

SHAKY FOUNDATIONS: CRITICISM OF
RECIPROCITY AND THE DISTINCTION
BETWEEN PUBLIC AND PRIVATE
INTERNATIONAL LAW

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I. INTRODUCTION

In 1890, a French clothing manufacturer brought suit in a United States District Court to enforce a French judgment worth roughly \$3.6 million dollars.¹ The manufacturer had prevailed against a New York City store owner in a lawsuit filed in a French court. After the commencement of the lawsuit, however, the American store owner had removed all of his assets from France and taken them back to the United States. The wealthy store owner thus became judgment-proof in France. Without the help of U.S. federal courts, the manufacturer could not collect its damages.²

By the time the case reached U.S. federal court, both parties' cases had been heard on the merits. The parties had hired lawyers, called witnesses, and produced evidence. Both had made arguments. The loser at the trial level, the American owner, had taken its opportunity to appeal. French courts considered the judgment final and conclusive.³

The district court enforced the French verdict,⁴ but, in *Hilton v. Guyot*,⁵ the U.S. Supreme Court reversed on appeal. The court announced: “[J]udgments rendered [in any] for-

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1. *Hilton v. Guyott* [sic], 42 F. 249 (S.D.N.Y. 1890). The conversion of the claimed damages is based on a calculation by the Columbia Journalism Review Dollar Conversion Calculator, <http://www.cjr.org/tools/inflation> (last visited Feb. 28, 2006).

2. *Hilton v. Guyot*, 159 U.S. 113, 227 (1895).

3. *See Guyott*, 42 F. at 250, 252.

4. 42 F. at 258.

5. 159 U.S. at 229.

eign country, by the laws of which our own judgments are reviewable on the merits, are not entitled to full credit and conclusive effect when sued upon in this country. . . .”⁶ French law at the time prohibited the enforcement of all foreign judgments, including those rendered in the U.S.⁷ Accordingly, the Supreme Court would not enforce the French judgment. The French judgment might have been valid on its merits, but under the Court’s decision, the French plaintiffs would have to prevail on another suit, this time in a U.S. court, if they wanted to collect an award.

In refusing to recognize a foreign nation’s judgment if that nation did not recognize U.S. judgments, the Court imposed what is known as a “reciprocity” requirement. In this note, I call the Court’s rule “judgments reciprocity” to distinguish it from other forms of reciprocity present in the law. As will be discussed below, judgments reciprocity is theoretically effective in pressuring other countries to enforce U.S. judgments. And, reciprocity as a general concept is commonly employed in other areas of foreign policy. However, critics have scorned judgments reciprocity consistently since the Supreme Court introduced it into American jurisprudence.⁸ National practice now reflects this criticism. The Court’s holding in *Hilton v. Guyot*, although never overruled, has little influence in judgment recognition and enforcement practices.⁹ In the 1920s, judgment enforcement came to be considered a matter of state law, and most states rejected judgments reciprocity.

6. *Id.* at 227.

7. *See id.* at 215.

8. Although the most famous, *Hilton v. Guyot*’s use of reciprocity as a precondition to foreign-country judgment enforcement was actually not the first in American history. Connecticut Colony passed a judgments recognition statute which included a reciprocity provision, but this statute is largely forgotten and has had little or no effect on subsequent developments in enforcement and recognition law. *See infra* discussion accompanying notes 45-48 for more on the Connecticut statute.

9. The “recognition” and “enforcement” of foreign judgments are distinct concepts. A U.S. court “recognizes” a foreign judgment when it relies on a foreign proceeding to preclude relitigation of a particular claim or issue. It “enforces” a judgment when it affirmatively requires the losing party in the foreign proceeding to satisfy the judgment. *See* GARY BORN, INTERNATIONAL CIVIL LITIGATION: COMMENTARY AND MATERIALS 936 (1996). However, their relationship to reciprocity is indistinguishable for purposes of this paper, and the terms are used interchangeably throughout.

Federal courts followed suit after *Erie Railroad Co. v. Tompkins*.¹⁰

This Note explores why judgments reciprocity has been consistently criticized. In 2006 this question is particularly important. Despite conventional wisdom, which indicates that judgments reciprocity will disappear completely,¹¹ the doctrine has recently experienced a resurgence in popularity. Eight out of thirty-three states enacting a version of the Uniform Foreign-Money Judgments Recognition Act, the model statute governing the enforcement and recognition of foreign country judgments, did so after adding a reciprocity requirement.¹² New Hampshire has a statutory reciprocity provision for Canadian judgments.¹³ And, most notably, the American Law Institute’s latest draft of its proposed Federal Act relating to the enforcement and recognition of foreign country judgments contains a reciprocity provision.¹⁴ These new developments mandate a reevaluation of the doctrine and the arguments historically levied against it. Does past criticism deserve any weight in contemporary arguments?

10. 304 U.S. 64 (1938). See AMERICAN LAW INSTITUTE INTERNATIONAL JURISDICTION AND JUDGMENTS PROJECT TENTATIVE DRAFT NO. 2 89 (Apr. 13, 2004) [hereinafter ALI TENTATIVE DRAFT]. The eradication of reciprocity from the common law is discussed in more detail in Part V(C) below.

11. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS and the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES both note that American states’ enforcement procedures generally lack a reciprocity requirement. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. f (1968); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 rptrs. note 1, at 598 (1986) (“[T]he great majority of courts in the United States have rejected the requirement of reciprocity . . .”).

12. See the National Conference of Commissioners on Uniform State Laws website for a list of states adopting the uniform act, http://www.nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ufmjra.asp (last visited Feb. 28, 2006). Florida, Idaho, Maine, North Carolina, Ohio, and Texas authorize but do not require reciprocity as a precondition of foreign judgment enforcement. Massachusetts and Georgia require reciprocity. ALI TENTATIVE DRAFT, *supra* note 10, at 90.

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13. See N.H. REV. STAT. ANN. § 524:11 (1957).

14. The ALI proposed statute reads: “A foreign judgment shall not be recognized or enforced in a court in the United States if the court finds that judgments of courts in the United States would not be enforced in comparable circumstances in the courts of the state of origin.” ALI TENTATIVE DRAFT, *supra* note 10, §7(a), at 81-82.

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This Note argues that much of the historical precedent against judgments reciprocity adds nothing to the debate today. Instead, it reflects the now outdated notion that public and private international law are categorically different and that no internationally-focused mechanism should ever skew resolutions to individuals' disputes.¹⁵ Today, scholars recognize that public and private international law are interconnected and that international affairs have relevance in the transnational disputes between individuals. Yet, during the nineteenth century, legal scholars believed that matters between individuals should be protected from government intervention. They erected strict boundaries between the so-called "public" and "private" spheres in all areas of law, including international law. By 1895, when *Hilton v. Guyot* instituted a reciprocity requirement, scholars had carved two separate fields out of the once unified law of nations. Public international law regulated relationships between sovereign nations. Private international law governed interactions, including judgments, between individuals.¹⁶

As will be demonstrated below, this doctrinal framework precluded judgments reciprocity. Judgments reciprocity encourages liberal judgment recognition practices among countries, but it does nothing to insure fairness between parties to a particular dispute. For example, judgments reciprocity does not filter out judgments based on fraud, protect parties from abuses of repeat litigation, or prevent enforcement of foreign judgments decided under unjust foreign laws. To the contrary, judgments reciprocity can require that a perfectly valid foreign judgment between individuals be thrown out—that individual justice *not* be done—in order to promote the national interest in recognition of U.S. judgments abroad. According to the nineteenth-century exclusion of public from private, then, judgments reciprocity requirements impermissibly allowed the government to pursue a "public" interest—universal judgment recognition—within the context of a "private" disagreement.

15. See generally Henry J. Steiner et al., *TRANSNATIONAL LEGAL PROBLEMS* 684-87 (4th ed. 1994) (discussing categories of public versus private, national versus individual, and law versus politics).

16. See generally Joel R. Paul, *The Isolation of Private International Law*, 7 *WIS. INT'L L.J.* 149, 155-64 (1988) [hereinafter Paul, *Isolation*] (discussing the development of separate categories of private and public international law).

In Part II, I develop the theory that the belief in a strict, doctrinal division between public and private international law precluded judgments reciprocity. In Parts III, IV, and V, I show that this theory is supported by practice. Part III traces the century of legal developments—the separation of public from private law and its effect on the law of foreign judgment enforcement—that ultimately produced the harsh critical reaction to *Hilton*. Part IV discusses *Hilton*'s break from the prior century's separation of private from public international law in its support of judgments reciprocity. I conclude that the majority's support for judgments reciprocity depended on its support of the view, contrary to prevailing opinion, that private and public international law cannot be separated. In Part V, I analyze critics' reactions to *Hilton* and conclude that, even through the latter half of the twentieth-century, arguments against judgments reciprocity reflect the outdated distinctions developed in the nineteenth century. In other words, judges and jurists detested judgments reciprocity because it embraced the pursuit of public aims through the resolution of private disputes. Finally, I show that judgments reciprocity's recent popularity is possible only with the corresponding acceptance that private international law and international affairs can and must be interrelated. In Part VI, I argue that states must reevaluate their rejection of judgments reciprocity in light of contemporary perspectives.

II. JUDGMENTS RECIPROCITY: A "PUBLIC LAW" SOLUTION IN "PRIVATE INTERNATIONAL LAW"

This section will explain the central theory of this paper: why judgments reciprocity runs counter to the beliefs underlying a strict, categorical division between public and private international law. For purposes of this section, public international law is defined as the law between nation states. It encompasses the law of war, treaties, and state recognition. In contrast, private international law is defined as the system of rules coordinating application of different sovereigns' "private law," i.e., contracts, tort, and family law, to disputes between individuals or corporations. Assume, for purposes of this section,¹⁷ that legal thinkers at one time viewed these fields as

17. Part III below will explore the historical development of the distinction between the fields, explain scholars' perception that the fields have no

being categorically different, even though both concern international relationships. With different goals and methodologies, the fields controlled different spheres. If private international law governed a dispute, said this view, public international law did not and could not.¹⁸ Public international law involved nations; private international law involved individuals. This section argues that judgments reciprocity violates this strict boundary. Judgments reciprocity operates within the so-called private sphere of judgment recognition, but it is a mechanism aimed at a national (public) rather than individual (private) problem. Thus, it does not make sense to champions of the legal framework that recognizes no commonality between public and private in international law.

International law does not require other countries to recognize in personam foreign judgments,¹⁹ but the adoption of liberal enforcement policies worldwide fuels international trade. If judgments do not take effect in courts outside of the forum nation, traders must expend more resources to re-secure legal rights and re-pursue legal remedies in each nation in which they operate. As a result, the transaction costs of international trade increase, prices rise, and ultimately, the number of exchanges falls.²⁰

points of overlap, and discuss how the distinction affected the law of foreign judgment enforcement.

18. See Paul, *Isolation*, *supra* note 6, at 150-51 and 154-55; Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) [hereinafter Horwitz, *History of the Public/Private Distinction*] (listing areas included in "private law").

19. John R. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COL. L. REV. 561, 584-85 (1952); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 33 (3d ed. 1846). Judgments in rem, however, may be enforceable as a matter of international law. *Hilton v. Guyot*, 159 U.S. 113, 166-67 (1895).

20. Cf. Antonio F. Perez, *The International Recognition of Judgments: The Debate Between Private and Public Law Solutions*, 19 BERKELEY J. INT'L L. 44, 44 (2001) [hereinafter Perez, *International Recognition of Judgments*] (noting that unenforceable judgments may lead exporters to undervalue gains and fail to take advantage of otherwise beneficial trading opportunities or may lead exporters to undervalue the costs and undertake less beneficial opportunities); 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 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

Beyond this interest in universal judgment recognition shared by all members of the international community, the United States faces the unique problem that foreign jurisdictions, perhaps suspicious of American courts' more plaintiff-friendly discovery rules, jurisdictional limits, and jury trials, do not match the liberality of American courts in enforcing foreign judgments.²¹ Without a judgments reciprocity requirement, such foreign jurisdictions have no incentive to change their policies. The U.S. confers economic benefits on foreign nations by enforcing their judgments, and they can enjoy these benefits without bothering to provide them in return. A judgments reciprocity requirement changes matters. With judgments reciprocity, nations who refuse to share the benefits of judgment enforcement with the United States do not enjoy those benefits. They no longer gain by refusing to enforce foreign judgments under the assumption that at least some nations (like the United States) will choose to enforce foreign judgments regardless of others' policies.²²

Early critics of judgments reciprocity argued that the doctrine would actually prevent universal judgment recognition by creating stalemates between countries with reciprocity provisions. If Countries A and B both have judgments reciprocity requirements, the argument goes, neither country can enforce the other's judgment without a guarantee that the other would do the same. Yet, neither country can provide that guarantee because they both condition enforcement on the other's enforcement. A could not enforce B's judgment unless B agreed to enforce A's. But, since B also had a reciprocity requirement, it could not enforce unless A did so first.

Game theorists later disproved this argument. They concluded that judgments reciprocity does realize eventual cooperation when employed between countries engaged in a series of interactions over time. In a process game theorists call "Tit for Tat," countries seeking to cooperate do not have to take

21. See Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the A.L.I.: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L. J. 635, 639 nn.21-22 (2000).

22. Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG 1 (1986), reprinted in ROBERT O. KEOHANE, *INTERNATIONAL INSTITUTIONS AND STATE POWER* 132, 132 (1989).

the first step but rather can signal their willingness to cooperate over time.²³

Despite its theoretical effectiveness, the harsh criticism of judgments reciprocity seems to suggest that reciprocity as a concept offends American notions of how to conduct foreign affairs.²⁴ Yet, scholarship focused on reciprocity as employed in other arenas suggests exactly the opposite conclusion: that *Hilton's* insistence on judgments reciprocity is precisely the way the United States approaches international relations.²⁵ American policy on international trade, for example, has always invoked reciprocity. The first commercial treaty signed by the Confederation contained a provision for reciprocal trade concessions between the United States and France.²⁶ In the early 1800s, the United States and Britain signed an agreement called "the Reciprocity of 1830" to resolve a long-standing dispute about trade in the West Indies.²⁷ Nearly a century later, the Harding administration touted reciprocity as the basis of its protectionist trade policy.²⁸ Reciprocity constituted a key component of political relations between the United States and the Soviet Union during the Cold War.²⁹ At least thirteen American federal statutes currently incorporate reciprocity.³⁰ One statute, for example, lists reciprocity as a requirement for granting a foreign national the right to sue the United States in attempts to recover damages caused by government vessels.³¹ Another punishes the smuggling of goods into a for-

23. *Id.* at 137-38.

24. *See infra* Part IV(C).

25. Bruno Simma, *Reciprocity*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 29, 32 (2000).

26. KEOHANE, *supra* note 22, at 133.

27. *Id.*

28. *Id.*

29. *Id.* at 133-34.

30. *See* Richard H.M. Maloy & Desamparados M. Nisi, *A Message to the Supreme Court: The Next Time You Get a Chance, Please Look at Hilton v. Guyot; We Think It Needs Repairing*, 5 *J. INT'L LEGAL STUD.* 1, 39-40 (1999) (listing federal statutes with reciprocity requirements). *See, e.g.*, 28 U.S.C.S. § 2502(a) (LexisNexis 2005) (giving an alien the right to sue the United States in the Court of Federal Claims only if the alien's native government grants American citizens a reciprocal right).

31. 46 U.S.C. § 785 (1994).

eign country only if that foreign government has a reciprocal criminal statute.³²

Thus a common theme in American foreign policy, reciprocity appears in slightly different legal forms. In some instances, as in the 1778 treaty between the United States and France, the sought-after behavior is mandated by international law, and reciprocity is simply an enforcement mechanism.³³ In other instances, reciprocity serves to create international law; countries allow certain behavior by other nations because they know that, in a similar situation, they could do the same.³⁴ Finally, reciprocity is employed in domestic law in an attempt to elicit a desirable response from other countries, even though that response may never be mandated by international law.³⁵ Whatever its incarnation, however, reciprocity is always pursued for the same reason: to provide additional incentives for foreign nations to behave in certain mutually beneficial ways. As discussed above, reciprocity creates incentives for the self-interested foreign nation to engage in the desired behavior, or at least to indicate that it might do so in return for similar concessions from the United States.³⁶

However, judgments reciprocity is different from these other uses in one key respect. Reciprocity as discussed above has been invoked in what is traditionally thought of as the public sphere. An international trade treaty, for example, is an agreement between nations and thus is considered to be public international law. The relations between the United States and the Soviet Union fall under the heading of international politics. Judgments reciprocity, in contrast, operates in the so-called private sphere of judgment recognition. Courts seek to resolve individual (private) disputes, whether rendering a new judgment between parties or enforcing a judgment issued by another court.

Why would this distinction make *Hilton's* judgments reciprocity unfathomable, but the other uses of reciprocity accept-

32. 18 U.S.C. § 546 (1994).

33. See generally Simma, *supra* note 25, at 31 (discussing the role of reciprocity in the enforcement of treaty provisions). **R**

34. See generally *id.* at 30-31 (discussing the role of reciprocity in the creation of international law).

35. See generally *id.* at 32 (discussing the use of reciprocity in municipal law "as a useful spur to neighbourly conduct").

36. See KEOHANE, *supra* note 22, at 137. **R**

able, to supporters of the strict, categorical distinction between public and private international law? Judgments reciprocity requirements allow the government to pursue a “public” interest—universal judgment recognition—within the context of a “private” dispute.³⁷ Judgments reciprocity’s introduction into a municipal statute means that an otherwise valid foreign judgment can be thrown out simply because of the national interest in having American judgments enforced abroad. In *Hilton*, for example, the court refused to recognize the French verdict not because it was erroneous or unfair to the parties, but to encourage France to change its judgment recognition laws.³⁸ If this national interest is seen as inappropriate, or if the government intervention is seen as impermissible, judgments reciprocity cannot be permitted. Thus, the ideas underpinning a strict separation of private and public international law developed in the nineteenth century—the perceived contrasts between public and private and national and individual—precluded judgments reciprocity.

III. THE DEVELOPMENT OF THE DISTINCTION BETWEEN PUBLIC AND PRIVATE INTERNATIONAL LAW

Between the seventeenth century and 1895, when the Supreme Court decided *Hilton*, scholars created separate fields of public and private international law. In the seventeenth and eighteenth centuries, they classified all international legal issues under the heading of the “law of nations.” By 1895, scholars believed that public international law governed relations between nations, whereas private international law governed international transactions between individuals. This section discusses the emergence of the separation between public and private international law and that separation’s effect on foreign judgments doctrine. It concludes that ideas solidified

37. Upon closer examination, this seems less clear. Whether or not we condemn government interference in “private” matters generally, isn’t courts’ willingness to enforce foreign judgments just as much government intervention as courts’ refusal to do so without reciprocity? Choosing to require reciprocity or not seems a decision between opposite political strategies, not one between intervention or not. Remember, however, in the nineteenth century, law was viewed as simply facilitating private preferences. Universal enforcement, under this view, was the baseline. Continued acceptance of that standard thus counted as neutral behavior by courts.

38. See *supra* discussion accompanying notes 1-9.

during the period produced the harsh critical reaction to the Supreme Court’s decision in *Hilton*.

A. *Early Support for Judgments Reciprocity: The “Law of Nations” through the 1830s*

In the seventeenth and eighteenth centuries, legal scholars conceptualized the “law of nations” to encompass all transactions with an international flavor, regardless of the actors involved. As Blackstone explained in 1765:

The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur *between two or more independent states, and the individuals belonging to each*.³⁹

The law of nations thus governed a diverse range of issues from “mercantile questions, such as bills of exchange and the like,” to “disputes relating to passports, the rights of ambassadors and piracy,”⁴⁰ to attempts to enforce foreign judgments.⁴¹ It applied to states as well as individuals operating transnationally. Scholars distinguished the law of nations from municipal

39. W. BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 66 (1st ed. 1765-1769), *quoted in* MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 235-36 (3d ed. 1999) (emphasis added).

40. BLACKSTONE, *supra* note 39, at 67-73, *quoted in* JANIS, *supra* note 39, at 236.

41. In *Cottington’s Case*, for example, Lord Chancellor Nottingham argued:

for we know not the laws of Savoy, so, if we did, we have no power to judge by them; and, ergo, it is against the law of nations not to give credit to the judgment and sentences of foreign countries, till they be reversed by the law, and according to the forum, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.

James Kent, COMMENTARIES ON AMERICAN LAW 120 (O.W. Holmes, Jr. ed., Fred B. Rothman & Co. 1989) (1873) (citing *Cottington’s Case*). *Weir’s Case*, decided in 1668, similarly concluded that the law of nations required one nation to execute the judgments of others. *Id.*

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law, or the internal (rather than international) law of a nation,⁴² because it was considered to be universal. As propounded by Hugo Grotius, the law of nations was Natural Law, discerned from eternal principles and applicable to everyone.⁴³

Judgments reciprocity received support during this period. Before the American Revolution, colonies were considered foreign nations to each other.⁴⁴ In 1644, the Commissioners from the Confederation of New England Colonies, a federation of Puritan colonies Massachusetts, Connecticut, New Haven, and Plymouth established in 1643,⁴⁵ suggested to each of the member colonies that it give inter-confederation judgments at least some presumption of validity rather than automatically retrying them on the merits. In 1649, the Province of Connecticut enacted the Commissioner's recommendation "that any verdict or sentence of any court within the colonies, presented under authentic testimony, shall have a due respect in the several courts of this jurisdiction"⁴⁶ but added a judgments reciprocity provision, the first in American history. The provision read: "[T]his order shall be accounted valid and improved only for the advantage of such as live within some of the confederate colonies; and where the verdict in the courts of this colony may receive reciprocal respect by a like order established by the general court of that colony."⁴⁷ Unfortunately, the reported cases from the Connecti-

42. BLACK'S LAW DICTIONARY 1037 (7th ed. 1999).

43. See Arthur Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 NW. U. L. REV. 619, 753 (1955) [hereinafter Lenhoff, *Reciprocity: The Legal Aspect*].

44. See Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 973 (1999).

45. *New England Confederation*, ENCYCLOPEDIA BRITANNICA, available at <http://www.britannica.com/eb/article-9055459/New-England-Confederation>.

46. Kurt H. Nadelmann, *Full Faith and Credit to Judgments and Public Acts: A Historical Analytical Reappraisal*, 56 MICH. L. REV. 33, 38-39 (1957-1958) [hereinafter Nadelmann, *Full Faith & Credit*] (quoting Verdict, 1659 Connecticut Acts and Laws (1650)). The Connecticut law is also reprinted in THE EARLIEST LAWS OF THE NEW HAVEN AND CONNECTICUT COLONIES, 1639-1673, at 141 (John D. Cushing ed., Michael Glazier, Inc. 1977).

47. Nadelmann, *Full Faith & Credit*, *supra* note 46, at 38-39.

cut Colony courts do not indicate how this judgments reciprocity provision worked in practice.⁴⁸

The first step in judgments reciprocity's eventual demise occurred in 1789, when utilitarian philosopher Jeremy Bentham articulated the distinction between the international law of states and that of private citizens. In his book *Principles of Morals and Legislation*, his first on law, Bentham introduced the term "international law" as a new name for the field usually called "law of nations." He reformulated the field to include only those matters now considered part of public international law.⁴⁹ Defining the term in the book's preface as "principles of legislation in matters betwixt nation and nation,"⁵⁰ he conspicuously left out the huge group of individual matters previously encompassed by the law of nations. In the last chapter of the book, he again remarked that international law as he conceived it was for nations only:

Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of these states There remain then the mutual transactions between sovereigns as such, for

48. Colonial legal research is difficult. Sean Murphy explains,

In the early colonial period, there were very few lawyers in the colonies; indeed, full-time lawyers were neither needed nor welcome. Early colonial law was not widely studied or read by those who followed. By the 1700s, more lawyers arrived, but the decisions of courts during this period were not regularly published; one must search statehouse archives to find most decisions. Even when those decisions are found, they are often long on facts but short on the law being applied by the court. Further, since appeals from colonial courts were made to the King in Council and not to the Court of King's Bench, few records of colonial cases were publicly available in England.

Sean D. Murphy, *The U.S. Lawyer-Statesman at Times of Crisis: A Look at Colonial America*, in AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 96TH ANNUAL MEETING 100 (2001).

49. JANIS, *supra* note 39, at 236-40. It is unclear whether Bentham knew that the "law of nations," unlike "international law" as he defined it, governed transactions between individuals as well nations. *Id.* at 236-39.

50. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* xii (Prometheus 1988).

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the subject of the branch of jurisprudence which may be properly and exclusively termed *international*.⁵¹

Bentham thus carved from the international sphere all matters concerning the rights and obligations of individuals acting internationally. His scheme anticipated the eventual exclusion of private from public international law. Not only did it reserve international law for relationships between sovereign nations, it also insisted that all other relationships be controlled by the various municipal legal systems.⁵² As discussed below, private international law eventually emerged to manage the coordination of these competing systems of municipal law.

Nineteenth century positivists embraced Bentham's claim that "international law" governed nations only.⁵³ Reacting against the natural law ideas of Hugo Grotius, they believed that law included only the legal rules created by a recognized authority at a specific time.⁵⁴ Commandments addressed to and imposed upon subjects by a sovereign power qualified; "natural" principles of universal acceptance did not.⁵⁵ International law, which did not emanate from any sovereign authority, could not qualify as law if applied to individuals.⁵⁶ That international law truly constituted law when applied to nations only was also questionable to many positivists, although at least less so. Mark Janis explains:

[P]ositive legal theory had taken the law of nations of the seventeenth and eighteenth centuries, a law common to the individuals as well as to the states, and transformed it into two international law disciples, one 'public' and the other 'private.' The former was deemed to apply to states, the latter to individuals. Positivists could scorn both sides of the subject: public international law was 'international' but not really 'law'; private international law was 'law,' but not really 'international.'⁵⁷

51. *Id.* at 326-27.

52. JANIS, *supra* note 39, at 238.

53. *Id.* at 240-41.

54. *Positivism*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1072, 1073-74 (2003).

55. *Id.*

56. *Id.*

57. JANIS, *supra* note 39, at 242.

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Due to the influence of positivism, the notion that international law did not concern relationships between individuals gradually came to dominate theories of public international law.⁵⁸

Thus, as Bentham's 1789 effort anticipated, the separation of private and public international law did not occur from both sides of the private/public divide. The separation did not develop, as one might imagine, because scholars recognized the inherent differences between two areas of international law developing equally but in different directions. Rather, positivist scholars of international law abandoned a host of international transactions concerning individuals—once part of the law of nations—to an undefined sphere within the huge field of “domestic law.”⁵⁹ In his 1834 *Commentaries on Private International Law*, Joseph Story coined the term “private international law” to describe this group of transactions.⁶⁰ Influenced by Story's treatise, British and American scholars further developed the field. The first edition of John Westlake's treatise on private international law was published in 1858, Francis Wharton's in 1872, George Merrill's in 1886, and Albert Dicey's in 1896.⁶¹

Joseph Story's treatise marked the beginning of scholars' recognition of private international law as a distinct legal subject. Unlike future scholars, however, Story did not believe that private international law had no link to international affairs generally. Rather, Story saw private international law as

58. *Id.* For a discussion of scholars' later disavowal of this view, see *infra* Part IV(B).

59. *Id.* at 161, 163.

60. STORY, *supra* note 19, § 9. For the influence of Story's COMMENTARIES on future conflicts scholarship, see Kurt H. Nadelmann, *Joseph Story's Contribution to American Conflicts Law: A Comment*, 5 AM. J. LEGAL HIST. 230, 243-53 (1961).

61. ALBERT VENN DICEY, A DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS (1896); GEORGE MERRILL, STUDIES IN COMPARATIVE JURISPRUDENCE AND THE CONFLICT OF LAWS (Boston, Little, Brown & Co. 1886); JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW, WITH PRINCIPLE REFERENCE TO THE PRACTICE IN ENGLAND (London, W. Maxwell 1858); FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS (1872). In the preface to the second edition of his treatise on Conflict of Laws, Francis Wharton noted that “the literature on the topic ha[d] more than doubled” during the nine years since the first edition of his work. FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS (2d ed. 1881).

the law of nations' most important branch.⁶² Private international law provided the rules governing “the common business of private persons” in an international system designed to promote political unity and commerce.⁶³

Story incorporated this view into his treatment of foreign judgment enforcement. On the one hand, he believed that international practice should affect judgment recognition. On the other, he also believed that international law did not compel the recognition of in personam foreign judgments. Because each nation was its own sovereign power, only the nation itself could decide whether to enforce a foreign judgment in its courts.⁶⁴ These views created a theoretical dilemma: if only an independent sovereign could decide to enforce a judgment in its tribunals, it made little sense for that sovereign to be simultaneously constrained by international practice. Story resolved this dilemma with the doctrine of comity. Comity allowed Story to recognize that a foreign judgment had no automatic effect within a sovereign jurisdiction without its consent, but also that such consent, beneficial to the international system, should be generally granted:

But of the nature and extent and utility of this recognition of foreign laws [and judgments] respecting the state and condition of persons, every nation must judge for itself, and certainly is not bound to recognize them when they would be prejudicial to its own interests Mutual utility presupposes that the interest of all nations is consulted, and not that of one only. Now this demonstrates that the doctrine owes its origin and authority to the voluntary adoption and consent of nations. It is therefore in the strictest

62. STORY, *supra* note 19, § 9. For example, Story introduced the term by remarking, “This branch of public law may therefore be fitly denominated private international law” *Id.* § 9. As will be discussed below, later scholars—both of conflicts and public international law—came to consider private international law as totally unconnected to the public sphere. *See infra* Part III(B).

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63. *Id.* § 9. *See* Paul, *Isolation*, *supra* note 16, at 160-61 (“Story saw conflicts as the cohesive principle to hold together his system of law; public and private law could not be separated. Commerce thrived on political unity and political unity was fostered by commerce. This was as true internationally as it was domestically.”).

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64. STORY, *supra* note 19, § 598.

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sense a matter of the comity of nations, and not of any absolute paramount obligation superseding all discretion on the subject.⁶⁵

Through comity, Story could agree to remove judgment enforcement from the ambit of the law of nations while insisting that international affairs continue to influence American practice.⁶⁶ Not surprisingly, Story explicitly touted reciprocity as means of bringing about a universal system of judgment recognition.⁶⁷ He noted: “[Reciprocity] is certainly a very reasonable rule, and may perhaps . . . work itself into the structure of international jurisprudence.”⁶⁸ In other words, comity did not mandate that nations adopt judgments reciprocity requirements, but the requirements seemed a viable way of bringing about the international cooperation which provided the basis for comity.

In formulating comity, Justice Story borrowed heavily from seventeenth-century Dutch scholar Ulrich Huber. Not only did he paraphrase Huber’s axioms in the second chapter of the work, his entire treatise can be said to rest on Huber’s notion of comity.⁶⁹ When the Dutch provinces won their independence from the Spanish monarchy in the seventeenth century, conflict of laws theories in existence at the time failed to reconcile the enforcement of foreign law and judgments with increasingly accepted ideas of state sovereignty and territorial authority.⁷⁰ Why, if a foreign judgment constituted the exercise of another sovereign’s authority, should Dutch courts give it any presumption of validity at all?⁷¹ At first, scholars chose

65. *Id.* § 36.

66. Cf. Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1, 77 (1991) [hereinafter Paul, *Comity*]; Paul, *Isolation*, *supra* note 16, at 174; accord Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT’L L. 280, 282-83 (1982) (noting Story’s use of comity to emphasize importance of international consequences in choice of law decisions).

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67. STORY, *supra* note 19, § 618.

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68. *Id.* § 36.

69. See *id.* § 17-38; Kurt H. Nadelmann, *Joseph Story’s Contribution*, *supra* note 60, at 230-31.

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70. See Paul, *Comity*, *supra* note 66, at 14-15.

71. The reasons to enforce a foreign judgment, and the parallel issue of why to apply foreign laws, remain a topic of current debate. See FRIEDRICH K. JUENGER, *A Historical Overview*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 3, 41 (2001); BORN, *supra* note 9, at 948-49. Also see D.J. Llewelyn Davies, *The*

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to eliminate this tension rather than resolve it, and they reduced the types of situations appropriate for the application of foreign law. Limited conflicts rules hindered trade, however. Huber explained: “[N]othing could be more inconvenient to the commerce and general intercourse of nations than that transactions valid by the law of one place should be rendered of no effect elsewhere owing to a difference in law.”⁷² Fresh ideas were needed. Huber posited comity.⁷³

Huber articulated three axioms of conflicts of law to allow, through comity, the operation of foreign law without compromising the territorial authority of the sovereign.⁷⁴ Foreign judgments were enforced only through the consent of the sovereign. But, unless the sovereign’s interests would be impaired by enforcing the judgment, international law required the sovereign to give consent so as to promote trade and unity.⁷⁵ In the Dutch edition of his work, Huber compares comity to “the high authorities of each country offer[ing] each other a hand.”⁷⁶ As with shaking hands, a classic example of reciprocal behavior, comity is impossible if one party acts unilaterally. Huber’s vision thus implied judgments reciprocity but did not explicitly require it. As his regime would have been mandated by international law—remember that judgments and application of foreign law were governed by the

Influence of Huber’s De Conflictu Legum on English Private International Law, 18 BRIT. Y.B. INT’L L. 49, 59 (1937).

72. Davies, *supra* note 71, at 59.

73. Paul, *Comity*, *supra* note 66, at 14-15.

74. Huber’s axioms are as follows:

- “1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subjects to it, but not beyond.
2. Those are held to be subject to a sovereign authority who are found within its boundaries, whether they be there permanently or temporarily.

3. Those who exercise sovereign authority so act from comity, that the laws of every nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the powers or rights of another state, or its subjects.”

See Davies, *supra* note 71, at 56-57. See, e.g., *id.* at 56 (Huber’s axioms “came to constitute the basis of the English doctrine regarding the conflict of laws.”).

75. Paul, *Comity*, *supra* note 66, at 15-16. Scholars debate whether Huber considered comity to be required by international law.

76. *Id.* at 17.

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broad “law of nations” at that time—no such provision would have been necessary.

B. *The Solidification of the Distinction Between Public and Private International Law and the Problem of Judgments Reciprocity: 1830s-1895*

From the 1830s, when Story published his treatise, through the end of the nineteenth century, judges and jurists brought about a fundamental change in legal thought. Responding to trends both internal and external to the law, they worked to create a strict, categorical separation between the public and private realms. Their efforts extended to matters once governed by the unified law of nations. As this section will demonstrate, the changes they encouraged produced a doctrinal framework which precluded judgments reciprocity.

As discussed above, scholars defined private international law to include all matters concerning relationships between individuals acting internationally and public international law to include all matters between nations.⁷⁷ From a contemporary perspective, the obvious interrelationship between individuals, organizations, and nations acting in the international arena would make categorizing, as either individual or national, all issues touched on by the traditional law of nations an almost impossible task. Laws about status of aliens, for example, clearly concern the rights of individuals. But, if a sovereign state demands a certain minimum standard for treatment of its nationals abroad, a violation of that standard just as clearly implicates relationships between nations. Classifying the immunity afforded to foreign diplomats would pose a similar challenge. A civil dispute between a foreign diplomat and a citizen can be seen as both a dispute between individuals, properly the jurisdiction of domestic courts, or one between sovereigns, properly solved through international diplomacy.⁷⁸

Judgment recognition is even more difficult to categorize along these lines. Although the underlying dispute in a judgment recognition case is one between individuals, we recognize today that the foreign court’s judgment constitutes an ex-

77. See *supra* notes 49-60 and accompanying text.

78. See Stevenson, *supra* note 19, at 562 (discussing the status of aliens, foreign immunity, and other issues which do not fall easily into either category).

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ercise 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. It also encompasses the relationship between a domestic court and a foreign court, and more broadly, the domestic sovereign and a foreign one. A Supreme Court decision rendered in the height of the Cold War concluded that a state rule of judgment recognition had the propensity to incite international conflict by giving judges the opportunity to insult Communist regimes.⁷⁹ If a law facially resolves disputes between individuals, but practically can cause a war between nations, how can it possibly be classified as either strictly individual or strictly national?

As legal historian Morton J. Horwitz notes, however, "nothing captures the essential difference between typical legal minds of nineteenth- and twentieth-century America quite as well as their attitude toward categories."⁸⁰ In the nineteenth century, scholars generally invoked clear, bright-line classifications of legal matters, whereas today, they tend to balance conflicting policies and draw a line somewhere between them.⁸¹ Nineteenth-century scholars characterized differences between legal phenomena as a "difference in kind." As indicated by our confusion in distinguishing individual from national above, contemporary scholars see the distinction as a matter of degree.⁸²

The nineteenth-century obsession with categorization reflected a broader effort to create a legal system which operated outside of politics:

Above all was the effort of orthodox judges and jurists to create a legal science that would sharply separate law from politics. By creating a neutral and apolitical system of legal doctrine and legal reasoning free from what was thought to be dangerous and un-

79. *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (holding that a reciprocity provision was unconstitutional in part because it gave state court judges the opportunity to insult communist regimes, a practice apt to spark international conflict in the height of the Cold War).

80. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 17 (Oxford Univ. Press 1992) [hereinafter HORWITZ, *TRANSFORMATION*].

81. *Id.*

82. *Id.*

stable redistributive tendencies of democratic politics, legal thinkers hoped to temper the problem of “tyranny of the majority.” Just as nineteenth century political economy elevated the market to the status of the paramount institution for distributing rewards on a supposedly neutral and apolitical basis, so too private law came to be understood as a neutral system for facilitating voluntary market transactions and vindicating injuries to private rights.⁸³

Judges and jurists of this period harbored a general opposition to government intervention in individuals’ economic relationships.⁸⁴ They injected into the common law their faith in the ability of the market to maximize productivity and commerce if left alone, and they crafted legal doctrines that established a distinctly private realm protected from encroachment by public power.⁸⁵ Many scholars, for example, argued for the elimination of punitive damages in tort awards during this period, claiming that punitive damages, designed to discourage behavior rather than simply compensate plaintiffs for their injuries, dangerously injected aims of public criminal law into the resolution of private disputes.⁸⁶ Similarly, parties were allowed to contract out of certain common law protections previously thought inalterable; states should have no interest, judges believed, in wholly private agreements between consenting individuals.⁸⁷

83. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1425-26; accord Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983) (discussing the classical legal thought promulgated by Christopher Columbus Langdell, Dean of Harvard Law School during the late 1800s, and his peers; arguing that “[t]he heart of [classical orthodoxy] was the view that law is a science . . . Langdell and his followers took the view of law as science seriously and carried it out programmatically in a way that had no precedent in the common law world, erecting a vast discursive structure that came to dominate legal education and to greatly influence the practical work of lawyers and judges.”).

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84. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1424. Grey similarly argues that an “explanation of the appeal of classical legal science was the ideological support it provided for business through its treatment of economic power relations as neutral, scientifically derived private law rights.” Grey, *supra* note 83, at 33.

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85. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1424.

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86. *Id.* at 1425.

87. *Id.*

Moreover, from 1870 to 1900, judges and jurists called for a reclassification of law around general and abstract principles which would allegedly be more “scientific” and “neutral.” Until then, scholars had conceived of law as being arranged along pragmatic grounds.⁸⁸ A mid-century contract law treatise, for example, would have been arranged into chapters on the law of sales, insurance, negotiable instruments, agents, railroads, etc. By 1900, however, the same treatise would have been reclassified by legal issue under general headings like “offer and acceptance” and “consideration.”⁸⁹

This process of generalization by legal issue the potential to allow legal rules to function without regard to underlying context. As Professor Thomas C. Grey writes:

The claim that justice, efficiency, and indeed everything but the internal conceptual logic of the system were “irrelevant,” dramatized the [classical] legal scientists’ principled neglect of the facts of human nature and culture; all the data of legal science were “contained in printed books,” the appellate reports in the law library.⁹⁰

In interpreting contracts, for example, judges could apply the same overarching set of principles to disputes involving both commercial and consumer contracts without regard to the relative sophistication of the parties involved. This indifference to social reality would have appeared less logical if, as before, separate categories of contract law existed for “commercial” and “consumer.” Not bound by an overarching principle covering all situations, judges would have been freer to develop separate rules for each category. This generality was later condemned as being overly formalistic, but nineteenth-century scholars considered it an important way to ensure that law remained apolitical.⁹¹

Judges’ economic liberalism, coupled with the idea that courts should be neutral when dealing with private rights, al-

88. HORWITZ, TRANSFORMATION, *supra* note 80, at 11-16.

89. *Id.* at 12-13.

90. Thomas C. Grey, *Book Review: Modern American Legal Thought*, 106 YALE L.J. 493, 496 (1996-1997) (quoting Professor Langdell, Speech at the ‘Quarter-Millennial’ Celebration of Harvard University (Nov. 5, 1886), *in* 3 L. Q. REV. 123, 124 (1887)).

91. HORWITZ, TRANSFORMATION, *supra* note 80, at 15.

lowed judges and jurists to categorize easily laws as private or public. If economic liberalism deemed government interference into a particular matter to be invalid, that matter fell into the realm of private law. Of course, as we recognize today, private law is never free from public influence: state action is necessary to confer legitimacy on even private activity, and this state action is the manifestation of a conscious policy choice by government. However, nineteenth-century judges' belief in the neutrality of the court system disguised this state action as the apolitical enactment of private preferences. In a well-known example from constitutional law, *Plessy v. Ferguson*,⁹² the Supreme Court upheld a racial segregation statute on the assumption that its decision simply reflected citizens' private choices to racially segregate.⁹³ As *Plessy* indicates, proponents of the private/public distinction did not recognize, or perhaps simply ignored, a public or government interest in law unless the government was literally a party to the suit. Thus, laws could be grouped according the perceived appropriateness of the government interest in them. On the private side fell laws concerning individual matters: torts, contracts, property, and commercial law. On the public side fell constitutional, criminal, and regulatory law.⁹⁴

Economic liberals could classify along similar lines the many matters once unified under the single law of nations. For example, if one views private law judgments as confirmations of private rights rather than exercises of state power, judgment recognition laws do not reflect government policy decisions about the interaction between foreign and domestic courts. Instead, they simply enact mechanical determinations to enforce or ignore an individual's private rights. Economic liberalism dictates that so-called private rights should be upheld. Foreign judgments are private rights. According to this logic, foreign judgments should be upheld. Thus, the "private" problem of judgment recognition is solved without reference to the "public" interest in universal judgment enforcement. This logic seems circular today. Arguing that a foreign judgment creates an enforceable private right which must be upheld in domestic courts begs the question of whether that

92. 163 U.S. 537 (1896).

93. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 42-45 (1993).

94. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1424.

judgment should be held conclusive in the first place. And, a court's decision to leave a foreign judgment undisturbed—to enforce the judgment—is as much state action as taking the opposite path. As Realists later argued,⁹⁵ whether or not to enforce a judgment is a political choice. Nonetheless, the tautology commanded at least some respect even into the mid-twentieth century.⁹⁶

Judges' and jurists' success in creating a strict, categorical distinction between the public and private realms generally extended to the many issues once governed by the unified laws of nations. The majority of conflict of laws scholars who came after Story ultimately disagreed with his view that private international law was fundamentally linked to international considerations. Instead, consistent with the era's separation of public from private, they believed that private international law, governing purely individual matters, should have no connection to international law or international relations.⁹⁷ The fact that the parties to a transnational litigation were from different countries did not change matters. For example, scholars of the period began to encourage the enforcement of "choice of law" clauses in contracts between citizens of different nations, as failure to do so represented a government-sponsored upsetting of private expectations.⁹⁸ The editor's comments to the eighth edition of Story's *Commentaries* exemplify this trend. Although the original text of the first edition is preserved, an editor's note to the text clarifies that, despite Story's sentiments, "there is nothing *international* in the rules by which the court determines which law is applicable [in a conflicts case] There is no obligation or duty recognized between nations to deal with such cases at all, or to deal with them in any particular way."⁹⁹

95. See *infra* Part V(B).

96. Followers of Beale's vested rights theory supported this theory. See *infra* Part V(A). For other examples of this logic in practice, see discussion *infra* Part V(B).

97. See Stevenson, *supra* note 19, at 565 ("[T]he majority [of Anglo-American jurists] has even denied that there is any connection at all between private and public international law.")

98. Paul, *Isolation*, *supra* note 16, at 163.

99. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC § 38, cmt. a (Melville Bigelow ed., 8th ed. 1883).

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How did the enforcement and recognition practices change during this period? At first glance, they appear to have changed only slightly. At the beginning of the century, the weight given to foreign judgments lacked consistency, and in 1895, things were no clearer. British and American cases generally held that foreign judgments should be given some presumption of validity, but the strength of this presumption varied greatly. On one end of the spectrum were cases that viewed foreign judgments as *prima facie* evidence of the matter adjudged. In these cases, the previously victorious party had grounds to initiate suit in the local forum, but the decision was open to attack by the losing party on practically unlimited grounds, including the merits of the case.¹⁰⁰ At the other end of the spectrum were decisions, more prevalent at the end of the nineteenth century, and then more common in Britain than in the United States, ruling that foreign judgments were conclusive. In these cases, judgments were open to impeachment under only very limited circumstances, such as fraud or lack of personal jurisdiction.¹⁰¹ At almost every point in between fell still other cases.¹⁰²

A closer look, however, reveals that judgment recognition practices actually changed dramatically during this period. Courts' ultimate holdings to enforce or reject foreign judgments continued to lack an overriding theme, but across the board, judges advanced new rationales for their decisions. Indeed, one can roughly place a decision or treatise within the history of private international law just by looking at the justification chosen. Still governed by a unified law of nations, English cases from the 1600s and 1700s viewed enforcement of foreign judgments as a requirement of international law.¹⁰³

100. *See, e.g.*, *Abouloff v. Oppenheimer*, 10 Q.B.D. 295 (1882) (holding that allegation that Russian Court had been misled by false testimony of plaintiff was sufficient to overrule foreign judgment).

101. *See, e.g.*, *Roth v. Roth*, 104 Ill. 35, 47 (1882); *Lazier v. Westcott*, 26 N.Y. 146 (1862).

102. *See* *Hilton v. Guyott* [sic], 42 F. 249, 254 (1890) (noting that "no definite lines" have been drawn as to when foreign judgments can be impeached). *See infra* note 158.

103. While commentator Hessel Yntema has taken the dicta in the cases mentioned below to indicate that seventeenth century English courts did view enforcement of foreign judgments as a matter of international law, see Hessel E. Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law*, 33 MICH. L. REV. 1129, 1143 n.22 (1935), it is unclear whether their holdings

Soon after the divorce of private from public international law, but before the emergence of a rigid distinction between the fields, English and American cases and commentary cited comity. And by 1895, when the distinctions were solid, American and English cases and American legal scholars relied on purely domestic concerns.¹⁰⁴ This substitution of domestic concerns for comity represented the broader rejection of a private international law connected to international affairs.

The trial court opinion in *Hilton v. Guyot* illustrates courts' embrace of domestic concerns as a rationale for judgment enforcement.¹⁰⁵ Holding that foreign judgments should be treated no differently than domestic judgments, the court relied on principles of *res judicata*. After a full and fair opportunity to litigate a case before a competent tribunal, a party should be able to escape an unfavorable result only through the appeals process. A party should not be able to escape the result by launching a collateral attack from another jurisdiction.¹⁰⁶ Although the court cited Story's *Commentaries*, it did so only in reference to an issue of judicial administration: that retrying cases involving foreign parties could present evidentiary difficulties.¹⁰⁷ The court ignored Story's recognition of the national interest in promoting the recognition of American judgments abroad and in judgment recognition generally.

were broad enough to cover *in personam* judgments like that of *Hilton v. Guyot*. *Cottington's Case* involved an English citizen hoping to escape a marriage to a once-divorced Italian woman by arguing that an Italian Court's annulment of her prior marriage of hers was invalid in England. The court's refusal to do so may be read simply to endorse a principal well-established by the time of *Hilton*: that cases involving *in rem* judgments and the status of people did involve the power of the sovereign over property under its control, and thus, were enforceable as a matter of international law. Similarly, the other cases he cites—*Gold v. Canham*, 36 Eng. Rep. 640 (1678-1679), and *Jurado v. Gregory*, 84 Eng. Rep. 320 (1669)—all involve matters today also held to be governed by international law. At the same time, however, the distinction between private and public international law had not yet taken shape at the time of these cases; one can assume that judgment enforcement generally depended on the law of nations. KENT, *supra* note 41.

104. Cf. *Hilton v. Guyott* [sic], 42 F. 249, 257 (S.D.N.Y. 1890) (listing late-nineteenth century English cases holding foreign judgments conclusive on principles of *res judicata*, a doctrine based purely on domestic concerns).

105. *See id.*

106. *See id.* at 257-58.

107. *Id.* at 256.

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One might suspect that the failure of the *Hilton* trial court and others to cite comity in the later cases simply indicated a lack of knowledge. Almost every new lawyer understands *res judicata*, but comity is a more advanced concept. If lawyers and judges did not know about comity, they certainly could not cite it. However, historical evidence proves that American lawyers would have been familiar with comity throughout the nineteenth century. Given its modern meaning in the 1600s,¹⁰⁸ comity had long been employed in both England and the United States as the principle justification for applying the law of a foreign forum to a locally contested dispute.¹⁰⁹ In 1828, Judge Alexander Porter famously suggested that only comity could rectify the difficulties in the Continental jurists' theories on the conflict of laws.¹¹⁰ In 1832, two years before publication of Story's *Commentaries*, James Kent was able to cite in the second edition of his *Commentaries on American Law* a random sample of eight American cases addressing comity.¹¹¹ Story's highly influential *Commentaries* explained the doctrine in depth and became the foundation for modern conflicts scholarship.¹¹² And, through mid-century, judges frequently

108. See *infra* Part II.

109. See, e.g., *Emory v. Grenough*, 3 U.S. 369, 370 (1797) (reciting Huber's maxims and noting that "[W]e ought to consult, not the civil law only, but what is to be inferred from the mutual convenience, and the tacit consent of different people, because as the laws of one people cannot have any force or effect directly with another people, so, on the other hand, nothing would be more inconvenient in the promiscuous intercourse and practice of mankind, than that what was valid by the laws of one place, should be rendered of no effect elsewhere, by a diversity of law, which is the reason of the third maxim, of which heretofore no doubt appears to have been entertained."); Hessel E. Yntema & Kurt H. Nadelmann, *The Comity Doctrine*, 65 MICH. L. REV. 1, 2-3 (1966-1967); Nadelmann, *Joseph Story's Contribution*, *supra* note 60, at 230-32.

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110. *Saul v. His Creditors*, 17 Martin 569, 589 (1827) ("[T]hey have attempted to go too far. To define and fix that which cannot, in the nature of things, be defined and fixed. They seem to have forgotten, that they wrote on a question which touched the comity of nations, and that that is, and ever must be uncertain . . .").

111. Additionally, a little-noticed conflict of laws treatise written by Samuel Livermore before the publication of Story's *Commentaries* attacked the general acceptance of the comity theory by U.S. courts. See Nadelmann, *Joseph Story's Contribution*, *supra* note 60, at 232.

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112. For the influence of Story and his use of comity on the study of conflict of laws, see Ernest G. Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934-1935) and Nadelmann, *Joseph Story's Contribution*, *supra* note 60, at 230-34.

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cited comity in the arena of slave law, and it played a key role in the *Dred Scott* decision.¹¹³

Since they were not ignorant of it, then, judges' and jurists' failure to employ comity as a ground for judgment enforcement represented a conscious rejection of the doctrine. The briefs submitted to the Supreme Court in *Hilton v. Guyot* illuminate this thinking. Even in the 1890s, *Hilton v. Guyot* seemed a hugely important case. The parties were wealthy, the lawyers were famous, and, most importantly, it was the first judgments case ever to make it to the Supreme Court. If judges and jurists saw comity as having any viability, it surely would have been argued. Yet, in the first set of briefs, submitted before the January 1894 argument, the parties barely mentioned the doctrine—and then only to reject it. As argued by Appellants Hilton and Libbey:

Fanciful as it may seem, this *comity* really signifies in many minds, *courteous and gentlemanlike behavior* between nations! And it commends itself most to those minds, even among judicial personages, who most value graces of that character. But the grave business of rendering or denying *justice* cannot be regulated by such considerations . . . [In contrast, evaluating *in rem* judgments, governed by public international law] involves great issues of peace and war . . . Nearly everything which is correctly disposed of under what is called the rule of *comity* proper, falls within this field of law.¹¹⁴

Appellee Guyot similarly renounced comity:

While the efficacy of foreign judgments rests partly on principles of comity, or friendly dealing between nations at peace, or was formerly held to do so, the modern doctrine of their conclusiveness rests on the same general ground of public policy which makes domestic judgments equally conclusive The ap-

113. ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN THE CONFLICTS OF LAW 74-75 (1992).

114. Brief for Appellants and Plaintiffs in Error at 129, *Hilton v. Guyot*, 159 U.S. 113 (1895) (No. 223). Primarily arguing that fraud should render the French judgment inconclusive in American courts, Hilton and Libbey devoted only four or five paragraphs to comity in their nearly one hundred and fifty page discussion. *Id.* at 62-63.

plication of the doctrine of *res adjudicata* to foreign judgments establishes a principle of purely domestic policy with which international relations have nothing whatever to do.¹¹⁵

In other words, comity was outdated. Used by Story to link international affairs with private concerns, comity now represented an impermissible transgression of the boundary between public and private international law. The national interests it acknowledged had no place in the private proceedings between individuals.¹¹⁶

Typical of the time, both parties' arguments in their briefs before the Supreme Court focused instead on the policies underlying *res judicata*. Guyot, arguing for enforcement, stressed that the policy goal of ending litigation required that foreign judgments be treated as conclusive. Since the French court in the case properly exercised jurisdiction, its judgment should be viewed no differently than a final and conclusive domestic judgment. The fact that the judgment was rendered in another country should be given no bearing; international relations had no place, they argued, in the purely domestic policy of *res judicata*. Rather, a foreign judgment, just like a private right created under foreign law, should be enforced unless contrary to the public policy of the state: "We have

115. Brief for Appellees and Defendants in Error at 84-85, 129, *Hilton v. Guyot*, 159 U.S. 113 (1895) (No. 223). The editor's comments to the eighth edition of Story's *COMMENTARIES* also demonstrate this rejection of comity. Although the original text of the first edition is preserved, an editor's note to the text clarifies that, despite Story's sentiments, "there is nothing *international* in the rules by which the court determines which law is applicable [in a conflicts case]" STORY, *supra* note 99, § 38, cmt. a.

116. Only in the second set of briefs—those for the April 1894 oral argument—did the parties give comity more than a cursory glance. No transcript of the proceedings of the January argument before the Supreme Court exists, but the justices' remarks and questions apparently tipped off the parties that their ruling might hinge on the doctrine. Having only dedicated a few paragraphs to the doctrine in their first argument, appellants Hilton and Libbey opened their April brief with an entire section entitled "Comity." Supplementary Observations on Behalf of Appellants and Plaintiff in Error at 2-7, *Hilton*, 159 U.S. 113 (1895) (No. 223). Appellee Guyot, already having abandoned comity as a basis for recognition in its first brief, marshaled a staggering amount of case precedent disproving the applicability of comity in favor of other rationales, discussed below. Supplementary Brief on Re-argument for Appellees and Defendants in Error at 1-50, *Hilton*, 159 U.S. 113 (1895) (No. 223).

reached a point, at least in this country, where the universal rule is that private rights, acquired under the laws of foreign states, are respected, recognized . . . so far [as they do not violate the public policy of the domestic forum].”¹¹⁷ Private rights, not international affairs, should control the Court’s decision.

Hilton and Libbey, arguing for the opposite result, also focused on *res judicata*. They agreed with Guyot that *res judicata* was the only conceivable reason to enforce a judgment, but they argued it could never apply in the case of a judgment rendered in another country. According to their logic, *res judicata* had relevance in only two situations: (1) when courts could be assured of the fairness of the foreign judgment; and (2) when they had reason to work to prevent endless litigation of a claim. With a foreign judgment, Hilton and Libbey argued, not only could courts never be sure that justice had been done—Anglo-American judicial procedures were superior to others in the world—but domestic courts had no reason to seek to minimize litigation worldwide. Since policies underlying *res judicata* could not justify enforcement, nothing could, and judgments should be open to attack on the merits of the case.¹¹⁸

Interestingly, the executive branch at the end of the nineteenth century shared lawyers’ and judges’ focus on domestic rather than international issues in the resolution of private international law disputes. From 1874 to 1884, the United States was invited to three proposed conferences on the standardization of different nations’ bodies of private international law. Foreign scholars at the time (like scholars today) hoped to enhance the predictability of private international law by making the rules consistent in different countries. Some countries enforced judgments; others did not. Foreign scholars hoped to bring about universal judgment enforcement through international agreement. At each invitation, however, the U.S. Secre-

117. Brief for Appellees and Defendants in Error at 86-87, *Hilton*, 159 U.S. 113 (1895) (No. 223).

118. *Hilton* and *Libbey* distinguished *in personam* from *in rem* judgments. With *in personam* judgments, policies underlying *res judicata* were the only conceivable reasons to enforce a judgment. In contrast, *in rem* judgments invoked the sovereign power of a particular nation over property within its territorial boundaries and involved other considerations.

tary of State declined to send American delegates.¹¹⁹ Not only did the decision to avoid the conferences suggest the low priority assigned to universal judgment recognition generally, but the explanation of the Secretary of State for the 1884 refusal indicates an aversion to the overlay of international concerns on the domestic law governing private disputes. Advising the Secretary of State, Attorney General Benjamin H. Brewster argued that the United States would gain nothing by attending the conference.¹²⁰ Why? American law would not change through the conference.¹²¹ The proposed rules for judgment recognition—universal enforcement if the rendering court had proper jurisdiction, notice had been given, and the public policy of the enforcing forum were not violated—comported with American laws already in existence. Secretary of State Fish transmitted this rationale to the Italian minister, who, mystified, again approached the U.S. government. While the United States generally enforced foreign judgments, he noted, other countries did not; the position of American judgment creditors abroad could only be improved by the United States' participation in the conference. This argument, assuming a U.S. interest in having American judgments enforced abroad, received no response.¹²² The United States evinced concern only for its domestic law decisions and not for international practice.¹²³

As this section indicates, from 1834, when Story's treatise was published, until 1895, when the Supreme Court decided *Hilton v. Guyot*, many judges and jurists worked to make law an

119. See Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law*, 102 U. Pa. L. Rev. 323, 323-29 (1953) [hereinafter Nadelmann, *Ignored State Interests*]. The U.S. was invited to conferences on the unification of private international law, the first specifically focusing on enforcement of foreign judgments, in 1874, 1875, and 1884.

120. *Id.* at 328.

121. *Id.*

122. *Id.* at 329.

123. Some government officials may also have believed that the federal government would overstep its Constitutional bounds by interfering in private law, an area traditionally left to the states. See *id.* at 330-36. Only in 1963 were these doubts completely dispelled when the U.S. joined the Hague Conference on Private International Law. Adolf Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 389-90 (1970).

embodiment of perceived contrasts between public and private, and international and individual. These judges and jurists transformed private international law. They created private international law doctrines which focused solely on individual rights and domestic concerns, and which purposefully excluded all goals and methods deemed “public” or national. As such, they rejected comity as a rationale for judgment enforcement. They instead cited policies aimed at domestic concerns. This jurisprudence ultimately produced the reaction to *Hilton*’s judgments reciprocity requirement, discussed in Part IV.

IV. *HILTON V. GUYOT*: THE PRODUCT OF A UNIFIED VISION OF PUBLIC AND PRIVATE INTERNATIONAL LAW

In 1895, judgment recognition practice was still a confused muddle. Some courts held foreign judgments conclusive in all circumstances; others considered them simply prima facie evidence that a cause of action existed; others chose an option somewhere in between.¹²⁴ Although perceived distinctions between private and public had prompted the creation of separate fields of private and public international law, this doctrinal change did little to make judgment recognition practice more consistent throughout the nations’ courts. Instead, as discussed above, the changes which occurred in the nineteenth century simply provided those courts that did choose to give foreign judgments weight new rationales for doing so.

Hilton v. Guyot gave commentators hope that the Supreme Court would resolve some of the confusion. A.T. Stewart & Co., the upscale New York City clothing store, had contracted with French manufacturer Charles Fortin & Co. for the production of Alexandre gloves, a fashion staple at the time. The business relationship was fraught with problems, and after the course of several years, the parties could reach no agreement on the amount of money owed to whom. The French manufacturer sued A.T. Stewart in France and won a huge judgment for \$195,122.47, roughly equivalent to \$3,613,379 today.¹²⁵

124. See *supra* notes 100-102 and accompanying text.

125. *Hilton v. Guyot*, 159 U.S. 113, 113-23 (1895). See also Columbia Journalism Review Dollar Conversion Calculator, *supra* note 1.

While awaiting appeal, A.T. Stewart removed its belongings from France.¹²⁶

Left with no assets on which to collect when the judgment was affirmed through the French appeals process, Charles Fortin sought to enforce the French judgment in U.S. federal court.¹²⁷ A.T. Stewart lost again. The Southern District of New York held that absent fraud, foreign judgments should be given the same weight as domestic judgments.¹²⁸ Still undeterred, A.T. Stewart hired future U.S. Secretary of State Elihu Root as counsel and prepared for a Supreme Court appeal.

No doubt to the surprise of legal scholars at the time, the Supreme Court reversed, citing comity and international law. As discussed above, the Court held that foreign judgments would not be considered conclusive unless the rendering forum gave similar weight to American judgments. Since France would not enforce a similar American judgment—at that time, France gave no presumption of validity to foreign judgments and re-tried all such cases on the merits—the Supreme Court prohibited federal courts from enforcing the French judgment for Charles Fortin.¹²⁹ The Court appears to have been unanimous on all questions addressed except judgments reciprocity, on which it split five to four.¹³⁰ As will be discussed below, the dissent likened foreign judgments to “private rights acquired under foreign laws” that should, like all private rights, be held conclusive in most cases. Judgments reciprocity, a tool of politics between nations, should be adopted by the legislative branch if at all.¹³¹

This section discusses the majority’s break from the precedent discussed in the previous section. First, it argues that the majority and dissent in *Hilton* support the thesis, discussed above in Part II, that judgments reciprocity cannot be endorsed by proponents of a strict separation between public and private international law. Requiring judgments reciprocity, the majority opinion rested on a unified vision of private and public international law. The dissent, opposed to judg-

126. 159 U.S. at 113-23.

127. *Id.*

128. *See Hilton v. Guyott* [sic], 42 F. 249, 252 (S.D.N.Y. 1890).

129. 159 U.S. at 202-03, 210, 227-28.

130. *See id.* at 229-30.

131. *Id.* at 233-34 (Fuller, C.J., dissenting). The dissent’s argument is more fully discussed below.

ments reciprocity, endorsed the now antiquated position that fields are entirely separate from one another.¹³² Second, it argues that the majority was ahead of its time in endorsing judgments reciprocity. Like later scholars, the majority understood that private international law is necessarily linked to international affairs, and its support of judgments reciprocity was a conscious rejection of the prior century's legal developments.

Writing for the majority, Justice Gray acknowledged that judgment recognition fell under the heading of private international law. And he agreed with his dissenting colleagues that no international obligation required enforcement of another sovereign's in personam judgment.¹³³ Yet, like Story, he still saw private international law as fundamentally connected to international law and international affairs. In the introduction of his legal analysis, he reaffirmed that international law includes "not only questions of right between nations . . . but also questions arising under what is usually called 'private international law.'"¹³⁴ Gray later noted that the Court must look to "the acts and usages of civilized nations" in making its decision,¹³⁵ despite general belief that judgment recognition required reference to domestic law only. And, consistent with this idea, he cited as many foreign sources as domestic in supporting his conclusions.¹³⁶

Required in ascertaining public international law but usually unnecessary in resolving private disputes, such heavy reliance on international custom closely links *Hilton* to cases decided under public international law. For example, *Hilton*'s tireless examination of foreign sources is similar to that in *Paquete Habana*,¹³⁷ Gray's seminal 1900 opinion measuring the state protection of foreign vessels required under public international law. *Paquete Habana* actually cites *Hilton* to explain its

132. *Id.*; See also ANDREAS LOWENFELD, CONFLICTS OF LAW: FEDERAL, STATE, AND INTERNATIONAL PERSPECTIVES 389 (2002) ("The difference between the majority and the dissent in *Hilton* shows once more the elusive distinction between public and private law . . .").

133. 159 U.S. at 233-34.

134. *Id.*

135. *Id.*

136. See, e.g., *id.* at 226 (citing Portuguese, Greek, Egyptian, Cuban, and Mexican judgment recognition practice).

137. 175 U.S. 677 (1900).

reliance on legal treatises rather than case law.¹³⁸ This parallel may seem unremarkable to modern scholars—why should opinions involving international affairs not rely on similar doctrine and sources?—but it flew in the face of the nineteenth century determination to separate private from public international law entirely. *Hilton* concerned a private dispute between merchants, *Paquete Habana* a public dispute between warring nations. *Hilton* was decided under domestic law, *Paquete Habana* under international law.¹³⁹ Those factual and legal differences, nineteenth-century scholars would argue, should produce unrelated opinions.

Following Story, Gray relied on comity to justify the enforcement of foreign judgments and employed a judgments reciprocity requirement as comity’s backbone. Comity allowed the Court to recognize that a foreign judgment had no automatic effect within American jurisdictions without its consent, but also that such consent, beneficial to the international system, should be granted absent several exceptions designed to protect individual interests:

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.¹⁴⁰

Through comity, the decision whether or not to accept a judgment was left to the discretion of the domestic court operating under municipal law. At the same time, that decision required a consideration of “international duty and convenience.” Thus, as in Story’s conception, comity functioned as a link between public and private international law.¹⁴¹ Judg-

138. *Id.* at 700.

139. See generally LOWENFELD, *supra* note 132, at 389 (discussing *Paquete Habana*).

140. 159 U.S. at 163-64.

141. See *infra* note 66 and accompanying text.

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ments reciprocity, in turn, allowed the court to facilitate a unified international system.¹⁴²

The dissent presented the opposite view of private and public international law. The dissent argued that international law or practice had nothing to do with judgment recognition. Although agreeing with the majority that a foreign judgment should normally be held conclusive, it rejected comity and instead looked to domestic principles of *res judicata* and the policy of ending litigation.¹⁴³ As Chief Justice Fuller pointed out, both were rooted in domestic law only:

It is difficult to see why rights acquired under foreign judgments do not belong to the category of private rights under foreign laws. Now, the rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced [A]lthough the source of this rule may have been the comity characterizing the intercourse between nations, it prevails to-day by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right.¹⁴⁴

Fuller presented an argument immediately reconcilable with nineteenth century efforts to erect inviolable boundaries between public and private international law. Viewing a judgment recognition case as simply a confirmation of a private right created in a foreign country, the dissent unsurprisingly condemned judgments reciprocity.¹⁴⁵

To most legal commentators, what glaringly set the majority opinion apart from prior legal developments was its endorsement of a judgments reciprocity requirement.¹⁴⁶ That difference produced the critical outrage which is the subject of

142. Some judges who have more recently cited comity in judgment recognition cases have removed the requirement of reciprocity. *See, e.g.*, *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1972) (holding that foreign judgment enforcement was governed by comity but that reciprocity was not required). Yet, for nineteenth century judges and jurists, Story and Gray's conception was the standard—reciprocity and comity were inextricably linked.

143. 159 U.S. at 229-33.

144. *Id.* at 233.

145. *Id.* at 229-33.

146. *See infra* Part V.

this paper.¹⁴⁷ However, scholars' condemnation of judgments reciprocity was just one manifestation of a broader disagreement about the place of international affairs in private international law. Cases before *Hilton* marked the rejection of Story and the solidification of the distinction between public and private international law. They constituted the endorsement of a private international law system based on ideas of private rights free from public intervention and domestic law free from international concerns.

The *Hilton* Court rebuked this distinction. It displayed an awareness of the place American judgment recognition practices have within the international community and considered national as well as individual interests in its rationale. In fact, had sixty years of legal development not occurred between the publication of Joseph Story's *Commentaries* and the Supreme Court's decision in *Hilton*, the majority opinion would have seemed a perfect application of the leading treatise on the subject at hand. Gray adopted Story's view of the inherent connection between private international law and foreign affairs; he enacted his theory of comity, the foundation of Story's treatise, with no modifications; and he incorporated into the common law his notion of judgments reciprocity requirements as a route to international cooperation.¹⁴⁸ As it were, however, *Hilton's* embrace of Story's views must have represented an almost inexplicable step backward for Gray's contemporaries.

Tellingly, Justice Gray cited very few American cases in support of comity, his justification for the enforcement of foreign judgments, although numerous American lower court cases about judgments existed at the time. Instead of relying on case precedent to justify what became the opinion's most important contribution, he cited primarily the works of Story, Kent, and Wheaton, scholars who, not coincidentally, disagreed with their peers and continued to champion the significance of international affairs to private international law throughout the nineteenth century.¹⁴⁹ To support judgments reciprocity, his basis for comity, Gray drew from the practice of

147. *See id.*

148. *See infra* discussion about Story's views.

149. *See generally* STORY, *supra* note 19; HENRY WHEATON, INTERNATIONAL LAW (8th ed. 1866).

European nations.¹⁵⁰ He mentioned some decisions explaining comity, but, involving the application of foreign law to locally adjudicated disputes, they were only indirectly related to the enforcement of foreign judgments. The few decisions Gray cited in his opinion which directly support comity—*D'Arcy v. Ketchum*,¹⁵¹ *Burnham v. Webster*,¹⁵² *McEwan v. Zimmer*,¹⁵³ *Taylor v. Bryden*,¹⁵⁴ and *De Brimont v. Penniman*¹⁵⁵—were among the only in existence. No other cases in Gray's impressive listing of precedent employed the doctrine.¹⁵⁶

Why did Gray go beyond American case law to rebuke one century of scholarship excluding international affairs from private international law? One possibility is that the Supreme Court simply undertook a bigger task than had prior state and lower federal courts. If the Supreme Court sought to resolve for posterity questions of judgment enforcement and recognition, as its comprehensive opinion indicates, it would have needed authority. Judges cannot appear to concoct workable doctrinal frameworks purely from imagination, especially when they are limited by nineteenth-century fantasies of a neutral, scientific legal system free from political influence.¹⁵⁷ If Anglo-American case precedent on conflict of laws were simply too undeveloped and confused to provide the doctrinal foundation required, Justice Gray would have been forced to borrow ideas of comity and judgments reciprocity from European practice. The Supreme Court's apparent awareness of the international ramifications of its private international law deci-

150. 159 U.S. at 164-66, 211-28.

151. 52 U.S. (11 How.) 165, 175 (1850) (noting that principles of comity dictate the enforcement of sister-state judgments).

152. 4 F. Cas. 781, 183 (D. Maine 1846) (No. 2179).

153. 38 Mich. 765, 769 (1878).

154. 8 Johns. Cas. 173, 177 (N.Y. Sup. Ct. 1811) (concluding that comity is owed in the context of sister-state judgments).

155. 7 F. Cas. 309, 311 (S.D.N.Y. 1873) (No. 3715).

156. *Cf. Hilton v. Guyot*, 159 U.S. 113, 186-87 (1895) (citing *Bryant v. Ela, Smith* (N.H.) 396, 404 (1815) (holding that comity is not extended to *in personam* foreign country judgments)).

157. *Cf. WATSON, supra* note 113, at 57 (similarly arguing that Story looked to European scholarship in writing his Commentaries on the Conflicts of Laws because insufficient American case precedent existed to "create a system . . . on a subject so broad and intellectually complex as conflict of laws . . .").

sion, then, could have been a reflection of these existing ideas and nothing more.

Gray’s contemporaries did believe that Anglo-American jurisprudence lacked clear answers. Remarking on the state of the law in 1894, appellant Hilton noted that “[t]here is scarcely any doctrine of the law which . . . is in a more unreduced and uncertain condition”¹⁵⁸ And nineteenth-century Anglo-American scholarship on conflicts of laws was much less developed than its European counterpart.¹⁵⁹ There were simply fewer cases. In Europe, scholars had grappled with conflicts of laws questions since the twelfth century. Commerce between independent city-states in Northern Italy, each with its own local statutes, gave rise to choice of law problems.¹⁶⁰ English courts, in contrast, faced few conflicts issues until the 1700s. Conflicts problems within England were nonexistent, as powerful central courts exercised jurisdiction over the entire empire.¹⁶¹ Further, English laws effectively prohibited English courts from hearing disputes involving foreign transactions. Laws required juries to be drawn from the vicinage where disputes occurred.¹⁶² If a dispute occurred abroad, plaintiffs were forced to seek legal remedies outside of England.¹⁶³ Beginning in the 1700s, the expansion of the English colonial empire and the relaxation of such jury requirements did bring conflicts cases into English and American courts, but Anglo-American jurisprudence still remained centuries behind.¹⁶⁴

If Gray did in fact view Anglo-American case law as insufficient to support a seminal opinion in *Hilton*, both Story and international practice would have been natural gap-fillers. Many scholars have noted that Story’s *Commentaries* provided the foundation for future conflicts scholarship in the United States.¹⁶⁵ Further, Justice Gray studied at Harvard Law School

158. Brief for Appellants and Plaintiffs in Error at 49, *Hilton v. Guyot*, 159 U.S. 113 (1895) (No. 223).

159. JUENGER, *supra* note 71, at 7-9.

160. *Id.*; *See also* Paul, *Comity*, *supra* note 66, at 12.

161. *Id.* at 18-19.

162. *Id.*

163. *Id.*

164. WATSON, *supra* note 113, at 47 (noting the slow development of Anglo-American conflicts law).

165. *See* Nadelmann, *Joseph Story’s Contribution*, *supra* note 60.

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when Story's teachings dominated coursework,¹⁶⁶ perhaps making *Commentaries* an even more obvious source of authority for judgments reciprocity and comity.

Justice Gray's parallel resort to international practices would also not have been unusual. In *Joseph Story and the Comity of Errors*, Alan Watson argues that borrowing from European legal doctrine was the standard method of filling in gaps in Anglo-American conflicts jurisprudence.¹⁶⁷ In an 1817 English case, for example, Master of the Rolls Sir William Grant explained: "On the subject of domicile, there is so little to be found in our own law that we are obliged to resort to the writings of foreign jurists for the decisions of most of the questions that arise concerning it."¹⁶⁸ Like *Hilton*, this English decision cited numerous European authorities.¹⁶⁹

Justice Gray would have been even more likely than the standard judge to look internationally to illuminate judgment recognition practice. When studying at Harvard Law School, he had developed an interest in an approach to law that emphasized the role of legal history and the evolution of precedent. His later opinions, often the product of comprehensive efforts to trace the development of legal doctrines from their origins, show that even as a judge he considered the historical evolution of a legal doctrine especially important.¹⁷⁰ The origins of comity were found in European rather than English legal history. In deciding *Hilton*, perhaps Justice Gray simply followed them there.

This argument, however, assumes too much. Realist scholars especially have questioned the political neutrality of the Court's supposedly scientific decisions,¹⁷¹ as discussed below. It is doubtful whether the Court would have adhered to borrowed practices with unfavorable political consequences simply in the name of citing persuasive authority. As it strug-

166. Elridge B. Davis & Harold A. Davis, *Mr. Justice Horace Gray: Some Aspects of His Judicial Career*, 41 A.B.A. J. 421 (1955).

167. WATSON, *supra* note 113, at 48.

168. *Id.* (quoting *Pottinger v. Wightman*).

169. *Id.*

170. *Horace Gray*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1379, 1386 (Leon Freidman & Fred L. Israel eds., 1969).

171. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1425-26.

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gled to remove the consideration of national interests from private transactions in other legal areas, why would it have allowed them to affect private transactions in private international law? Additionally, Anglo-American precedent may have been confused, but there were more than enough cases to support a seminal opinion. The number of conflicts cases in existence had dramatically increased since Story wrote his *Commentaries* in 1834, and private international law scholarship had more than doubled.¹⁷² The dissent's very existence proves that these existing cases and scholarly works could have been sufficient for Gray to have taken the opposite view. Authored by Chief Justice Fuller and joined by three other justices, the dissent's opinion did not cite European cases. Instead, it cited only English cases and put forth commonly held views about the distinction between private and public international law.¹⁷³

A more plausible explanation for the majority's break from precedent is that it was ahead of its time—the majority understood the strict, categorical distinction between public and private international law but believed its fallacies severe enough to warrant rejection of the whole scheme. According to this argument, Justice Gray looked to European precedent not out of necessity but out of choice. Final paragraphs in *Hilton* almost mirror the then newly-conceived Realist critiques, discussed below, of the distinction between government action and inaction generally:

In holding such a judgment, . . . we do not proceed upon any theory of retaliation upon one person by reason of injustice done to another . . . By our law, at the time of the adoption of the constitution, a foreign judgment was considered as prima facie evidence, and not conclusive. [No statute or treaty] has changed that law . . . It is not supposed that, if any statute or treaty had been or should be made, it would recognize as conclusive the judgments of any country, which did not give like effect to our own judgments. In the absence of statute or treaty, it ap-

172. In fact, even by 1834, Story could draw from more than 500 conflicts cases to write his COMMENTARIES. See Nadelmann, *Joseph Story's Contribution*, *supra* note 60, at 237.

173. *Hilton v. Guyot*, 159 U.S. 113, 229-35 (1895).

pears to us equally unwarrantable to assume that the comity of the United States requires anything more.¹⁷⁴

This passage can be read as an attack on the dissent's assumption that mechanical interpretation of private preference forbids judgments reciprocity. If existing law says nothing, argued Gray, any judgment constitutes court action. Requiring judgments reciprocity is no more government intervention in private disputes or international affairs than is taking the opposite path. Gray wisely refrained from taking the next step in the argument—that requiring judgments reciprocity (or not) is a political choice—but it closely follows.

The year 1895 marked a new awareness in the importance of universal judgment recognition. International commerce had always been important in the United States, and it was becoming increasingly so. And, invitations extended to the United States for three international conferences on the unification of private international law,¹⁷⁵ discussed above, had no doubt focused at least some degree of national attention on the issue. Seeing judgments reciprocity as a means of bringing about universal judgment, Gray chose to introduce the tool into American common law. Gray cited European sources because domestic law was still imprisoned in a doctrinal framework that separated private international law from international relations.

V. *HILTON'S RECEPTION: JUDGMENTS RECIPROCITY AND THE BLURRING OF THE PUBLIC/PRIVATE DISTINCTION*

Commentators were outraged by Justice Gray's endorsement of comity and judgments reciprocity. Predictably, judges and scholars found his call for a return to earlier ideas about private and public international law hopelessly outdated, and they immediately spoke out against the judgments reciprocity requirement. Law reviews, for example, criticized the doctrine as early as 1896.¹⁷⁶ Calling the Court's introduction of judg-

174. *Id.* at 228.

175. See Nadelmann, *Ignored State Interests*, *supra* note 119, at 323-29; discussion *infra* Part III.

176. Note, *Conclusiveness of Foreign Judgments*, 44 AM. L. REG. 271, 277 (1896) (noting the criticism leveled on the reciprocity doctrine just one year after *Hilton*).

ments reciprocity a “failure,” the *Law Quarterly Review* argued for the quick abandonment of *Hilton’s* holding: “[T]he so-called enforcement of a foreign judgment is in truth nothing but the recognition of a right acquired by A against X under a foreign law.”¹⁷⁷ The *Michigan Law Review* said that “principles of rights and justice”—i.e., concepts of fairness as between private parties—should determine the effect of foreign judgments, not judgments reciprocity.¹⁷⁸ And, noting that the doctrine made foreign judgment enforcement dependent on the actions of other nations, the *Columbia Law Review* deemed judgments reciprocity to be “legally unsatisfactory” because of its unpredictability. The enforceability of a foreign judgment was determined not by American law but by that of another sovereign.¹⁷⁹

This section argues that these nineteenth-century ideas have survived in criticism of judgments reciprocity through the 1970s. After *Hilton*, two conflicting trends, to be described in this section, dominated private international law. The first trend was continued development of the public/private line, both inside and outside of international law. Champions of the distinction between public and private achieved their most visible victories in court,¹⁸⁰ and proponents of the isolation of conflicts of law from international affairs developed theories more comprehensive than those pre-*Hilton*.¹⁸¹ The second trend pushed in the opposite direction. Legal scholars began to criticize the separation of private from public generally. Additionally, international law scholars began to recognize that issues of international relations could both affect and be affected by individual actions, thereby blurring the rigid separation between private and public international law.¹⁸²

This second trend, at least among the legal vanguard, made the simultaneous attempts to further solidify the public/private distinction outdated, in a sense, even before publication. If this were the end of the story, this Note’s main thesis

177. Note, 12 L.Q. REV. 299, 303 (1896).

178. Recent Important Decisions, *Judgment: Of Foreign Country: Conclusiveness*, 7 MICH. L. REV. 339, 351 (1908-1909).

179. See Recent Decisions, *Judgments: Foreign Judgments: Conclusiveness: Reciprocity*, 13 COLUM. L. REV. 73, 79 (1913).

180. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

181. See *infra* discussion accompanying notes 186-193.

182. See *infra* discussion accompanying notes 200-210.

could not be correct: criticism of judgments reciprocity grounded in the distinction would simply be the irrelevant remnants of a dying doctrine. Yet, longstanding assumptions do not disappear overnight, even among the vanguard. Rather, development of legal doctrine from 1895—when at least the majority of the scholars recognized the distinction—to 2004—when most of them question it—progressed gradually.

First, this section separately considers the two conflicting trends: the continued development of the theories supporting a division between public and private international law by one group of scholars,¹⁸³ and the simultaneous dismantling of the public/private distinction by another.¹⁸⁴ Second, it shows how these trends have interacted to affect critics' perceptions of judgments reciprocity to this day.¹⁸⁵ It concludes that vestiges of the outdated separation between private international law and international affairs have produced the bulk of arguments levied against judgments reciprocity. Although the substance of the arguments against judgments reciprocity may have been forgotten in today's world, scholars, judges, and legislators have only recently started to reconsider judgments reciprocity as a viable prerequisite to foreign judgment enforcement.

A. *Joseph Beale's Vested Rights Theory & Continued Exclusion of the "Public" from Private International Law*

In the late nineteenth and early twentieth centuries, Joseph H. Beale, a professor at Harvard Law School, replaced Joseph Story as the leading influence on the development of private international law.¹⁸⁶ Beale and his followers developed the "vested rights" theory of conflicts of law. The vested rights theory continued the move away from Story's vision and further entrenched the idea that private international law had no link to international affairs.

183. See *infra* part IV(A).

184. See *infra* part IV(B).

185. See *infra* part IV(C).

186. Maier, *supra* note 66, at 284. Ernest G. Lorenzen credits Professor Beale for inciting national interest in private international law. See ERNEST G. LORENZEN, *Developments in the Conflicts of Laws, 1902-1942*, in SELECTED ARTICLES ON THE CONFLICT OF LAWS 203, 203 (1947).

Beale's theory can be summarized as follows. At base, law was territorial. Courts could apply the law of the forum and that law only. The law of other jurisdictions had no effect outside of their territorial boundaries. Consequently, forum law determined the consequence of acts occurring within the forum: "If two laws were present at the same time and in the same place upon the same subject we should also have a condition of anarchy. By its very nature law must apply to everything and must exclusively apply to everything within the boundary of its jurisdiction."¹⁸⁷

The idea of "vested rights" came into play when an injured plaintiff brought suit in a forum other than the one in which the underlying events occurred. Agreeing with the prevailing notion that law should strive to protect individual rights, Beale called individual interests "primary rights."¹⁸⁸ Violation of the primary right instantly produced the right to redress. The right to redress was a "secondary right," and it was treated as though it were the injured party's private property: the injured party could take that secondary right into other forums and use it as a basis for a lawsuit. In granting relief, forum courts did not apply foreign law—they could not. They simply recognized a secondary right vested under foreign law. The forum court's task was thus reduced to determining whether and when the secondary right had vested. Under Beale's view, this question was of one of fact rather than law.¹⁸⁹

Beale's "vested rights" theory seems circular today. Arguing that foreign law creates rights begs the question of whether foreign law should be considered in the first place. Nonetheless, the theory satisfied nineteenth century judges' and jurists' desire to make legal thought more "neutral" and "scientific."¹⁹⁰ Determining the place where events occurred, required under Beale's theory, often posed a complicated problem. A large company's negligence, for example, could arguably take place in many jurisdictions: corporate headquarters, where the decision was made; the factory line, where the

187. Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2455-56 (1998-1999) (quoting JOSEPH H. BEALE, SELECTIONS FROM A TREATISE ON THE CONFLICT OF LAWS §§ 1.15-1.19 (1935)).

188. *Id.* at 2456.

189. *Id.* at 2456-57.

190. *See supra* Part III(B).

worker followed faulty instructions; or the place of purchase, where the injury occurred. To ease this determination, Beale formulated general principles of tort, contract, trusts and estates, etc.¹⁹¹ These general principles theoretically operated regardless of underlying fact patterns. In tort, for example, Beale's rules deemed the event to have occurred in the place of injury. Under his rules, if a railroad mechanic negligently repaired a train car in Alabama and that negligence finally led to an accident when the train crossed Mississippi, the event occurred in Mississippi. Mississippi law created the "secondary right," or the right to sue under Mississippi law. The plaintiff then could carry his "secondary right" into any court in the country.¹⁹² Operating without regard to factual context, these rules escaped criticism as being vulnerable to an individual judge's political beliefs.¹⁹³ Beale's theory became the basis for the *First Restatement of the Conflict of Laws* published in 1934 and for his three volume treatise published in 1935.¹⁹⁴

B. *Legal Realism and Attacks on the Public/Private Distinction*

As Beale and his followers developed the vested rights theory, another group of scholars started to attack the core beliefs underlying the rigid separation of public and private international law. Beginning in the 1880s and culminating in the Legal Realist Movement of the 1920s and 1930s, scholars leveled harsh criticisms on the more general distinction between public and private law.¹⁹⁵ Noting that laws produce rather than reflect social reality, these scholars argued that allegedly "natural" rights of the private sphere actually could not exist without positive action by the state. Realist J.M. Clark aptly summarized their position: "[W]hat are rights? Legally, they are those interests which society chooses to protect. Which reduces our proposition to a very simple form: those injuries are forbidden which the law forbids; those interests are pro-

191. See Roosevelt, *supra* note 187, at 2457-58.

192. See *Alabama G. S. R. Co. v. Carroll*, 11 So. 803 (1892).

193. Judges, however, circumvented Beale's bright-line rules by inventing "escape" devices such as characterization and renvoi.

194. AMERICAN LAW INSTITUTE, *FIRST RESTATEMENT OF THE CONFLICT OF LAWS* (Reporter Joseph H. Beale, 1934); BEALE, *supra* note 187.

195. See Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1426.

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tected which the law protects.”¹⁹⁶ If public power created private rights, not only did the public/private distinction mean nothing, law could not be neutral or apolitical. If the government had the power to give, it had the power to take away. Any division created between the public and private realms was not an inescapable and neutral legal development but rather a political decision reflecting judges’ beliefs in conservative economic ideologies.¹⁹⁷ As a result of these criticisms, the legal barriers to public interference in private relationships erected in the nineteenth century were gradually torn down. Today, the government regularly intervenes, at least to some degree, in many private economic transactions.¹⁹⁸

This blurring of the public/private distinction in general did not have immediate effect on public and private international law, however. The idea that law could be divided into public and private spheres had bolstered the positivist distinction between public and private international law, but, as discussed above, had not created it.¹⁹⁹ Only with a widespread theoretical attack on the distinction’s positivist underpinnings did the strict, categorical distinction begin to seem illogical and even detrimental to continued development of international law. Public international law theorists began to argue that public international law could and should apply to individuals,²⁰⁰ despite the positivists’ insistence that it apply only to sovereign states, and in 1946, the Nuremberg Tribunal assigned individuals criminal responsibility for violations of international law.

196. J.M. CLARK, SOCIAL CONTROL OF BUSINESS 36 (Augustus M. Kelley Publishers 1969), *quoted in* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE 79 (1998).

197. Horwitz, *History of the Public/Private Distinction*, *supra* note 18, at 1426.

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198. *Cf.* Perez, *International Recognition of Judgments*, *supra* note 20, at 44 (stating that “it is a basic proposition that some level of public intervention is necessary to facilitate socially optimal trade”); Felix D. Strebler, *The Enforcement of Foreign Judgments and Foreign Public Law*, 21 LOY. L.A. INT’L & COMP. L. REV. 55, 56 (1999).

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199. *See supra* text accompanying notes 54-58.

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200. It “is obvious that international relations are not limited to relations between states.” SIR JOHN FISCHER WILLIAMS, ASPECTS OF MODERN INTERNATIONAL LAW 18 (1939), *quoted in* PHILLIP C. JESSUP, A MODERN LAW OF NATIONS 16 (1948).

Simultaneously, more and more private international law scholars began to recognize the international significance of rules they fashioned for private entities. In 1931, Ellery C. Stowell argued, “The system of laws, known as conflict of laws or private international law, is administered by national courts and is a part of the national system of administration of justice. Nevertheless, in the discharge of this duty the national courts fulfill an international function.”²⁰¹ Eleven years later in 1942, Phillip Marshall Brown argued that

matters [of private international law] clearly engage national interests of importance as well as private concern Private international law must no longer be relegated to a separate and inferior status. There is no clear line of demarcation between it and public international law. Both are integral parts of the law of nations.²⁰²

And, in his influential volume *A Modern Law of Nations*, Phillip C. Jessup spoke for both groups of scholars in pointing out the deficiencies in an international law divided into separate private and public branches:

The function of international law is to provide a legal basis for the orderly management of international relations. The traditional nature of that law was keyed to the actualities of past centuries in which international relations were interstate relations. The actualities have changed; the law is changing For the purposes of this context, therefore, international law . . . may . . . be applicable to certain interrelationships of individuals themselves, where such interrelationships involve matters of international concern.²⁰³

Somewhat ironically, then, the cutting edge of private international law scholarship in the 1940s and 1950s strove to demonstrate what the field’s founder Joseph Story had argued in 1834 when conceiving the field: that “the jurisprudence . . . arising from the conflict of the laws of different nations in their actual application to modern commerce and intercourse,

201. Stevenson, *supra* note 19, at 565 n.24 (quoting ELLERY C. STOWELL, INTERNATIONAL LAW 299-300 (Holt 1931)).

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202. Phillip Marshall Brown, *Private versus Public International Law*, 36 AM. J. INT’L L. 448, 449-50 (1942).

203. JESSUP, *supra* note 200, at 16-17.

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is a most interesting and important branch of public law.”²⁰⁴ Scholars’ recognition that private and public international law were connected legitimated *Hilton’s* unified vision of international law.

Scholars’ recognition that private and public international law overlapped only grew more prevalent as courts began to hear more and more cases touching on international relations. Two factors increased the number of private and public international law cases in U.S. courts. First, ongoing globalization created more disputes between parties of different nationalities.²⁰⁵ Second, the Supreme Court broadened the constitutional limits on courts’ in personam jurisdiction, thereby allowing state and federal courts to hear more transnational cases. Moving from strict notions of power and notice leftover from the *Pennoyer v. Neff*²⁰⁶ era, courts instead focused on a minimum contacts analysis, under which state long-arm statutes could confer jurisdiction over foreign corporate defendants with comparatively fleeting contacts with the forum.²⁰⁷ Forced to deal more frequently with matters of international importance, courts also began to notice the interconnectedness of private international law and international affairs. Courts’ treatment of U.S. “public” law in transnational disputes illustrates this trend. A U.S. court resolving a commercial dispute between an American party and a foreign party at one time would have applied U.S. regulatory law to the transaction without regard for the parties’ choice of another country’s law. Now, however, courts have allowed parties to choose the applicable public law in some cases.²⁰⁸

These developments increasingly obscured the once irrefutable distinction between private and public international law. In 1979, Professor Andreas Lowenfeld argued that “the classical distinction between public and private law, in so far as it affects transnational activity has long been overtaken—one

204. STORY, *supra* note 19, § 9.

205. See Strebel, *supra* note 198, at 57.

206. 95 U.S. 714 (1877).

207. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 147-51 (2d ed. 2002).

208. See Phillip J. McConaughay, *Reviving the “Public Law Taboo” in International Conflict of Laws*, 35 STAN. J. INT’L L. 255, 255-58 (1999).

could well say overwhelmed”²⁰⁹ Today, separate fields of private international law do still exist. Law school curricula offer individual courses entitled “International Law” and “Conflicts of Law”; scholars devote treatises and casebooks to one subject, not both;²¹⁰ and problems covered by one field can be usually solved without recourse to the other. Yet, as Professor Lowenfeld’s statement indicates, most scholars agree that public and private international law overlap at least in some areas.

C. *Perceptions of Judgments Reciprocity*

This section plots critics’ perceptions of *Hilton*’s judgments reciprocity rule against the trends discussed in the two previous sections. First, it discusses the fifty year period after *Hilton*, when scholars battled over the fate of the public/private distinction. It concludes that the scholarly attacks on the public/private distinction initially did little to relax commentators’ stance against judgments reciprocity. Critics on both sides of the debate—even those who might have denounced it in other contexts—continued to make arguments against judgments reciprocity which were based on the distinction. Second, it concludes that judgments reciprocity’s recent popularity is only possible with the simultaneous blurring of the boundary between the fields.

Proponents of both trends discussed above in Parts IV(A) and (B) rejected judgments reciprocity during the first half of the century. The followers of Beale’s “territorial view” discussed in Part IV(A), the staunchest advocates of a strict separation between public and private international law, clearly despised the doctrine. Under their theory, foreign judgments created private rights. Since private rights should be enforced, foreign judgments should be held conclusive. *Hilton*’s comity between nations was unnecessary: a relationship between private parties, not a relationship between governments, required enforcement.²¹¹ Likewise, judgments reciprocity had no

209. See *id.* at 274 (quoting Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law and Some Suggestions for Their Interaction*, 63 RECUEIL DES COURS 31, 326 (1979)).

210. See, e.g., LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION, *supra* note 207, at 149-50.

211. BEALE, *supra* note 187, §§ 430.1-434.1 (paraphrasing his earlier four-volume treatise). See, e.g., Note, 12 L. Q. REV. 299, 302 (1896) (calling the majority’s acceptance of comity rather than a private rights doctrine a “fail-

place. Beale’s followers argued that the doctrine was “un-sound” in both theory and practice: “[Judgments] Reciprocity does not distinguish the wheat from the chaff since the quality of a court does not depend on the particular theory it may have as to the recognition of our judgments.” Beale’s followers considered judgments reciprocity’s effectiveness in terms of promoting individual rights and fairness between the parties. Finding it had none, they rejected the doctrine.²¹²

In 1926, the New York Court of Appeals applied Beale’s vested rights theory to recognize a French judgment against an American plaintiff, despite France’s continued refusal to enforce American judgments in return.²¹³ Writing for the majority, Judge Pound concluded that *Hilton* did not bind state courts.²¹⁴ Judgments were private rights to be protected from government intervention,²¹⁵ and imposition of a judgments reciprocity requirement would impermissibly impose national prerogatives on otherwise private disputes.²¹⁶ Interestingly, the court supported comity, but not in the form advocated by Story and *Hilton*. For Pound, comity *could not* concern international relations. It was exercised by a state (as opposed to the federal) government, and states were constitutionally barred from engaging in international affairs. Comity was instead procedural. It was properly based not on judgments reciprocity but on the “persuasiveness of the foreign judgment.” Cap-

ure”); see also Yntema, *supra* note 103, at 1130 (“The common conception of Anglo-American law is that a foreign judgment constitutes merely a species of private obligation.”).

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212. BEALE, *supra* note 187, §§ 430.1, 434.3 (quoting 36 YALE L.J. 542 (1997)).

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213. *Johnston v. Compagnie Gernale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926).

214. *Id.*

215. *Id.* (“The question [of foreign judgment enforcement] is one of private right rather than public relations and our courts will recognize private rights acquired under foreign laws and the sufficiency of the evidence establishing such rights.”).

216. In a later case, the New York Court of Appeals decisively rejected reciprocity for this reason. After reiterating much of the logic of *Johnston*, Judge Van Kirk concluded that reciprocity “would deprive a party of the rights he has acquired by reason of a foreign judgment because the country in whose courts that judgment was rendered has a rule of evidence different from that which we have and does not give the same effect as this State gives to a foreign judgment.” *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 N.Y.S. 284 (1927).

turing the essence of critics' disagreement with *Hilton*, judgments reciprocity, and comity, Pound declared, "[T]he question [of judgment enforcement is] one of private rather than public international law."²¹⁷

Even those critics discussed in Part IV(B), those who recognized the fallacies in Beale's theory from its inception, chose the "territorial view" over judgments reciprocity. Why? As Hessel Yntema, a well-known legal scholar, argued in 1935, "[T]he private transactional character of foreign judgments . . . is commendable in that it avoids the inequity and impropriety of adjudicating what are essentially private claims upon an invidious basis of international judgments reciprocity."²¹⁸ In other words, Yntema took precisely the stance shared by the "vested rights" school and other scholars of the time: that national policy should not taint individual relations. Thus, scholars who did not go as far as Beale in advocating the continued privatization of judgment enforcement law still resisted judgments reciprocity's infusion of international concerns in individual disputes. They rejected vested rights but had not similarly rejected the public/private distinction in international law in its entirety.

Other examples are easy to find. An early *Harvard Law Review* Note criticized judgments reciprocity on three grounds which could serve as a summary of the reasons to divide the "law of nations" into two separate fields:

Our rules as to conflict of laws should not vary according to the conflict of laws rules in various foreign countries. Nor does there seem any reason for treating rights acquired under a judgment differently from other private rights acquired under foreign laws. Furthermore, lack of reciprocity is a political rather than a legal question.²¹⁹

217. 152 N.E. at 123.

218. Yntema, *supra* note 103, at 1164.

219. Arthur C. Rounds, *Injunctions Against Liquor Nuisances*, 9 HARV. L. REV. 521, 530 (1896). The note's third sentence, and my argument that it represents a reason to divide public from private international law, deserves explanation. As discussed *supra* in Part III(B), scholars' goal to isolate law from politics and to make law a completely neutral science prompted their obsession with the public/private distinction. To these scholars, reciprocity seemed like a political solution because it injected a national issue (universal judgment recognition) into an individual dispute. Of course, as Justice Gray

In 1926, another critic argued that judgments reciprocity was an unwelcome government intrusion on domestic policies of *res judicata*:

It would seem that to follow [the *Hilton* rule] is to decide private controversies upon considerations of inter-governmental diplomacy, and since the reason we recognize validly-rendered judgments by courts of competent jurisdiction as conclusive is to put an end to litigation it should make no difference whether the court be that of a foreign country or a sister state.²²⁰

In 1956, Professor Arthur Lenhoff focused his criticism of judgments reciprocity on its making municipal laws dependent on the attitudes of other nations: “The [*Hilton*] Court confused the international problem with the rule of domestic law The question of recognition and enforcement of a foreign judgment is, as we might recall, always one of domestic law.”²²¹ Lenhoff also argued that judgments reciprocity was pointless, as the United States had no national interest in the enforcement of American judgments abroad.²²²

As a result of this criticism, judgments reciprocity was, for the most part, written out of the common law by mid-century. When *Hilton* was decided in 1895, *Swift v. Tyson*²²³ still governed the relationship between federal and state common law. State courts and legal scholars assumed that judgment recognition implicated individual rather than national interests, despite language in *Hilton* to the contrary, and they generally agreed that *Swift* entitled states to decide on their own whether to require judgments reciprocity. Most states chose to reject the doctrine. In 1907, for example, the California state legislature enacted a statute allowing recognition without judgments reciprocity.²²⁴ In 1926, the New York State Court of Ap-

noted in *Hilton*, choosing not to require reciprocity is also a government action (and thus a political choice). See *infra* Part IV.

220. Recent Decisions, *Conflicts of Laws: Doctrine of Hilton v. Guyot*, 26 COLUM. L. REV. 892, 893 (1926). For a similar view see Recent Cases, *Conflict of Laws: conclusiveness of Foreign Judgment*, 38 HARV. L. REV. 678, 683 (1925).

221. Lenhoff, *Historical Reciprocity*, *supra* note 43, at 472.

222. *Id.* at 472-73.

223. 41 U.S. 1 (1842).

224. See PROCEEDINGS IN COMMITTEE OF THE WHOLE UNIFORM MONEY JUDGMENT RECOGNITION ACT 8 (Aug. 5, 1961) (discussing California’s passage of

peals relegated the holding of *Hilton* to “magnificent dictum.”²²⁵ Federal courts followed suit after *Erie Railroad Co. v. Tompkins*.²²⁶ Also assuming that judgment recognition laws did not affect national interests, federal courts saw judgment recognition as a matter of state rather than federal common law. In 1966, for example, the First Circuit looked back to Massachusetts state court decisions rendered before *Hilton* to determine what weight to give a Swedish judgment. While acknowledging the *Hilton* rule of judgments reciprocity, the court read *Erie* to require the application of state law.²²⁷ *Hilton*'s doctrine of judgments reciprocity was generally rejected, and commentators in the 1950s predicted its certain demise.²²⁸

Gradually, however, the debate about judgments reciprocity began to reflect the ongoing arguments against the distinction generally between public and private international law.

the Act in response to fears that California judgments would not be enforced in Germany due to uncertainty abroad about American judgment recognition law). Of course, a state legislature's decision to reject reciprocity quite obviously falls into the political realm, whereas a court's decision to do so does not. Nonetheless, I argue that the reasons behind legislatures' actions to eradicate reciprocity during this period also reflected a belief in the idea that individual disputes should not be skewed by national prerogatives.

225. *Johnston v. Compagnie Generale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926).

226. 304 U.S. 64 (1938). The assumption that recognition law does not implicate national interests has been questioned by many commentators. It will be discussed further below.

227. *Handelsbanken v. Carlson*, 258 F. Supp. 448, 450-51 (D. Mass 1966). *Cf. New York Life Ins. Co. v. Panagiotopoulos*, 80 F.2d 136, 139 (1st Cir. 1935) (discussing, pre-*Erie*, the circuit's adherence to *Hilton*'s reciprocity rule). *See, e.g., Hunt v. BP Exploration Co. (Libya)*, 580 F. Supp. 304, 306-07 (N.D. Tex. 1984) (concluding that Texas statute giving judge discretion to decline enforcement for lack of reciprocity required judge to consider reciprocity, even though judge personally disagreed with the doctrine). For other federal cases following state law on reciprocity, *see, e.g., Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 683-84 (7th Cir. 1987) (applying state law rule that did not require reciprocity); *Toronto-Dominion Bank v. Hall*, 367 F.Supp. 1009, 1013-14 (E.D. Ark. 1973) (predicting that Arkansas Supreme Court would reject reciprocity). A minority of federal courts have at least expressed skepticism that judgment recognition should be a matter of state law. *See, e.g., Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981) (arguing that judgment recognition is a national, not a state, issue).

228. *See, e.g., William L.M. Reese, The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950).

As will be discussed below, the change in perceptions of judgments reciprocity was gradual. Scholars did not suddenly embrace the doctrine, but they at least began to craft new arguments against it. Some scholars realized the importance of securing recognition of judgment recognition abroad but argued that judgments reciprocity was ineffective because it produced stalemates between countries. This argument, later proven unsound in theory, at least did not rest on the antiquated distinction between public and private international law.²²⁹ More progressive scholars went so far as to endorse the doctrine. Arthur Nussbaum, for example, defined private international law as “that part of private law which deals with foreign relations”—thereby recognizing that private international law could not be separated from international affairs. He lauded Justice Gray’s introduction of judgments reciprocity in *Hilton*.²³⁰ His acceptance of the interrelationship between international affairs and private international law, as indicated by his definition of the field, allowed him to endorse judgments reciprocity.

Nonetheless, the distinction survived in criticism of judgments reciprocity, albeit in a more subtle form, even through the 1960s and 1970s. Kurt H. Nadelmann and Willis L. M. Reese, the progressive drafters of the Uniform Foreign Money Judgment Recognition Act, did not include judgments reciprocity as a precondition to enforcement in the Act. When explaining their reasoning for the omission, Professor Nadelmann interestingly suggested that the due process requirement in their draft provided an adequate substitute for a judgments reciprocity provision.²³¹ A due process requirement seeks to protect individual rights. It prohibits enforcement of foreign judgments rendered in violation of them. By

229. See ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* 9-10 (3d ed. 1977).

230. ARTHUR NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* § 1, at 3 (1943); *id.* § 23, at 238.

231. PROCEEDINGS IN COMMITTEE OF THE WHOLE UNIFORM MONEY JUDGMENT RECOGNITION ACT 9 (Aug. 5, 1961). Nadelmann made a similar argument in an article published in the early 1950s. He contended that the parties would be the losers if reciprocity were adopted. But, that reciprocity might be justified if done to prevent violations of “due process of law.” Again, he assumed that reciprocity’s function was to protect private interests, not the national interest in getting American judgments recognized abroad. See Kurt H. Nadelmann, *Reprisals against American Judgments?*, 65 *HARV. L. REV.* 1184, 1189 (1952).

substituting due process for judgments reciprocity, did the drafters mean to indicate that judgments reciprocity also protected individual interests? If so, drafters of a law explicitly designed to promote global judgment recognition by making American law easily discernible to foreign countries fell back on the public/private distinction. They assumed that judgments reciprocity, a tool designed to protect the national interest in universal judgment recognition, was in place to protect the rights of individual parties to a dispute. Not surprisingly, they did not consider it effective. As discussed in Part II, judgments reciprocity does nothing to protect individual parties and can in fact mean that an otherwise enforceable judgment will be thrown out because of another country's law.²³²

Treatment of judgment recognition law after *Erie* provides further evidence of the continued survival of the distinction. As mentioned above, state courts and scholars agreed that judgment recognition was properly a matter of state common law. As a separate federal common law exists for matters implicating national interests, and as international affairs is surely a national interest, this view rests on the assumption that judgment recognition law implicates state or individual interests only.²³³

Several developments culminated in the recent resurgence in popularity of judgments reciprocity. First, judges and scholars began to recognize the strong national interest in assuring enforcement of U.S. judgments abroad. International commerce is enhanced if traders do not lose rights across national borders.²³⁴ As such, they began question to one of the last remaining vestiges of the nineteenth century distinctions—the assignment of judgment recognition to state law.²³⁵ States are constitutionally barred from engaging in international affairs. Scholars' questioning of the reliance on state law indicates that they believe that judgment recognition is a national question of international affairs. In other words, public concerns in the traditionally private arena of judgment rec-

232. *Id.*

233. See LOWENFELD, *supra* note 132, at 390.

234. See *supra* Part II.

235. See, e.g., Homburger, *supra* note 123, at 381-90; *Tahan v. Hodgson*, 662 F.2d 862, 868 (D.C. Cir. 1981) (arguing that judgment recognition is a national, not a state, issue).

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ognition deserve the protection that judgments reciprocity can provide. Their skepticism has yet to prompt Congress to adopt a federal judgments law, but the American Law Institute is currently working on a proposed federal statute to govern the issue.

Second, game theorists demonstrated that judgments reciprocity could be effective in promoting international cooperation. As discussed above, some early critics of judgments reciprocity had argued that the doctrine would actually prevent universal judgment recognition by creating stalemates. If two countries both had judgments reciprocity requirements, neither country could enforce the other's judgment without assurance that the other would do the same. Yet, neither country could provide such assurance unless the other moved first. They both condition judgments reciprocity on the other's guarantee. However, game theorists concluded that judgments reciprocity does realize eventual cooperation when employed between countries engaged in a series of interactions over time. In a process game theorists call "Tit for Tat," countries seeking to cooperate do not have to take the first step but rather can signal their willingness to cooperate over time.²³⁶

Third, in the 1970s and 1980s, politicians widely endorsed judgments reciprocity as a political strategy, which no doubt brought the doctrine back into the consciousness of private international law scholars. In 1986, Robert O. Keohane aptly described the acclaim given to judgments reciprocity as a remedy for conflict among nations during this period. Noting that the "praise for reciprocity by political leaders ha[d] recently been echoed by scholars," he cautioned that the "current enthusiasm for reciprocity resembles the revival of balance-of-power thinking in the United States after World War II." Politicians of the time, including Richard Nixon, Ronald Reagan, and Gary Hart all invoked the principle of reciprocity as a foreign relations tool. Additionally, scholars like Robert Axelrod and Elizabeth Zoller touted the doctrine. In 1984, Keohane himself argued that reciprocity "seems to be the most

236. See KEOHANE, *supra* note 22, at 137-38.

effective strategy for maintaining cooperation among egoists.”²³⁷

As a result of these developments—newfound confidence in the effectiveness of reciprocity as a public law tool, a resurgence in popularity of the doctrine in international politics, and, most crucially, the further erosion of the distinction between private and public international law—judgments reciprocity now seems to those who reconsider the issue at least a possible solution in judgment recognition cases. This doctrine, consigned to oblivion in the 1950s, has recently gained popularity among state legislatures. For example, in the 1960s, only one state—Massachusetts—had incorporated reciprocity into its state judgment recognition statute.²³⁸ Now eight states do. Georgia added a reciprocity requirement to its version of the Uniform Act in 1975. Texas added reciprocity as a discretionary ground for non-recognition in 1981, Ohio in 1985, Idaho in 1990, North Carolina in 1993, Florida in 1994, and Maine in 1999.²³⁹ And, most notably, the American Law Institute’s latest draft for a proposed Federal Act relating to the enforcement and recognition of foreign country judgments contains a reciprocity provision.²⁴⁰ These recent endorsements would not have been possible without the breaking down of nineteenth-century barriers between public and private international law.

VI. CONCLUSION

Reciprocity could not be accepted by American jurists and judges until they abandoned strict, mutually exclusive categories of public and private international law. Reciprocity only makes sense if it is thought that a government can have a valid interest in the outcome of a private dispute, and if international relations can be conducted through the adjudication of lawsuits. Public and private international law were created as

237. *See id.* at 132 (quoting ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 214 (1984)).

238. *See* MASS. ANN. LAWS ch. 235 § 23A (LexisNexis 1966).

239. *See* GA. CODE ANN. §§ 9-12-110 to 9-12-117 (1975); TEX. CIV. PRAC. & REM. CODE §§ 36.001 to 36.008 (Vernon 1981); OHIO REV. CODE ANN. §§ 2329.90-2329.94 (West 1994); IDAHO CODE ANN. §§ 10-1401 to 10-1490 (1990); N.C. GEN. STAT. ANN. §§ 1C-1800 to 1C-1808 (West 1993); Fla. Stat. §§ 55.601–.607 (2006); ME. REV. STAT. ANN. tit. 14 §§ 8501-8509 (1964).

240. ALI TENTATIVE DRAFT, *supra* note 10, §7(a), at 81-82.

distinct categories simply because such intervention in private disputes, either in the name of a national interest or international relations, was once deemed inappropriate. It is no coincidence that a resurgence in judgments reciprocity has come with a resurgence in scholarship advocating more unified categories of public and private international law.²⁴¹ Judgments reciprocity depended on it.

However, the legacy of the public/private distinction, or at least the analogous distinction between national and individual interests in international affairs, still survives: despite the doctrine's recent popularity, fewer American states currently require judgments reciprocity than do the opposite.²⁴² This is not to say that judgments reciprocity must be endorsed if one rejects the categorical distinction between public and private international law. Rather, the distinction survives if the result of the arguments based on it—the rejection of judgments reciprocity—is not reevaluated to take into account contemporary perspectives.

Individual actions can and do affect international relations and national interests. So do the decisions of courts. Even the failure to require judgments reciprocity necessarily has bearing on foreign relations. With these realities in mind, the debate surrounding judgments reciprocity should center on what is important: the effectiveness of judgments reciprocity in bringing about universal judgment recognition, the desirability of encouraging recognition by reticence rather than by example, and the comparable competence of courts and legislatures in bringing about change, if it is desired. History should not doom judgments reciprocity. With globalization, universal judgment recognition can only become more important, and judgments reciprocity is an effective means of promoting it. States should reevaluate their stance against judgments reciprocity in light of widespread agreement that international affairs should play a role in private international law generally.

241. See generally, e.g., Maier, *supra* note 66 (discussing subjects in which public and private international law intersect).

242. See discussion *infra* notes 238-239 and accompanying text.

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