INTRODUCTION

In their 1968 seminal survey on the “recognition of foreign adjudications,” Professors Arthur von Mehren and Donald Trautman set out five reasons attesting to the vital importance of recognizing judgments rendered in foreign nations.1 The policies they highlighted focused on efficiency, protection of the successful party, forum shopping, grant of authority to the more appropriate jurisdiction, and “an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction.”2 Today, more than thirty-five years later, their reasoning rings true, as the issues surrounding both the recognition and the enforcement of foreign judgments have never been more salient.3 Breakthroughs in real-time communication in the last twenty-five years are only one reason for ever-blurring borders between nations. As human action and the need for efficiency increasingly demand that the judgments of one country’s courts are recognized and enforced by other nations, there

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1 A.B. 1998, Princeton University; J.D. Candidate 2005, University of Pennsylvania. Many thanks are due to my Comments Editor, Mary “Nell” McCarthy, for her thoughtful insights and the time that she dedicated to helping me make this a better piece. Thanks also to my family and friends for their unflagging support of me in all my endeavors. And finally, thanks to my husband, Eric, for all his love and encouragement. I am truly blessed to have him. Any errors are mine—all mine.


3 Recognition and enforcement are terms that reflect on the ability of a judgment to survive in forums beyond its own boundaries. In the course of this Comment, I will use both words to refer to the movement of judgments across borders. However, it is important to be able to differentiate between the two terms because—although related—the concepts are distinct from one another. Recognition occurs when a court “relies upon a foreign judicial ruling to preclude litigation of a particular claim, or issue, on the ground that it has been previously litigated abroad.” GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 936 (3d ed. 1996). On the other hand, enforcement occurs when a court “affirmatively uses its coercive powers to compel a defendant . . . to satisfy a judgment rendered abroad.” Id.
is a common acknowledgment that ours must be a global legal system. Despite the importance of establishing such a policy of general acceptance, the United States has yet to codify an agreement with any other nation regarding the recognition and enforcement of judgments.

While the Brussels Convention has governed relations between the courts of many European countries since 1968, the United States and other countries that are members of the Hague Conference—and therefore potential parties to a relevant convention—have yet to successfully ratify an agreement on jurisdiction and judgments. The slow

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4 As Professor Linda Silberman points out, a further benefit of a successful Hague Convention rests on the fact that it would “build on the principle expressed in Article 220 of the Treaty of Rome that unification of markets goes together with mutual enforcement of judgments.” Linda J. Silberman, Can the Hague Judgments Project Be Saved?: A Perspective from the United States, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 159, 162 (John J. Barceló III & Kevin M. Clermont eds., 2002); see also infra note 7 (discussing the Hague Conference).

5 In the 1970s, the United States entered into negotiations in an attempt to achieve a treaty concerning the recognition and enforcement of foreign judgments with the United Kingdom, but the negotiations failed. BORN, supra note 3, at 938. For further discussion of the unsuccessful convention, see P.M. North, The Draft U.K./U.S. Judgments Convention: A British Viewpoint, 1 NW. J. INT’L L. & BUS. 219 (1979).

6 The 1968 Brussels Convention was the first international agreement employed to broadly regulate standards of jurisdiction and enforcement of judgments across borders. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, as amended, 1998 O.J. (C 27) 1 [hereinafter Brussels Convention]. Often referred to in combination with the 1988 Lugano Convention, the Brussels Convention is in force between the member states of the European Union, while the Lugano Convention, which is based on a practically identical framework, binds the latter as well as the member states of the European Free Trade Association (EFTA). Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, as amended, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].


In 1992, the Hague Conference initiated a project to write a worldwide convention on territorial jurisdiction and recognition and enforcement of judgments in civil and commercial matters. Though an initial Draft Convention was completed in 1999, there has been much controversy and many setbacks, with the United States acting as a key dissenter in discussions regarding that draft. Informal discussions have continued since 1999, but there is no officially approved document as of yet. In this Comment,
pace of negotiations leading up to ratification is due in large part to the difficulties member nations are facing in reaching an acceptable conclusion regarding certain key issues before the Conference. One such issue is rooted in the sometimes conflicting public policies and associated legal predispositions of member nations.

Historically, many courts, both in the United States and abroad, have reserved the right, either implicitly or statutorily, to refuse to recognize a judgment from a foreign court if such judgment violates important public policies of the recognizing state. The Brussels Convention is just one document that provides for such a public policy exception. However, the possibility of crisis looms when public policies in forum nations are disparate enough that such an exception threatens to become a catchall or “escape” provision. Though it is widely accepted that the bar is high and that the public policy exception should not be used indiscriminately, it is generally at the discretion of the deciding court to determine whether or not the judgment to be recognized clearly “undermine[s] the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.” It is thus the case that each court will apply the standard in a distinct way, and considered in the context of the proposed Hague Convention—where there is no plan to establish an authority to oversee or review potential abuses of such a provision—the fear of a public policy exception taking on a life of its own is a viable concern.

the jurisdiction and judgments project and all of the discussions associated with the project will be referred to as “Hague Convention.” For a list of the current working documents of the Hague Convention, see http://hcch.e-vision.nl/index_en.php?act+progress.cats.

8 See Brussels Convention, supra note 6, tit. III, § 1, art. 27(1), 1998 O.J. (C 27) at 10 (“A judgment shall not be recognized: (1) if such recognition is contrary to public policy in the State in which recognition is sought . . . .”). For examples of public policy provisions in other documents, see discussion infra pp. 807-08 and notes 44-47.


10 Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986).

11 The Brussels Convention has dealt with this issue by enabling the European Court of Justice to act as a supranational appellate body: When the Brussels Convention was signed in 1968, the European Court of Justice did not have the power to review jurisdictional issues. At that time, a Joint Declaration was adopted committing the contracting states to study the question of conferring jurisdiction on the European Court of Justice to interpret the Brussels Convention. In 1971, a Protocol was adopted that conferred upon the European Court of Justice jurisdiction to give rulings on the inter-
The United States is in a difficult position with regard to an international recognition and enforcement agreement. Despite an ever-increasing need, the U.S. has never successfully been party to such an agreement, whereas many of the European countries who would be party to a Hague Convention are already signatories to the Brussels Convention. Parties to the Brussels Convention have existing relationships, which suggests that they are unlikely to face the same level of public policy apprehension with regard to one another. As a result, many of the public policy concerns that stem from the proposed Hague Convention are those implicating the U.S.—either as the forum where judgment was initially handed down or as the forum in which a plaintiff seeks recognition. The situation is complicated by the fact that the U.S. is left without a key negotiating chip because, in comparison to other nations, the U.S. historically has been generous in recognizing and enforcing judgments.  

To best confront these obstacles, one must look to existing practices in the United States that present similar public policy issues. The relationships between state courts are governed on both a constitutional and statutory level by the notion of “full faith and credit” and, hence, do not allow for public policy exceptions. Therefore, the movement of judgments from state to state has not encountered the same problems presented by the movement of judgments between the U.S. and other countries. Because Indian tribes do not fit into any of the categories governed by the Full Faith and Credit Clause, the relationship between tribal courts and courts of the United States, both state and federal, is similar to the relationship

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12 For further discussion on reciprocity and foreign judgments, see Susan L. Stevens, Note, Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments, 26 HASTINGS INT’L & COMP. L. REV. 115, 115 (2002) (“While the United States has been generous in its recognition and enforcement of foreign judgments, many foreign countries have been unwilling to honor U.S. judgments. Such disparity is due in part . . . to the tendency of U.S. courts to unilaterally recognize and enforce foreign judgments.”).


14 Though the majority of scholars agree that Indian tribes are not bound by full faith and credit, there are scholars who argue otherwise. See infra note 17.
between the courts of foreign nations. The cultural divide that gives rise to differences in public policy between foreign nations is also apparent in the interactions between the United States and tribes. Many of the same complications arise, and many of the same negotiations occur.

Part I of this Comment sets the stage for the analysis by outlining pertinent aspects of the relationship between, first, tribal courts and U.S. courts and, second, U.S. courts and courts of foreign nations. In addition, Part I serves as an introduction to the public policy exception and the obstacle it presents when attempting to move judgments across boundaries. Part II identifies some of the differences between the relationship of the U.S. with tribal nations and the relationship of the U.S. with foreign nations, and acknowledges the limitations of the comparison. Part III introduces three potential solutions to the inherent dangers of a public policy exception, and Part IV discusses the necessary process that the U.S. must undergo in order to successfully adopt the most promising of the three solutions, a constitution-like document that establishes a standard of public policy by which participating nations would be encouraged to abide.

I. LAYING THE GROUNDWORK: PUBLIC POLICY AND THE RELATIONSHIP BETWEEN DISPARATE COURTS

Indian tribes are recognized as sovereign entities separate from the federal and state governments of the United States.15 The intricacies of the relationship between tribes and the state and federal governments are complex, the source of more than one scholarly analysis, and not the purpose of this Comment. Rather, this Comment first looks at the ways that the United States and tribal nations have learned to coexist with regard to recognition of judgments. It then employs that experience to develop a better understanding of how the United States can apply the lessons learned within our own boundaries to the ongoing issues surrounding the recognition of foreign judgments.

15 Indians did not participate in the Constitutional Convention and did not play a role in the ratification of the Constitution. Though the Constitution does refer to Indians in several different places within the document, it does so in a way that suggests that the constitutional compact is not otherwise binding on them. For example, Article I, Section 2, Clause 3 stipulates that the apportionment of representatives of the House of Representatives excludes “Indians not taxed,” and Article I, Section 8, Clause 3 allows Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”
A. The Relationship Between Tribal Courts and the Courts of the United States

To start, it is necessary to characterize the relationship between tribal courts and the courts of the United States. Though the debate is ongoing, it is generally accepted that the Full Faith and Credit Clause does not apply to tribal courts. On a statutory level, legal scholars have argued for the exclusion of tribes from the doctrine on a number of fronts. First, § 1738, which implements the Full Faith and Credit Clause, refers to states, territories, and possessions with no reference to tribes. Second, Congress has passed a number of statutes that extend full faith and credit terms to the tribes on specific causes of action.

Beyond the statutory evidence, there are practical reasons why full faith and credit is not the most viable way to approach the movement of judgments to and from tribal courts. As set out in the Constitution, full faith and credit embraces res judicata and makes it the “uniform law of the Union, thereby in large part creating the so-called ‘sisterhood’ of the states as we know it.” By doing this, the doctrine succeeds in achieving a symmetry between state courts that glosses over any cultural differences that exist among the respective states by making recognition of judgments a constant and dependable force. According to

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17 A majority of scholars agree that tribes are not bound by full faith and credit. See, e.g., Robert N. Clinton, Tribal Courts and the Federal Union, 26 WILLAMETTE L. REV. 841, 921 (1990) (concluding that “Indian tribal courts cannot reasonably expect the laws and judgments of their tribe to be honored by federal and state courts if they consistently decline to discharge their federal statutory obligation to provide full faith and credit to the laws and judgments of federal and state governments”). However, some scholars still argue for tribal inclusion. See, e.g., Robert Laurence, The Convergence of Cross-Boundary Enforcement Theories in American Indian Law: An Attempt to Reconcile Full Faith and Credit, Comity and Asymmetry, 18 QUINNIPIAC L. REV. 115 (1998) (arguing that full faith and credit inclusion could be asymmetrical in order to allow tribal courts to test the external judgments for conformity to tribal traditions).
18 See 28 U.S.C. § 1738 (“The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions . . . .”).
19 See, e.g., 25 U.S.C. § 1725(g) (2000) (“The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.”); id. § 1911(d) (obligating state courts to give full faith and credit to tribal court judgments in certain child custody matters); 28 U.S.C. § 1360(c) (2000) (stating that state courts must give “full force and effect” to “[a]ny tribal ordinance or custom . . . adopted by an Indian tribe, band, or community . . . if not inconsistent with any applicable civil law of the State . . . .”).
20 Laurence, supra note 17, at 120.
the mandates of full faith and credit, “[r]ecognition or enforcement of a sister state judgment is required even where the underlying claim is contrary to the public policy of the state where enforcement is sought.” The establishment of this type of “symmetrical” legal system furthers the purpose of uniting the states into a cohesive nation, where they coexist semi-independently under one overarching legal system. In fact, full faith and credit, as set out in the Constitution, implemented by § 1738, and interpreted by the courts, specifically disallows any departure on the basis of cultural differences or public policy. The full faith and credit doctrine successfully created a homogeneous legal system. However, the relationship between the U.S. and tribal nations is different from the union between sister states.

In an article examining the theories of tribal judgment enforcement, Professor Robert Laurence reasoned that “[s]ymmetry, reciprocity, retaliation and full faith and credit are all principles in furtherance of the overriding objectives of uniformity and sameness. However, most everything we know about Indian law is affected by the overriding concepts of variety and difference.” Tribal nations exist separately within the boundaries of the United States in order to safeguard the differences that make them unique. It logically follows that the theories upon which the laws of the states are built may not be the same as those upon which the laws of a tribe are structured. Accordingly, to insist that a judgment issued in one forum is to be unquestionably enforced in the other forum would be to ignore the very reasoning by which the courts were separated and given independent status in the first place.

Rather, recognition of tribal court judgments in the courts of the United States and recognition of U.S. court judgments in tribal courts is more sensibly bound by a form of comity. Articulated in Hilton v.

21 BORN, supra note 3, at 937.
22 See Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908) (holding that a judgment in Missouri must be given the same credit, validity, and effect in Mississippi that it would have received in the Missouri courts even though the laws and public policies of Mississippi prohibited the contracts and transaction on which the judgment was based); Christmas v. Russell, 72 U.S. (5 Wall.) 290, 301-02 (1866) (holding that a Kentucky judgment will have the same faith and credit in Mississippi notwithstanding that it was contrary to Mississippi laws).
23 Laurence, supra note 17, at 137.
24 To emphasize that tribal courts should have more discretion than full faith and credit allows, scholars point to differences including population, economic power, systematic differences, and the issue of impact. See, e.g., id. (stating that “[t]ribal reluctance to enforce state judgments ought to be expected” because tribal societies, which tend to be “small, homogeneous, old and fragile,” could be disrupted by enforcing a judgment from a dominant society that is “large, diverse, young and sturdy”).
Guyot, comity is defined as follows:

“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.

The doctrine of comity thus grants a court the discretion to recognize a foreign judgment without compelling it to do so.

Comity has created complications in both the tribal context and the international context. The Hilton Court’s concept of comity gave rise to the public policy exception in the United States. However, it remains a well-recognized danger that, if abused, a public policy exception might “swallow the whole rule [of comity],” especially in a tribal setting. Still, in most states, judges applying comity have the discretion to “take[] into account the many differences among Indian tribes, especially in size and in the types of courts they have.” The obvious risk is that judges—both on the tribal court side and on the U.S. court side—will apply their own independent standards of public policy in restricting the recognition or enforcement of outside judgments. That risk has been reduced, at least partially, by the adoption of the Indian Civil Rights Act of 1968.

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25 159 U.S. 113 (1895).
26 Id. at 163-64.
27 In Hilton, the Supreme Court adopted the doctrine of comity with regard to foreign judgments. Id. at 227-28. In essence, the Court defined comity as a presumption in support of the enforcement and recognition of foreign judgments and established several prerequisites to the application of comity. See Hon. Richard E. Ransom et al., Recognizing and Enforcing State and Tribal Judgments: A Roundtable Discussion of Law, Policy, and Practice, 18 AM. INDIAN L. REV. 239, 251 (1993) (listing the Hilton requirements for the use of comity). The prerequisites are as follows: 1) the foreign court must have had subject matter and personal jurisdiction; 2) the foreign judgment must not have been fraudulently obtained; 3) basic tenets of due process must have been observed by the foreign court; and 4) the judgment should not offend the public policy of the enforcing state. Id. at 251-52. The Hilton Court also included a fifth requirement of reciprocity, but most states have rejected the use of this requirement. Id. at 252.
28 Ransom et al., supra note 27, at 252.
29 Id. at 253.
B. The Relationship Between Courts of the United States and Courts of Foreign Nations

Currently, the recognition and enforcement of foreign judgments in the United States are dictated by the principle of comity, as enunciated in *Hilton v. Guyot*. For a number of reasons, however, the United States is motivated to seek a treaty with foreign nations that would address questions of jurisdiction and recognition of judgments. First, European nations are far ahead of the United States in addressing this issue. With the ratification of the Brussels Convention in 1968, the principal European nations developed a rule of law that, with few exceptions, allows for automatic recognition and enforcement of judgments of other signatory states. As a result, these nations tend to be “rather stingy in extending respect to foreign judgments not covered by treaty,” and there is no exception extended to U.S. judgments.

Further, on a jurisdictional level, though the Brussels Convention prohibits some of the exacting jurisdictional practices in which individual signatory countries have traditionally engaged, the prohibition only extends to those countries who are parties to the convention. There is no similar reciprocity limit on recognition practiced by the United States, since few states have adopted a policy that requires reciprocity when considering whether to recognize a foreign judgment. Accordingly, judgments handed down in European forums are often recognized in U.S. courts, regardless of whether the court

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31 See supra notes 25-27 and accompanying text.
32 See infra note 38 and accompanying text.
33 See Brussels Convention, supra note 6, tit. III, § 1, art. 26, 1998 O.J. (C 27) at 10 (“A judgment given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required.”); id. tit. III, § 2, art. 31, 1998 O.J. (C 27) at 11 (“A judgment given in a Contracting State and enforceable in that State shall be enforced in another Contracting State when, on the application of any interested party, it has been declared enforceable there . . . .”).
35 See Brussels Convention, supra note 6, tit. II, § 1, art. 3, 1998 O.J. (C 27) at 4 (specifying certain jurisdictional provisions inapplicable to suits against persons domiciled in a contracting state).
36 See supra note 27 (noting that most states have rejected the reciprocity requirement); see also Stevens, supra note 12, at 129 (“[R]eciprocity has met resistance by state legislatures, indicating that the dominant American approach to foreign judgments is recognition and enforcement without reciprocity.”); cf. infra p. 808 (attributing some of the difficulties in consistently defining the permissible bounds of a public policy exception to the fact that state courts operate in a manner largely independent of federal courts).
issuing the judgment would extend the same courtesy to a U.S. judgment. In his article outlining the current state of affairs and providing an introduction to the United States’ attempts to deal with the issues, Professor Kevin Clermont summed up the situation nicely: “In short, Americans are being whipsawed. Not only are they still subject in theory to the far-reaching jurisdiction of European courts and the wide recognition and enforceability of the resulting European judgments, but also U.S. judgments tend in practice to receive short shrift in European courts.”

In 1992, the United States initiated efforts to establish a worldwide convention on jurisdiction and judgments through the Hague Conference on Private International Law. As these negotiations enter their thirteenth year, however, there is skepticism about whether a treaty will be established successfully. There are a number of barrier issues, and the cause is further complicated by the fact that, while the United States is in a position to gain the most from the ratification of the convention, it has little bargaining power in comparison to its European counterparts.

One of the barrier issues involves the concern that, as a signatory to a multilateral treaty, the United States may be “forced to give respect to distasteful foreign judgments.” This is the point at which a public policy exception becomes an issue. The most recent proposal by the drafting committee, dated December 2003, contains a public policy “escape clause” in chapter III, article 7 of the document. In its current draft form, the clause reads as follows:

A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the following grounds . . . [where] recognition of enforcement would be manifestly incompatible with the public policy of the requested State, in particular if the specific

57 Clermont, supra note 34, at 5.
58 This Comment is limited to discussing the necessity of establishing guidelines to recognize the judgments of other forums. However, developing jurisdictional provisions was the accompanying goal of the Hague Convention. For general observations on the issues surrounding jurisdiction and the interrelationship of foreign courts, see Stephen B. Burbank, Jurisdictional Equilibration, the Proposed Hague Convention and Progress in National Law, 49 Am. J. Comp. L. 203 (2001); Kevin M. Clermont, Jurisdictional Salvation and the Hague Treaty, 85 Cornell L. Rev. 89 (1999); Friedrich K. Juenger, The American Law of General Jurisdiction, 2001 U. Chl. Legal F. 141; Allan R. Stein, Frontiers of Jurisdiction: From Isolation to Connectedness, 2001 U. Chl. Legal F. 373.
59 See supra notes 33-37 and accompanying text (discussing the United States’ lack of bargaining power in international jurisdictional negotiations).
60 Clermont, supra note 34, at 13.
proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State.41

Accordingly, there are two aspects of a judgment that may be deemed “incompatible” with public policy and thus result in a member nation’s refusal to enforce it. A judgment could be found lacking from a procedural standpoint, or a judgment could be substantively at odds with the public policy of the country in which enforcement is being sought.

On a procedural level, according to the current draft of the Hague Convention, a member nation must refuse to enforce a judgment that was rendered without proper jurisdiction.42 The Hilton Court further articulated procedural requirements that the United States has historically deemed essential for recognition of foreign judgments—namely, the “opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice.”43 Though these requirements may necessitate an analysis of the court that issued the judgment, the procedural conditions stipulated as essential for recognition of judgments are relatively clear.

On a substantive level, the issues are more complicated. As discussed above, the current draft of the applicable Hague Convention allows refusal where “recognition or enforcement would be manifestly incompatible with the public policy of the requested State.”44 Such broad language is not unique to the Hague Convention. The Brussels Convention states that a judgment will not be recognized “if such recognition is contrary to public policy in the State in which recognition is sought”;45 the Uniform Foreign Money-Judgments Recognition Act allows that recognition is not necessary if the action underlying the judgment is “repugnant to the public policy of [the] state”;46 and, us-


42 See Clermont, supra note 34, at 6-9 (providing a detailed description of the current Hague Convention’s provisions on jurisdiction).


44 DRAFT DOCUMENT, supra note 41, at 4.

45 Brussels Convention, supra note 6, tit. III, § 1, art. 27(1), 1998 O.J. (C 27) at 10.

46 UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 Pt. II U.L.A.
ing parallel language, the *Restatement (Third) of the Foreign Relations Law of the United States* observes that U.S. courts do not have to recognize a foreign judgment if “the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought.” These rules are all subject to interpretation, and the reach of the public policy exception is by no means clear from a cursory reading of any of the three documents. However, one thing is evident: standing alone, these clauses grant the enforcing courts a substantial degree of discretion.

In the United States, an additional difficulty associated with a public policy exception to recognizing foreign judgments is that—characteristic of federations, in general, and of the United States, in particular—state courts operate in a manner that is largely independent of the federal government and of the federal court system. Currently, the law permits states to govern their own and their residents’ interactions with foreign countries. In the context of an international convention, which is to bind the country in its entirety, there is a question as to whether this is an appropriate approach to foreign-judgment recognition. Specifically, the danger lies in the fact that, although the federal government and federal courts will be bound if the convention culminates in an agreement, the question of enforcing foreign judgments only appears in federal court when there is a federal question, or when diversity of citizenship requirements are met. Therefore, the bulk of judgments to be enforced will be brought through the state court system. While this obviously creates an independent issue in the grand scheme of judgment recognition, for the purposes of this Comment, the additional layer of unpredictability that would be added to a public policy exception is the aspect that is especially worrisome.

At present, states have the power to govern the majority of court-based interaction with foreign countries. However, it is the federal government of the United States, not each individual state, that nego-

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59 (2002).
48 See 28 U.S.C. § 1331 (2000) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).
49 See id. § 1332(a)(2)-(4) (granting federal district courts original jurisdiction of all civil actions meeting the amount in controversy requirement where citizens or subjects of a foreign state are parties or where a foreign state is a plaintiff).
tiates agreements with other nations. The purpose of the Hague Con-
vention is to establish uniformity and predictability, and if the federal
government does not have the power to bind the states to a single,
national public policy standard, then the effect of any agreement will
be severely limited.\textsuperscript{50}

II. DIFFERENCES BETWEEN TRIBAL NATIONS AND FOREIGN NATIONS

While examining the interaction of tribal courts and state courts is
helpful in determining the most effective way to address recognition
of foreign judgments, one must note the important differences be-
tween tribal nations and foreign nations. Though it has long been
recognized that tribal nations hold a unique position with regard to
the laws of the United States, Chief Justice John Marshall pointed out
in 1831 that such special treatment does not render them the equiva-
 lent of a foreign nation:

Though the Indians are acknowledged to have an unquestionable,
and heretofore, unquestioned right to the lands they occupy, until that
right shall be extinguished by a voluntary cession to our government; yet
it may well be doubted whether those tribes which reside within the ac-
knowledged boundaries of the United States can, with strict accuracy, be
denominated foreign nations. They may, more correctly, perhaps, be
denominated domestic dependent nations. They occupy a territory to
which we assert a title independent of their will, which must take effect
in point of possession when their right of possession ceases. Meanwhile
they are in a state of pupilage. Their relation to the United States re-
sembles that of a ward to his guardian.\textsuperscript{51}

The legal relationship between the United States and tribal nations is
clearly atypical, requiring different treatment from that extended to
foreign nations.

In some ways, it is the differences that make the analysis all the
more effective. First, tribal courts and the courts of the United States
constantly interact with one another, largely due to their geographical
proximity and the nature of free travel and commerce in the U.S.

\textsuperscript{50} See Michael Traynor, Conflict of Laws, Comparative Law, and the American Law Insti-
tute, 49 AM. J. COMP. L. 391, 400 (2001) (discussing an American Law Institute project
focused on promoting a federal statute to address foreign country judgments); Joachim Zekoll, The Role and Status of American Law in the Hague Judgments Convention
Project, 61 ALB. L. REV. 1283, 1306 (1998) (arguing that applying state law to a foreign
judgment runs counter to the Hague Convention’s goal of creating “uniform and pre-
dictable rules”).

\textsuperscript{51} Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (denying a motion for
an injunction restraining the state of Georgia from enforcing its laws within Cherokee
Nation territory).
Frequent interactions inject a level of urgency into the resolution of any problem, and the necessity of finding a common ground regarding recognition and enforcement of judgments across jurisdictional lines is no exception. Accordingly, as the world economy becomes more global, the need to establish a standard of recognition and enforcement of judgments issued by foreign nations becomes increasingly important. Nevertheless, the treatment of foreign judgments has yet to affect every citizen of each associated member nation to the same degree that every Indian is affected by the way her tribe chooses to enforce and accept the judgments coming from the surrounding states.

Further, because many of the differences in the issues at stake are related to the disparate size and scale of the parties involved, it is easier to imagine how a decision regarding public policy controversies could dramatically affect the culture of a tribe. Tribal society is much more fragile than that of the United States or of other similarly situated countries. As Professor Laurence indicated in a roundtable discussion on this topic in July 1992, “very small tribal communities are more susceptible to being unsettled by foreign judgments than are larger state communities.”

The United States, whether represented by the entire federation or by an individual state, is clearly the dominant society. Accordingly, in a case where a plaintiff is seeking enforcement of a state court judgment in a tribal forum, any public policy concern that may arise will have the potential to upset the culture of the tribe in a dramatic and visible way. Likewise, a series of cases in which a state court repeatedly refuses to recognize or enforce judgments issued by tribal courts may, in effect, challenge the legitimacy of the tribal courts. Either occurrence could have destabilizing effects on the tribe that is involved.

Many of the issues that arise in the relationship between tribal courts and U.S. courts are simply a magnification of those that occur in the interactions between courts of different countries. Despite some of the more obvious differences, the analysis of the recognition and enforcement of judgments at a tribal level is a useful strategy for isolating some of the most challenging issues and focusing on potential solutions.

52 Ransom et al., supra note 27, at 255.
53 Id. at 256 (quoting coauthor Professor Nell Jessup Newton) (“[A] state court’s consistent refusal to enforce tribal judgments on . . . flaky grounds undercuts the legitimacy of the tribal courts . . . .”).
III. POTENTIAL SOLUTIONS

There are a number of proposed solutions and combinations of solutions to the public policy issue, only a few of which will be addressed in this Comment.

A. Supranational Judiciary

In order to ensure that the public policy exception is construed in the same way by all of the member nations, parties to an agreement can take the route that the Brussels Convention has taken—reliance upon a supranational judiciary[54] that has the final say in whether a country’s interpretation of a provision of the convention is appropriate.[55] For the European countries involved in the Brussels Convention, this has been a successful approach, resulting in the increased mobility of judgments between European nations and favorable comparison to the Full Faith and Credit Clause of the United States Constitution.[56]

Many scholars have bemoaned the lack of a similar body in Hague Convention proposals, suggesting that without it, the convention may not be as cohesive or successful as Brussels has proven to be: “Unlike the Brussels Convention, which benefits from a uniform interpretation provided by the European Court of Justice, Hague Conventions are implemented solely by domestic courts without guidance from a supranational institution. Consequently, different legal systems, based on different legal cultures, may reach diverging conclusions in interpreting the same text.”[57] However, the same disparities that may benefit from a supranational institution would also serve as impediments to its development.

A proposal to concentrate power in a supranational institution would likely face overwhelming obstacles.[58] In remarks delivered at

54 In their article on supranational adjudication, Professors Laurence Helfer and Anne-Marie Slaughter describe “supranational” as the term “typically used to identify a particular type of international organization that is empowered to exercise directly some of the functions otherwise reserved to states.” Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 287 (1997). They go on to define “supranational adjudication” as “adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties.” Id. at 289.
55 See TREATY ON EUROPEAN UNION, Feb. 7, 1992, 31 I.L.M 247, 293-94 (“Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.”).
56 Zekoll, supra note 50, at 1290.
57 Id. at 1286 n.16.
58 For further discussion on the idea of supranational institutions in general, see Brian F. Havel, The Constitution in an Era of Supranational Adjudication, 78 N.C. L. REV.
New York University School of Law in 1995, Justice Sandra Day O’Connor touched upon the potential role of an international supranational judiciary, suggesting that “the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States.”

She further contended that “Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal ‘the essential attributes of judicial power.’” Accordingly, aside from any potential policy differences, the Constitution may be an impenetrable barrier to an agreement by the United States to recognize the authority of a supranational judiciary.

In addition to the constitutional question, the redistribution of any significant amount of power from the hands of the federal and state courts to a judiciary that would be independent of the United States would likely encounter a good deal of popular resistance. Looking beyond any legal and interpretive issues that may block the establishment of a supranational judiciary, one cannot help but consider that—for better or worse—the United States sees itself as a unique nation, operating independently from the rest of the world. United States citizens generally have not considered the idea of a common geographical union with other countries, as many European countries have, and as a result they tend to be protective of their borders and their self-identification as a “free” and democratic nation.


Id.

“American exceptionalism,” a principle first presented by Alexis de Tocqueville in Democracy in America, is the notion that America has a distinctive role in the world, apart from other countries, with a unique sense of national purpose and destiny. See, e.g., Tom Kando, September 11: America and the World, INT’L J. ON WORLD PEACE, Dec. 2001, at 69, 70 (arguing that the United States cannot both protect itself and remain a respected member of the international community if it continues to espouse American exceptionalism); Paul Starobin, Did God Bless America?, 26 NAT’L J. 2930, 2930 (1994) (tracing the history of American exceptionalism and its revival by then House Speaker-to-be Newt Gingrich); Paul Starobin, The French Were Right, 35 NAT’L J. 3406, 3412 (2003) (examining the role American exceptionalism plays in the Iraq policy debate between the United States and France). While the idea of American exceptionalism has been touted by all manners of politicians and patriots, see Starobin, Did God Bless America?, supra, it has also been the source of many a critique, see Kando, supra. In an article on the changing face of international relations, Professor Daniel Mahoney observed that “American exceptionalism leads some Americans to reject the
For most citizens, even when they are not happy with the decisions that the U.S. government makes, there is still a palpable degree of pride that comes with hailing from a nation built on such a strong and distinct value system. Hence, the idea of giving up any real measure of control over what U.S. courts can and cannot decide would be unacceptable to many. Therefore, in addition to any constitutional challenges that may arise, the idea of a supranational judiciary is unlikely to successfully pass through the court of public opinion.

B. Bilateralization

Another proposal is that each nation form separate, bilateral agreements with other nations that are parties to the Hague Convention. The “bilateralization” proposal is a response to some countries’ desire to have the power to pick and choose which signatory nations’ judgments to recognize. At a conference held at New York University School of Law, Professor Trevor Hartley suggested that, rather than ratifying an all-or-nothing convention that requires every member nation who signs the convention to recognize judgments from every other signatory, each country that becomes a party to the agreement should have the right to specify from which countries they will recognize judgments. Professor Hartley went on to suggest that in signing the treaty, each country’s executive could put additional conditions on the recognition of judgments.

ways of the world. In their view, the United States is too good to muddy itself in the rough and tumble of international political life.” Daniel J. Mahoney, De Gaulle and the Death of Europe, Nat’l Interest, Summer 1997, at 46, 47. For further discussion on American exceptionalism, see Seymour Martin Lipset, American Exceptionalism: A Double-Edged Sword (1996).

62 In the months leading up to the divisive presidential election of 2004, pollsters questioned the American public about American exceptionalism: 64 percent agreed that America is generally fair and decent, while 22 percent said it was unfair and discriminatory. And 62 percent agreed that the world would be a better place if other countries behaved more like the United States, while 14 percent say it would be a worse place.

Michael Barone, No, It’s Not the American Way, U.S. News & World Rep., May 17, 2004, at 40, 40. The results of the “fair and decent” question showed a clear divide between Republicans and Democrats—the percentage of polled Republicans who agreed with the “fair and decent” characterization was much higher than that of polled Democrats. However, even in the polarized political climate that defined this time period, the Democrats who agreed with the “fair and decent” characterization outnumbered those who disagreed. Id.


64 See id. at 113 (applying the concept of bilateralization to the proposed convention).
nition of judgments. For example, as a member nation, the United States could condition judgment recognition on reciprocity by specifying that it will only recognize judgments from those countries that have agreed to recognize U.S. judgments. Proponents allow that such favored-nation lists will have to be amended occasionally. However, they suggest that the power to specify which countries’ judgments a signatory will recognize encourages member nations to review the general policies of other member nations’ courts prior to agreeing to recognize the decisions issued by those courts. Supporters urge that this preliminary step will solve the unpredictability and applicability problems of the public policy exception because each signatory country will have notice as to which member nations will recognize and enforce its judgments.

Critics of the proposal point to the dangers that can arise from the “finger pointing” aspect of bilateralization, as well as complications that would likely result from having to determine which courts are acceptable and which courts are not. The acceptability issue is especially pertinent when one takes into consideration the very purpose, and the inherent difficulties, of a worldwide convention. By passing negative judgment on a country’s court system, a member nation essentially says that it does not trust that country’s legal system to enforce the same level of justice as is enforced in other nations. While in some cases legal systems may indeed be so fraught with corruption that this is an apt concern, there is a danger that, in other cases, acceptance will be withheld based to some degree on misunderstandings or disapproval merely resulting from the differences between countries’ legal systems. Further, some scholars express concerns regarding the effect that such a selection process would have on the future—both on the relationship between the discriminating and the discriminated countries and on the future successes of worldwide agreements.

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65 See id. at 112 (explaining that one country could make recognition of another country’s judgments conditional on reciprocity).

66 See, e.g., id. at 112-13 (arguing that a country should maintain a list of nations from which that country will recognize judgments).

67 Commenting on the aforementioned presentation by Professor Hartley, supra note 63, Professor Kurt Siehr objected, saying that bilateralization would be a “mine field” because of the difficulty in identifying corrupt countries and the consequences of naming them. Discussion, Accession and Bilateral Agreements, in THE HAGUE CONVENTION ON JURISDICTION AND JUDGMENTS, supra note 65, at 113-14.

68 Id. at 113 (providing a further critique, Professor Siehr stated: “[W]e have to think about the future. The psychological situation in these discriminatory and discriminated countries will be ‘We are not accepted by, say, the European countries. Then we may do what we want, because all of these courts have said, well, we are corrupt.’”); cf. id. at 114 (agreeing with Professor Siehr, Professor Louise Lussier suggested: “[W]e should be very mindful and very cautious, and I think any discussion of
C. “Constitution-Like” Documents and the ICRA

The third and final potential solution is the one that has the most promise. In the context of an agreement addressing recognition and enforcement of judgments, many of the dangers that accompany a public policy exception can be mitigated by way of a “constitution-like” document that outlines some nonnegotiable policies by which the involved nations have agreed to abide. The ICRA provides the best example of this type of document. 69

The primary reason the ICRA was enacted was to ensure that certain individual rights are respected by Indian tribal governments. 70 Because the Constitution and the personal freedoms granted to individuals by the Bill of Rights do not extend to include tribal governments, 71 the ICRA was established to constrain tribal governments and to bind them to recognize some of the rights on which the United States government will not compromise.

The ICRA has certainly attracted its share of criticism, especially from those who view any limitation placed on Indians’ “self-defining vision” as “a highly efficient process of legal auto-genocide.” 72 One author criticized the concept of any structure imposed on Indians’ right to self-govern, observing that the power of tribes to govern is “recognized . . . only as long as the tribes’ desires are consistent with the interests, expressed or implied, of the European-derived vision of the superior sovereign.” 73 Even the most unbiased observer must admit that the statute represents an “imposition on tribal ways of the dominant society’s notions of the proper method of governing.” 74

However, the same scholars who recognize the drawbacks and stifling nature of the ICRA also grant that “it is a flexible statute that, the courts have held, does not impose on the tribes the full panoply of those dominant society ways.” 75 At its most optimistic, the statute attempts to accommodate two competing goals: “preventing injustices
perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.\textsuperscript{76} The ICRA seeks to establish a covenant by which tribal governments can interact with federal and state governments. It serves as an enumerated list of those individual rights on which the United States will not compromise, giving real structure to the term “public policy.”

The enumeration of individual rights undoubtedly cuts into the ability of tribes to self-govern. In similar fashion, the Constitution cuts into the United States’ power to govern its own citizens. In \textit{Santa Clara Pueblo v. Martinez,}\textsuperscript{77} Justice Byron White dissented from the opinion of the Court:

\begin{quote}

The major intrusion upon the tribe’s right to govern itself occurred when Congress enacted the ICRA and mandated that the tribe “in exercising powers of self-government” observe the rights enumerated in § 1302. The extension of constitutional rights to individual citizens is intended to intrude upon the authority of government.
\end{quote}

Like the Bill of Rights, the ICRA was primarily intended to protect the rights of individual Indians from unjust intrusion on the part of their tribal government. However, the “distinct and competing” purpose of the Act—the furthering of Indian self-government—opened the door to a mandate for interaction between tribes and the U.S.\textsuperscript{79}

A discernable result of the Act was to establish a set of policies to which the Indian tribes and the United States agreed, and that—if followed—would have the effect of ensuring that neither the tribal nor the federal governments’ ability to govern is compromised.\textsuperscript{80} In

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\item\textsuperscript{76} Subcomm. on Constitutional Rights of the Comm. on the Judiciary, U.S. Senate, 89th Cong., Constitutional Rights of the American Indian 11 (Comm. Print 1966).
\item\textsuperscript{77} 436 U.S. 49 (1978).
\item\textsuperscript{78} Id. at 82-83 (White, J., dissenting).
\item\textsuperscript{79} Id. at 62 (majority opinion) (acknowledging the “distinct and competing” objectives behind the creation of the ICRA).
\item\textsuperscript{80} It is unlikely that the United States government would ever allow tribal nations to behave in a way that negatively affected its ability to govern. \textit{See infra} note 109 and accompanying text. However, by the early 1960s, the courts had established that the Bill of Rights did not extend to include Indians living on reservations. \textit{See Tilton v. Menares}, 163 U.S. 576 (1896) (holding that the Cherokee Nation was sovereign from the United States and, therefore, not bound by the limitations imposed by the Fifth Amendment); \textit{see also} Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959) (rejecting a First Amendment attack on a tribal court criminal conviction for the ritual use of peyote); Barta v. Oglala Sioux Tribe of Pine Ridge Reservation, 259 F.2d 553 (8th Cir. 1958) (ruling that neither the Fifth nor the Fourteenth Amendments applied to a tribe’s imposition of a land use tax on nonmembers);
establishing the ICRA and specifying the principles that the tribal nations must accept, the United States did not take the extra step and create a federal cause of action for the enforcement of rights granted to individuals via the Act. Outside of any redress that tribal courts or other tribal governing bodies may offer, the only federal remedy available for violations of the ICRA is the writ of habeas corpus.\textsuperscript{81} Careful not to undermine the tribes’ abilities to self-govern, yet attentive to the need for balance, the federal government chose to severely limit its ongoing influence in the day-to-day activities of the tribal courts. \textit{Smith v. Confederated Tribes of Warm Springs Reservation}\textsuperscript{82} was an appeal from the United States District Court of Oregon concerning “the comity that federal courts must accord to Indian Tribal Court procedures under the Indian Civil Rights Act.”\textsuperscript{83} In considering whether or not the tribal court’s proceedings commenced without undue delay, the court chose to defer to the tribal court’s judgment:

The procedures that the Tribal Courts choose to adopt are not necessarily the same procedures that the federal courts follow. Most tribes operate their own court systems and, except to the extent demanded by the Indian Civil Rights Act, the structure and procedure of such courts may be determined by the tribes themselves. Federal courts must avoid undue or intrusive interference in reviewing Tribal Court procedures. Comity towards the Tribal Courts requires that deference be given to the procedures which those courts choose to follow.\textsuperscript{84}

\textsuperscript{81} This interpretation of the statute was upheld in \textit{Santa Clara Pueblo}.

\textsuperscript{82} Id. at 1412 (internal quotation marks and citations omitted).
Courts often cite specifically to the ICRA as the reason for recognizing tribal court rulings and abstaining from rehearing such cases. In *Wetsit v. Stafne*, the court declared that, from the view of the United States federal court system, a tribal court’s fitness to try a homicide case hinged on the ICRA: “A tribal court, which is in compliance with the Indian Civil Rights Act is competent to try a tribal member for a crime also prosecutable under the Major Crimes Act.”

In *Santa Clara Pueblo*, Martinez, a female member of the Santa Clara Pueblo tribe, attempted to challenge a tribal ordinance that denied tribal membership to the children of female members who marry outside of the tribe, but not to similarly situated children of male members. After failing to convince the tribe to alter the rule, Martinez filed an action in District Court, on the basis that the rule was discriminatory in violation of the ICRA. The United States District Court for the District of New Mexico held that the application and interpretation of the ICRA’s equal protection clause should be left to the judgment of the tribe:

> [T]he equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved . . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day.

After the Tenth Circuit Court of Appeals reversed the District Court’s holding, the Supreme Court granted certiorari and reversed the Tenth Circuit decision, holding that a federal court may not pass on the validity of a tribal ordinance.

Admittedly, the bargaining power between the United States and tribal nations is skewed; the United States’ role as the dominant party invariably affects the tribes’ ability to negotiate. However, the actions of courts following the adoption of the ICRA suggest that, from a legal standpoint, working together to formulate a relatively broad structure
of policy guidelines by which all parties agree to abide can bridge the gap between two distinct cultures.

It is important to note that the ICRA is not the only document that has successfully established policy guidelines for divergent nations. Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms essentially provides a protection of due process rights, akin to a constitutional guarantee, and has been interpreted by courts to guide the treatment of foreign judgments. Though this is obviously an example of procedural protection, it is a good illustration of a policy requirement codified by the signatories to a multilateral convention.

IV. THE BEST APPROACH

The United States cannot maintain the stance that any judgment deviating from protections—even constitutional protections—ex-

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92 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights [after which five specific rights are listed, including rights related to information regarding the charge and the defense of the charge] . . . .


93 In a 2001 article, Professor Horatia Muir Watt commented on Article 6’s effect on the public policy issues surrounding the recognition of foreign judgments:

[European] national courts are now bound, for example, to consider as part of their public policy . . . the content of Article 6 Section 1 of the European Convention on Human Rights; they may not . . . invoke public policy against a decision from another European State on the grounds that jurisdiction was exercised on the sole basis of the claimant’s nationality, or that it afforded protection to a national intellectual property right.

Horatia Muir Watt, Evidence of an Emergent European Legal Culture: Public Policy Requirements of Procedural Fairness Under the Brussels and Lugano Conventions, 36 TEX. INT’L L.J. 539, 552 (2001) (footnote omitted); see also, e.g., Perez v. France, App. No. 47287/99, [2004] ECHR 71, at ¶ 80, at http://www.worldlii.org/eu/cases/ECHR/2004/71.html (“[T]he effect of Article 6 is . . . to place the ‘tribunal’ under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant . . . .”); Jokela v. Finland, 2002-IV Eur. Ct. H.R. 1, 22 (“The Court must ascertain whether the overall proceedings, including the way in which evidence was dealt with, were fair within the meaning of Article 6 § 1. This provision places the domestic tribunal under a duty to conduct a proper examination . . . without prejudice [as to relevance].”), available at http://www.worldlii.org/eu/cases/ECHR/2002/452.html.
tended to the American people should be denied recognition on the basis of public policy. Instead, like the ICRA, which attempts to give structure and boundaries to policy differences between the U.S. and tribal governments, and like the European Convention, which protects human rights by setting out standards to which signatories must adhere, the member nations to the Hague Conference must draft an explicit agreement. This agreement should strike a compromise between competing points of view, respect the complexity of the various cultural norms involved, and dictate relatively specific situations in which it would be permissible to use the public policy escape clause.

In order to further the process, the United States must formulate a short list of the policies on which they are unable to compromise, keeping in mind that their goal is not to impose the dictates of the Constitution on other member nations, but to determine which policies, if violated, would compromise fundamental U.S. beliefs and have a distinct and chilling effect on a direct U.S. interest. In order to respect global public policy considerations, the U.S. should deny recognition based on internal public policy only where a violation is so severe as to interfere with the ability of the country to maintain its legal culture. 94 Further, when a court determines that a judgment falls within an identified public policy exception, the court should be required to engage in additional analysis. 95 Such analysis should examine the U.S. interests at stake and their associated vulnerabilities. 96

Finally, any policy enumerations must be based on federal, not state, policies and dictated on a national, not state-by-state, basis. The Supreme Court decision in Erie Railroad Co. v. Tompkins 97 rejecting federal general common law has been interpreted to establish that the law applicable to judgments enforcement in United States federal courts is state law. Therefore, enforcement and recognition of judg-

94 See Telnikoff v. Matusevitch, 702 A.2d 230, 256 (Md. 1997) (Chasanow, J., dissenting) (“This libel judgment obtained by one British resident against another British resident was not a ‘serious injustice’; it does not violate fundamental notions of what is decent and just; and it does not undermine public confidence in the administration of law.”); see also id. at 257 (advocating a balancing test with “interest in good will, comity, and res judicata fostered by recognition of foreign judgments” on one side and “interest in giving the benefits of our local . . . policy to residents of another country” on the other).

95 For a thorough example of the analysis in which courts currently engage when determining public policy, see id. at 248-51 (majority opinion).

96 See Linda J. Silberman & Andreas F. Lowenfeld, A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute, 75 Ind. L.J. 635, 644-45 (2000) (explaining that United States interests should be identified in order to meaningfully comprehend the public policy defense).

97 304 U.S. 64, 78 (1938).
ments are governed by the laws of the fifty states. Both courts and commentators have noted the problems inherent in this system.\textsuperscript{98} In Banco Nacional de Cuba v. Sabbatino,\textsuperscript{99} the Supreme Court held that a question concerning the effect of an act of state “must be treated exclusively as an aspect of federal law.”\textsuperscript{100} However, there is a line drawn between an “act of state” and the more conventional enforcement of judgments according to “foreign decrees or statutes.”\textsuperscript{101} The argument made by the Second Circuit in Republic of Iraq v. First National City Bank with respect to the United States’ need to uniformly recognize an act of state is also salient to the foreign judgment issue:

It is fundamental to our constitutional scheme that in dealing with other nations the country must speak with a united voice. It would be baffling if a foreign act of state intended to affect property in the United States were ignored on one side of the Hudson but respected on the other; any such diversity between states would needlessly complicate the handling of the foreign relations of the United States. The required uniformity can be secured only by recognizing the expansive reach of the [Sab- batino] principle . . . that all questions relating to an act of state are questions of federal law . . . .

If the current “act of state” doctrine were extended to recognition of foreign judicial acts, any exceptions to recognition on the basis of public policy would be more consistent and predictable.

In sum, the United States, and every other country involved in the compilation of a public policy document such as the one proposed here, needs to choose its issues carefully and fight the battles that it makes sense to fight, while recognizing and respecting that other


\textsuperscript{99} 376 U.S. 398 (1964).

\textsuperscript{100} Id. at 425.

\textsuperscript{101} Republic of Iraq v. First Nat’l City Bank, 353 F.2d 47, 50 (2d Cir. 1965).

\textsuperscript{102} Id. at 50-51 (internal citations omitted).
countries’ concerns may differ. In his dissent in *Telnikoff v. Matusevitch*, Judge Howard Chasanow of the Maryland Court of Appeals spoke to this sentiment:

> There should be no question about the need for First Amendment protection for a United States news wire service . . . . There is a huge difference between giving First Amendment protection to a United States news wire service and giving First Amendment protection . . . to all English libel defendants. It is unwarranted to simply refuse, on the basis of freedom of the press and Maryland public policy, to enforce all English libel judgments. . . . It should not violate our public policy to recognize [England’s] interest [in protecting its residents from defamatory statements] as long as it does not endanger our interest in the free dissemination of information by our media and those people shielded by our Constitution.

It is sometimes difficult to determine whether two nations’ conflicting public policies threaten one another or whether, though different, they can coexist despite fielding different forums. However, successfully recognizing the differences is key to establishing a judgment recognition policy with which all parties are content.

Even though public policy issues have been a barrier to the ratification of a Hague Convention, there is a body of work that suggests that, if nations are able to overcome their differences in this arena and implement a treaty, the perception and the role of public policy may actually shift in response. In essence, if we can take the first step, the very agreement that we negotiate will offer the opportunity to change the member nations’ take on the character of public policy. Professor Horatia Muir Watt commented on post-Brussels Convention effects:

> Recent case law . . . concerning recognition and enforcement of foreign judgments under the Brussels and Lugano Conventions shows that public policy, traditionally a vector of inward-looking national values even in a European context, is undergoing significant transformation, so as to become the very cornerstone of the edification of common European values . . . . The free movement of foreign judgments . . . testifies to the disappearance of purely national definitions and standpoints, which give way to common European parameters.

In the United States, the prospect of edifying “common European values” is not necessarily an attractive one. However, Professor Watt argues that, in some situations, the movement toward a common public policy initiative has occurred spontaneously, as the associated na-

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103 702 A.2d 230 (Md. 1997).
104 Id. at 260 (Chasanow, J., dissenting).
105 Watt, *supra* note 93, at 539-40.
tions have strengthened their relationships with one another.\textsuperscript{106} Accordingly, though some degree of high-level imposition regarding a structured public policy stance is likely required at the outset, the probability is that involved nations will respond to the initial push and begin to come together on their own.\textsuperscript{107}

Of course, an integrated policy document is not the perfect solution. The weaknesses of the ICRA will be mirrored in any policy document that Hague Conference attendees draft. One of the primary concerns regarding public policy will continue to be that, just as there is no collateral review or regimented appeal process to review whether or not a decision is consistent with the ICRA,\textsuperscript{108} there will be no supranational body to hear the same sort of “consistency appeals” stemming from a policy judgment that is adopted by foreign nations. Critics will surely point out that this means the problem is just one level removed. Though such a statement is accurate, the value of a cohesive policy document is that it will provide a level of guidance sufficient to calm the most divisive of public policy-related fears.

\section*{Conclusion}

The argument for an international constitution-like document is one that finds its beginning in an issue best categorized as domestic—the interplay between the courts of tribal nations and the courts of the United States. This was certainly an easier negotiation than a multinational one will be. The United States was operating from a position of superior bargaining power, not just because of the difference in size and scope of governments, but also because tribal courts and tribal governments operate independently since the U.S. government granted them that right.\textsuperscript{109} That in itself probably made the

\begin{small}
\textsuperscript{106} Id. at 540-41.
\textsuperscript{107} Id.

\textsuperscript{108} Per the ICRA, the only potential for appeal or federal review is the writ of habeas corpus. See supra note 81 and accompanying text.

\textsuperscript{109} The relationship between tribal nations and the U.S. government is premised upon broad federal constitutional power over Indian affairs. The sources of federal powers over Indian affairs are many, including the Property Clause, \textit{U.S. Const.} art. IV, § 3, cl. 2 (granting Congress the power to dispose of and regulate U.S. territory and property); the Indian Commerce Clause, \textit{id.} art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); the Treaty Clause, \textit{id.} art. II, § 2, cl. 2 (granting the national government exclusive authority to enter into treaties); the Supremacy Clause, \textit{id.} art. VI, cl. 2; and the Necessary and Proper Clause, \textit{id.} art. I, § 8, cl. 18 (giving Congress the broad authority to execute enumerated powers). For a more detailed discussion on the source and scope of federal authority in Indian affairs, see \textbf{Felix S. Cohen, Handbook}
thought of concessions on some policy issues more palatable to the U.S.

The situation in which the United States currently finds itself is quite different. As discussed above, the nation’s bargaining position is not a strong one. The United States certainly does not exercise the same level of control over its peers at the Hague Conference as it does over tribal governments. This makes it much more difficult for the government and the judiciary to agree to relinquish any significant measure of control over the actions of the courts and accept and enforce the policies of other nations, which may run counter to our own. However, that is what must be done. In 1918, Justice Benjamin Cardozo provided a fitting assessment of the situation:

> Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. . . . If a foreign statute gives the right, the mere fact that we do not give a like right is no reason for refusing to help the plaintiff in getting what belongs to him. We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.\(^{110}\)

Unless an overwhelming policy reason validates an alternative action, the United States must be prepared to respect and recognize other nations’ laws, even if such laws are different from those existing in the U.S.

Today, in addition to the logic articulated by Justice Cardozo, we must also consider the broader consequences of maintaining the status quo. At the outset of this Comment, I noted the ever-increasing urgency with which we must pursue a solution to the problem of foreign judgments. Our failure to codify a policy thus far is a grave inefficiency and a barrier to the growth of the global economy. I have advanced what I believe to be a valid answer, a cohesive policy document, to one of the issues that is causing the stalemate, but it is only one step toward resolution. As it becomes more and more common for legal problems to expand beyond the borders of an individual nation, there is an increased need for countries to find a solution that ensures stability and predictability. The failure to do so will have negative consequences to international relations and the worldwide economy. It is vital that the countries of the world work together to overcome their differences, or we will all suffer.\(^{111}\)

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\(^{110}\) Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 201 (N.Y. 1918).

\(^{111}\) See Traynor, supra note 50, at 403 (identifying the need to find “harmonious,” “noncombative,” and “cooperative” approaches to solving international conflict of laws problems).