660–62 (1968); William G. Southard, Comment, *The Reciprocity Rule and Enforcement of Foreign Judgments*, 16 COLUM. J. TRANSNAT'L L. 327, 348–49 (1977).

5. When a state court in the United States renders a judgment, federal law generally requires that it be enforced by the courts of its sister states. *See* U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012). When a foreign court renders a judgment, by contrast, the issue of enforceability is in most cases governed by state law. RESTATEMENT (THIRD) OF

reciprocity claim that it is necessary to create incentives for foreign states to enforce U.S. judgments.[6] Critics argue that a policy of judgments reciprocity is both costly to administer and highly unlikely to bring about any change in foreign state practice.[7] This old debate was rekindled in 2006 when the American Law Institute ("ALI") proposed a federal statute on the enforcement of foreign judgments that contained a reciprocity requirement.[8] This proposal led to the publication of a number of scholarly articles—many of them critical of the ALI's provision[9]—and to hearings in 2011 before a subcommittee of the House of Representatives.[10] Although the issue

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FOREIGN RELATIONS LAW § 481 cmt. a (1987). *But see* SPEECH Act, Pub. L. No. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105) (establishing a federal rule for recognizing and enforcing foreign libel judgments). Currently, only two U.S. states—Georgia and Massachusetts—require proof of reciprocity as a precondition to enforcing a foreign judgment. *See* GA. CODE ANN. § 9-12-114(10) (2006); MASS. ANN. LAWS ch. 235, § 23A (LexisNexis 2009). New Hampshire imposes a reciprocity requirement solely upon judgments rendered by courts in Canada. N.H. REV. STAT. ANN. § 524:11 (LexisNexis 2006). Florida, Maine, Ohio, and Texas permit (but do not require) judges to take into account a lack of reciprocity in deciding whether to enforce a foreign judgment. FLA. STAT. ANN. § 55.605(2)(g) (West Supp. 2014); ME. REV. STAT. ANN. tit. 14, § 8505(2)(G) (2003); OHIO REV. CODE ANN. § 2329.92(B) (LexisNexis 2010); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (West 2008). Neither version of the Uniform Act contains a reciprocity requirement. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, 13 pt. II U.L.A. 23 (Supp. 2013); UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT 1962, 13 pt. II U.L.A. 44 (Supp. 2013).

6. *See, e.g.*, AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 7 cmt. b (2006).

7. *See, e.g.*, Miller, *supra* note 4, at 314–17; von Mehren & Trautman, *supra* note 4, at 1661.

8. *See* AM. LAW INST., *supra* note 6, § 7(a) ("A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin."); *see also Discussion of Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, 82 A.L.I. PROC. 94, 159 (2006) (remarks of Michael Traynor, President, Am. Law Inst.) (stating that sixty-eight members of the ALI voted to include the reciprocity clause in the draft statute and that fifty-five members voted to exclude it).

9. *See, e.g.*, Richard W. Hulbert, *Some Thoughts on Judgments, Reciprocity, and the Seeming Paradox of International Commercial Arbitration*, 29 U. PA. J. INT'L. L. 641, 652–53 (2008); Robert L. McFarland, *Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute*, 45 NEW ENG. L. REV. 63, 92–100 (2010); Miller, *supra* note 4, at 289–318; Franklin O. Ballard, Comment, *Turnabout Is Fair Play: Why a Reciprocity Requirement Should Be Included in the America Law Institute's Proposed Federal Statute*, 28 HOUS. J. INT'L L. 199, 222–33 (2006); Vishali Singal, Note, *Preserving Power Without Sacrificing Justice: Creating an Effective Reciprocity Regime for the Recognition and Enforcement of Foreign Judgments*, 59 HASTINGS L.J. 943, 962–68 (2008).

10. In late 2011, a House Subcommittee solicited testimony from several experts as to the need for a federal statute on the topic of foreign judgments; the possible inclusion of a

of judgments reciprocity may seem somewhat obscure, it is of deep and abiding interest to those involved in international civil litigation.[11] If the United States were to adopt a national policy of judgments reciprocity, it would have a profound effect on the ability of plaintiffs who prevail in a lawsuit abroad to enforce that judgment against a defendant with assets in the United States.

There are, broadly speaking, two contrasting visions of judgments reciprocity. The optimistic vision holds that adopting a reciprocity requirement will benefit U.S. nationals by encouraging foreign states that currently refuse to recognize and enforce U.S. judgments to change their laws.[12] It will achieve this end by directing U.S. judges to refuse to enforce judgments rendered by courts in such states until these states agree to enforce U.S. judgments.[13] If the United States makes it impossible to enforce judgments rendered by courts in these states in the United States, so this argument goes, then the foreign states in question are likely to rethink their policy of not enforcing U.S. judgments. Under this optimistic vision, the reciprocity requirement would make it possible to enforce U.S. judgments in jurisdictions where it previously was not.

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reciprocity requirement was discussed at some length. *See Recognition and Enforcement of Foreign Judgments: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 11–12 (2012) (statement of Linda J. Silberman, Martin Lipton Professor of Law, New York University School of Law) ("There are good arguments on both sides of the reciprocity debate . . . ."); *id.* at 65 (testimony of John B. Bellinger III, Partner, Arnold & Porter LLP) (noting that by requiring reciprocity, "the ALI proposal encourages other countries to recognize reciprocally and enforce judgments rendered by U.S. courts"). Should Congress decide to take up legislation on this topic, this issue is one that will doubtless spark debate between proponents and opponents of a reciprocity requirement.

11. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1094–1102 (5th ed. 2011) (discussing judgments reciprocity in the broader context of international civil litigation).

12. *See* AM. LAW INST., *supra* note 6, § 7 cmt. b ("The purpose of the reciprocity provision . . . is not to make it more difficult to secure recognition and enforcement of foreign judgments, but rather to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.").

13. The "recognition" of a judgment is conceptually distinct from the "enforcement" of a judgment. A court "recognizes" a foreign judgment when it "relies on a foreign proceeding to preclude relitigation of a particular claim or issue." Childs, *supra* note 4, at 222 n.9 (citing GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 936 (3d ed. 1996)). By contrast, a court "enforces" a judgment when it "affirmatively requires the losing party in the foreign proceeding to satisfy the judgment." *Id.* In the context of determining whether reciprocity does or does not exist, however, this distinction is generally immaterial. *Id.* This Article generally refers to the "enforcement" of judgments, but much of the analysis would apply with equal force to their "recognition."

There is, however, a more pessimistic vision of judgments reciprocity. On this account, the decision by the United States to adopt a reciprocity requirement will be met with a collective shrug by states that currently refuse to enforce U.S. judgments.[14] None of these states will change their practice and, as a consequence, U.S.-judgment creditors will derive no real benefit from the reciprocity requirement.[15] However, the administrative, fairness, and efficiency costs associated with administering a regime based on reciprocity will still be realized. Under this darker vision, adopting a policy of judgments reciprocity is a fool's errand in which foreign-judgment creditors suffer to no discernible end.[16]

Which of these two visions is closer to the truth? That is the question that this Article sets out to answer. It seeks to do so by rigorously testing—apparently for the first time—the assumption that foreign nations have a strong interest in having judgments rendered by their national courts enforced in the United States.[17] To do so, the

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14. *See* Hulbert, *supra* note 9, at 653 ("[W]ill the introduction of a reciprocity requirement achieve the hoped-for leverage to overcome the putative obstacles to acceptance of American judgments abroad?").

15. This change to foreign state practice may occur in one of three ways. In situations in which the barriers to recognizing U.S. judgments are *legal* in character, the foreign state may remove these barriers by (1) enacting a statute that changes the general rules for enforcing foreign judgments, or (2) entering into a judgments treaty with the United States. In either case, the change must be approved by the legislature of the foreign state. In situations in which the barriers to recognizing U.S. judgments are more informal, governmental officials in the foreign state may remove these barriers by (3) taking steps to ensure that domestic actors apply the law as written.

16. *See* Arthur Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical—Critical Analysis*, 16 LA. L. REV. 465, 482 (1956) ("[T]he insistence on reciprocity serves only to mislead the forum by diverting its attention from the real question, that is, the question of whether the judgment shows that the particular national had become the victim of serious injustice." (citing Reese, *supra* note 4, at 793)); Comment, *Reciprocity and the Recognition of Foreign Judgments*, 36 YALE L.J. 542, 548 (1927) ("Does reciprocity help us . . . to distinguish the wheat from the chaff? Obviously it does not. The quality of a court does not depend upon the particular theory it may have as to recognition of our judgments . . . .").

17. *See* Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U. J. INT'L L. & POL. 965, 975 n.32 (2013) ("Whether, in fact, the reciprocity requirement has been [effective] in the two centuries or more that it has been on the books . . . is an empirical question that still needs to be answered." (citing Dieter Martiny, *Anerkennung ausländischer Entscheidungen nach autonomem Recht*, *in* III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS [MANUAL OF INTERNATIONAL CIVIL PROCEDURE] at 575 (Paul Siebeck ed., 1984))); Hulbert, *supra* note 9, at 654 ("Will [reciprocity] work? Or will it have negative consequences? Time alone will tell . . . ."). The absence of academic work seeking to evaluate the efficacy of reciprocal legislation standing alone may be attributable to the fact that the ALI statute was drafted against the backdrop of negotiations relating

Article canvasses the historical record in search of instances in which reciprocal legislation did, in fact, prompt foreign states to change their laws. It identifies three such cases—drawn from a number of jurisdictions across a wide range of time periods—and seeks to ascertain whether they share any common elements. When viewed collectively, the Article argues, these case studies suggest that foreign state response to reciprocal legislation affecting private rights will be driven largely by the reaction of interest groups within those states.[18] If actual and potential judgment creditors perceive their new inability to enforce judgments in the United States as a serious threat to their economic interests, for example, they may lobby for their home state to enact legislation that reverses that state's practice of refusing to enforce U.S. judgments. By contrast, if these individuals perceive an inability to enforce judgments in the United States as only a minor inconvenience, they will not undertake any lobbying effort and foreign practice will not change. The key to evaluating the likely success of any U.S. policy of judgments reciprocity, therefore, is to determine what foreign-judgment creditors in the relevant states stand to *lose* if this policy is adopted.

With this insight in mind, the Article then seeks to estimate the size and scope of the losses that would be suffered by judgment creditors in states that currently refuse to enforce U.S. judgments if the United States were to adopt a policy of judgments reciprocity. The results are not encouraging for the proponents of such a policy. The data—drawn from a hand-collected dataset of federal complaints, reported federal cases, and reported state cases involving the enforcement of foreign judgments[19]—suggest that judgment creditors in states that currently refuse to enforce U.S. judgments are unlikely to suffer significant economic losses as a consequence of a

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to the Hague Convention on Jurisdiction and Judgments. One of the reasons why the reciprocity provision was included in the draft statute was to give U.S. negotiators more leverage in these negotiations. *See* Miller, *supra* note 4, at 290–91; *Discussion of International Jurisdiction and Judgments*, 76 A.L.I. PROC. 453, 454–55 (2000) (remarks of Peter H. Pfund). Given this context, commentators were less focused on whether the requirement, if adopted, would successfully incentivize foreign states to change their laws in the event that the treaty negotiations failed to produce a comprehensive judgments treaty. *See infra* notes 206–11 and accompanying text (discussing the relationship between the Hague Convention and the ALI's proposed statute).

18. For one of the very few articles exploring the role of interest groups in shaping recognition doctrine, see Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1338–44 (2004) (discussing the role of interest groups in shaping German recognition doctrine).

19. *See* Appendix.

new U.S. reciprocity requirement. This suggests, in turn, that these individuals are unlikely to respond to such a requirement by lobbying their respective home state governments to change their laws. On balance, the Article concludes that a policy of reciprocity along the lines suggested by the ALI is unlikely to generate much in the way of benefits for U.S.-judgment creditors. Given this policy's not insignificant costs, therefore, its adoption is arguably not in the best interests of the United States.

The Article proceeds as follows. Part I defines the concept of "reciprocity" and briefly identifies several types of reciprocal legislation. Part II discusses the costs inherent to any legal regime premised upon reciprocity and argues that such a regime can only be justified if the benefits of such a regime exceed these costs. Part III examines three historical examples in which one state used reciprocal legislation—sometimes successfully, sometimes not—to bring about a change in the law of another state. It then mines these examples for insights into the conditions under which such legislation is likely to be effective generally. Part IV draws upon these insights to develop a framework for analyzing how other states would respond generally to a decision by the United States to adopt a policy of judgments reciprocity. Part V then uses this framework to evaluate how specific foreign states would be likely to respond if the United States were to adopt a policy of judgments reciprocity along the lines suggested by the ALI.

I. RECIPROCAL LEGISLATION DEFINED

"Reciprocity" is a term susceptible to a variety of shadings and interpretations.[20] In this Article, the term "reciprocity" serves as shorthand for a legal standard that defines the rights and privileges of

20. *See* MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 17 (2009) ("Reciprocity is a concept that admits of several conceptions."); Keith D. Yamauchi, *Should Reciprocity Be a Part of the UNCITRAL Model Cross-Border Insolvency Law?*, 16 INT'L INSOLVENCY REV. 145, 146 (2007) ("[Reciprocity] does not have a universal meaning."). Reciprocity is defined in *Black's Law Dictionary* as the "[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations." BLACK'S LAW DICTIONARY 1384 (9th ed. 2009); *cf.* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 493 (1978) (White, J., dissenting) ("The usual form of reciprocal law is a statute passed by State Y, saying that any other State which accords Y access to its courts for the enforcement of tax obligations likewise will have access to the courts of Y.").

certain individuals with a connection to a foreign state.[21] Unlike most legal standards, the rights accorded by reciprocal legislation will vary depending on the legal rules adopted by a particular foreign state.[22] In many cases, therefore, it will be necessary for courts to conduct research into contemporary foreign state practice to determine what rights, if any, are conferred by the reciprocal legislation at issue.

As a general matter, reciprocal legislation may be sorted into one of three types: (1) legislation that affects state-to-state interactions, (2) legislation that affects a state's interactions with private individuals, and (3) legislation that affects interactions between private individuals. First, legislators may choose to include a reciprocity clause in legislation that addresses the rights of foreign-state officials. Such legislation may, for example, spell out the rights and immunities of diplomats.[23] Alternatively, it may address the rights and privileges accorded to foreign military personnel.[24] In these cases,

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21. In discussing reciprocity as a legal standard, scholars sometimes distinguish between formal reciprocity and material reciprocity. *See* J.A.L. STERLING, WORLD COPYRIGHT LAW 162–63 (3d ed. 2008) (discussing the distinction); William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 404 & n.91 (2000) (same). Under a standard of formal reciprocity, the enacting state will grant to a non-citizen precisely the same rights and privileges that it grants to its own citizens, regardless of whether the non-citizen's country of origin grants these rights to citizens of the enacting state in actuality; this is the standard of "national treatment" frequently utilized in international treaty making. *See* STERLING, *supra*, at 162–63. Under a standard of material reciprocity, the enacting state will grant to a non-citizen only those rights and privileges that the non-citizen's country of origin *actually* extends to the citizens of the home state in practice; this is the standard that is typically utilized in reciprocal legislation. *See id.* at 163. When the U.S. Congress enacts reciprocal legislation, therefore, it is directing courts to apply a standard of material (rather than formal) reciprocity.

22. *See* Joseph R. Starr, *Reciprocal and Retaliatory Legislation in the American States*, 21 MINN. L. REV. 371, 374 (1937) ("[R]eciprocal legislation is a device whereby one state, by legislative action, undertakes to secure for its citizens an advantage or an immunity by granting that advantage or immunity to the citizens of any other state on condition that the other state make a similar grant.").

23. *See* 22 U.S.C. § 254c (2012) (discussing reciprocity in the context of foreign diplomats); *see also id.* § 4301(c) (discussing reciprocity in the context of foreign missions); *id.* § 4304(b) (giving the Secretary of State discretionary power to determine what benefits to give foreign missions on the basis of reciprocity); *cf. id.* § 288f (discussing reciprocity requirement as it relates to employees of international organizations). Reciprocity also plays a role in determining the immunity enjoyed by high-ranking foreign officials through long-held common-law principles. *See* Ingrid Wuerth, *Pinochet's Legacy Reassessed*, 106 AM. J. INT'L L. 731, 734 (2012). It does not, however, inform inquiries into the immunities of foreign states as states. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891, 2892–93 (codified as amended at 28 U.S.C. § 1605(a) (2012)) (making no reference to any reciprocity requirement).

24. *See* 22 U.S.C. § 2559(b) ("[T]he Secretary of Defense may provide inpatient medical care in the United States without cost to military personnel and their dependents

the impact of any reciprocity clause is felt not by private individuals, but rather by the foreign state via its representatives.

Second, a legislature may choose to enact reciprocal legislation that affects the enacting state's relationship with private citizens who have some connection to a foreign state. The classic example of this type of legislation relates to the taxation of certain income earned by a resident of a foreign state.[25] One may, however, find additional examples of such legislation in areas as diverse as criminal law,[26] commodities law,[27] maritime law,[28] federal claims law,[29] art law,[30] and

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from a foreign country if comparable care is made available to a comparable number of United States military personnel and their dependents in that foreign country."). *See generally* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365 (2009) (discussing reciprocity in the context of international humanitarian law).

25. The Internal Revenue Code provides, for example, that gross income earned by an individual resident of a foreign country from the international operation of a ship or an aircraft shall be exempt from federal taxation in the United States "if such foreign country grants an equivalent exemption to individual residents of the United States." 26 U.S.C. § 872(b)(1)–(2).

26. *See* Pasquantino v. United States, 544 U.S. 349, 374 (2005) (Ginsburg, J., dissenting) (citing 18 U.S.C. § 546 (2000)) (observing that the statute at issue called "for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the United States").

27. *See* 7 U.S.C. § 18(c) (2012) ("[T]he Commission shall have authority to waive the furnishing of a bond by a [person complaining of a violation of the Commodities Exchange Act] who is a resident of a country which permits the filing of a complaint by a resident of the United States without the furnishing of a bond.").

28. *See* 46 U.S.C. § 3303 (2006) ("A foreign certificate of inspection may be accepted as evidence of lawful inspection only when presented by a vessel of a country that has by its laws accorded to vessels of the United States visiting that country the same privileges accorded to vessels of that country visiting the United States.").

29. *See* 28 U.S.C. § 2502(a) (2012) ("Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court's jurisdiction."). A similar provision governs claims brought against the U.S. government under the Public Vessels Act. *See* Public Vessels Act, Pub. L. No. 109-304, § 6(c), 120 Stat. 1485, 1522 (2006) (codified at 46 U.S.C. § 31111 (2006)) ("A national of a foreign country may not maintain a civil action [in suits involving public vessels] unless it appears to the satisfaction of the court in which the action is brought that the government of that country, in similar circumstances, allows nationals of the United States to sue in its courts.").

30. *See* 19 U.S.C. § 2609(c)(1) (2012) ("In any action for forfeiture ... where the claimant does not establish such title but establishes that it purchased the article for value without knowledge or reason to believe it was stolen, forfeiture shall not be decreed unless (A) the State Party to which the article is to be returned pays the claimant an amount equal to the amount which the claimant paid for the article, or (B) the United States establishes that such State Party, as a matter of law or reciprocity, would in similar circumstances recover and return an article stolen from an institution in the United States without requiring the payment of compensation.").

consular law.[31] In each case, the rights and privileges of these individuals with respect to the enacting state are determined according to a legal standard that takes into account the law and practice of a particular foreign state.

Third, and finally, reciprocal legislation may work to determine the legal rights of one private citizen vis-à-vis another private citizen. The best-known example of this type of legislation relates to the enforcement of foreign judgments.[32] Reciprocal legislation of this type may also be found, however, in intellectual property law[33] and cross-border insolvency law.[34] In these cases, while the state clearly has some interest in the scope and application of the legislation,[35] the

31. *See* 8 U.S.C. § 1351 ("The fees for the furnishing and verification of applications for visas by nonimmigrants of each foreign country and for the issuance of visas to nonimmigrants of each foreign country shall be prescribed by the Secretary of State, if practicable, in amounts corresponding to the total of all visa, entry, residence, or other similar fees, taxes, or charges assessed or levied against nationals of the United States by the foreign countries of which such nonimmigrants are nationals . . . .").

32. *See, e.g.*, GA. CODE ANN. § 9-12-114 (2006); MASS. ANN. LAWS ch. 235, § 23A (LexisNexis 2009); *see also* Genujo Lok Beteiligungs GmbH v. Zorn, 2008 ME 50, ¶ 24, 943 A.2d 573, 580–81 (observing that Germany considers reciprocity a mandatory condition for recognizing a foreign-country judgment); Comm. on Foreign & Comparative Law, Ass'n of the Bar of N.Y.C., *Survey on Foreign Recognition of U.S. Money Judgments*, 56 RECORD 378, 400–02 (2001) (noting existence of reciprocity requirements in Mexico and Spain); Hideyuki Kobayashi & Yoshimasa Furuta, *Products Liability Act and Transnational Litigation in Japan*, 34 TEX. INT'L L.J. 93, 117 (1999) ("Reciprocity is another condition for the enforcement of foreign judgments in Japan."); Chenglin Liu, *The Obstacles of Outsourcing Imported Food Safety to China*, 43 CORNELL INT'L L.J. 249, 270–71 (2010) ("In order to enforce a foreign judgment in China, Article 265 of the Chinese Civil Procedure Law requires the existence of a treaty or reciprocity." (footnote omitted)).

33. *See, e.g.*, 15 U.S.C. § 1126(b) ("Any person whose country of origin . . . extends reciprocal [trademark] rights to nationals of the United States by law, shall be entitled to the benefits of this section under the conditions expressed herein to the extent necessary to give effect to any provision of such . . . reciprocal law, in addition to the rights to which any owner of a mark is otherwise entitled by this chapter.").

34. *See* Yamauchi, *supra* note 20, at 167–73 (discussing the use of reciprocity clauses in cross-border insolvency legislation in Mexico and South Africa). In enacting its version of the cross-border insolvency law, the United States decided not to insert a reciprocity provision. *See id.* at 172.

35. *See* AM. LAW INST., *supra* note 6, at 1 ("[A] foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties."); Childs, *supra* note 4, at 239–40 ("Although the underlying dispute in a judgment recognition case is one between individuals, we recognize today that the foreign court's judgment constitutes an exercise of state power. So does the domestic court's decision to enforce or ignore that judgment. Accordingly, a judgment recognition case does not encompass only a dispute between individuals.").

parties who are most directly affected by the reciprocity requirement are private citizens.[36] It is this third category of reciprocal legislation—relating primarily to the rights of private citizens *inter se*—that is the principal focus of the debate surrounding judgments reciprocity and, hence, the principal focus of this Article.

II. THE COSTS OF JUDGMENTS RECIPROCITY

Critics of reciprocity have advanced a number of objections to its use in the judgments context.[37] Some critics maintain that the judicial costs of administering reciprocal legislation are simply too great. Others argue that it is unfair to hold foreign litigants responsible for actions taken by their governments. Still others oppose reciprocity requirements on efficiency grounds. Each of these critiques is well founded in many respects. At the same time, the mere fact that a reciprocity requirement may be costly is not enough, by itself, to conclude it should not be used. In order to fully assess the merits of adopting a policy of reciprocity, the known costs of reciprocity must be weighed against its potential benefits. To date, however, the critics have focused almost exclusively on its costs, which are discussed at some length below.

A. Administrability

One longstanding critique of reciprocal legislation in the judgments context is that it imposes a heavy burden on judges. In a legal regime premised on reciprocity, judges must look to foreign state practice to determine what rights (if any) these states grant to citizens of the judge's home state in order to determine what rights (if any) the judge should grant to citizens of the foreign state.[38] The fact-

36. *See* Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505, 521 (2010) ("The recognition of foreign judgments thus becomes a private matter, which concerns the two litigating parties. Governments generally do not perceive these as questions of international relationships.").

37. *See, e.g.*, *In re* Wilde, A.3d 749, 763 n.21 (D.C. 2013) ("The reciprocity doctrine has been widely criticized . . . ." (quoting Tahan v. Hodgson, 662 F.2d 862, 867 n.21 (D.C. Cir. 1981) (internal quotation marks omitted))); Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 113 (1998) (suggesting that reciprocity is an "ill-conceived notion").

38. *See* Brand, *supra* note 4, at 281–83. The problem of *renvoi*—the analytical hall of mirrors that would arise if both nations required a showing of reciprocity—presents another challenge to judicial administrability. *See id.* at 282–83. This problem may be substantially alleviated, however, simply by allocating the burden of proof to the party seeking to avoid enforcement. *See* Russell J. Weintraub, *How Substantial Is Our Need for*

finding challenges inherent in such an inquiry have led some scholars to argue that judges lack the capacity to administer reciprocal legislation effectively.[39] In the words of one scholar, "judicial examination of the observance of material reciprocity has proved clumsy, if not unworkable."[40]

There is little question that a legislative regime premised on reciprocity can impose a heavy burden on judges. There are, however, a number of ways in which this burden may be lightened. First, the problem of proving reciprocity could be addressed via expert testimony.[41] Indeed, this is the means by which the issue is often addressed in the U.S. states that have already adopted a policy of judgments reciprocity as a matter of state law.[42] To be sure, the use of experts is not ideal from the litigants' perspective because it shifts the costs of determining foreign state practice to them. It also raises the possibility of inconsistent judicial decisions based on the persuasiveness of different experts. One can imagine a scenario, for example, in which a Georgia court and a Massachusetts court reach different conclusions as to whether a particular foreign state's

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a Judgments-Recognition Convention and What Should We Bargain Away to Get It?, 24 BROOK. J. INT'L L. 167, 178 (1998); *see also* AM. LAW INST., *supra* note 6, § 7(b) (assigning the burden of proof to the "party resisting recognition or enforcement").

39. *See* Miller, *supra* note 4, at 304 ("The collection of data and evaluation of judicial motives required [pursuant to a reciprocity provision] will either cripple U.S. courts, or encourage them to engage in inequitable evidentiary short cuts."); Reese, *supra* note 4, at 793 ("The [reciprocity] doctrine would obviously place an onerous burden on the courts, since it would frequently be difficult to determine the effect which the courts of a particular nation do in fact accord to the judgments rendered in this country."); Rotem, *supra* note 36, at 530 ("[B]ecause of the problem of asymmetric information, the forum cannot ascertain whether or not the foreign country, a judgment of which it is considering for recognition, is applying a selective or sporadic recognition regime with regard to judgments rendered by the forum."); *see also* Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885, 899 (N.D. Tex. 1980) ("[T]he reciprocity rule is difficult to apply . . . because courts are ill-equipped to determine foreign law."); *cf.* Brand, *supra* note 4, at 281–83 (discussing administrative challenges faced by *foreign* courts seeking to determine U.S. practice for reciprocity purposes).

40. Arthur Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U. L. REV. 752, 778 (1955).

41. *See* AM. LAW INST., *supra* note 6, § 7 cmt. e. *See generally* Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887 (2011) (discussing methods by which U.S. courts may better ascertain and apply foreign law).

42. *See infra* note 71 and accompanying text (explaining that Georgia and Massachusetts courts require foreign-judgment creditors to prove reciprocity as a precondition to enforcing foreign judgments); *see also* AM. LAW INST., *supra* note 6, § 7 cmt. e ("The law or practice of the courts of the state of origin may be demonstrated by . . . expert testimony . . . .").

practice satisfies the relevant reciprocity requirement.[43] Nevertheless, to the extent that one is concerned about the capacity of judges to determine foreign state practice, the use of expert testimony offers one possible means of addressing that concern.

Alternatively, a legislature could delegate to the executive branch the task of determining foreign state practice and of keeping a list of states that recognize U.S. judgments. A number of foreign nations—including Austria, Denmark, and Singapore—have adopted precisely this approach.[44] This approach has also been followed by the United States in areas outside of the judgments context,[45] and the ALI gave it serious consideration when preparing its draft statute.[46] If a legislature were to adopt this approach, it would likewise alleviate to a significant extent critics' concerns about judicial capacity to manage a statutory regime premised on reciprocity, albeit at the cost of shifting the burden to the Department of State.[47] The task of

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43. *Cf.* Jacob Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in the Estates of American Decedents*, 25 S. CAL. L. REV. 297, 311–12 (1952) (discussing conflicting California decisions as to whether reciprocal rights existed in context of inheritance statutes). This cost is implicit in any legal regime premised on material reciprocity; the essence of such a requirement is that a court must conduct a separate inquiry in each new case. *See* Nadelmann, *supra* note 4, at 250 ("A ruling [on reciprocity] in a specific case creates no legally binding precedent, as the principle of stare decisis does not obtain."); *cf.* William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL L. REV. 23, 28 (1957) ("The treatment of foreign law as a fact for purposes of pleading, proof, and appeal deprives the holdings on foreign law of one court from becoming rules which control the decisions of other courts under the rule of stare decisis.").

44. *See* Nadelmann, *supra* note 4, at 249 (Austria and Denmark); Margaret A. Dale, *Proskauer on International Litigation and Arbitration, Ch. 18 Recognition & Enforcement of Judgments*, PROSKAUER (2011), http://www.proskauerguide.com/litigation/18/III (Singapore).

45. *See, e.g.*, 46 U.S.C. § 60503(a) (2006) ("On receiving satisfactory proof from the government of a foreign country that it has suspended, in any part, the imposition of discriminating duties for any class of vessels owned by citizens of the United States or goods imported in those vessels, the President may proclaim a reciprocal suspension of discriminating duties for the same class of vessels owned by citizens of that country or goods imported in those vessels.").

46. *See* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 5(c) (Council Draft No. 1, 2001) ("The Secretary of State is directed to maintain and publish (i) a list of foreign states that accord recognition and enforcement to judgments rendered in the United States; and (ii) a list of foreign states that do not accord recognition and enforcement to judgments rendered in the United States."). Ultimately, the ALI decided not to follow this approach in the final version of the draft legislation. *See* AM. LAW INST., *supra* note 6, § 7(e).

47. There exists, of course, the possibility that the Department of State will bow to political pressure to keep certain states on the "approved" list even if their courts refuse to enforce U.S. judgments. This problem is, however, surmountable. The list could, for

determining foreign practice, under this approach, would be the responsibility of the executive branch rather than the judiciary.

Finally, a U.S. court system could enhance its capacity to administer a regime premised on reciprocity by working to develop cooperative relationships with foreign judges. In 2010, for example, the state court system of New York entered a memorandum of understanding with the court system of New South Wales, Australia.[48] Pursuant to this agreement, New York judges gained the ability to certify certain questions relating to Australian law to judges in New South Wales on an informal basis.[49] The judges in New South Wales, in return, gained the ability to do the same to New York judges with respect to New York law.[50] If agreements such as this were widely replicated, then the task of determining foreign state law (and, to a lesser extent, foreign state practice) in connection with a reciprocity provision would become less difficult.[51] This, too, would alleviate the concerns of those critics who have expressed misgivings about the judicial costs of administering such a regime.

These various mitigation strategies notwithstanding, any legislative regime based on reciprocity carries with it certain administrative costs.[52] While these costs may be mitigated, or shifted to other institutional actors, they cannot be eliminated because such legislation by definition requires *some* actor to determine the precise character of foreign state practice at a particular moment in time. These costs are therefore an inescapable part of any rule of reciprocity.

B. Unfairness

Another common critique of requiring reciprocity in the judgments context is that it is unfair to private litigants. Critics argue

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example, function as a rebuttable presumption. The burden would then be on the litigant challenging the conclusion to prove otherwise.

48. Press Release, State of N.Y. Unified Court Sys., First of Its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court (Oct. 28, 2010), http://www.courts.state.ny.us/press/pr2010_14.shtml.

49. *Id.*

50. *Id.*

51. *See generally* Wilson, *supra* note 41 (discussing methods by which U.S. courts may better ascertain and apply foreign law).

52. *See* Yuliya Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?*, 31 BERKELEY J. INT'L L. 150, 203 (2013) (observing that a reciprocity requirement "increases the time, cost, and uncertainty of the entire . . . recognition process").

that the effect of such a requirement will not be felt by the foreign government that refuses to enforce U.S. judgments but, rather, by individuals seeking to enforce foreign judgments. These critics maintain that it is unfair to require these individuals to bear the costs of relitigating a particular dispute because they have no control over government policy.[53] In the words of the drafters of the Restatement (Second) on Conflict of Laws: "Private parties . . . should not be made to suffer for the fact that the courts of the state from which they come give insufficient consideration to the interests of the state of the forum."[54]

It is true that a reciprocity requirement will sometimes make it impossible for a litigant to enforce a foreign judgment. It is also true that the reason for this incapacity will often lie with decisions made by a particular government rather than with any fault of the party or even the foreign court that rendered the judgment. It is not always the case, however, that private actors lack the ability to influence government policy.[55] Foreign litigants who find themselves unable to enforce judgments rendered by courts in their home state as a result of a U.S. reciprocity requirement will have a powerful motivation to lobby for a change in that state's policy. Since the primary purpose of a reciprocity requirement is to bring about a change in foreign state practice, the unfair treatment inflicted on these litigants may serve to align their interests with those of the United States. Viewed from the perspective of the enacting state, therefore, the fact that a reciprocity

53. *See* William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 219–20 (2002) ("While governments can protect their interests by negotiating treaties for reciprocal enforcement, private plaintiffs cannot."); Hulbert, *supra* note 9, at 653 ("The party thus deprived of rights under the foreign judgment is penalized, not for any cause for which that party is responsible, but because the American court refusing enforcement decides that some hypothetical American judgment in some other hypothetical case would not, or might not, be enforced by (some or all of the) courts in the country of origin."); Friedrich K. Juenger, *Private International Law and the German Legislature*, *in* THE INTERNATIONAL LAWYER: FREUNDESGABE FUR WULF H. DOSER 623, 625 (Friedrich Kumubler et al. eds., 1999) ("It [is] blatantly unfair to make private parties the whipping boys for perceived inadequacies of foreign legal systems."); Miller, *supra* note 4, at 299 (discussing the "inherent unfairness of punishing litigants for national policies over which they have no control"); Reese, *supra* note 4, at 793 ("[T]he creditor is not to blame for the fact that the state of rendition does not accord conclusive effect to American judgments, and it might well be thought unfair to rob him on this account of the essential advantages of his judgment."). *But see* Ballard, *supra* note 9, at 237 (arguing that reciprocity clause is fair because other nations routinely utilize such clauses in the enforcement of judgments context).

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. k (1971).

55. *See infra* Part III (providing examples of such private-actor influence).

requirement holds private foreign citizens accountable for their government's policy choices—thereby giving them an incentive to lobby for policy changes—may be a positive feature of such legislation rather than a flaw. Whether these citizens are, in fact, likely to lobby for such a change is a question taken up in Part V.

C. *Inefficiency*

A final criticism holds that judgments reciprocity is inefficient.[56] This argument suggests that it is wasteful for one state to insist upon reciprocity because this insistence will require the parties to litigate their dispute all over again in the second jurisdiction.[57] One commentator has argued, for example, that "by not respecting foreign decisions because reciprocity is lacking, courts thwart the valuable goal of putting an end to litigation" and that "[i]f these decisions were recognized, courts would save themselves and the parties both time and resources."[58]

There is no doubt that the imposition of a reciprocity requirement could generate inefficiency in the short run to the extent that it forces foreign-judgment creditors to re-litigate suits in the United States. It is important to remember, however, that a rule of reciprocity would only operate to bar a U.S. court from enforcing a foreign judgment in cases where the rendering state was refusing to enforce U.S. judgments. The imposition of a reciprocity requirement, therefore, merely imposes upon foreign-judgment creditors the same inefficiencies currently borne by U.S.-judgment creditors seeking to enforce U.S. judgments in foreign states. If the imposition of a reciprocity requirement ultimately prompts this foreign state to change its laws to recognize U.S. judgments, then there would be net efficiency gains because judgment creditors from *both* states would thereafter be able to enforce judgments rendered by courts in the

56. *See, e.g.*, Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 4 (1988) ("To retry cases that have been authoritatively decided violates fundamental tenets of judicial economy."); Miller, *supra* note 4, at 315.

57. *Discussion of International Jurisdiction and Judgments Project*, 77 A.L.I. PROC. 201, 223 (2001) (remarks of Patrick J. Borchers, Dean, Creighton Univ. Sch. of Law) ("I think it would be a very poor idea to tell our courts that we have to relitigate a matter that we have determined has been fairly tried in a foreign forum just in an effort to implement policies entirely external to those litigants. It seems to me that that would be a waste of our resources and their resources as well."); Hulbert, *supra* note 9, at 646 ("[A reciprocity requirement] will necessarily lead to duplicate litigation . . . .").

58. Southard, *supra* note 4, at 349.

other.[59] It is possible, in other words, that a short-term *decrease* in efficiency attributable to a reciprocity requirement could ultimately lead to a dramatic *increase* in efficiency in the long run if that requirement prompts the foreign state to begin enforcing U.S. judgments.

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The costs outlined above—administrative costs, fairness costs, and efficiency costs—are the primary reasons why many scholars argue that the United States should not adopt a policy of judgments reciprocity. To date, however, critics of such a policy have generally dismissed or otherwise discounted the potential benefits that such a policy might achieve. However, if adopting a policy of judgments reciprocity is likely to prompt many foreign states that currently refuse to enforce U.S. judgments to reverse course, then the policy's benefits may well exceed its costs. The question of whether a reciprocity requirement is, in fact, likely to bring about any meaningful change in foreign state practice is taken up in the next three Parts.

III. RECIPROCAL LEGISLATION IN HISTORICAL PERSPECTIVE

The question of whether a reciprocity requirement is likely to prompt another state to change its laws—whether reciprocity *works*—has attracted surprisingly little attention in the academic literature to date. It is not uncommon for articles on the topic of judgments reciprocity to ignore altogether the question of its efficacy.[60] In the articles that consider the issue, however, the consensus is that reciprocity requirements do not work.[61] The conventional wisdom

59. To understand why this is so, recall that a reciprocity requirement will be most salient when a court in the foreign state is refusing to enforce judgments rendered by courts in the enacting state. In these cases, judgment creditors from the enacting state are already being forced to re-litigate disputes abroad, which is itself an inefficient outcome. To the extent that a reciprocity requirement imposes similar inefficiencies on judgment creditors located in the foreign state, then there will be a net decrease in efficiency in the short run but there is also a possible increase in efficiency in the long run if the foreign state revises its policy.

60. *See, e.g.*, Lenhoff, *supra* note 16, at 482 (critiquing judgments reciprocity without discussing efficacy); Southard, *supra* note 4, at 345–49 (same); *cf.* Yamauchi, *supra* note 20, at 179 (criticizing the practice of attaching reciprocity clauses to cross-border insolvency legislation but not addressing the question of such clauses' efficacy).

61. *See, e.g.*, Hulbert, *supra* note 9, at 654–55 (doubting the efficacy of reciprocity); Miller, *supra* note 4, at 293 (same); *cf.* Peter Child Nosek, *Unifying Maritime Claims Against the United States: A Proposal to Repeal the Suits in Admiralty Act and the Public*

among academics is that these requirements are unlikely to prompt other states to change their ways.

The precise origins of this conventional wisdom, however, are frustratingly elusive. In many cases, scholars and judges writing on this topic simply assert, without evidence, that reciprocity requirements are ineffective. In a classic article, for example, Arthur von Mehren and Donald Trautman noted the prevailing academic view that a rule of reciprocity "has little if any constructive effect" and that it "tends instead to a general breakdown of recognition practice."[62] In these and other instances in which such claims are made, one would expect to find, at a minimum, anecdotal evidence to support the claim that reciprocity requirements do not work. Instead, one finds citations to academic writers who, frustratingly, likewise fail to cite any historical evidence—anecdotal or otherwise—to support this proposition.[63]

The absence of historical examples in support of the conventional wisdom does not, of course, mean that the wisdom is wrong. It does mean, however, that it is past time for a careful inquiry into whether, and under what circumstances, reciprocal legislation

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Vessels Act, 30 J. MAR. L. & COM. 41, 54 (1999) (arguing that reciprocity clause in Public Vessels Act is an "inadequate instrument for effective coercion").

62. Von Mehren & Trautman, *supra* note 4, at 1661. The Supreme Court of Minnesota has also expressed "serious doubt" that a reciprocity requirement will in fact "encourag[e] foreign nations to enforce United States judgments." Nicol v. Tanner, 256 N.W.2d 796, 801 (Minn. 1976); *see also* Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885, 899 (N.D. Tex. 1980) (suggesting that reciprocity "tends . . . to a general breakdown of recognition practice" (quoting von Mehren & Trautman, *supra* note 4, at 1661)).

63. Von Mehren and Trautman cite to three sources in support of the proposition quoted above. The first provides no direct support for it. *See* von Mehren & Trautman, *supra* note 4, at 1661 (citing ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 166 (1962)). The second discusses the possibility that some foreign nations will undertake "reprisals" against U.S. judgments as the result of a reciprocity requirement. *See id.* (citing Kurt H. Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184, 1185 (1959)). A careful review of this second source reveals, however, that the "reprisals" at issue were merely considered (not actually adopted) and were considered only by a single country (France). *See* Kurt H. Nadelmann, *Reprisals Against American Judgments?*, 65 HARV. L. REV. 1184, 1191 (1959) (noting the reprisals were a "French proposal"). The third source supports the proposition but only cites the second source (Nadelmann) as an authority. *See* von Mehren & Trautman, *supra* note 4, at 1661 (citing ROBERT A. LEFLAR, THE LAW OF CONFLICT OF LAWS 132 & n.19 (1959)). The Supreme Court of Minnesota, which has also expressed skepticism as to the efficacy of judgments reciprocity, cites to an article which, again, cites to Kurt Nadelmann's 1959 article and von Mehren and Trautman's 1968 article in support of the proposition. *See Nicol*, 256 N.W.2d at 801 (citing Alan E. Golomb, *Recognition of Foreign Money Judgments: A Goal-Oriented Approach*, 43 ST. JOHN'S L. REV. 604, 616 (1969)). At no point, in short, do any of these critics ever offer any firm evidence to support their view.

will have its intended effect. In recent years, a number of scholars have attempted such a study by turning to game theory.[64] These studies, while generating some insights, are highly abstract.[65] They also pay little attention to the social and historical context in which reciprocal legislation has been effective in the past and make a number of unrealistic assumptions.[66] It would be useful, therefore, to

64. For attempts to use game theory to determine whether a state should adopt a policy of judgments reciprocity, see Sunghoon Lee, *Game of Foreign Judgment Recognition*, 3 ASIA L. REV. 101, 133 (2006) (relying on game theory to describe the use of reciprocity requirements as "foolish" and to argue that such requirements are "not the most effective means to draw recognition from the foreign countries"); Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 60 (2001) ("It is possible such [a tit-for-tat] strategy [premised on a reciprocity requirement], if maintained, would have resulted in the widespread recognition and enforcement of U.S. judgments in Europe."); Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 117 (2002) ("From a game theory perspective, a statute that requires reciprocity is always superior to a statute that does not include such a requirement."); *cf.* Francesco Parisi & Nina Ghei, *The Role of Reciprocity in International Law*, 36 CORNELL INT'L L.J. 93, 109–18 (2003) (using game theory to analyze various topics in the area of public international law). For attempts to use game theory to determine whether a state should enforce the judgments of another state more generally, see MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 158 (2001); Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, *in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES 592, 625 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997); Dodge, *supra* note 53, at 224–25; Mark D. Rosen, *Should "Un-American" Foreign Judgments Be Enforced?*, 88 MINN. L. REV. 783, 808 (2004); Michael Whincop, *The Recognition Scene: Game Theoretic Issues in the Recognition of Foreign Judgments*, 23 MELB. U. L. REV. 416, 421–22 (1999).

65. The games in these studies, for example, typically use a standard payoff structure that fails to account for the fact that different states are likely to react to a reciprocity requirement in very different ways. *See* Lee, *supra* note 64, at 120 & n.71 (stating that the Stevens article "ignored" this possibility); *cf.* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 17 (1984) (observing that "[t]he payoffs of a player . . . need [to] be measured relative to each another").

66. The Stevens study concluded, for example, that the United States should adopt a policy of judgments reciprocity based on an analysis which assumed that (1) actors in the United States could not communicate with actors in other states, (2) the gains and losses accruing to individuals in the United States and other nations under a reciprocity regime would be essentially equal, and (3) the "game" would be played exactly once. Stevens, *supra* note 64, at 141, 157; *cf.* Lee, *supra* note 64, at 120 n.71 (criticizing the assumption that gains and losses will be roughly equal). *See generally* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 91 (1994) ("[G]ames that are similar in mathematical form, and thus expected to produce similar outcomes, produce levels of cooperation that vary considerably with the social context in which they take place."); ROGER A. MCCAIN, GAME THEORY AND PUBLIC POLICY 6 (2009) (noting that the

obtain more information about past examples of successful (and unsuccessful) reciprocal legislation to develop a deeper and richer understanding of the circumstances in which such legislation is likely to work.

Such an inquiry is, however, more complicated than it may appear at first glance. In the United States, for example, the Supreme Court adopted a reciprocity requirement with respect to foreign judgments in 1895 as a matter of general federal common law in the case of *Hilton v. Guyot*.[67] The Court then cast aside this rule (along with the rest of general federal common law) in 1938 in the case of *Erie Railroad v. Tompkins*.[68] In theory, therefore, one might seek to determine whether the imposition of a reciprocity requirement by the U.S. federal courts during this time period led foreign states to be more receptive to U.S. judgments. The problem with such an approach is that this particular rule of reciprocity applied exclusively to the federal courts; state courts were not bound by it.[69] Throughout this period, foreign-judgment creditors were thus able to enforce their judgments in state courts without needing to satisfy any reciprocity requirement.[70] Accordingly, the rule applied by the U.S. federal courts in the span of time between 1895 and 1938 does not offer any real insight into the efficacy of a reciprocity requirement in the judgments context.

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simplifying assumptions made by game theory "mean that most cooperative game theory is not applicable to very many problems of public policy").

67. 159 U.S. 113, 228 (1895).

68. 304 U.S. 64, 78 (1938).

69. *See* John Norton Moore, *Federalism and Federal Relations*, 1965 DUKE L.J. 248, 255 ("Since some of our largest states with the greatest amount of foreign commerce have rejected the *Hilton* reciprocity rule, other reciprocity rule and even non-enforcement rule nations have many of their judgments enforced in this country without the necessity of a treaty." (footnote omitted)).

70. *See, e.g.*, Johnson v. Compagnie Générale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (enforcing a French judgment notwithstanding lack of reciprocity). During this period, the defendant could, of course, have sought to remove the case to federal court on the basis of diversity jurisdiction. *See* Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 128 (1997). If the enforcement action was brought in a state of the United States of which the defendant was a resident, however, removal would not have been permitted. *See* Judicial Code of 1911, ch. 231, § 28, 36 Stat. 1087, 1094 (codified as amended at 28 U.S.C. § 1441(b)(2) (2012)) ("Any other suit of a civil nature . . . may be removed into the district court of the United States for the proper district by the defendant or defendants therein, *being nonresidents of that state*." (emphasis added)); *see also* 28 U.S.C. § 1441(b)(2) (2012) ("A civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may not be removed if any of the . . . defendants is a citizen of the State in which such action is brought.").

Alternatively, one might look to the experience of the U.S. states that have already adopted a policy of judgments reciprocity as a matter of state law. In the 1960s and 1970s, for example, two U.S. states—Georgia and Massachusetts—enacted legislation that requires foreign-judgment creditors to prove reciprocity as a precondition to enforcing foreign judgments.[71] While the imposition of a reciprocity requirement by these two states could conceivably prompt foreign states to rethink their willingness to enforce U.S. judgments more generally, neither Massachusetts nor Georgia is likely to be viewed as sufficiently important from the point of view of foreign nations to prompt any significant change in their general judgments recognition policy.[72] This fact, along with the ability of foreign-judgment creditors to obtain recognition of foreign judgments in one of the remaining forty-eight states that lack any mandatory reciprocity requirement and then enforce the resulting judgment in another state pursuant to the Full Faith and Credit Clause, likewise makes it difficult (if not impossible) to draw any definitive conclusions as to the impact of these two states' reciprocity requirements on foreign state practice.[73]

These challenges notwithstanding, there are a number of historical examples in which reciprocal legislation did, in fact, have a documented impact upon another state. This Part identifies and discusses three such examples. It first discusses how reciprocal legislation enacted by Germany led California to amend its foreign-judgment law in the aftermath of the San Francisco Earthquake of 1906. It then examines how the United States used reciprocal legislation to induce other states to recognize an intellectual property right in semiconductor design during the mid-1980s. Finally, it

71. *See* GA. CODE ANN. § 9-12-114 (2006); MASS. ANN. LAWS ch. 235, § 23A (LexisNexis 2009).

72. In 2012, exports from Massachusetts accounted for 1.7% of all U.S exports, *State Exports for Massachusetts*, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/statistics/state/data/ma.html (last visited Apr. 11, 2014), while exports from Georgia accounted for 2.3%, *State Exports for Georgia*, U.S. CENSUS BUREAU, http://www.census.gov/foreign-trade/statistics/state/data/ga.html (last visited Apr. 11, 2014).

73. *See* Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. 459, 475–76 (2013) (questioning the effectiveness of state-specific recognition criteria by noting the ability of foreign-judgment holders to obtain recognition of the judgment in a U.S. state with lax recognition criteria and then to enforce the new "U.S." judgment in a state with stricter criteria by means of the Full Faith and Credit Clause). *But see* Reading & Bates Constr. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702, 714–15 (Tex. App. 1998) (refusing to recognize and enforce a Canadian judgment previously recognized by a state court in Louisiana).

explores how the European Union attempted to use reciprocal legislation to persuade other states to grant *sui generis* intellectual property protection to databases during the late-1990s.

When viewed collectively, these case studies suggest that the key to predicting how a particular state will respond to a particular piece of reciprocal legislation affecting private rights is to evaluate how interest groups within that state are likely to react to the legislation.[74] In some ways, this insight is unsurprising. The legal academy has looked to theories of interest-group politics for decades in order to explain various aspects of the legislative process.[75] Indeed, the notion that legislative outcomes will be driven in many cases not by disinterested legislators acting in the public interest but rather by active lobbying by interest groups with a stake in the outcome is widely accepted.[76] To date, however, scholars writing about the efficacy of reciprocal legislation have devoted virtually no time or attention to the role of these groups.[77] The case studies below illustrate the costs of this inattention and pave the way for a better

74. This account is generally consistent with what is known in the political science literature as interest-group theory. Interest-group theory is a branch of public choice theory that "seeks to explain governmental behavior on the basis of the costs of organizing interest groups." Robert B. Ekeland, Jr. & Robert D. Tollison, *The Interest-Group Theory of Government*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE 357, 357 (William F. Shughart II & Laura Razzolini eds., 2001). The essence of interest-group theory has been described as follows:

> Small, homogeneous groups with strong communities of interest tend to be more effective suppliers of political pressure and political support (votes, campaign contributions, and the like) than larger groups whose interests are more diffuse. The members of smaller groups have greater individual stakes in favorable policy decisions, can organize at lower cost, and can more successfully control the free riding that otherwise would undermine the achievement of their collective goals.

William F. Shughart II, *Public Choice*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 427, 429 (David R. Henderson ed., 2008).

75. *See, e.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35–44 (1991); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 469 (1987).

76. *See supra* notes 74–75.

77. Scholars have discussed the role of domestic interest groups more generally in the context of "two-level games" that take place at both the domestic and the international levels. *See* Andrew Moravcsik, *Introduction: Integrating International and Domestic Theories of International Bargaining*, *in* DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 3, 14–17 (Peter B. Evans, Harold K. Jacobson & Robert D. Putnam eds., 1993); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433–35 (1988).

understanding of when reciprocal legislation affecting private rights is likely to have its intended effect.[78]

A. *Case Studies*

1. The San Francisco Earthquake of 1906

In the late nineteenth century, Germany enacted legislation directing its courts to refuse to enforce foreign judgments rendered by states that did not enforce German judgments as a means of incentivizing foreign states to recognize these judgments.[79] The law achieved a spectacular success when it prompted the state of California to amend its laws relating to the enforcement of foreign judgments in the years following the San Francisco Earthquake of 1906.

The earthquake caused massive property losses across much of Northern California; contemporary estimates of the total losses

78. This is not to suggest that theories of legislative action based on interest-group politics are without their weaknesses. Critics of this approach have argued that it "generally works better in supplying after-the-fact explanations than in predicting the future." *See* Thomas W. Merrill, *Explaining Market Mechanisms*, 2000 U. ILL. L. REV. 275, 281; *cf.* STEPHEN BREYER, REGULATION AND ITS REFORM 388 n.38 (1982) (noting that although interest-group theories may help explain the origins of regulation in certain industries, "[t]hey cannot fully explain environmental, health, safety regulation, or even traditional utility and transportation regulation"). This critique would hold that while interest-group theory may be helpful in explaining the outcomes of reciprocal legislation retrospectively, it would be folly to attempt to use it prospectively to guess at a state's likely response to such legislation. *See* GREEN & SHAPIRO, *supra* note 66, at 9 (arguing that public-choice theorists are too willing to advance ambitious normative proposals based on thin evidence). There are several responses to this critique. The first is that it is odd to argue that factors that are concededly explanatory ex post should not be considered relevant ex ante. While one must always be cautious when seeking to guess at future outcomes, the fact that interest groups will likely play some role in determining any legislative response to a piece of reciprocal legislation is one that should not be disregarded. While it is doubtless true that using interest-group theory is not a crystal ball that is capable of predicting the future, this is not in itself a reason to disregard the importance of interest groups in shaping outcomes. Moreover, the fact that other theories purport to offer a definitive answer to the question of efficacy is not itself a reason to prefer them. The legislative process is complex. In the context of reciprocal legislation, it is even more so because one is seeking to guess at the likely response to such legislation in multiple foreign jurisdictions, each with a political system that is unique and idiosyncratic. While there is virtue in seeking to abstract away from these complexities, there is also the risk that simplifying the problem will generate false certainty as to its likely outcome. Interest-group theory, to its credit, embraces these complexities rather than assuming them away.

79. *See* Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT'L L. 175, 179–81 (2005).

ranged from $133 million to $296 million.[80] A number of individuals and businesses that suffered losses held insurance policies issued by German insurance companies and, in the aftermath of the earthquake, sought to recover their losses by filing claims.[81] In many cases, the German insurers refused to pay, arguing that the insurance contracts at issue clearly stipulated that the insurer was not liable for damage caused by earthquakes.[82] In response, the policyholders argued that the damage in question was, in fact, caused by fire, which was covered under the relevant policies.[83]

The courts of California ultimately resolved a number of these disputes in the policyholders' favor.[84] When the policyholders sought to enforce these judgments in Germany, however, they found themselves stymied by the German reciprocity requirement.[85] In a famous case decided in 1907, the German Imperial Court surveyed California law and concluded that the courts of California were unlikely to enforce a judgment rendered by a German court.[86] Consequently, that court held that the California judgments won by the policyholders could not be enforced in Germany.[87]

In the wake of this decision, an organization known as the Policyholders' Protective League announced that it would lobby for a change in California's laws as they related to foreign judgments.[88] This organization—which was formed in 1906 to represent the interests of members of the San Francisco Merchants' Association, the Chamber of Commerce, and the Board of Trade, among others[89]—sent representatives to "ask[] the Legislature to amend the Code of Civil Procedure regarding the effect of foreign judgments [in

80. TILMANN J. RÖDER, FROM INDUSTRIAL TO LEGAL STANDARDIZATION, 1871–1914: TRANSNATIONAL INSURANCE LAW AND THE GREAT SAN FRANCISCO EARTHQUAKE 74 (Frederik Heinemann trans., 2012).

81. *See id.* at 88–89.

82. *See id.* at 81–88.

83. *See id.*

84. *See id.* at 88.

85. *See* Wurmnest, *supra* note 79, at 186.

86. *Id.* at 186–87 ("In 1907, the German Imperial Court decided that because reciprocity was not assured with California, it could not enforce default judgments obtained from California courts by parties damaged in the 1906 San Francisco earthquake.").

87. *Id.* at 186.

88. *See* RÖDER, *supra* note 80, at 75–77 (discussing the Policyholders' Protective League).

89. *See id.* at 75.

California]."[90] This lobbying effort soon bore fruit. On March 5, 1907, the California legislature unanimously approved legislation that would liberalize the state's laws relating to the enforcement of foreign judgments.[91] One assemblyman helpfully explained that "the measure was designed to help insurance claimants."[92] On March 11, 1907, the Governor signed the bill.[93]

The original law had stated that the state's courts could refuse to enforce a foreign judgment if the foreign court lacked jurisdiction, if there was a lack of proper notice to the parties, if there was fraud, or if the judgment in question contained a clear mistake of law or fact.[94] The revised law, by contrast, stipulated that a California court could refuse to enforce a foreign judgment only if the foreign court lacked jurisdiction.[95] To the extent that Germany's reciprocity requirement was intended to prompt other states to amend their laws to make it easier to enforce German judgments, this goal was clearly realized here. There can be little doubt that the relevant amendments to the California Civil Code made it easier to enforce German judgments in California.

There can also be little doubt that interest-group lobbying played a key role in bringing about the change to the California law. California policyholders—represented by the Policyholders Protective League—stood to gain a great deal if the California law was changed. A successful campaign to change the law, if deemed sufficient by the German courts, would mean that judgments already won in California could be enforced against the assets held by the insurance companies in Germany. A failed campaign would mean

90. *See* Editorial, *Judgments on Foreign Fire Insurance*, S.F. CALL, Feb. 25, 1907, at 6.

91. *See Foreign Judgments Are Given Recognition*, S.F. CALL, Mar. 5, 1907, at 2 ("Senator Leavitt's bill making the judgments of foreign courts good in California passed the Assembly without opposition today and is now on its way to the Governor.").

92. *Id.*

93. Act of Mar. 11, 1907, ch. 178, 1907 Cal. Stat. 206 (codified at CAL. CIV. PROC. CODE § 1915 (repealed 1974)); *see Signed by the Governor*, S.F. CALL, Mar. 13, 1907, at 2.

94. CAL. CIV. PROC. CODE § 1915 (Deering 1899) ("The effect of the judgment of any other tribunal of a foreign country having jurisdiction to pronounce the judgment, is as follows: 1. In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing; 2. In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title, and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.").

95. Act of Mar. 11, 1907, ch. 178, § 1 ("A final judgment of any other tribunal of a foreign country having jurisdiction, *according to the laws of such country*, to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." (emphasis added)).

that the suits would have to be re-litigated in Germany. In this instance, therefore, a German reciprocity requirement effectively incentivized interest groups in California to lobby for legislative change.

As it happened, this story did not have a happy ending for the policyholders. When they again sought to enforce the California judgments in Germany after the change in California law, the German Imperial Court concluded that even the revised law was insufficient to satisfy German reciprocity requirements.[96] This fact notwithstanding, California did not undo the changes to its foreign judgments recognition law after the second decision by the Imperial Court. Indeed, the liberalized law remained on the books until 1967, when California adopted the Uniform Foreign Money-Judgments Recognition Act.[97] In this instance, therefore, the German statute must be viewed as an unqualified success from the point of view of its drafters: it prompted legislative change which made it easier for German-judgment creditors to enforce their judgments in California without exposing German judgment debtors to the sting of having California judgments enforced against them at home. To the extent that the conventional wisdom holds that judgments reciprocity will not lead to changes in foreign state practice, therefore, the case of California in 1907 provides a compelling counterexample.

2. Semiconductor Chip Protection Act of 1984

The discussion of the California policyholders above shows that reciprocal legislation enacted by a foreign government can, in some cases, lead interest groups within the United States to successfully lobby for legislative change. The question arises, however, whether reciprocal legislation enacted within the United States would prompt a similar response among interest groups abroad. To answer this question, it is useful to look to how foreign interest groups responded

96. *See* Ernest G. Lorenzen, *The Enforcement of American Judgments Abroad*, 29 YALE L.J. 188, 202–03 (1919). This decision was subjected to severe criticism by a number of German academics. *See id.* at 203–04; Wurmnest, *supra* note 79, at 186–87. In subsequent years, the German courts "softened the reciprocity requirement's rough edges by interpreting the notion of reciprocity more broadly, thus silently correcting the Imperial Court's ruling." Wurmnest, *supra* note 79, at 187.

97. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT 1962, 13 pt. II U.L.A. 39 (2002) (listing California among the states included in the "Table of Jurisdictions Wherein Act Has Been Adopted"; the Uniform Foreign Money-Judgments Recognition Act became effective in California on November 8, 1967).

to a piece of reciprocal intellectual property legislation enacted by the United States three decades ago.

In 1984, Congress unanimously approved the Semiconductor Chip Protection Act ("SCPA").[98] The purpose of the law was to provide short-term, copyright-like protection to semiconductor chip designs—known in the trade as "mask works"—thereby providing U.S. semiconductor manufacturers a weapon to wield against pirates seeking to reverse engineer their chip designs.[99] The SCPA's passage represented the culmination of a multi-year lobbying campaign by the U.S. semiconductor industry and marked the recognition of a "new" type of intellectual property not previously accorded protection under U.S. law.[100]

In the months preceding the SCPA's enactment, its drafters were concerned about the ability of U.S. semiconductor manufacturers to obtain legal protection for these designs outside of the United States. The United States was the first nation in the world to grant intellectual property protection to mask works, and legislators were concerned that, absent coordination with other jurisdictions, U.S. semiconductor manufacturers would have little recourse against pirates operating abroad.[101] In an attempt to address this concern, Congress included in the legislation a reciprocity clause stipulating that the designs of foreign semiconductor manufacturers would be entitled to protection under the Act if (and only if) their state of origin agreed to grant similar protections to U.S. manufacturers under that state's domestic law.[102]

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98. Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (codified as amended at 17 U.S.C. §§ 901–914 (2012)); *see* Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground*, 70 MINN. L. REV. 417, 429–30 (1985) (stating that the bill "was unanimously endorsed"); J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2478 (1994).

99. *See* Reichman, *supra* note 98, at 2478 & n.234 (noting that these designs were not entitled to copyright protection); Pamela Samuelson & Suzanne Scotchmer, *The Law of Economics of Reverse Engineering*, 111 YALE L.J. 1575, 1578, 1595 (2002); *see also* 17 U.S.C. § 901(a)(2) (2012) (defining mask works).

100. *See* Jay A. Erstling, *The Semiconductor Chip Protection Act and Its Impact on the International Protection of Chip Designs*, 15 RUTGERS COMPUTER & TECH. L.J. 303, 303–04 (1989); Samuelson & Scotchmer, *supra* note 99, at 1598–1600.

101. *See* Kastenmeier & Remington, *supra* note 98, at 466 ("Since the United States was the first country to protect clearly mask works in specific implementing legislation, Congress had no recourse but to create a unilateral scheme that hopefully will spawn a movement towards first bilateralism and then multilateralism.").

102. 17 U.S.C. §§ 902(a), 914(a)(1)–(3); *see also* H.R. REP. No. 98-781, at 8 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5757 ("[The SCPA] affords full reciprocity to foreign

The drafters of the reciprocity provision were very clear about their intent to use the clause to encourage foreign states to change their laws. As one member of the relevant House subcommittee stated, "We ... decided to conduct an experiment by providing [reciprocity] provisions intended to encourage the rapid development of a new worldwide regime for the protection of semiconductor chips."[103] By 1989, the European Community ("E.C.") and six other nations had adopted legislation granting protection to mask works in direct response to the SCPA.[104] Another eleven nations had such legislation under consideration.[105] In the words of one observer, "The allure of reciprocity under the SCPA ... motivated a host of nations, including Japan, the Member States of the European Communities ..., Sweden, Finland, Canada, Australia, and Switzerland, to adopt or consider adopting chip protection legislation."[106] The SCPA is thus a case in which reciprocal legislation enacted by the United States successfully brought about a change in the law and practice of a number of foreign states.

It is also noteworthy that a number of these states chose to enact responsive legislation only after sustained lobbying from domestic interest groups. In Japan, for example, local semiconductor manufacturers actively lobbied the government to enact such legislation and contributed $5 million in funds to establish the agency tasked with administering the new registration regime for mask

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owners of mask works and allows them to secure protection under this Act if their country allows such protection to U.S. owners of mask works."); *id.* at 18 (describing the subject matter protected by the SCPA).

103. 133 CONG. REC. 8068 (1987) (statement of Rep. Robert W. Kastenmeier).

104. Erstling, *supra* note 100, at 306. Certain elements of these various national laws were ultimately incorporated into the Treaty on Intellectual Property in Respect of Integrated Circuits in 1989. *See* Treaty on Intellectual Property in Respect of Integrated Circuits, *opened for signature* May 26, 1989, 28 I.L.M. 1484. The text of this treaty was, in turn, incorporated into Article 35 of the TRIPS Agreement, which became effective in 1995. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights art. 35, Apr. 15, 1994, 33 I.L.M. 1197 ("Members agree to provide protection to the layout-designs (topographies) of integrated circuits (referred to in this Agreement as 'layout-designs') in accordance with Articles 2 through 7 (other than paragraph 3 of Article 6), Article 12 and paragraph 3 of Article 16 of the Treaty on Intellectual Property in Respect of Integrated Circuits...."). All of this legislating notwithstanding, the protections afforded by the SCPA are rarely invoked by U.S. semiconductor manufacturers today. *See* Miriam Bitton, *A New Outlook on the Economic Dimension of the Database Protection Debate*, 47 IDEA 93, 124 (2006) ("In practice, [the SCPA] has been utilized very infrequently, and the semiconductor chip industry has relied almost exclusively on patent protection.").

105. *See* Erstling, *supra* note 100, at 321–22.

106. *Id.* at 306.

works.[107] In Canada, no fewer than four trade groups banded together to urge the government to enact comparable legislation.[108] In Finland, legislation on this topic was initially proposed by a trade association—the Confederation of Finnish Industries—rather than by legislators.[109] The parties responsible for pushing legislative change in jurisdictions outside the United States, in short, were not infrequently private companies with an economic stake in the outcome.[110]

3. European Community Database Directive of 1996

Each of the cases discussed above highlighted an instance in which interest groups lobbied successfully to change a law in response to reciprocal legislation. There is no guarantee, however, that interest groups will always play a positive role in sponsoring such change. History suggests that such groups can also work to *prevent* a legislature from enacting such responsive legislation, as illustrated by the case of the European Community Database Directive.

On March 11, 1996, the E.C. officially adopted its Directive on the Legal Protection of Databases.[111] The Directive's primary goal was to grant *sui generis* intellectual property protection to databases and, in so doing, to make the E.C. a more attractive market for database designers.[112] In an effort to incentivize foreign states to grant

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107. *See id.* at 324; Letter from Akio Morita to Senator Charles Mathias, Jr. and Representative Robert W. Kastenmeier (July 18, 1984) ("[The Electronic Industries Association of Japan] recognizes the need for, and importance of, protection in Japan for the intellectual property embodied in semiconductor chips. Accordingly, we will ask the Government of Japan to provide such protection, as expeditiously as possible, through a new legislative framework.").

108. *See* Erstling, *supra* note 100, at 330 & n.118 (noting that these groups included the Canadian Manufacturers' Association, the Electrical and Electronics Manufacturers Association of Canada, the Canadian Business Equipment Manufacturers Association, and the Canadian Advanced Technology Association).

109. *Id.* at 338.

110. It is of course possible that responsive legislation would have been enacted in these other jurisdictions even in the absence of lobbying pressure; given the complexities in the legislative process in any one country—let alone across many foreign jurisdictions—it is impossible to attribute a legislative outcome to any one single factor. The fact that lobbying pressure by private groups was clearly brought to bear on foreign governments in this instance, however, suggests that the success or failure of reciprocal legislation enacted by the United States will in some cases be affected by the reaction of interest groups in those states.

111. Directive 96/9, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77).

112. *See* Philip J. Cardinale, Comment, *Sui Generis Database Protection: Second Thoughts in the European Union and What It Means for the United States*, 6 CHI.-KENT J. INTELL. PROP. 157, 157 (2007).

similar protections to European database designers, the drafters of the Directive included a reciprocity clause which conditioned the protection of databases from non-member countries on the reciprocal grant of protection.[113] Absent such a grant of reciprocal protection, a non-member database producer would have no legal recourse in the E.C. if its databases were reproduced or otherwise used by nationals of E.C. member states.

Several commentators have noted the parallels between the E.C.'s efforts to encourage foreign states to grant protection to database designers and U.S. efforts to do the same with respect to semiconductor manufacturers.[114] Indeed, at least one scholar has argued that the E.C. modeled its Directive explicitly after the approach pioneered by the United States with the SCPA.[115] The early signs suggested that the Directive's reciprocity clause would succeed in bringing about a change in U.S. law. Within months of the Directive's adoption, legislation was introduced into Congress offering protections to database makers comparable to those set forth in the Directive.[116] The sense of urgency here was attributable to several factors, but the reciprocity clause played a role. As one commentator has argued, "the E.U.'s reciprocity clause provided the immediate catalyst [for the U.S. legislation], due to the expectation that the Directive would put U.S. database producers at a competitive disadvantage."[117]

The proposed U.S. legislation was strongly supported by a number of interest groups in the United States. These groups included the Information Industry Association—the "principal trade association for the software and digital content industry"[118]—and the

113. *See id.* at 158; *see also* 142 CONG. REC. 12484 (1996) (statement of Rep. Carlos J. Moorhead) (explaining that the "Directive could place U.S. firms at an enormous competitive disadvantage throughout the entire European market").

114. *See, e.g.*, Mark Powell, *The European Union's Database Directive: An International Antidote to the Side Effects of* Feist*?*, 20 FORDHAM INT'L L.J. 1215, 1216 n.9 (1997) ("There are clear parallels between the EU's vanguard approach to the legal protection of databases and the creation by U.S. Congress of a *sui generis* form of protection for semiconductor mask works in the Semiconductor Chip Protection Act of 1984 . . . .").

115. *See* Charles R. McManis, *Intellectual Property and International Mergers and Acquisitions*, 66 U. CIN. L. REV. 1283, 1295 (1998).

116. *See* Cardinale, *supra* note 112, at 158.

117. *Id.* at 162.

118. *About SIIA*, SOFTWARE & INFO. INDUSTRY ASS'N (2014), http://www.siia.net/index.php?option=com_content&view=article&id=159&Itemid=6; *see Collections of Information Antipiracy Act; Vessel Hull Design Protection Act; Trade Dress Protection Act;*

American Medical Association.[119] These groups argued that if the United States did not pass responsive legislation, their databases would be pirated with impunity by European companies.[120] With the support of these groups, the legislation easily cleared the U.S. House of Representatives in 1998.[121] The bill failed, however, to advance in the Senate.[122] In subsequent years, similar bills were introduced, but these, too, failed to pass.[123] As of the time of this writing, the reciprocity clause attached to the Directive has not led to any meaningful change in U.S. law.

What accounts for this failure? Opposition from domestic interest groups, among other factors, played an important role.[124] The Online Banking Association, the Information Technology Association of America, and the Association of Directory Publishers all opposed the legislation.[125] These groups actively lobbied against the proposed legislation on the grounds that it would "increase[] . . . transaction costs for assembling information which would thereby stifle competition."[126] Scientists, researchers, and academics, all of whom regularly rely on databases compiled by other parties to conduct their research, also opposed the bill.[127] Collectively, these groups managed to defeat the legislation. This defeat is particularly noteworthy because other states—including Mexico and Brazil—did, in fact, enact database protection legislation following the enactment of the Database Directive.[128]

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and Internet Domain Name Trademark Protection: Hearings on H.R. 2652, H.R. 2696 and H.R. 3163 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary, 105th Cong. 144 (1999) [herinafter *Hearings on H.R. 2652, H.R. 2696 and H.R. 3163*] (statement of Robert E. Aber, on behalf of the Information Industry Association, now named the Software & Information Industry Association).

119. *See* Cardinale, *supra* note 112, at 162–63.

120. *See id.* at 163; *Hearings on H.R. 2652, H.R. 2696 and H.R. 3163*, *supra* note 118, at 145 (statement of Robert E. Aber, on behalf of the Information Industry Association, now named the Software & Information Industry Association).

121. *See* Cardinale, *supra* note 112, at 164.

122. *See id.*

123. *Id.*

124. *See* Stephen M. Maurer, P. Bernt Hugenholtz & Harlan J. Onsrud, *Europe's Database Experiment*, 294 SCI. 789, 789 (2001).

125. *See* Cardinale, *supra* note 112, at 164.

126. *Id.* at 164.

127. *See id.* at 158; *see also* J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 73 (1997) (noting that the United States has historically "favored free and open access to scientific data").

128. *Collections of Information Antipiracy Act: Hearing on H.R. 354 Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 170 (2000) [hereinafter *Hearing on H.R. 354*] (statement of Dan Duncan, Vice President,

B. *Insights and Conclusion*

The foregoing case studies suggest that the strong version of the conventional wisdom—that reciprocity requirements are always ineffective—is indefensible. There are several historical examples in which these requirements did, in fact, successfully bring about some change in foreign law. These examples do not, however, serve to disprove the weak version of the conventional wisdom—that reciprocity requirements are *rarely* effective. It may well be that the vast majority of reciprocity requirements do not work and that the California legislation of 1907, the SCPA, and the Database Directive are the exceptions to the rule.

Even if legislative regimes premised on reciprocity are only rarely effective, the fact that they *can* be successful means that each proposed regime must be considered on its own merits to determine its likely effect. In conducting such an inquiry, one would ideally wish to draw upon an analytical framework that identifies those factors that are most relevant to the success of any piece of reciprocal legislation. The common elements exhibited by the foregoing case studies, happily, offer a basis for constructing such a framework.

First, and most importantly, foreign interest groups matter. Particularly with respect to legislation where the primary purpose is to determine legal rights between and among private parties (such as with the enforcement of judgments), the willingness of a foreign legislature to take up and pass such a law in response to a reciprocity requirement will, in many cases, depend upon the willingness of foreign interest groups to lobby in support of that law. In order to gauge the likelihood that a particular reciprocity requirement will prompt legislative change in a particular state, one would be well-advised to consider first how interest groups in that state—supporters and opponents alike—are likely to react to the incentives provided by that requirement.[129]

Government Affairs, Software & Information Industry Association) ("Mexico has had a database protection law in place since 1997, also with reciprocity provisions. Brazil has adopted a similar law.").

129. There are, to be sure, limits on the use of interest-group analysis. In situations where the response to a particular piece of reciprocal legislation must originate in a governmental actor that is not elected—such as a court—then interest groups will likely play a much smaller role in shaping the response. This point is illustrated by the well-known *Munzer* case in France. *See* Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 7, 1964, Bull. civ. I, No. 15. Throughout the nineteenth and the early twentieth century, France reserved the right to review the merits of decisions rendered by foreign courts before deciding whether to enforce those decisions in France, a doctrine

Second, reciprocal legislation will not have a universal effect on all foreign states. While a number of commercially important states enacted legislation designed to protect semiconductor designs in the years after the United States adopted the SCPA, a number of other similarly important states did not.[130] Similarly, while Brazil and Mexico enacted database protection legislation in the years after the E.C. adopted the Database Directive, the United States did not.[131] To suggest that all states are likely to respond to a reciprocity provision in the same way, therefore, is to fail to account for the complexity of international politics and the vagaries of the domestic legislative process.

Third, interest groups are most likely to lobby for legislative change in cases in which the returns to such lobbying are direct and

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known as *révision au fond*. Nadelmann, *supra* note 4, at 238, 243. In the 1940s and 1950s, however, this rule came under sustained attack from academic commentators in France. *See id.* at 243. In 1964, the Cour de cassation formally abandoned the doctrine of *révision au fond* in the *Munzer* case. *See* Cass. 1e civ., Jan. 7, 1964, Bull. civ. I, No. 15; James C. Regan, Comment, *The Enforcement of Foreign Judgments in France Under the* Nouveau Code de Procédure Civile, 4 B.C. INT'L & COMP. L. REV. 149, 162 (1981). A number of contemporary commentators noted that the decision in *Munzer* would make it possible for French-judgment creditors to enforce French judgments in Germany because French judgments policy was now compliant with the longstanding German reciprocity requirement. *See* Kurt H. Nadelmann, *French Courts Recognize Foreign Money-Judgments: One Down and More To Go*, 13 AM. J. COMP. L. 72, 78 (1964); Arthur Taylor von Mehren, *Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements*, *in* 167 RECUEIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 49 (1981); *cf.* Georges Holleaux, Case Comment, Cass. 1e civ., Jan. 8, 1963, 52 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 109, 113 (1963) (noting the difficulty, prior to *Munzer*, of enforcing a French judgment in Germany). While it is unclear whether a desire to facilitate the enforcement of French judgments in Germany was the court's intention—or whether it was merely an incidental effect of the decision—a number of scholars have cited the *Munzer* case as another instance in which a piece of reciprocal legislation brought about a change in the practice of a foreign state. *See, e.g.*, Nadelmann, *supra*, at 78; von Mehren, *supra*, at 49 & n.80. If this characterization is accepted as accurate, then it illustrates the limits of looking to interest-group influence to determine the likely impact of reciprocal legislation. Unlike the French parliament, the judges on the *Cour de cassation* are not elected and, consequently, are unlikely to be reliant on interest groups for electoral support. *See* MARY L. VOLCANSEK, MARIA ELISABETTA DE FRANCISCIS & JACQUELINE LUCIENNE LAFON, JUDICIAL MISCONDUCT: A CROSS-NATIONAL COMPARISON 37 (1996). In cases in which the governmental actor with the authority to respond to a piece of reciprocal legislation is insulated from political pressure, in short, one must look to other factors beyond interest-group politics to evaluate that jurisdiction's likely response.

130. *See* Erstling, *supra* note 100, at 306 (noting certain foreign states that have adopted or are considering the adoption of "chip protection legislation").

131. *See Hearing on H.R. 354*, *supra* note 128, at 170.

immediate. The policyholders in California stood to gain the ability to enforce sizable (and already rendered) judgments in Germany. The semiconductor manufacturers stood to gain intellectual property protection for a product they had already designed. This is not to suggest that successful lobbying cannot occur when the benefits are more temporally remote.[132] It is merely to note that the incentives for individuals to organize and lobby for change are much stronger when the rewards are more immediate.

With these insights in mind, the remainder of this Article considers whether the enactment of reciprocal judgments legislation by the United States along the lines suggested by the ALI would, in fact, be likely to prompt foreign states that currently refuse to enforce U.S. judgments to reconsider their respective positions.

IV. A THEORY OF JUDGMENTS RECIPROCITY

The question of whether the United States should adopt a policy of judgments reciprocity at the national level is, at its heart, a question of whether the policy is likely to lead certain foreign states to reverse their position of refusing to enforce U.S. judgments. Whether this reversal will occur depends, in significant part, upon how particular interest groups in these nations react to the new policy of judgments reciprocity. This Part identifies the relevant interest groups and weighs how they are likely to react as a theoretical matter. Part V then uses this analysis to evaluate the likely impact of such a policy in practice.

A. Foreign-Judgment Creditors

If the United States were to adopt a policy of judgments reciprocity, its impact would be felt most keenly by actual and

132. One example in which reciprocal legislation was successfully used by interest groups to achieve ends that were temporally remote involves a movement to reform state inheritance laws in the United States during the early twentieth century. *See* Starr, *supra* note 22, at 395–98 (discussing the successful movement to persuade twenty-five state legislatures in the United States to enact reciprocal legislation relating to inheritance taxation and suggesting that its success was attributable in part to interest-group lobbying); *see also* Current Legislation, *Legislative Efforts in New York to Avoid Multiplicity in Inheritance Taxation*, 28 COLUM. L. REV. 806, 809 (1928) ("Reciprocity of this sort ... has since been adopted by a large number of states, with general satisfaction."); Fin. Dep't, Chamber of Commerce of the U.S., *Consider Interstate Death Tax Proposal*, PUB. DOLLAR, Jan. 1929, at 1 ("Bills designed to effectuate the [reciprocity] proposal ... have been sponsored and endorsed by commercial organizations in virtually all of the affected states.").

potential foreign-judgment creditors who reside in nations that currently refuse to enforce U.S. judgments.[133] These individuals would, as a direct consequence of the reciprocity requirement, no longer be able to enforce their judgments in the United States and would consequently suffer some economic loss.[134] The key question is how these judgment creditors would respond to this development. If they perceive their new inability to enforce judgments in the United States as a serious threat to their economic interests, they may well band together to lobby for their home state to reverse its policy of refusing to enforce U.S. judgments. If they perceive this development as only a minor inconvenience, however, then they will not lobby for change and the status quo will be maintained.

Whether these individuals perceive a reciprocity requirement as a serious threat to their economic interests will, in turn, depend upon the size of the judgments at issue and the frequency with which enforcement actions occur. If foreign-judgment creditors routinely seek to enforce sizable judgments rendered by their home state's courts in the United States, then they are more likely to pool their resources to lobby for change. If these same individuals enforce judgments rendered by their home state's courts in the United States only rarely, or if the judgments that they seek to enforce are for relatively small amounts, then they are less likely to allocate time and resources to lobbying. The ability of reciprocal legislation to bring about changes to the laws of foreign states, in short, will depend in significant part upon the economic impact that such legislation is likely to have on these judgment creditors.

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133. The analysis in this Part assumes that foreign-judgment creditors are domiciliaries of the foreign state that rendered the original judgment. It assumes, in other words, that the typical configuration will involve a plaintiff from State A seeking to enforce a judgment rendered by a court in State A against a defendant in the United States. This assumption will not hold in all cases. Consider, for example, a scenario whereby a plaintiff from State A brings suit against a U.S. defendant in the courts of State B. If the plaintiff from State A wins the suit, he may seek to enforce the resulting judgment rendered by the State B court in the United States even though the plaintiff himself is not a citizen of State B. While this particular scenario sometimes arises, it is more common to see a judgment creditor seeking to enforce a judgment rendered by a court of the judgment creditor's home state. Accordingly, this is treated as the typical scenario.

134. The nature of the loss associated with a lack of ability to enforce a foreign judgment will vary from case to case. In some cases, it will be the value of the original (unenforced) judgment. In other cases, the loss may be the cost of re-litigating the dispute in the United States. If, for example, a foreign-judgment creditor was unable to enforce a $50 million judgment against a U.S. debtor but successfully re-litigates the case in the United States at a cost of $2.5 million in attorneys' fees, then the judgment creditor's loss is $2.5 million, not $50 million.

Even if one assumes, however, that individuals in a particular state routinely enforce sizable judgments against U.S. defendants in the United States, there remains the question of whether these individuals will in fact come together to lobby for change. If very few of these litigants ever seek to enforce a judgment in the United States more than once, for example, then they may decide not to pool their resources because they (rationally) conclude that their individual costs of organizing are likely to exceed the individual benefits of changing the law.[135] In these cases, it is possible that an existing organization such as a trade association (or perhaps the local equivalent of the chamber of commerce) will step in to advance the general interests of the business community.[136] If this particular cause enjoys only diffuse and general support across its membership, however, it is possible that the organization will decide to allocate its time and resources to other projects that its members support more intensely.[137]

It is, of course, always possible that a single judgment creditor (or group of creditors) that has obtained (or is in a position to obtain) a judgment of exceptional size will conclude that it is in its economic interest to lobby for a change in the law even if the odds of repeat play are low.[138] This is arguably what happened in California in 1907.[139] When the size of a judgment is sufficiently large, then the lobbying costs may be viewed as worthwhile even if the plaintiff will never again seek to enforce another judgment in the United States. Judgments of exceptional size are, however, fairly rare.[140] In addition, a foreign legislature may be wary of amending its laws relating to the

135. *See* DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 489 (1992) ("Rational maximizers decide to form an interest group just as they make any other decision, by comparing the costs with the benefits.").

136. *See id.* at 490 ("Groups already formed to achieve another joint purpose . . . have a distinct cost advantage when it comes to lobbying."); *see also* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 47 (1965) ("In certain cases a group will already be organized for some other purpose, and then these costs of organization are already being met.").

137. *See* BARNES & STOUT, *supra* note 135, at 489 ("[T]he more intense the interest of individual group members, the more likely a group will be formed.").

138. *See* Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1447–48 (2011) (discussing an $18 billion judgment against Chevron rendered by a court in Ecuador); Wurmnest, *supra* note 79, at 186 (discussing efforts by California-judgment creditors seeking to enforce U.S. judgments against German insurance companies after the San Francisco Earthquake of 1906).

139. *See supra* Part III.A.1.

140. *See infra* Table 1.

enforcement of judgments—which are laws of general application—solely for the purpose of benefiting a single judgment creditor.

It is also possible that foreign-judgment creditors would respond to a reciprocity requirement not by lobbying for change but rather by developing workarounds. They may, for example, choose to write arbitration clauses into contracts that they negotiate with their American partners; foreign arbitral awards are enforceable in the United States under the New York Convention, a legal regime that is separate and distinct from the one relating to the enforcement of foreign judgments.[141] Alternatively, they could choose to bring suit in the United States in the first instance, thereby avoiding the need to seek enforcement of any foreign judgment. There are, to be sure, potential problems associated with each of these alternatives. Arbitration is increasingly costly and is rarely (if ever) available in tort suits.[142] Further, the costs of litigating in the United States may include language difficulties, a lack of familiarity with the U.S. legal system, and the inconvenience of transporting witnesses to the United States to testify. Nevertheless, the costs of arbitrating disputes or litigating them in the United States may be viewed as sufficiently manageable so that foreign-judgment creditors see little upside in investing time and resources into lobbying to change their home state's laws relating to the enforcement of judgments.

In summary, actual and potential foreign-judgment creditors are the engine that will drive the process of legal reform in response to a

141. *See* U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *see also* 9 U.S.C. §§ 201–208 (2012) (legislation implementing the Convention in the United States). Since the New York Convention has been so widely ratified—it is currently in force in more than 144 states, including the United States—it is easier to enforce a foreign arbitral award than to enforce a foreign judgment in many states. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, UNCITRAL (2014), http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (providing updates on the status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The viability of arbitration as an alternative to litigation, in other words, has arguably given private parties little incentive to lobby aggressively for changes to the laws relating to the enforcement of foreign judgments.

142. *See* Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 8 (noting the increased cost of arbitration relative to litigation); Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing an Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 544 (2005) (observing that the Hague Choice of Court Convention, which makes it easier to resolve international disputes in national courts, "was designed to help the middle class litigant, not just the large multinational corporations which tend to resolve transnational disputes through arbitration" (footnote omitted) (internal quotation marks omitted)).

policy of judgments reciprocity. As the individuals in the foreign state who will feel the sting of a reciprocity requirement most keenly, they are the ones who will be most motivated to lobby for change. If judgment creditors from a particular state are unwilling, unable, or uninterested in lobbying their legislature for any reason, then any U.S. reciprocity provision relating to the enforcement of judgments is unlikely to have its desired effect in that state.

B. Other Interest Groups

The incentives of foreign-judgment creditors, while important, are not the whole story. In order to fully account for the interest-group dynamics in a foreign state, it is also necessary to consider the incentives of other interest groups.

One such group consists of actual and potential judgment debtors. Actual judgment debtors are individuals in the foreign state who have already lost lawsuits in the United States. Potential judgment debtors are individuals in the foreign state who fear that they may someday lose a lawsuit in the United States.[143] Since these debtors currently reside in a state that refuses to enforce U.S. judgments, they have the ability to force a past or future U.S.-judgment creditor to settle a successful suit brought against them in the United States at a discount—or to force the creditor to re-litigate the dispute in the courts of the debtors' home state—so long as they lack sufficient U.S. assets to satisfy the judgment. If the debtors' home state were to amend its laws to make it easier for creditors to enforce U.S. judgments, however, then the judgment debtors would lose these advantages.[144] These individuals are therefore likely to oppose any effort to change the laws of the foreign state, provided

143. In evaluating the incentives of this group, the views of potential judgment debtors are likely to play as important a role as those of actual judgment debtors. *See* Baumgartner, *supra* note 17, at 980 ("[I]n this context, perception is more important than reality.").

144. *See* WHINCOP & KEYES, *supra* note 64, at 157, 160 (discussing reasons why individuals might prefer that their state not recognize foreign judgments). There is evidence that foreign interest groups have in the past sought to make it more difficult for U.S.-judgment creditors to enforce U.S. judgments in their home states. *See* Baumgartner, *supra* note 17, at 990 (arguing that "there have been more general efforts by [foreign] individuals and groups to change recognition doctrine so as to render the recognition and enforcement of U.S. judgments more difficult").

that the perceived benefits of lobbying against the change are great enough to overcome the costs of organizing.[145]

Legal academics and judges may also play a role in shaping a particular foreign state's potential response to a reciprocity requirement. A number of studies have shown that academics gain status within the legal profession by becoming involved in legal reform.[146] In situations in which the issue in question is somewhat technical, is of only intermittent concern to most businesses, and is primarily the province of lawyers—all of which is arguably true in the judgments context—the possibility arises that foreign legal academics may play a role in determining their state's response. It is also possible that the foreign judges will choose to weigh in with their views.[147] It is, however, difficult to gauge in the abstract how each of these groups would respond to the imposition of a reciprocity requirement. On the one hand, one could imagine a cadre of reformist legal academics and judges coming together to support a proposal to liberalize the current laws relating to the enforcement of

145. Further, if actual and potential judgment debtors view the U.S. legal system as generating fair and reasonable outcomes, then they are unlikely to oppose the proposed change. If they view the system as a lottery that routinely generates windfalls for undeserving plaintiffs, then they are likely to oppose these changes. Anecdotal evidence suggests that the perception of the U.S. civil justice system in a number of European states is not particularly positive, but more research is necessary to determine whether these views would coalesce into a lobbying effort. *See, e.g.*, Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 213 (2008) (observing that the prevalent view in Germany has long been "of a U.S. litigation system in which strike suits are rampant and in which defending such suits is an unreasonably expensive proposition").

146. *See, e.g.*, Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 610 (1995) ("[Legal reformers] differ from interest group members in two relevant ways. First, a reformer derives utility from a [private legislature]'s passage of a reform proposal independently of whether the proposal ultimately becomes law. The reformer is commonly a law professor who can write about and teach [private legislature] proposals because the proposals are plausible candidates for becoming law. Moreover, status in academia attaches to one who causes a [private legislature] to adopt a proposal. In contrast, an interest group member derives utility from [private legislature] adoption of a proposal only when adoption increases the likelihood or reduces the costs of securing ultimate, stable legislative enactment."); *see also* Robert K. Rasmussen, *The Uneasy Case Against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1122 (2002) (noting that academics may choose to become involved in legal reform out of a desire for cultivating "prestige with the practicing bar").

147. *Cf.* Christopher E. Smith, *Judicial Lobbying and Court Reform: U.S. Magistrate Judges and the Judicial Improvements Act of 1990*, 14 U. ARK. LITTLE ROCK L.J. 163, 173 (1992) (discussing federal judicial lobbying in the United States).

judgments.[148] On the other hand, one could just as easily imagine these groups banding together to oppose any changes to the law because of their discomfort with certain elements of U.S. legal practice.[149] The precise reaction among these groups is likely to vary depending on the foreign state in question.

Still another group that may have an interest in the outcome of any lobbying effort is the local plaintiffs' bar. If such a group exists within a particular foreign state, then it will have a strong incentive to preserve the ability of judgment creditors to enforce their home state's judgments in the United States. All things being equal, these attorneys would prefer to be able to litigate at home and enforce abroad because, in most cases, they will be licensed to practice law only in their home jurisdiction. If a client must re-litigate a dispute in the United States as a result of a reciprocity requirement, these attorneys will not be able to earn fees from the second representation. Indeed, depending on the local rules, these attorneys may find that they will not be paid for their work in the first representation until the second is resolved. From the perspective of the plaintiffs' bar, therefore, there is good reason to prefer a legal rule that facilitates the enforcement of local judgments in the United States. In some cases, such as those involving tort victims, the plaintiffs' bar may actually be better positioned to lobby for change than the clients (who are formally the judgment creditors) because of existing organizational advantages and because they are more likely to be repeat players. The incentives of this group will, however, largely track those of the foreign-judgment creditors. If these creditors rarely seek to enforce judgments in the United States, then their attorneys will see little need to lobby the legislature in order to preserve their clients' ability to do so.

C. National Institutions

In gauging how likely it is that any one of these interest groups will be successful in its lobbying efforts, it is also important to consider the national institutional structures in which these efforts will take place.[150] In congressional systems such as the United States,

148. *Cf. supra* note 129 (noting that changing views among French academics helped pave the way to a change in French enforcement practice during the 1960s).

149. *See* Baumgartner, *supra* note 18, at 1338–44 (discussing the changing views of German legal academics regarding the desirability of enforcing U.S. judgments).

150. In conducting this inquiry, it would be a mistake to assume that models of interest-group politics developed by U.S. legal scholars in the specific context of U.S. institutions

for example, interest groups may play a more active role in shaping legislation because congressional leaders assemble legislative voting coalitions one policy issue at a time.[151] In parliamentary systems such as those used in much of Europe, by contrast, interest groups may play a reduced role because the vote of confidence procedure promotes discipline within the governing coalition and reduces the need for legislators to obtain information from lobbyists.[152]

Still other differences may stem from the idiosyncratic characteristics of specific national political structures. In Italy, for example, scholars have long observed that interest groups play a more influential role at certain ministries (labor, industry, commerce) than at others (war, interior, foreign affairs).[153] And, at least historically, national interest groups are generally viewed by scholars as exercising less influence over legislatures in Ireland, Portugal, and Spain than over legislatures in Austria, Finland, and the Netherlands.[154] In-depth studies of the national parliaments of France and Germany have also shown that interest groups exercise varying degrees of power in each of these two bodies.[155] These institutional factors will also play a role in determining the ultimate result of any lobbying effort assuming, again, that the engine driving such an effort—foreign-judgment creditors—is committed to the project.

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may be applied directly to evaluate how interest groups operate in other national political systems; one French legal scholar has described "the vanity and the dangers of such a position." Joseph LaPalombara, *The Utility and Limitations of Interest Group Theory in Non-American Field Situations*, 22 J. POL. 29, 29 (1960) (quoting Jean Meynaud, *I gruppi d'interesse in Francia*, 4 STUDI POLITICI, July–Sept. 1957, at 433–34).

151. *See* Morten Bennedsen & Sven E. Feldmann, *Lobbying Legislatures*, 110 J. POL. ECON. 919, 942 (2002).

152. *See id.* at 942–43.

153. *See* LaPalombara, *supra* note 150, at 43–44.

154. *See* Ulrike Liebert, *Parliamentary Lobby Regimes*, *in* PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 407, 430–33 (Herbert Döring ed., 1995) (discussing the dynamics of lobbying the executive and how these differ from those of lobbying the legislature).

155. *See* JOHN D. HUBER, RATIONALIZING PARLIAMENT: LEGISLATIVE INSTITUTIONS AND PARTY POLITICS IN FRANCE 94–95 (1996) (discussing the role of interest groups in French parliament); KLAUS VON BEYME, THE LEGISLATOR: GERMAN PARLIAMENT AS A CENTRE OF POLITICAL DECISION-MAKING 48–62 (1998) (discussing the role of interest groups in German parliament). *See generally* INTEREST GROUPS ON FOUR CONTINENTS (Henry W. Ehrmann ed., 1958) (discussing the varying roles of interest groups in a number of nations).

V. RETHINKING JUDGMENTS RECIPROCITY

Having developed an analytical framework for evaluating the impact of reciprocal legislation in the judgments context as a theoretical matter, this Part considers whether a U.S. policy of judgments reciprocity would, in fact, prompt the foreign states that currently refuse to enforce U.S. judgments to change their position. To this end, it first discusses the differences between the various rules of reciprocity that the United States could adopt. It next identifies the states whose judgments would be affected by one such rule—the one proposed by the American Law Institute in 2006—and considers how actual and potential judgment creditors in those states would be affected by such a policy.[156] This Part ultimately concludes that the rule of reciprocity proposed by the ALI is highly unlikely to motivate judgment creditors in the states that currently refuse to enforce U.S. judgments to lobby for change and that, as a consequence, U.S. nationals are unlikely to benefit from the adoption of this rule at the federal level.

A. The Relevant Rule of Reciprocity

While all reciprocal legislation seeks to achieve the same basic goal, not all reciprocity provisions are created equal. A particular statute may, for example, adopt a test of strict reciprocity that allows for very few exceptions. Alternatively, a statute may impose a general obligation of reciprocity but carve out enough exceptions to this rule that it is somewhat lenient in practice. There are at least three ways in which one rule of reciprocity may differ materially from another: (1) its scope of general application, (2) the assignment of the burden of proof, and (3) carve-outs to its scope of application.

First, the scope of a particular reciprocity provision may vary depending on the precise language chosen by its drafters. In Massachusetts, for example, the reciprocity provision literally applies to *any* judgment rendered by any court in the foreign state.[157] A refusal on the part of a foreign state to respect a judgment of divorce entered by a Massachusetts court, therefore, could potentially provide

156. The analysis in this Part also assumes that there is no "bundling" of related issues—such as trade or military aid—that could prompt interest groups otherwise uninterested in the enforcement of foreign judgments to support a change in the law on this topic. The possibility of bundling is discussed in the Conclusion.

157. MASS. ANN. LAWS ch. 235, § 23A (LexisNexis 2009) ("A foreign judgment shall not be recognized if . . . judgments of this state are not recognized in the courts of the foreign state.").

grounds for a Massachusetts court to refuse to recognize a money judgment rendered by that same state. The drafters of the ALI's statute, by contrast, stipulate that reciprocity shall be denied only in cases where a foreign court would not enforce *comparable* judgments rendered by courts in the United States.[158] Under this approach, a refusal on the part of a foreign court to recognize a judgment of divorce entered by a U.S. state would not be grounds for a U.S. court to refuse to recognize a money judgment rendered by the foreign court.

Second, the impact of a particular reciprocity provision will in many cases depend on which party is assigned the burden of proof. In Georgia, for example, the foreign-judgment creditor bears the burden of proving that the rendering state *would* enforce a U.S. judgment.[159] Under the rule proposed by the ALI, by contrast, the judgment debtor in the United States bears the burden of proving that the rendering state *would not* enforce a U.S. judgment.[160] In close cases, where the precise nature of foreign practice is unclear, there is a much greater likelihood that a foreign judgment will be enforced if the burden of proving a lack of reciprocity is placed on the U.S.-judgment debtor.

Third, and finally, a reciprocity provision may expressly carve out certain types of judgments from its ambit. The rule proposed by the ALI, for example, states that a refusal on the part of a foreign court to enforce U.S. judgments for "punitive, exemplary, or multiple damages shall not be regarded as denial of reciprocal enforcement of judgments . . . if the courts of the state of origin would enforce the compensatory portions of such judgments."[161] The effect of this particular carve-out is to limit the impact of the reciprocity provision; many foreign countries refuse to enforce those portions of U.S. judgments that award punitive or multiple damages.[162] In effect, this

158. AM. LAW INST., *supra* note 6, § 7(a) ("A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that comparable judgments of courts in the United States would not be recognized or enforced in the courts of the state of origin.").

159. *See* Shehadeh v. Alexander, 727 S.E.2d 227, 229 (Ga. Ct. App. 2012).

160. AM. LAW INST., *supra* note 6, § 7(b).

161. *Id.* § 7(d).

162. *See, e.g.*, Baumgartner, *supra* note 17, at 993–96 (discussing concern among foreign judges about U.S. punitive damages awards); Comm. on Foreign & Comparative Law, *supra* note 32, 391–93 (same); *Discussion of International Jurisdiction and Judgments*, *supra* note 17, at 457 (remarks of Prof. Catherine Kessedjian) ("[E]verybody fears to be obliged to enforce what they consider to be excessive judgments coming out of U.S.

provision directs U.S. courts to find that reciprocity exists even in cases where the foreign state in question refuses to enforce certain types of U.S. money judgments.

The precise character of the chosen rule of reciprocity—its scope of application, its assignment of the burden of proof, and its various carve-outs—will not alter the nature of the basic inquiry outlined in Part IV. It will, however, serve to limit (or to expand) the number of nations in which it is necessary to consider the likely response of various interest groups. If a particular nation refuses to enforce U.S. punitive judgment awards but enforces other U.S. money judgments, for example, judgment creditors from that nation will not be affected by the rule of reciprocity proposed by the ALI because of the carve-out provision. The precise rule chosen will thus "pre-screen" for states that are likely to be affected by that rule. If judgments from a particular state would not be affected, then the rule change is unlikely to have any impact upon interest groups in those states. In these situations, there is no need to inquire as to how these interest groups from such states will react.

The analysis below uses the ALI rule as its baseline for several reasons. First, this rule has received an enormous amount of scholarly attention since it was first proposed in 2006.[163] Second, this rule won the endorsement of a significant number of prominent U.S. academics who are familiar with the debates surrounding the use of reciprocity in the judgments context.[164] Third, and finally, if Congress should choose to take up legislation on the topic of foreign judgments, the ALI rule may well serve as the starting point for any legislative proposal. With this rule in mind, the Article next considers how it would impact the ability of judgment creditors to enforce certain foreign judgments in the United States.

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courts."); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. TIMES, Mar. 26, 2008, at A1 ("The U.S. practice of permitting a lay jury to exercise largely discretionary judgment with limited constraints in awarding punitive damages is regarded almost universally outside the U.S. with a high degree of disfavor." (quoting Gary Born) (internal quotation marks omitted)).

163. *See supra* note 9 (collecting sources).

164. *See Discussion of Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute*, *supra* note 8, at 159 (remarks of Michael Traynor, President, Am. Law Inst.).

B. *The Impact of Reciprocity*

There has long been a perception that judgments rendered by U.S. courts fare quite poorly when one seeks to enforce them abroad.[165] There is doubtless some truth in this.[166] In many cases, however, the difficulties that arise when one seeks to enforce U.S. judgments overseas are not the result of outright refusals on the part of foreign courts to enforce all U.S. judgments. Rather, these difficulties stem from reluctance among other nations to enforce certain types of U.S. judgments under certain circumstances. It is therefore important to distinguish between states that refuse to enforce U.S. judgments outright and those that will enforce U.S. judgments if certain conditions are satisfied. The goal of this analysis is not to offer a comprehensive account of each nation's recognition regime but, rather, to sort foreign states into two groups—those whose judgments would likely be affected by a U.S. reciprocity requirement and those that likely would not.[167]

1. Affected Countries

A small number of countries simply refuse to enforce any and all foreign judgments, including U.S. judgments. Indonesia is the most prominent example of such a nation.[168] Other countries generally prohibit national courts from recognizing and enforcing foreign judgments in the absence of a judgments treaty between the two nations. A number of European nations—including Austria, Denmark, Finland, Iceland, Norway, and Sweden—have adopted

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165. Baumgartner, *supra* note 145, at 175; Miller, *supra* note 4, at 292. *But see* Matthew H. Adler, *If We Build It, Will They Come?–The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 L. & POL'Y INT'L BUS. 79, 82 (1994) ("Although there are many scholarly works that discuss the perceived problems litigants face in seeking recognition and enforcement of U.S. judgments, this perception currently is not supported by empirical data." (footnotes omitted)); Zeynalova, *supra* note 52, at 172–78 (discussing lack of reliable empirical data as to foreign practice).

166. *See* Baumgartner, *supra* note 145, at 184–85.

167. Each nation's recognition regime is, to be sure, unique and idiosyncratic. One must be cautious about drawing generalizations about any one regime because there are inevitably exceptions and counterexamples that cut against the generalization. This Part makes a number of assertions about foreign state practice based on the prevailing views in the U.S. legal literature, but it does not attempt to provide a comprehensive account of how other nations decide whether and under what circumstances to enforce foreign judgments.

168. *See* Frank Partnoy, *Why Markets Crash and What Law Can Do About It*, 61 U. PITT. L. REV. 741, 796 (2000) ("In Indonesia, foreign court judgments generally are not enforceable.").

such a rule.[169] Since each of these states has declined to enter into any judgments treaty with the United States, U.S. judgments are generally unenforceable in each. In other countries still, it may be possible to enforce U.S. judgments as a formal legal matter, but it may be difficult (if not impossible) to achieve this end in practice. This arguably describes the situation in China and Saudi Arabia.[170] If the United States were to adopt the ALI rule, therefore, it would likely become impossible to enforce in the United States judgments rendered by courts in any of the above nations.[171] The key question is how interest groups in each of these states would be likely to react to such a development.

a. Indonesia

Indonesia is one of the few states that refuse to enforce any foreign judgments.[172] If the United States were to adopt a policy of judgments reciprocity, therefore, actual and prospective judgment creditors in that nation would, at least in theory, be incentivized to lobby to change this practice so as to preserve their ability to enforce Indonesian judgments in the United States. Whether Indonesian-judgment creditors would, in fact, undertake this project is a complex question. There are, however, at least two reasons to suspect that a U.S. reciprocity requirement would be unlikely to lead to any change in Indonesian law.

First, it is unclear that judgment creditors in Indonesia would perceive an inability to enforce Indonesian judgments in the United States as a serious threat to their economic interests. So far as can be determined, there is not a single reported case in which a judgment creditor sought to enforce an Indonesian judgment in the United States, which is suggestive (though not conclusive) that such enforcement actions are relatively rare. If Indonesian-judgment

169. *See* Baumgartner, *supra* note 145, at 184–85. Austria also permits its courts to enforce judgments rendered by states that are on an "approved" list kept by the Austrian Ministry of Justice. *Id.* at 184–85, 191–92. To date, the United States has not been placed on the list for civil money judgments, though it is possible to enforce U.S. judgments relating to support payments in Austria. *See id.* at 185.

170. *See infra* notes 187–89 and accompanying text.

171. This list is intended to be illustrative rather than exhaustive; there are doubtless other nations that are unlikely to enforce U.S. judgments. These nameless other nations, however, have attracted so little attention in American legal literature that the inability of U.S.-judgment creditors to enforce U.S. judgments in those jurisdictions is probably not of great significance.

172. *See* Partnoy, *supra* note 168, at 796.

creditors rarely enforce their judgments in the United States, then a new inability to do so will not meaningfully affect their economic interests and, hence, will not lead them to lobby for change.

Second, Indonesia has already shown itself to be more or less indifferent to reciprocity requirements put in place by other countries. Indonesia is geographically proximate to China, Japan, Singapore, and South Korea. Its trading relationships with each of these nations are at least as extensive as its trading relationship with the United States and, in the case of Japan, much more so.[173] Each of these nations has long maintained a policy of judgments reciprocity.[174] To date, however, Indonesia has declined to change its laws relating to enforcement of foreign judgments. If the adoption of a reciprocity requirement by no fewer than four other states with comparably extensive trading relationships with Indonesia has failed to bring about any change in Indonesian law, the odds that a U.S. reciprocity requirement would be the proverbial straw that breaks the camel's back seem slim.

b. The Nordic States and Austria

The Nordic states—Denmark, Finland, Iceland, Norway, and Sweden—have long refused to enforce foreign judgments in the absence of a judgments treaty.[175] These states have also declined to negotiate any judgments treaties with the United States and, consequently, it is currently impossible to enforce U.S. judgments in these states under most circumstances.[176] If the United States were to adopt a policy of judgments reciprocity, then virtually all judgments rendered by these states would no longer be enforceable in the

173. *See Indonesia*, U.N. COMTRADE, http://comtrade.un.org/pb/FileFetch.aspx?docID=4848&type=country%20pages (last visited Apr. 11, 2014) (stating that Indonesian exports to Japan totaled approximately $26 billion in 2010 and that its exports to China, the United States, Singapore, and Korea totaled $16 billion, $14 billion, $14 billion, and $13 billion, respectively, during that same year).

174. *See* Minsa sosong beob [Civil Procedure Act], Act No. 547, Apr. 4, 1960, art. 217, *amended by* Act No. 10,629, May 19, 2011 (S. Kor.); Reciprocal Enforcement of Foreign Judgments Act, Mar. 26, 1959, cap. 265, § 12, *as amended* (Singapore); Kobayashi & Furuta, *supra* note 32, at 117 (Japan); Liu, *supra* note 32, at 270–71 (China).

175. *See* Baumgartner, *supra* note 145, at 184.

176. *See id.* at 227. There are several limited exceptions to this rule. Norway and Sweden will enforce judgments from states with which they have not entered into judgments treaties if there was a forum selection clause in a contract giving exclusive jurisdiction to the courts of the rendering state. *Id.* at 187–88. And Finland will enforce foreign judgments "in cases where, because of lack of personal jurisdiction, the claim could never have been brought in Finland from the outset." *Id.* at 188.

United States. The question then becomes what actions, if any, judgment creditors in the Nordic states would take in response.[177]

To obtain a rough sense of the extent to which an inability to enforce judgments in the United States is likely to be perceived as a serious threat by foreign-judgment creditors in the Nordic States, it is useful to consider actual data about how frequently these creditors seek to enforce judgments in the United States. To this end, I sought to obtain data that sheds light on the question with respect to *all* foreign judgments in the United States. The results are reported in Table 1. This dataset is drawn from (1) federal complaints filed between 2008 and 2012 in which a judgment creditor sought to enforce a foreign judgment in federal court, (2) reported federal cases between 2008 and 2012 in which a judgment creditor sought to enforce a foreign judgment in federal court, and (3) reported state cases between 2008 and 2012 in which a judgment creditor sought to enforce a foreign judgment in state court.[178]

177. Only Norway and Iceland currently have the authority to negotiate a judgments treaty with the United States on a bilateral basis. *See* Thalia Kruger, Case Note, *Opinion 1/03, Competence of the Community to Conclude the New Lugano Convention on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 13 COLUM. J. EUR. L. 189, 194–96 (2006). A recent decision by the European Court of Justice ruled that the competence to enter into civil and commercial judgments treaties with nations outside the European Union now lies exclusively with the European Union; its Member States no longer have the ability to enter into new agreements of this type with third-party countries. *See* Case C-1/03, *In re* Lugano Convention, 2006 ECR I-1145; Baumgartner, *supra* note 145, at 181; Kruger, *supra*, at 198 (2006). Accordingly, Denmark, Finland and Sweden would only be able to respond to the U.S. reciprocity requirement by changing the national rules that govern the enforcement of judgments rendered by non-EU Member states such as the United States. *See* Kruger, *supra*, at 194 ("EU Member States retain the freedom to shape their national rules regarding defendants domiciled in third states."). Norway and Iceland, which are not currently members of the European Union, would be able to respond to the reciprocity requirement either by enacting national legislation or by negotiating a judgments treaty with the United States. *See Member Countries of the European Union*, EUR. UNION, http://europa.eu/about-eu/countries/member-countries/index_en.htm (last visited Apr. 11, 2014) (listing EU members).

178. The methods by which this dataset was collected, and the caveats to which its use is subject, are set forth in the Appendix.

Table 1: Selected Actions to Enforce Foreign Money Judgments in U.S. Courts, 2008–2012

Country	Number of Enforcement Actions	Total Size of Foreign Judgments (USD, in millions)
Nigeria	5	308.5
England	25	207.7*
Switzerland	2	103.6
Nicaragua	1	97.0
Japan	2	68.8
Germany	6	29.6
Bahrain	1	25.0
Mexico	3	21.4
Kuwait	1	20.3
Korea	5	20.6*
France	2	14.5
Belgium	3	12.8*
Canada	12	3.6**
Netherlands	3	3.6*
Qatar	1	3.6
Gibraltar	1	3.2
Israel	2	2.4
Australia	3	2.1
Russia	2	2.2
China	4	1.8*
Malta	1	1.1
Philippines	1	1.0
Micronesia	1	0.5
Dubai	1	0.5
Brazil	1	0.4
Norway	1	0.3
Hong Kong	1	0.3
Sweden	2	0.2
Argentina	1	0.2
Estonia	1	0.2
Italy	1	0.2
India	1	0.1
Poland	1	0.1
Uruguay	1	0.1

Source: Federal complaints (PACER) and reported state and federal court decisions (LexisNexis)

* One of the reported cases from this country did not disclose the size of the judgment.

** Four of the reported cases from this country did not disclose the size of the judgment.

Significantly, there is little in Table 1 to suggest that judgment creditors in the Nordic States would perceive a new inability to enforce judgments in the United States as a serious threat to their economic interests. The table indicates that in the five-year period between 2008 and 2012, there was one enforcement action brought by a judgment creditor from Norway (for $300,000) and two enforcement actions brought by judgment creditors from Sweden (for $200,000). There were no enforcement actions brought by judgment creditors from Denmark, Finland, or Iceland during this same time period. This dataset is, to be sure, subject to important limitations and qualifications.[179] Nevertheless, it is the best dataset currently available and there is very little in it to suggest that judgment creditors in any of these states would perceive a loss of their ability to enforce their home judgments in the United States as a serious blow.

An alternative (if still imperfect) means of weighing the intensity of interest among judgment creditors in the Nordic States is to consider the number of reported state and federal cases in the United States over the past fifty years in which a judgment creditor has sought to enforce a judgment from one of these states.[180] These findings are presented in Table 2.

Table 2: Reported State and Federal Cases Involving Actions to Enforce Money Judgments Rendered by Courts in Nordic States (1963–2012)

Sweden	4	Iceland	0
Denmark	0	Norway	0
Finland	0		

Source: Reported state and federal court decisions (LexisNexis)

Even taking into account the selection bias inherent in using reported cases as opposed to filed complaints, the results of this inquiry are striking. Over the past fifty years, there does not appear to have been a single reported case in the United States in which a judgment creditor sought to enforce a money judgment rendered by a

179. *See* Appendix.

180. This inquiry is different from the one detailed in Table 1 in that (1) the time frame is longer, and (2) the only source of data is state and federal reported cases; complaints from the federal courts are not included.

court in Denmark, Finland, Iceland, or Norway.[181] Over that same time period, there have been exactly four reported cases in which such a creditor has sought to enforce a judgment from Sweden.[182] As a point of comparison, there are at least sixty reported cases over this same time period in which a litigant sought to enforce a judgment from England.[183]

These patterns of past enforcement practice suggest that actual and potential judgment creditors in the Nordic States are more likely to react to a U.S. reciprocity requirement with a shrug than with a call to their elected representatives. When one considers further the fact that judgment creditors who may wish to lobby for change face relatively high organizing costs, the low probability that most judgment creditors will be repeat players, and the lack of any direct and immediate payoff to lobbying in many cases, the odds that a lobbying campaign will be launched dwindle further. Add in the fact that individuals in each of these states may choose to write enforceable arbitration clauses into their commercial agreements with U.S. partners, and to enforce any resulting arbitral award in the United States pursuant to the New York Convention,[184] and legislative change appears even less likely.

The foregoing analysis applies with equal force to Austria, subject to one minor caveat. The Ministry of Justice in Austria maintains a certified list of states whose judgments are presumptively entitled to enforcement in Austria even in the absence of a treaty between Austria and that nation.[185] It may perhaps be less costly for judgment creditors in Austria to persuade their Ministry of Justice to

181. This does not mean that no judgments from these nations were enforced in the United States during this time. As Table 1 indicates, there was one enforcement action brought with respect to a Norwegian judgment during the past five years. It does suggest, however, that actions to enforce judgments rendered by courts in these nations are relatively rare.

182. *See* Compagnie Noga D'Importation Et D'Exportation S.A. v. Russian Fed'n, No. 00 Civ. 0632 (WHP), 2002 U.S. Dist. LEXIS 17749, at *1 (S.D.N.Y. Sept. 19, 2002) (attempt to enforce Swedish judgment in U.S. court), *vacated*, 361 F.3d 676 (2d Cir. 2004); Svenska Handelsbanken v. Carlson, 258 F. Supp. 448, 451 (D. Mass. 1966) (same); Baker & McKenzie Advokatbyra v. Thinkstream Inc., 20 So. 3d 1109, 1111 (La. Ct. App. 2009) (same); Bonnierföretagen v. Harrison, No. CIV. A. 92-0056-D, 1996 WL 511747, at *3 (Mass. Super. Ct. Sept. 4, 1996) (same).

183. *See* John F. Coyle, Reported State and Federal Cases Involving Actions to Enforce a Money Judgment Rendered by an English Court, 1963–2012 (spreadsheet on file with the author).

184. *See supra* note 141 and accompanying text.

185. *See* Baumgartner, *supra* note 145, at 184–85, 191–92.

add the United States to the list than it would be for individuals in the Nordic States to lobby their respective parliaments. If this is the case, then there may be an incrementally greater chance that a reciprocity requirement would bring about a change in Austrian state practice. All told, however, the prospects for change in Austria seem similarly grim simply because there is so little evidence that a reciprocity requirement would have a meaningful economic impact on judgment creditors there. Over the past fifty years there has been only one reported case—state or federal—in which a judgment creditor sought to enforce an Austrian judgment in the United States.[186]

c. China and Saudi Arabia

Whether a U.S. reciprocity requirement would be likely to bring about a meaningful change in the law and practice of China and Saudi Arabia necessitates a slightly different inquiry from the one undertaken above. The issue in each of these states is not the law on the books, which suggests that U.S. judgments will be enforced as a matter of course, but the way the law is applied in practice.

With respect to China, for example, one commentator has stated that while in theory a foreign party may apply to an Intermediate People's Court to enforce a foreign judgment, it is in practice difficult to convince a court to enforce a foreign judgment in China.[187] Similarly, one observer has noted that Saudi Arabia, in theory, provides a forum in which parties may enforce a judgment against a Saudi Arabian party obtained abroad: parties may submit their judgment to the Board of Grievances.[188] In reality, however, that Board rarely enforces judgments rendered by foreign courts, except for the occasional judgments from other members of the League of Arab States.[189] The question presented, therefore, is whether the adoption of a reciprocity requirement by the United States would be likely to bring about a change in the status quo. On the whole, such an outcome seems unlikely due to the lack of an institutionalized

186. *See* Kreditverein Der Bank Austria v. Nejezchleba, 477 F.3d 942, 944 (8th Cir. 2007).

187. *See* Ariel Ye, *Enforcement of Foreign Arbitral Awards and Foreign Judgments in China*, 74 DEF. COUNS. J. 248, 251–52 (2007).

188. *See The Saudi Legal System*, JAPAN DISP. AVOIDANCE NEWSL. No. 82 (Herbert Smith LLP, Tokyo, Japan), June 2009, *available at* http://ghazzawilawfirm.com/files/Dispute%20avoidance%20newsletter%20June%202009.pdf.

189. *Id.*

process in each of these states through which interest groups may influence elected representatives.

The bite of any U.S. reciprocity requirement, it should be remembered, would not be felt directly by the governments of China and Saudi Arabia. Instead, it would be felt by judgment creditors in those states with unenforced judgments against defendants in the United States.[190] In democratic states, interest groups frequently have the ability to shape official policy by lobbying elected officials. These officials will, at least in theory, be receptive to these overtures because they implicitly carry the promise of votes and campaign support. In a hereditary monarchy like Saudi Arabia—where the king is the head of the state, the commander in chief of the military, and the de facto court of final appeal in the judicial system—the ability of interest groups to lobby for change is limited by the fact that the ultimate decision-maker has no need for votes or campaign support.[191] The capacity for interest groups to bring about a change in government policy is similarly limited in a single-party state like China, where the officials with the power to alter the policy are unelected and accountable primarily to other unelected officials.[192]

This is not to suggest that individuals in Saudi Arabia or China are powerless to affect government policy; no government can endure by entirely ignoring the needs of its citizens. It is, however, to suggest that the ability of judgment creditors to lobby for a change in the way that the law is administered will be constrained in these states, given the fact that the officials tasked with deciding this issue are neither elected nor accountable to other elected officials. Accordingly, it seems unlikely that the adoption of a policy of judgments reciprocity by the United States would bring about a change in the way existing laws are applied in either China or Saudi Arabia because, as a structural matter, the interest groups most likely to be injured by such a policy are limited in their ability to influence policy.

Even if this were not the case, however, there is nothing in Table 1 to suggest that an inability to enforce judgments from either country in the United States would have a substantial economic impact on

190. *See supra* Part IV.A (noting that the economic impact of any reciprocity policy would be most keenly felt by the actual and potential foreign-judgment creditors).

191. *See* A. Michael Tarazi, Recent Development, *Saudi Arabia's New Basic Laws: The Struggle for Participatory Islamic Government*, 34 HARV. INT'L L.J. 258, 264–65 (1993) (listing the several ways in which the king has unconstrained powers).

192. *See* Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 UCLA J. INT'L L. & FOREIGN AFF. 227, 297 (2004).

foreign-judgment creditors. Between 2008 and 2012, no enforcement actions were brought with respect to judgments from Saudi Arabia. During that same time period, only four such actions were brought with respect to Chinese judgments, the known value of which was only $1.8 million. These numbers are quite small relative to those of other states and provide an additional reason to suspect that a reciprocity requirement would have little impact on practice in either China or Saudi Arabia.

* * *

The foregoing analysis suggests that a U.S. reciprocity requirement would be highly unlikely to generate change in many states that categorically refuse to enforce U.S. judgments as a matter of law or as a matter of practice. In light of this analysis, it is difficult to imagine any viable means by which a policy of judgments reciprocity would, by itself, ultimately result in benefits to U.S.-judgment creditors seeking to enforce U.S. judgments in these states. This is not, however, the end of the inquiry. It is also important to consider the likely impact of a U.S. reciprocity requirement on states that take a less categorical view of U.S. judgments. This topic is taken up below.

2. Other Countries

This Article next considers the likely impact of the ALI rule on the nations that will enforce U.S. judgments in some situations but not others. Some nations, for example, refuse to enforce those portions of U.S. judgments awarding punitive damages. This is the case in Germany, Italy, and Japan.[193] Other nations, by comparison,

193. *See* Benjamin West Janke & François-Xavier Licari, *Enforcing Punitive Damage Awards in France After* Fountaine Pajot, 60 AM. J. COMP. L. 775, 776 (2012) ("For decades, commentators have lamented the reluctance of European courts to recognize and enforce American judgments awarding non-compensatory damages."); *id.* at 776–77 & n.9 (noting Germany and Italy both refuse to enforce U.S. punitive damages awards on public policy grounds); *see also* Baumgartner, *supra* note 145, at 216–17 (discussing Italian reluctance to enforce U.S. punitive damages awards); Ronald A. Brand, *Punitive Damages Revisited: Taking the Rationale for Non-Recognition of Foreign Judgments Too Far*, 24 J.L. & COM. 181, 185 (2005) (explaining Germany's refusal to enforce U.S. punitive damages judgments); Norman T. Braslow, *The Recognition and Enforcement of Common Law Punitive Damages in a Civil Law System: Some Reflections on the Japanese Experience*, 16 ARIZ. J. INT'L & COMP. L. 285, 293–94 (1999) (noting a decision by the Supreme Court of Japan holding that enforcement of punitive damages violated Japanese public policy); John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391, 396–97 & n.24 (2004) (noting that most civil-law systems view "punitive damages . . . to be a penal sanction that may be imposed only in criminal proceedings").

refuse to enforce U.S. judgments in cases where the basis for the U.S. court's assertion of personal jurisdiction fails to satisfy the local jurisdictional standard. This is the case in England.[194] There is no question that these various rules of recognition will in some cases lead foreign courts to refuse to enforce particular U.S. judgments. None of these rules, however, amount to a de facto ban on the enforcement of U.S. judgments that would obviously trigger a finding that there was a lack of reciprocity. Whether these nations would be impacted by a U.S. reciprocity requirement will depend, therefore, on whether their specific practices would run afoul of the rule proposed by the ALI. There is good reason to think that many of them would not.

The ALI rule, as discussed above, provides that a refusal by a foreign court to enforce U.S. punitive or multiple damage awards shall not be regarded as a denial of reciprocal treatment.[195] This provision means that the current policies of Germany, Italy, and Japan with respect to U.S. punitive damages awards do not run afoul of this particular rule of reciprocity. That same rule, it will be recalled, places the burden of proving non-recognition on the party seeking to avoid enforcement.[196] This provision makes it less likely that a U.S. court will conclude that there is a lack of reciprocity as a result of the jurisdictional tests applied by countries such as England; it will be difficult in many cases for the party resisting enforcement to create a substantial doubt that the courts of these nations would refuse to enforce comparable U.S. judgments.[197]

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194. *See* Rubin v. Eurofinance SA [2012] UKSC 46 (appeal taken from Eng.) (refusing to enforce U.S. bankruptcy judgment because U.K. defendant had never submitted to jurisdiction of U.S. court); Baumgartner, *supra* note 145, at 190. France used to impose a strict jurisdictional test but abandoned it in 2006. *See* Cass. 1e civ., May 23, 2006, Bull. civ. 1, No. 857.

195. *See* AM. LAW INST., *supra* note 6, § 7(d); *supra* note 161 and accompanying text.

196. *See* AM. LAW INST., *supra* note 6, § 7(b); *supra* note 160 and accompanying text.

197. *See* AM. LAW INST., *supra* note 6, § 7(b). The uniform statutory regime for enforcing U.S. judgments in most U.S. states also permits a U.S. court to decline to enforce a foreign judgment if the rendering court lacked jurisdiction according to U.S. jurisdictional standards. *See* UNIF. FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT § 4(b)(2)–(3), 13 pt. II U.L.A. 28 (Supp. 2013); BORN & RUTLEDGE, *supra* note 11, at 1125 (2011) ("Most U.S. courts have reviewed the personal jurisdiction of foreign courts according to U.S. jurisdictional standards, rather than by using the standards applicable under foreign law." (citing cases)); *cf.* Jeff Larsen, Comment, *Enforcement of Foreign Judgments in Latin America: Trends and Individual Differences*, 17 TEX. INT'L L.J. 213, 215 (1982) ("The most nearly universal requirement for recognition and enforcement of a foreign judgment is that the original court must have been competent to decide the case."). While the jurisdictional tests imposed by foreign states are in some cases more stringent than those imposed by U.S. courts, they are not

If the United States were to adopt a policy of judgments reciprocity along the lines suggested by the ALI, therefore, it is not at all clear that this policy would consistently serve to bar the enforcement of judgments rendered by courts in England, Germany, Japan, or Italy.[198] It also seems likely that judgments from Canada, France, Greece, and Spain would continue to be enforceable in many cases, as each of these nations has historically enforced some (if not all) U.S. judgments.[199] Consequently, it seems unlikely that the United States' adoption of this particular reciprocity requirement would generate much in the way of benefits for U.S.-judgment creditors in many states in Western Europe because relatively few judgments rendered by courts in these states would, in fact, be denied recognition by a U.S. court under the rule.[200] If this is correct, then it would not even be necessary to consider the reaction of interest groups in these states because they would be largely unaffected by the new rule.

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qualitatively different in kind, which provides further reason to question whether reciprocity would be found not to exist.

198. *See* Baumgartner, *supra* note 145, at 185–86 (suggesting that England has "recognition requirements that are similar to those set up for judgments recognition in the United States and elsewhere"); *id.* at 213 ("[T]he recognition of U.S. judgments in Germany remains comparatively liberal."); *id.* at 219 ("[T]he Italian courts have been quite generous with the recognition of U.S. judgments."); *id.* ("[T]he Swiss Supreme Court has been quite liberal with the recognition of foreign judgments, including judgments from the United States."); Yasuhiro Fujita, *Enforcing U.S. Judgments in Japan*, L.A. LAW., Dec. 2004, at 19 ("U.S. practitioners should note that Japanese courts are enforcing money judgments rendered by U.S. courts."); *see also* Weintraub, *supra* note 38, at 180 (arguing that "recent changes [in Italy and China] have accelerated the trend toward recognition").

199. *See* Baumgartner, *supra* note 145, at 185; *id.* at 191 ("To the extent that European countries do recognize foreign judgments, their requirements for doing so are considerably similar to those prevailing in the United States."); Russell J. Weintraub, *Recognition and Enforcement of Judgments and Child Support Obligations in United States and Canadian Courts*, 34 TEX. INT'L L.J. 361, 378 (1999) (observing that "if respect for foreign legal proceedings were the same between all countries as it is between the United States and Canada, the world would be a more pleasant and peaceful place").

200. This insight raises the question of why a number of commentators have argued that reciprocity is necessary to give the United States "leverage" in the negotiations relating to the Hague Convention. *See infra* note 206 and accompanying text. The nationals of the states that were the primary stumbling blocks to the successful negotiation of such a treaty were unlikely to feel the sting of reciprocity via the inability to enforce judgments rendered by courts in those states. It was more likely that they would bear the (far more modest) costs of defeating motions to refuse enforcement in the United States for lack of reciprocity. Given the modest nature of the potential sanction, it seems unlikely that the U.S. adoption of a reciprocity requirement would have prompted countries such as France, Germany, Italy, and the United Kingdom to enter into a treaty with which they were otherwise dissatisfied.

It is possible, to be sure, that the ALI's reciprocity requirement would occasionally result in a U.S. court refusing to enforce a judgment rendered by a court in one of the states above. Even if this were the case, however, it would not significantly alter the analysis. A reciprocity requirement is most effective when it successfully motivates all actual and potential judgment creditors in a particular jurisdiction to pull together by threatening them with the loss of their ability to enforce judgments in the United States. A weaker threat necessarily means a weaker incentive effect. Intermittent refusals to enforce foreign judgments on reciprocity grounds are unlikely to lead judgment creditors in these states to pressure their home governments to change their policies vis-à-vis U.S. judgments even if these individuals routinely seek to enforce sizable judgments in the United States. Consequently, there is little reason to believe that these governments will, in fact, change their policies in the face of the ALI's proposed reciprocity requirement.

C. *Summing Up . . . and a Brief Word on Multilateral Judgments Treaties*

The prospect that the reciprocity requirement proposed by the ALI would succeed in changing the behavior of states that currently refuse to enforce U.S. judgments in most or all cases—a list that currently includes Austria, China, Denmark, Finland, Iceland, Indonesia, Norway, Saudi Arabia, and Sweden—is doubtful.[201] The prospect that this particular rule would succeed in changing the behavior of certain states that enforce U.S. judgments under some (but not all) circumstances—a list that currently includes Canada, England, France, Germany, Greece, Italy, Japan, and Spain, among others—is likewise doubtful.[202] Accordingly, the likelihood that a U.S. policy of judgments reciprocity modeled along the lines suggested by the ALI would offer substantial benefits to U.S. nationals is remote. As the foregoing analysis has shown, there is simply no obvious mechanism by which this requirement seems likely to generate the changes that would be necessary for these benefits to be realized.

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201. *See supra* Part V.B.1.a (discussing Indonesia's refusal to enforce foreign judgments); Part V.B.1.b (discussing the Nordic States' and Austria's refusal to enforce foreign judgments in the absence of a judgments treaty); Part V.B.1.c (analyzing whether a reciprocity requirement would lead to change in the law and practice of China and Saudi Arabia).

202. *See supra* Part V.B.2 (analyzing the possible impact of the ALI rule in countries that enforce U.S. judgments in some situations but not others).

In light of this conclusion, the not insignificant costs of a regime premised on reciprocity loom large. These costs include the administrative costs of determining foreign state practice,[203] the perceived unfairness of punishing foreign-judgment creditors for the sins of their governments,[204] and the inefficiency inherent in requiring two parties to litigate the same dispute twice.[205] Given the low probability that this particular regime of judgments reciprocity will generate benefits for U.S. nationals, its costs counsel strongly against its adoption.

Notably, this conclusion would stand even if the ultimate goal of the reciprocity provision were to give the United States additional leverage in international negotiations rather than to encourage foreign legislatures to amend their laws. A number of commentators have noted that one of the reasons for including the reciprocity provision in the ALI draft statute in the first place was to strengthen the hand of the U.S. delegation to the conference to negotiate the Hague Convention on Jurisdiction and Foreign Judgments.[206] Officials representing the United States, which has traditionally taken a relatively liberal attitude to enforcing foreign judgments, found that they lacked bargaining power because they had little to offer by way of concessions in these negotiations.[207] In the face of this perceived difficulty, some commentators urged the United States to adopt a policy of judgments reciprocity unilaterally to obtain the leverage that it lacked.[208] Once the policy was in place, so the argument went, then the United States could bargain it away in order to obtain concessions from other nations.

If the desire to obtain bargaining power in international negotiations was the true reason for adopting a policy of judgments

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203. *See supra* Part II.A.

204. *See supra* Part II.B.

205. *See supra* Part II.C.

206. *See* Adler, *supra* note 165, at 109 (arguing that adopting a reciprocity requirement would give the United States leverage in international negotiations relating to a comprehensive judgments treaty); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AM. J. INT'L L. 387, 420 (2001) (same). *But see* Hulbert, *supra* note 9, at 653–54 (questioning the viability of such a strategy). *See generally* Miller, *supra* note 4, at 257–66 (providing historical overview of the relationship between the ALI drafting project and the Hague Convention negotiations); *id.* at 290–92 (expressing skepticism about the ability of a reciprocity requirement to improve U.S. leverage in these negotiations).

207. *See* Murphy, *supra* note 206, at 420.

208. *See, e.g.*, *Discussion of International Jurisdiction and Judgments*, *supra* note 17, at 455 (remarks of Peter H. Pfund).

reciprocity, then much of the analysis and discussion above—which focused largely on the interplay between foreign interest groups and foreign legislators at the domestic level—could be criticized for focusing on the wrong set of institutions and actors. On this alternative account, whether the reciprocal legislation is likely to achieve its desired end will not depend on the preferences of private interest groups but, rather, on the preferences of official state representatives formally engaged in the process of international lawmaking. Accordingly, critics might be tempted to dismiss the conclusions set forth above on the grounds that they explore the incentives of the wrong group of actors.

This critique is, however, unconvincing. First, it mistakenly presumes that the power wielded by interest groups at the domestic level evaporates when the process of lawmaking shifts to the international level.[209] Second, it overlooks the fact that many states must obtain the approval of domestic legislatures in order for a treaty to become legally binding.[210] Finally, and most fundamentally, this critique overlooks the fact that the state officials tasked with negotiating international treaties whose effects will be predominantly felt by private actors will in almost all cases seek input from these private actors in formulating their official negotiating positions.[211] If the United States were to adopt a policy of judgments reciprocity as a means of obtaining more leverage in international negotiations, it is likely that representatives from other states would respond to this development by reaching out to private actors in their home states to gauge their reactions. When many of these actors respond that the inconvenience presented by the new policy would be minimal—as the foregoing analysis suggests that they would—then it is difficult to see how the United States would gain any leverage. Even if one believes that the true purpose of reciprocal legislation in this context is to enhance the bargaining strength of the United States in international

209. *See* Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743, 761–80 (1999) (discussing the prominent role played by interest groups in shaping a number of multilateral treaties affecting private rights).

210. *See* Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307, 313 (2007) ("[T]he domestic law of many countries . . . requires that the executive obtain legislative approval before concluding treaties.").

211. *See* Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L.J. 615, 621–24 (2007) (discussing the extensive role played by private groups in shaping the U.S. approach to private international lawmaking).

negotiations, therefore, the basic contention set forth above—that a policy of judgments reciprocity is unlikely to offer much in the way of benefits to U.S. nationals—still holds.

CONCLUSION

If a policy of judgments reciprocity is unlikely to persuade the nations that currently refuse to enforce U.S. judgments to change their practice—as seems to be the case—then the answer to the question of whether to adopt such a policy is easy. Given the non-trivial costs inherent in a regime of judgments reciprocity, it is unwise to adopt such a regime when its promised benefits are unlikely to be realized. This has, to be sure, long been the intuition of scholars who write in this area. These intuitions were, however, based largely upon citations to decades-old academic articles that offered little in the way of evidence to support the claim.[212] This Article, by contrast, mined the historical record to identify actual examples in which reciprocal legislation achieved its goal. It identified a common element among these disparate examples—the role of interest groups in shaping state response—and used this element to construct a framework for evaluating the likelihood that a reciprocity requirement would prompt foreign states to change their practice. On the basis of this analysis, the Article argued that a particular policy of judgments reciprocity was likely to impose not-insignificant costs on U.S. courts and foreign litigants with little in the way of offsetting benefits.[213] All of this suggests that adopting a policy of judgments reciprocity, at least along the lines suggested by the ALI, is not in the long-term best interests of the United States.

Whether judgments reciprocity is good policy is, of course, a separate question from whether it is good politics. Even if one ultimately concludes that adopting a federal statute containing a reciprocity clause along the lines proposed by the ALI is bad policy, it is possible that Congress would insist upon including such a clause in the statute for political reasons. In this situation, the advantages of having a uniform federal rule on the topic of foreign judgments would have to be weighed against the disadvantages of having an ineffective

212. *See supra* notes 61–63 and accompanying text.

213. Even if the party resisting enforcement had the burden of proving a lack of reciprocity, the judgment creditor would still be well advised to oppose these efforts in contested cases by hiring an expert witness to testify that the rendering state would enforce a U.S. judgment.

(and costly) reciprocity requirement. This Article takes no position on this question. It merely notes that, as a policy matter, the best available information currently suggests that requiring reciprocity is unlikely to generate many benefits for U.S. nationals by encouraging foreign states that currently refuse to enforce U.S. judgments to change their ways.

APPENDIX

Table 1 presents information relating to (1) federal complaints and (2) reported state and federal cases involving attempts to enforce foreign judgments in the United States between 2008 and 2012. The precise means by which this information was collected is set forth below.

Federal Complaints. The source for federal complaints is Public Access to Court Electronic Records ("PACER"), which was accessed through the Bloomberg Law interface. PACER is an "electronic public access service that allows users to obtain case and docket information from federal appellate, district and bankruptcy courts in the United States."[214] In order to locate complaints in which one party sought to enforce a foreign judgment against another, I worked with two research assistants to use the "search dockets" feature in the Bloomberg Law database. We first searched courts: "U.S. District Court Dockets." We then searched the date range 1/1/2008–12/31/2012. We then searched by Nature of Suit code "Contract – Enforcement of Judgment [*150]." This search yielded 2,649 initial hits. We opened each of these complaints to look at the docket sheet to determine whether the complaint was filed in order to enforce a foreign money judgment. Of the 2,649 initial hits, only thirty-eight involved attempts to enforce judgments rendered by foreign courts; the remainder involved attempts to enforce judgments rendered in other U.S. jurisdictions. The relevant information from these thirty-eight complaints—judgment size and rendering court—was then added to the chart.

Reported State Cases. The source for these cases was the LexisNexis database. In order to identify these cases, I first performed a search in LexisNexis in "State Court Cases, Combined" for the term "foreign money judgment" for the date range 1/1/2008–12/31/2012. This search resulted in fifty-one hits. I reviewed these hits to determine which ones involved attempts to enforce judgments rendered by foreign courts. After examining each case, I identified twenty-five cases in which one party sought to enforce a foreign money judgment against another. The relevant information from these twenty-five cases—judgment size and rendering court—was then added to the chart.

214. PACER, http://www.pacer.gov/ (last visited Apr. 11, 2014).

Next, I performed a subsequent search in LexisNexis in "State Court Cases, Combined" for the term "foreign country money judgment" for the date range 1/1/2008–12/31/2012. This search resulted in thirty-six hits. I reviewed these hits to determine which ones involved attempts to enforce judgments rendered by foreign courts. I identified seven such cases not already captured by the initial search. The relevant information from these seven cases was then added to the chart.

I then performed an additional search in LexisNexis in "State Court Cases, Combined" for the term "CPLR 5303" or "Cal. Civ. Proc. Code sec. 1715" or "Tex. Civ. Prac. & Rem. Code §36.001" or "§ 55.604" for the date range 1/1/2008–12/31/2012. These are the state statutes that govern actions to enforce foreign judgments in New York, California, Texas, and Florida respectively. This search resulted in twenty-six hits. I reviewed these hits to determine which ones involved attempts to enforce judgments rendered by foreign courts. I identified three such cases not already captured by earlier searches. The relevant information from two of these cases was added to the chart. The relevant information for the other case was not added to the chart due to the disproportionate size of the judgment ($2.6 billion) relative to the loss allegedly suffered by the plaintiff ($2,550).[215]

Reported Federal Cases. The source for these cases was the LexisNexis database. In order to identify these cases, I first performed a search in LexisNexis in "Federal Court Cases, Combined" for the term "foreign money judgment or foreign judgment or foreign country money judgment" for the date range 1/1/2008–12/31/2012. This search resulted in 491 hits. I reviewed these hits to determine which ones involved attempts to enforce judgments rendered by foreign courts. I identified twenty-seven such cases not already captured by the previous searches. The relevant information for these cases was then added to the chart.[216]

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215. *See* Bandera de Gusmao de Mello v. Banco Bradesco S.A., No. 600043/06, 2010 N.Y. Misc. LEXIS 2615, at *1 (N.Y. Sup. Ct. Mar. 8, 2010) (involving an attempt by a Brazilian plaintiff to enforce a Brazilian judgment of $2.6 billion in New York when the actual damages—as found by a Brazilian court—amounted to only $2,550).

216. There were two noteworthy federal cases that were not included in the chart for different reasons. The first, *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), was excluded because the plaintiffs in that case had not attempted to enforce an Ecuadorean money judgment of approximately $17.2 billion in the United States. The second, *Sea Search Armada v. Republic of Colombia*, 821 F. Supp. 2d 268 (D.D.C. 2011), was omitted

In total, information from thirty-four state court cases and twenty-seven federal cases published between 2008 and 2012 is reflected in Table 1.[217]

Potential Weaknesses in PACER Data. The use of federal complaints to gain insight into foreign-judgment-recognition practice in the United States may be criticized on several grounds. First, owing to the ways in which the PACER system operates, it is unlikely that every federal complaint makes its way into the PACER system. It is therefore likely that there were additional actions brought in federal court to enforce a foreign judgment between 2008 and 2012 that are not available through PACER and, hence, are absent from the dataset. Second, owing to the ways in which the PACER suit codes operate, litigants are not allowed to check more than one "box" for the "type of suit" at issue. Accordingly, there may be some cases in which a litigant (or a court clerk) checks a box for a substantive area reflecting the underlying dispute rather than the enforcement box. If these missing complaints were to be identified and the relevant information from them added to the chart, a different picture as to the nature of enforcement practice may emerge. These limitations notwithstanding, the PACER system arguably represents the "best, most representative data set available" when it comes to tracking complaints filed at the federal level.[218]

Potential Weaknesses in Reported Case Data. The use of reported cases to gain insight into foreign-judgment-recognition practice in the United States is also potentially subject to criticism. It is well known that reported cases are not necessarily representative of all cases filed in a particular jurisdiction.[219] Ideally, one would look to *complaint* data relating to the enforcement of foreign judgments. This was done with respect to federal complaints via the search in PACER and this data is reported in Table 1. State-level complaint data are not,

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because the court in the case concluded that no foreign money judgment had, in fact, been rendered.

217. It should be noted that although these cases were all *reported* between 2008 and 2012, some of them were first *filed* prior to 2008.

218. John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 GEO. L.J. 677, 682 n.22 (2011) (noting limitations in data collected from PACER).

219. *See, e.g.*, Stephen B. Burbank, *The United States' Approach to International Civil Litigation: Recent Developments in Forum Selection*, 19 U. PA. J. INT'L ECON. L. 1, 10 (1998) (citing RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 59 (Stephen B. Burbank, reporter, 1989)).

however, reflected in Table 1 because no state currently collects this data and it is not currently possible to search state-level complaints to identify those in which one party is seeking to enforce a foreign judgment. If this information were to become available, it may present a different picture of enforcement practice. Until this day arrives, reported state and federal cases offer one of the best, if imperfect, sources of information about enforcement practices.[220]

220. *See* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 36 (2011) (observing that there are "very little data" available with respect to enforcement practice).