Washington University Law Review

Volume 94 | Issue 1

2016

Judging Foreign States

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Washington University
Law Review

VOLUME 94 NUMBER 1 2016

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ABSTRACT

Famed foreign relations law principles, including the act of state doctrine, the public law taboo, and Zschernig's foreign affairs preemption, rely on the notion that U.S. courts should not sit in judgment on foreign states. Judges in these cases, as well as scholars writing in the area, frequently suggest that U.S. courts should sit out of important disputes due to considerations of sovereign equality and international comity. Yet, in less attention-grabbing cases, U.S. courts routinely sit in judgment on foreign judgments, laws, legal systems, and interests, sometimes concluding that they do meet U.S. standards. The first goal of this project, therefore, is to identify and catalog those circumstances in which U.S. courts sit in judgment on foreign states. This extensive catalog should cast doubt on unsystematic objections to sitting in judgment: Were we to accept that sitting in judgment was per se impermissible, all sorts of current doctrines would need to be revisited. Such a categorical rule is not only radical, but also unjustified. The doctrines in which courts sit in judgment are routine and unremarkable; they protect important institutional and individual concerns; and they have not sparked international incident. Nor is there a coherent distinction between the doctrines that call for courts to sit in judgment and those that do not.

Identifying these issues does not determine a better approach, and recent scholarship on these and related cases have proposed changes to

* Assistant Professor of Law, Cornell Law School. Thank you to Pamela Bookman, Andrew Bradt, Steve Burbank, Adam Chilton, Carrie Menkel-Meadow, Jens Ohlin, Ryan Scoville, Chris Whytock, and participants in the Junior Federal Courts and Junior International Law Scholars Association workshops for their helpful comments.

U.S. law that turn on external considerations such as foreign interests or international comity. But this literature, in my view, risks focusing too much on the transnational aspects of these cases to the exclusion of domestic institutional concerns. As a potential corrective, this Article imagines sitting-in-judgment doctrine that is responsive to those structural factors that govern institutional arrangements within the U.S. system. Applying the tools of comparative institutional analysis, cases could be divided into those bilateral, legal, and constrained adjudications for which the common-law courts were designed, versus those polycentric, systemic, political inquiries best left to the political branches. Federalism, with implications for both authority and capacity, would suggest further division of responsibilities among relevant institutions. And individual-rights considerations would offer guidance to courts about how to sit in judgment when called upon to do so. This analysis demonstrates not only that there is no per se reason that U.S. institutions should avoid sitting in judgment on foreign state acts, but also that current law may not be allocating responsibility for sitting in judgment consistent with domestic institutional considerations.

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"To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court . . . ."

—Judge Learned Hand[1]

I. INTRODUCTION

In a seemingly unremarkable 10-page opinion, the Eleventh Circuit in May 2015 affirmed the dismissal of a human rights lawsuit filed against various Venezuelan entities in part because the act of state doctrine bars U.S. courts from sitting in judgment of a foreign state.[2] Yet during the period between the district court's dismissal and the court of appeal's affirmance, district courts within the Eleventh Circuit issued more than forty written opinions on forum non conveniens motions,[3] which canonically require the court to assess the adequacy of a foreign judicial system.[4]

In March 2014, the Second Circuit refused to turn over $6.8 million owed to the government of Brazil pursuant to a Brazilian penal judgment because the court wanted to avoid passing upon the public law of another state.[5] Yet the same court ruled that Namibia's United Nations mission may be sued in tort based on its alleged failure to comply with the New York City building code.[6] More dramatically, the same court also affirmed a district court judgment allowing a suit to proceed because "if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."[7]

In February 2014, the District of Maryland dismissed Chinese dissidents' lawsuit against an American corporation and its officers for complicity in China's surveillance programs in part because the suit would

1. Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930).

2. Mezerhane v. República Bolivariana de Venez., 785 F.3d 545, 551–52 (11th Cir. 2015). For further discussion of the act of state doctrine, see *infra* Part II.B.3.

3. *See, e.g.*, Mootilal Ramhit & Sons Contracting, Ltd. v. Mohammed, 2014 WL 3439742 (S.D. Fla. July 15, 2014) (dismissing case in favor of suit in Trinidad and Tobago). A full list can be compiled from Westlaw by searching for the phrase "forum non conveniens" in district courts within the Eleventh Circuit between December 30, 2013 and May 7, 2015.

4. *See infra* notes 97–99, 109–10 and accompanying text.

5. United States v. Federative Republic of Braz., 748 F.3d 86 (2d Cir. 2014). *See infra* notes 33–41 and accompanying text (discussing the public law taboo).

6. USAA Cas. Ins. Co. v. Permanent Mission of the Republic of Namib., 681 F.3d 103 (2d Cir. 2012).

7. Rasoulzadeh v. Associated Press, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985).

have required the court to sit in judgment on the acts of a foreign government.[8] Yet only a few weeks before defendants filed their motion to dismiss,[9] the same district court stayed enforcement of a Nigerian judgment to permit a defendant to proffer evidence that the judgment was obtained by fraud, the cause of action was repugnant to Maryland's public policy, and the Nigerian legal system failed to provide impartial tribunals or procedures compatible with due process.[10]

These sets of cases are not isolated incidents. On the one hand, famed foreign-relations law principles including the act of state doctrine,[11] the public law taboo,[12] and *Zschernig*'s foreign affairs preemption[13] rely on the notion that U.S. courts should not sit in judgment on foreign states. Judges in these cases, as well as scholars writing in the area,[14] frequently suggest that U.S. courts should sit out of important disputes due to considerations of sovereign equality and international comity.[15] Yet on the other hand, in less attention-grabbing cases, U.S. courts routinely sit in judgment on foreign judgments, laws, legal systems, and interests, sometimes concluding that they do meet U.S. standards.[16]

The first goal of this project is to identify and catalog those circumstances in which U.S. courts sit in judgment on foreign states. This

8. Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717 (D. Md. 2014).

9. *See* Defs.' Mem. of Law in Supp. of Mot. to Dismiss Pls.' First Am. Compl. Under FED. R. CIV. P. 12(b)(1), 12(b)(2), and 12(b)(6), Du Daobin v. Cisco Sys., Inc., 2 F. Supp. 3d 717 (D. Md. 2014) (No. 8:11-cv-01538), 2013 WL 4521770.

10. Mezu v. Progress Bank of Nigeria, No. JKB-12-2865, 2013 WL 3146929 (D. Md. June 18, 2013) (drawing on, *inter alia*, MD. CODE ANN., CTS. & JUD. PROC. §§ 10–701 *et seq.*).

11. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416 (1964) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.") (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)); Oetjen v. Cent. Leather Co., 246 U.S. 297, 304 (1918) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'")).

12. According to the "public law taboo," the United States will not enforce foreign judgments or recognize foreign causes of action that derive from foreign public law. *See, e.g.*, Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), *aff'd on other grounds,* 281 U.S. 18 (1930); William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161 (2002) [hereinafter Dodge, *Public Law Taboo*]; Philip J. McConnaughay, *Reviving the "Public Law Taboo" in International Conflicts Law*, 35 STAN. J. INT'L L. 255 (1999); Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 321, 322–26 (1979).

13. Zschernig v. Miller, 389 U.S. 429, 440 (1968) (finding an Oregon state statute preempted because it "seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own.").

14. *See infra* notes 18 & 157 (collecting sources).

15. *See infra* Part II.A.

16. *See infra* Part II.B.

extensive catalog should cast doubt on unsystematic objections to sitting in judgment: Were we to accept that sitting in judgment was *per se* impermissible, all sorts of current doctrines would need to be revisited. Such a categorical rule is not only radical but also unjustified—the doctrines in which courts sit in judgment are routine and unremarkable, they protect important domestic and individual concerns, and they have not sparked international incident. Nor is there a coherent distinction between the doctrines that call for courts to sit in judgment and those that do not.

Having identified these issues with existing law, this Article pivots to the normative questions relating to sitting in judgment. In addition to the occasional treatment of one issue or another,[17] there has been recent interest in sitting-in-judgment and related cases by scholars of transnational litigation.[18] But that literature, in my view, risks focusing too much on the transnational aspects of these cases to the exclusion of domestic institutional concerns. As a potential corrective, this Article proposes a thought experiment: What if we crafted sitting-in-judgment doctrine by reference to those structural factors that govern institutional arrangements *within* the U.S. system? Comparative institutional analysis would divide cases into those bilateral, legal, and constrained adjudications for which the common-law courts were designed, versus those polycentric, systemic, political inquiries best left to the political branches. Considerations of institutional authority would buttress these divisions as well. Federalism, with implications for both authority and capacity, could suggest further divisions of institutional responsibility. And individual rights would factor into the work of courts on these cases (and others). Overall, this structural approach suggests that U.S. courts may be sitting in judgment too much and too little: some of the systemic

17. Scholars occasionally look at particular doctrines and comment about whether consideration of foreign legal acts is appropriate. *E.g.*, Dodge, *Public Law Taboo*, *supra* note 12 (discussing the public law taboo); Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159 (2007) (discussing judgment recognition); Carl A. Cira, Jr., *The Challenge of Foreign Laws to Block American Antitrust Actions*, 18 STAN. J. INT'L L. 247 (1982) (discussing extraterritorial discovery). These inquiries tend to be doctrine-specific.

18. *See, e.g.*, Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071 (2015) [hereinafter Dodge, *Comity*]; Michael D. Ramsey, *Escaping "International Comity,"* 83 IOWA L. REV. 893 (1998); Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991). For a further discussion of Dodge's work in particular, see *infra* note 50. Professor Rutledge gets the closest to the approach of this Article in a symposium piece that looks to the principle of sovereign equality to argue that U.S. court approaches should vary depending on whether the foreign state is acting as a party, a regulator, or an adjudicator. Peter B. Rutledge, *Toward a Functional Approach to Sovereign Equality*, 53 VA. J. INT'L L. 181 (2012).

evaluations could be handed over to the political branches, but legal rules like the act of state doctrine and the public law taboo may be unnecessarily timid in their approach to transnational litigation.

In this way, this Article is part of a larger project of anti-exceptionalism in transnational litigation.[19] Although certainly not alone, in previous work I have argued that special treatment need not be accorded to class actions involving foreign plaintiffs[20] and that standard tools of statutory interpretation are sufficient in themselves to resolve international ambiguities in statutes.[21] More generally, this project suggests that we should be cautious about creating international-specific solutions unnecessarily while, at the same time, refocusing on those circumstances for which international issues (and in particular international law) call for exceptional treatment.[22]

This Article proceeds as follows. Part II addresses current law: those situations in which U.S. courts avoid sitting in judgment on foreign states, and the myriad situations in which sitting in judgment is an integral part of existing doctrine. Part II concludes by showing that existing justifications do not explain current doctrine descriptively or normatively. Part III hypothesizes a structural approach to sitting in judgment that accounts for the separation of powers, federalism, and individual rights. Part IV then demonstrates how these lessons would be applied to the doctrines previously described. This thought experiment demonstrates that there is no *per se* reason that U.S. institutions should avoid sitting in judgment on foreign state acts, but also that current law may not be allocating responsibility for sitting in judgment consistent with domestic institutional considerations.

II. THE STATE OF THE LAW

This Part begins with a brief description of those decisions that reject U.S. courts sitting in judgment on foreign acts, most prominently the act of

19. It is also consistent with recent efforts to "normalize" foreign affairs law. *See* Ganesh Sitaraman & Ingrid B. Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015). But unlike Sitaraman and Wuerth, this Article imagines normalizing doctrine along domestic institutional lines.

20. *See generally* Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L.J. 1387 (2015) [hereinafter Clopton, *Transnational Class Actions*].

21. *See generally* Zachary D. Clopton, *Territoriality, Technology, and National Security*, 83 U. CHI. L. REV. 45 (2016); Zachary D. Clopton, *Replacing the Presumption against Extraterritoriality*, 94 B.U. L. REV. 1 (2014) [hereinafter Clopton, *Replacing*].

22. *See infra* notes 232–35 (discussing the role of international law); *infra* Part V (discussing this claim generally).

state doctrine and the public law taboo. Notably, courts translate their concern with sitting in judgment into two seemingly contradictory approaches—treating all foreign acts as valid (acts of state) or refusing to honor them at all (public laws). Part B then catalogs doctrines in which courts routinely sit in judgment on foreign states, judgments, laws, legal systems, and interests, including in situations that look strikingly like acts of state and public laws. The implication of this descriptive account is that sitting in judgment may be within the judicial ken, and that these decisions have not engendered significant response from domestic or international law.

A. Refusing to Sit in Judgment

Perhaps the most prominent invocation of the sitting-in-judgment argument can be found in *Banco Nacional de Cuba v. Sabbatino*.[23] *Sabbatino* was one of the many decisions in the fallout from the Cuban government's expropriation of American-owned property. The key issue in *Sabbatino* was the reach of the act of state doctrine,[24] which provides that decisions of a foreign sovereign within its own territory are presumptively valid.[25] Although justifications for the act of state doctrine have varied over the years,[26] *Sabbatino* instantiated this rule as a reflection of the seeming impropriety of courts invalidating foreign sovereign acts.[27] Or, in the words of the Fifth Circuit, the act of state doctrine "averts

23. 376 U.S. 398 (1964).

24. Other prominent act of state doctrine decisions include W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990); Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); and Underhill v. Hernandez, 168 U.S. 250 (1897).

25. For further discussion of the act of state doctrine, *see*, *e.g.*, Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325 (1986); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992); Daniel C. K. Chow, *Rethinking the Act of State Doctrine: An Analysis in Terms of Jurisdiction to Prescribe*, 62 WASH. L. REV. 397 (1987); Malvina Halberstam, *Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law*, 79 AM. J. INT'L L. 68 (1985); Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 COLUM. J. TRANSNAT'L L. 175 (1967); Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

26. *See, e.g.*, W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., 493 U.S. 400, 404–05 (1990) (reviewing historical justifications, including international law, comity, and separation of powers).

27. The Court declared that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." 376 U.S. at 416 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).

potential diplomatic embarrassment from the courts of one sovereign sitting in judgment over the public acts of another."[28]

Importantly, in order to avoid sitting in judgment on foreign state acts, the act of state doctrine operates as a choice of law rule rather than an abstention doctrine. The *Sabbatino* Court did not throw out the case, but instead treated the Cuban expropriation as providing the valid legal rule.[29] In the name of sovereign equality, therefore, the Court treated the Cuban expropriation as valid and resolved the rest of the case against the background of that valid act.[30] More generally, courts have used the act of state doctrine to avoid passing on the validity of foreign executive acts, legislation, military conduct,[31] and judicial decisions,[32] and have extended that doctrine beyond formal enactments to informal and unofficial conduct as well.[33]

On the other side of the coin are those sitting-in-judgment decisions that operate as abstention rules. Illustrative of this approach are the various doctrines that coalesce in the public law taboo.[34] Sparing the details, U.S. courts refuse to enforce foreign public-law judgments, including penal judgments,[35] tax judgments,[36] and other civil judgments of a public-law nature.[37] Similarly, although U.S. courts are open to causes of action under foreign law, U.S. courts will not hear foreign public-law claims.[38] Why do

28. Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380 (5th Cir. 1980).

29. 376 U.S. at 438 (noting that "the act of state doctrine reflects the desirability of presuming the relevant transaction valid").

30. *See generally* Sabbatino, 376 U.S. 398.

31. *See*, *e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. i (AM. LAW INST. 1987) ("The act of state doctrine applies to acts such as constitutional amendments, statutes, decrees and proclamations, and in certain circumstances to physical acts, such as occupation of an estate by the state's armed forces in application of state policy.").

32. *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 41 cmt. d (AM. LAW INST. 1965) ("A judgment of a court may be an act of state. Usually, it is not . . . ."); In re Philippine Nat'l Bank, 397 F.3d 768, 772–73 (9th Cir. 2005) (treating judgment as an act of state); Liu v. Republic of China, 892 F. 2d 1419, 1432–34 (9th Cir. 1989) (same). *But see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 443, Reporters' Note 10 (rejecting judgments as acts of state).

33. *See, e.g.*, Galu v. Swiss Air Transp. Co., 873 F.2d 650 (2d Cir. 1989) (applying act of state doctrine to a Swiss expulsion order).

34. *See supra* note 12 (collecting sources). As Professor Dodge explained, only recently has the "public law taboo" label covered both laws and judgments. Dodge, *Public Law Taboo*, *supra* note 12. Etymology aside, this Article applies the taboo label to laws and judgments.

35. *E.g.*, The Antelope, 23 U.S. (1 Wheat.) 66, 123 (1825) ("The Courts of no country execute the penal laws of another . . . .").

36. *E.g.*, Her Majesty the Queen in Right of B.C. v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979).

37. *See*, *e.g.*, Dodge, *Public Law Taboo*, *supra* note 12 at 185–93.

38. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 109 (1998) (noting that "[a] U.S. court will apply

courts reject public-law actions? The answer is not that courts fear that foreign public law is likely to conflict with fundamental American notions of justice—the public policy exception in conflict of laws would address this concern.[39] Rather, courts reject public laws and judgments in large part because they want to avoid the public-policy analysis altogether.[40] According to the Restatement (Third) of Foreign Relations Law, the public law taboo "appears to reflect a reluctance of courts to subject foreign public law to judicial scrutiny."[41] As noted above, the act of state doctrine avoids sitting in judgment of foreign acts by treating them as valid. The public law taboo, on the contrary, turns this reluctance to sit in judgment into a rule of abstention. Same argument, different result.[42]

Although not expressly abstention decisions, courts also have invoked the concern with sitting in judgment to limit the reach of U.S. laws. In *Zschernig v. Miller*, the Supreme Court held that an Oregon statute was preempted because it called upon state judges to sit in judgment on foreign acts, even though there was no federal enactment, practice, or policy that preempted it.[43] The Court objected because "[t]he statute as construed seems to make unavoidable judicial criticism of nations established on a more authoritarian basis than our own."[44] Similar logic has appeared in other U.S. decisions. The Supreme Court held that the habeas statute provided no relief in a case "that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area,"[45] and Judge Bork channeled

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foreign tort or contract law to decide a case before it, but it will not apply foreign regulatory law like antitrust law.").

39. *E.g.*, Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918) (discussing the public-policy exception in the United States and elsewhere).

40. Professor Dodge elaborated on three justifications: "(1) the difficulty of applying foreign law; (2) the fear of embarrassing foreign nations; and (3) the notion that the courts of one nation should not help to advance the interests of another." Dodge, *Public Law Taboo*, *supra* note 12, at 164.

41. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 483, Reporters' Note 2.

42. In *Sabbatino*, the Court acknowledged as much: "Although [the revenue] rule presumes invalidity in the forum whereas the act of state principle presumes the contrary, the doctrines have a common rationale . . . ." 376 U.S. 398, 437 (1964). In dissent, Justice White argued that the majority "fails to explain why it may be more embarrassing to refuse recognition to an extraterritorial confiscatory law directed at nationals of the confiscating state than it would be to refuse effect to a territorial confiscatory law." *Id.* at 450 n.11 (White, J., dissenting).

43. 389 U.S. 429 (1968).

44. *Id.* at 440. For further discussion of *Zschernig*, see, *e.g.*, Frederic L. Kirgis, Zschernig v. Miller *and the* Breard *Matter*, 92 AM. J. INT'L L. 704 (1998); Carlos Manuel Vazquez, *W(h)ither* Zschernig*?*, 46 VILL. L. REV. 1259 (2001).

45. Munaf v. Geren, 553 U.S. 674, 702 (2008).

this objection against Alien Tort Statute[46] litigation because it called for courts to "sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens."[47] Meanwhile, some lower courts have (seemingly) converted act-of-state precedents into abstention outcomes, refusing to entertain suits because they risked finding that foreign governments failed to comply with statutory or contractual duties.[48] These decisions—like the public law taboo but contrary to traditional act of state cases—remove cases from judicial consideration in order to avoid disrespecting a foreign sovereign by sitting in judgment of its sovereign acts.

B. Sitting in Judgment

In a public law decision, Judge Learned Hand wrote that "[t]o pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court."[49] This Part challenges his descriptive claim by identifying many situations in which U.S. courts sit in judgment on foreign states. The most obvious examples are those in which U.S. courts sit in judgment on foreign states or officials as parties. This Part briefly addresses those cases before turning to the less obvious (but more relevant) situations in which U.S. courts sit in judgment on foreign judgments, foreign laws, foreign legal systems, and foreign interests.[50]

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46. The Alien Tort Statute (ATS) is a jurisdictional statute, providing that federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2014). *See*, *e.g.*, Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013); Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

47. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring). The Supreme Court cited favorably to this Bork quotation in limiting the scope of ATS causes of action in *Sosa*, 542 U.S. at 728.

48. *E.g.*, Spectrum Stores v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir. 2011) (antitrust law); World Wide Minerals Ltd. v. Republic of Kazakhstan, 116 F. Supp. 2d 98 (D.D.C. 2000) (contract). *See also* John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507 (2016) (criticizing this approach to the act of state doctrine).

49. Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring).

50. This categorization stands in marked contrast to Professor Dodge's matrix of international comity, which divides cases depending on the foreign government actor to whom the doctrine applies. *See* Dodge, *Comity*, *supra* note 18. So, for example, Dodge would call judgment recognition "adjudicative comity" because it involves consideration of a foreign judicial decision. This Article, however, subdivides judgment recognition into component parts, *e.g.*, whether the U.S. court is evaluating the foreign judgment itself, the foreign substantive law applied, or the foreign legal system. This distinction from Dodge has important consequences for our respective normative conclusions. It might make sense for Dodge to conclude that "deference to the Executive would seem utterly inappropriate . . . [when applied to] the enforcement of foreign judgments" when foreign judgments are understood as judicial acts only. *Id.* at 2083. But, as this Article suggests in the next Part, it should not seem as "utterly inappropriate" to defer to the political branches when the judgment-recognition

In addition to its taxonomic goal, this Part's catalog of doctrines in which courts judge foreign states implicitly undermines the normative contention that U.S. courts should not sit in judgment on foreign acts. The examples described here are commonsensical, facially reasonable, and have not prompted notable reprisals from foreign states or the political branches. Instead, sitting in judgment on foreign acts is a routine and necessary part of litigation with international connections.

1. Foreign States, Instrumentalities, and Officials

It almost goes without saying that U.S. courts sit in judgment on foreign states, officials, and instrumentalities when they are defendants in U.S. litigation. These judgments are categorically different from those addressed in the balance of this Article in that foreign states are necessarily *parties* to these cases, but it is worth pausing on these judgments to note a few salient features. And, it turns out that the analysis recommended in Parts III and IV is consistent with current foreign sovereign immunity law.[51]

Historically, the United States applied an absolute theory of sovereign immunity that protected foreign states from all lawsuits in U.S. courts.[52] By the mid-twentieth century, at the urging of the U.S. State Department, courts applied a restrictive theory of immunity that limited immunity to sovereign or public acts.[53] And in 1976, Congress cut out the Executive Branch by adopting the Foreign Sovereign Immunities Act (FSIA).[54] The FSIA detailed the circumstances under which a foreign state, political subdivision, agency or instrumentality would not be entitled to immunity—that is, when a U.S. court would be permitted to sit in judgment.[55] As amended, these circumstances include: (1) commercial

decision turns on an assessment of the foreign legal system as a whole. Indeed, institutional authority and competence determinations may turn on exactly this type of distinction. *See infra* Part III.A.

51. *See infra* Parts III and IV. In brief, much like the recommended analysis below, U.S. federal courts sit in judgment on foreign states in Foreign Sovereign Immunities Act (FSIA) cases only at the direction of a duly enacted statute, and they only apply standards created by that statute. And in some FSIA cases, executive branch action is also required. Finally, of course, it is the judiciary that resolves the bilateral questions of law and fact in these cases.

52. *See, e.g.*, The Schooner Exch. v. McFaddon, 11 U.S. 116 (1812); Ex parte Peru, 318 U.S. 578 (1943).

53. *See, e.g.*, Republic of Mex. v. Hoffman, 324 U.S. 30 (1945). *See also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 app. 2 (1976).

54. *See* Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1602–11 (1976).

55. *Id.* Because FSIA does not define "foreign states," at least some courts have taken it upon themselves to judge statehood for entities not recognized by the Executive Branch—one more way that courts sit in judgment. *E.g.*, Ungar v. Palestine Liberation Org., 402 F.3d 274 (1st Cir. 2005). And

activity with a U.S. nexus; (2) noncommercial torts in the United States; (3) taking of property located in the United States, in violation of international law; (4) waiver; (5) arbitration-related matters; (6) rights to property in the United States that were acquired by succession or gift, or rights to immoveable property situated in the United States; (7) certain admiralty matters; (8) counterclaims; and, most recently (9) involvement in certain acts of terrorism.[56] It also permits the enforcement of certain judgments against foreign states.[57] The FSIA does not provide any immunity forbidding or limiting discovery in aid of the execution of a judgment against a foreign state.[58] Nor does it apply to foreign officials, and thus foreign official immunity is still governed by common law.[59] Finally, FSIA says nothing about foreign states as plaintiffs[60] or amici,[61] so when foreign states elect to file suits or briefs in U.S. courts, they also can be judged.[62]

2. Foreign Judgments

The foregoing Part addressed foreign states as parties to litigation. While these cases certainly represent U.S. courts "sitting in judgment" on foreign states, the focus of this Article is elsewhere. In particular, this Article is concerned with the (usually) judicially created doctrines that

multiple courts have held that the FSIA does not interfere with their inherent power to issue contempt orders against foreign sovereigns. *See, e.g.*, Autotech Techs. v. Integral Research & Dev. Corp., 499 F.3d 737 (7th Cir. 2007); F.G. Hemisphere Assoc. v. Dem. Rep. Congo, 637 F.3d 373 (D.C. Cir. 2011).

56. 28 U.S.C. §§ 1602–11. In addition, it seems that states could open state courts to litigation against foreign sovereigns separate from FSIA if the state authorizes cases that would not satisfy Article III. *See* Envtl. World Watch, Inc. v. American Airlines, Inc., No. C05-1799 TEH, 2005 WL 1867728 (N.D. Cal. Aug. 3, 2005) (remanding case against putative sovereign actor for lack of federal standing).

57. 28 U.S.C. §§ 1609–11.

58. Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250 (2014). In response to this decision and BG Group, PLC v. Republic of Arg., 134 S. Ct. 1198 (2014) (honoring arbitration interpretation of relevant treaty), the President of Argentina accused the Supreme Court of "extortion." *See* Tom Hamburger & Roberto A. Ferdman, *Argentine Leader Rejects U.S. Supreme Court Rulings in Debt Case*, WASH. POST (June 16, 2014), https://www.washingtonpost.com/politics/us-supreme-court-rejects-argentinas-appeal-in-debt-case-about-paying-off-holdouts/2014/06/16/cdfcf58e-f56c-11e3-a606-946fd632f9f1_story.html.

59. *See* Samantar v. Yousuf, 560 U.S. 305 (2010).

60. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964) ("[S]overeign states are allowed to sue in the courts of the United States."); Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 320 (1978) (allowing a foreign nation to sue for treble damages under antitrust laws).

61. *See, e.g.*, Brief for the United Mexican States as Amicus Curiae Supporting Respondent, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 1098267.

62. For data regarding foreign state performance as amici, see Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016).

result in courts passing judgments on foreign acts when foreign states are not parties to litigation.

Perhaps the most conventional way that U.S. courts sit in judgment on foreign acts is when they evaluate foreign judgments for purposes of recognition and enforcement. In what might surprise many readers, U.S. courts presumptively enforce foreign judgments, provided they meet certain baseline requirements.[63]

Prior to recognition or enforcement, U.S. courts engage in procedural and substantive evaluations of the foreign proceedings. Procedurally, U.S. courts will not enforce judgments that result from an unfair system or an unfair process—a conclusion they reach only after sitting in judgment.[64] Famously, a federal district court in New York barred the worldwide enforcement of a $19 billion Ecuadorian judgment against Chevron due to fraud and corruption.[65] Substantively, U.S. courts may decline to enforce a foreign judgment if it violates some notion of public policy.[66] From free speech[67] to arbitration priority[68] to whistleblower protection,[69] U.S. courts have declined to enforce foreign judgments based on forum public policy interests. Thus, although the public law taboo claims to insulate foreign public acts from judicial scrutiny, U.S. courts routinely sit in judgment of private law decisions that touch on public law values.[70]

Despite prohibitions on enforcing penal judgments, U.S. courts also sit in judgment on foreign criminal judgments. For example, U.S. courts may need to look at a foreign criminal judgment in order to determine whether it should contribute to a sentencing enhancement for prior criminal activity or recidivism.[71] Some states prohibit felons from possessing firearms and

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63. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895).

64. *Hilton* requires that the foreign court had personal and subject-matter jurisdiction, the defendant had adequate notice and the opportunity to be heard, and the process was not fraudulent, biased, or unfair. *Id.* The Uniform Acts that followed *Hilton* reflect similar requirements. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (1962); UNIF. MONEY JUDGMENTS RECOGNITION ACT (2005) [hereinafter UFCMJRA].

65. Chevron Corp. v. Donzinger, 974 F. Supp. 2d 362 (S.D.N.Y. 2013).

66. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 (AM. LAW INST. 1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 445 (AM. LAW INST. 1934).

67. Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997). *See also* Carodine, *supra* note 17 (collecting other First Amendment cases).

68. South Ionian Shipping Co. v. Hugo Neu & Sons Int'l Sales Corp., 545 F. Supp. 323 (S.D.N.Y. 1982).

69. Aguerre v. Schering-Plough Corp., 924 A.2d 571 (N.J. Super. Ct. App. Div. 2007).

70. *See also infra* note 134 and accompanying text (challenging the public versus private law distinction).

71. William S. Dodge, *The Penal and Revenue Rules, State Law, and Federal Preemption*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 54 (Paul B. Stephan ed., 2014) [hereinafter Dodge, *Rules*] (collecting sources); Alex Glashausser, *The Treatment of Foreign Country*

interpret these provisions to apply to individuals convicted of felonies abroad.[72] Many states have double jeopardy standards that credit foreign prosecutions.[73] And at least two bar associations will consider disciplining lawyers based on convictions in foreign courts.[74] To apply these rules, U.S. courts must assess not only the content of the foreign criminal judgment, but also its propriety: a U.S. court would not apply a recidivism enhancement or a felon-in-possession statute if the prior conviction was fundamentally unfair,[75] nor would it dismiss a criminal case on the basis of double jeopardy if the foreign prosecution was a sham.[76] Thus, by adopting rules that incorporate foreign criminal judgments, U.S. courts also open the door to sitting in judgment of those foreign acts.

3. Foreign Laws and Acts

In addition to foreign laws that appear in foreign judgments, U.S. courts sit in judgment on foreign laws directly. Because the line between a

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Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes, 44 DUKE L.J. 134, 142 (1994). The Federal Sentencing Guidelines Manual expressly provide that foreign convictions are not calculated into criminal history scores, § 4A1.2(h), but the same section allows those convictions to factor into the court's discretion to depart from the guidelines range. *Id.* (cross-referencing § 4A1.3). *See, e.g.*, United States v. Struzik, 572 F.3d 484 (8th Cir. 2009) (discussing Polish conviction); United States v. Makki, 47 F. Supp. 2d 25 (D.D.C. 1999) (discussing German conviction).

72. The Attorney General of the State of Washington, for example, interpreted the state's felon-dispossession statute to provide that "a conviction in a foreign country would disqualify an individual from the right to possess a firearm in Washington State if the foreign conviction is equivalent to a serious offense or other felony under Washington law." Letter from Attorney Gen. Robert W. Ferguson to Representative Jason Overstreet (June 2, 2014), http://www.atg.wa.gov/ago-opinions/whether-criminal-conviction-foreign-country-disqualifies-applicant-obtaining-concealed. *Cf.* Small v. United States, 544 U.S. 385 (2005) (interpreting the federal felon-dispossession statute to apply to domestic convictions only).

73. Dodge, *Rules*, *supra* note 71 (collecting sources). Federal law, however, does not. For an interesting argument regarding double jeopardy and international law prosecutions, including historical support for the view, see Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 769 (2009).

74. *See* In re Scallen, 269 N.W.2d 834, 835 (Minn. 1978) (crediting Canadian conviction); In re Wilde, 68 A.3d 749 (D.C. 2013) (holding that Hearing Committee could take into account a foreign conviction if certain requirements were satisfied).

75. In *State v. Herzog*, 740 P.2d 380 (Wash. Ct. App. 1987), for example, a Washington state court held that foreign convictions may be included in criminal history for sentencing purposes but rejected the inclusion of defendant's West German conviction as constitutionally invalid (because he was convicted by a two-person jury).

76. Federal courts have considered whether to apply double jeopardy when defendants claim that a foreign prosecution was a sham for a U.S. federal prosecution. *See, e.g.*, United States v. Guzman, 85 F.3d 823, 827 (1st Cir. 1996); United States v. Baptista–Rodriguez, 17 F.3d 1354, 1361 (11th Cir. 1994); United States v. McRary, 616 F.2d 181, 185 (5th Cir. 1980); United States v. Richardson, 580 F.2d 946, 947 (9th Cir. 1978).

foreign law and a foreign act is blurry, this Part treats them together.[77] As will become apparent, this review belies the notion that foreign public laws and acts of state are immune from judicial scrutiny.

First, mainstream conflict of laws analysis calls upon courts to sit in judgment on foreign laws. In many circumstances, U.S. courts will consider applying foreign law to a dispute with foreign connections. But even when foreign law would normally apply, U.S. courts can reject the foreign law if the rule or its results violate the public policy of the forum.[78] In other words, courts sit in judgment of the relevant foreign law and decide whether it can be appropriately applied in a particular case. To give just one example, in *Victor v. Sperry*, California courts refused to apply a Mexican no-fault rule for car-accident liability because it violated California's public policy of requiring negligence for liability to attach.[79] As noted above, the public law taboo means that courts do not apply the public policy exception to foreign public laws, but again, U.S. courts make public policy judgments about foreign private laws in the normal course.[80]

American courts also apply and judge foreign law when foreign law is an input in domestic substantive or procedural doctrines. And these cases of "foreign law as datum"[81] may include foreign public laws.[82] To name just a few examples of embedded foreign law: defendants in breach of contract cases may plead supervening foreign illegality;[83] domestic

77. In *Sabbatino*, for example, the expropriation was the result of an executive resolution, but it was issued pursuant to express legislative authorization from Public Law 851. And, the Supreme Court has said that the act of state doctrine may apply to a "statute, decree, order, or resolution" of the foreign government. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695 (1976). More generally, it must be acknowledged that the line between foreign laws and foreign executive acts is blurry, particularly in states that have less crisp divisions among the branches.

78. *E.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (AM. LAW INST. 1971).

79. 329 P.2d 728 (Cal. Ct. App. 1958).

80. For one timely example, consider that the law of marriage is subject to the public policy exception. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2).

81. Conflict-of-laws scholars occasionally have used the term "foreign law as datum" to describe cases in which U.S. courts incorporate foreign law into domestic doctrines. *E.g.*, Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 448 (1995); Herma Hill Kay, *Conflict of Laws: Foreign Law as Datum*, 53 CAL. L. REV. 47 (1965). Some sources refer to these questions as "incidental" uses of foreign law. *See* A. E. Gotlieb, *The Incidental Question Revisited—Theory and Practice in the Conflict of Laws*, 26 INT'L & COMP. L.Q. 734 (1977) (taking issue with this label as applied to foreign law as datum). Conflicts scholars identify such cases in order to disregard them as "false conflicts." The concept of "foreign law as datum" is useful in understanding these cases, but merely identifying it is not the only goal here.

There is also an analogy to the notion of "embedded federal law" in state causes of action that may be relevant for federal subject-matter jurisdiction. *See* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308 (2005).

82. For a particularly useful catalog of *public laws* as datum, see Baade, *supra* note 81.

83. *See* UNIF. COMMERCIAL CODE § 2-615(a) (AM. LAW INST. & UNIF. LAW COMM'N 2014); RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. LAW INST. 1981); *see also* Jody Daniel

statutes may create liability for conduct in violation of foreign law;[84] the Fifth Amendment protection against self-incrimination may apply to potential foreign prosecutions;[85] Fourth Amendment analysis of overseas wiretapping may employ foreign law as a measure of reasonableness;[86] courts manage civil discovery in light of foreign laws that affect potential compliance;[87] foreign law provides the basis to determine if foreign entities have the capacity to sue and be sued;[88] U.S. service of process abroad is permissible "as prescribed by the foreign country's law";[89] particular foreign laws are relevant to venue decisions;[90] laws creating exceptions for double taxation require an assessment of whether foreign tax liability attaches;[91] resolution of various types of disputes requires determination of the validity of a foreign marriage;[92] and the foreign sovereign compulsion doctrine provides that courts will not order extraterritorial conduct that is illegal under the laws of the foreign state.[93] Just this term, the Supreme Court denied cert in a case in which the Fifth Circuit interpreted the Mexican Constitution and Mexican federal and state law to find that three Mexican states (Veracruz, Tamaulipas, and Quintana Roo) lacked sufficient property interests to sue BP for harms arising from

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Newman, Note, *Exchange Controls and Foreign Loan Defaults: Force Majeure as an Alternative Defense*, 71 IOWA L. REV. 1499 (1986).

84. *See* Thomas O. Main, *The Word Commons and Foreign Laws*, 46 CORNELL INT'L L.J. 219, 244 n.138 (2013) (collecting sources, *inter alia*, Registration and Regulation of Brokers and Dealers; Tariff Act of 1930; Marine Mammal Protection Act of 1972; The Lacey Act of 1990).

85. *See* Diane M. Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998).

86. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 853–54 (2004).

87. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442 (AM. LAW INST. 1987).

88. *See* FED. R. CIV. P. 17(b).

89. FED. R. CIV. P. 4(f)(2)(A).

90. *See infra* notes 111–13 and accompanying text (discussing forum non conveniens, forum selection agreements, lis pendens, and antisuit injunctions).

91. *See* Baade, *supra* note 81, at 451.

92. Eugene Volokh highlights "sitting in judgment" on foreign marriages with respect to polygamy, citing cases in which U.S. courts honor a foreign polygamous marriage in a probate dispute but not in immigration and statutory rape cases. *See* Eugene Volokh, *Polygamous Foreign Marriages under U.S. Law*, WASH. POST: VOLOKH CONSPIRACY (Nov. 5, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/05/polygamous-foreign-marriages-under-u-s-law/ (citing In re Bir's Estate, 83 Cal. App. 2d 256 (1948) (inheritance); Al Sharabi v. Heinauer, No. C-10-2695 SC, 2011 WL 3955027 (N.D. Cal. Sept. 7, 2011) (immigration); and People v. Ezeonu, 588 N.Y.S.2d 116 (1992) (statutory rape)).

93. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 441 (AM. LAW INST. 1987). Title VII and the ADEA, among others, have codified this exception. 42 U.S.C. § 2000e-1(b) (2014); 29 U.S.C. § 623(f)(1) (2014). Some statutes also make foreign legality an affirmative defense. *See, e.g.*, Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(c) & 78dd-2(c) (2014).

the Deepwater Horizon incident.[94] One hundred seventy five years ago, Justice Story was able to release the slaves in *The Amistad* by using Spanish public law abolishing the slave trade to provide the definitions for relevant treaty terms.[95] Each of these categories incorporates foreign law—including public law—but each one permits a U.S. court to sit in judgment of the relevant foreign law in order to weed out those laws that violate some fundamental notion of fairness or public policy.

What does it look like for a U.S. court to sit in judgment on foreign law in these cases? Two helpful examples come from civil discovery and venue. With respect to discovery, the Supreme Court held that a court may require parties to comply with discovery orders even if compliance places them in violation of foreign law.[96] However, the foreign illegality may be relevant to the exercise of the court's discretion to manage discovery and punish noncompliance.[97] Thus, U.S. courts are authorized to treat the foreign law with more or less respect based on their judgment of it. In particular, U.S. courts often honor substantive policy choices (*e.g.*, privacy laws) that limit discoverability, but courts give less deference to foreign "blocking statutes" seemingly adopted in order to obstruct U.S. discovery requests.[98] To apply this distinction, U.S. courts must sit in judgment on foreign laws and determine in which category they fit.

Blocking statutes of a different sort are relevant in venue cases. The doctrine of forum non conveniens allows a U.S. court to dismiss a case for which it has jurisdiction only if an alternative foreign forum is more

94. In re Deepwater Horizon, 784 F.3d 1019 (5th Cir. 2015), *cert. denied*, 136 S. Ct 536 (2015).

95. The Amistad, 40 U.S. 518, 520 (1841) ("[T]he laws of Spain would seem to furnish the proper rule of interpretation. . . . By the laws, treaties and edicts of Spain, the African slave-trade is utterly abolished; the dealing in that trade is deemed a heinous crime; and the negroes thereby introduced into the dominions of Spain, are declared to be free."). The Court also used this logic to reject as evidence of ownership the "public documents of the [Spanish] government" that accompanied *The Amistad*. *Id.*

96. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 94 (1934); Société Internationale Pour Participations v. Rogers, 357 U.S. 197 (1958); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 442 (1987).

97. *Id.*

98. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442, Reporters' Note 5 (AM. LAW INST. 1987) ("[W]hen a state has jurisdiction to prescribe and its courts have jurisdiction to adjudicate, adjudication should take place on the basis of the best information available, and that statutes that frustrate this goal need not be given the same deference by courts of the United States as differences in substantive rules of law."). Prominent examples include Canadian and European industry-specific blocking statutes passed after U.S. antitrust investigations began in those areas. *See* Donald I. Baker, *Antitrust Conflicts between Friends: Canada and the United States in the Mid-1970's*, 11 CORNELL INT'L L.J. 165 (1978); Paul A. Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation*, 17 INT'L LAW. 61 (1983); P.C.F. Pettit & C.J.D. Styles, *The International Response to the Extraterritorial Application of United States Antitrust Laws*, 37 BUS. LAW. 697 (1982).

convenient.[99] If there is no alternative forum, the case must stay in the U.S. court.[100] Ostensibly to help citizen plaintiffs recover damages in U.S. courts, Ecuador passed a law stripping its courts of jurisdiction over cases first filed abroad—meaning that a U.S. defendant's motions to dismiss for forum non conveniens may be denied because Ecuador would not be an "adequate alternative forum."[101] In practice, U.S. courts have been "skeptical" of foreign jurisdictional blocking statutes.[102] Again, disparate treatment of blocking statutes requires courts to sit in judgment on foreign laws, crediting some but not others.

Finally, before moving on, it turns out that the act of state doctrine highlights important examples of U.S. courts sitting in judgment. Recall that in order to qualify as an act of state, the relevant foreign act must be a sovereign act within the territory of the foreign state.[103] These qualifications suggest classes of cases that the act of state doctrine will not protect. First, non-sovereign acts of state are subject to U.S. judicial scrutiny. To apply this requirement, U.S. courts also must sit in judgment on whether the conduct of a high government official is sovereign enough.[104] Second, extraterritorial acts of state are excluded.[105] This territorial requirement is particularly relevant (and particularly vexing[106]) in cases involving intangible assets.[107] Thus, U.S. courts may sit in judgment on non-sovereign acts and nonterritorial sovereign ones.[108]

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99. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

100. *Id.*; GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION (5th ed. 2011) at 426–53.

101. *See* Ecuadorian Ley 55 (1998) ("Should the lawsuit be filed outside Ecuadorian territory, this will definitely terminate national competency as well as any jurisdiction of Ecuadorian judges over the matter."). *See also* Leon v. Million Air, Inc., 251 F.3d 1305, 1313 (11th Cir. 2001).

102. *See* BORN & RUTLEDGE, *supra* note 100, at 448 (collecting cases and calling U.S. courts "skeptical").

103. *See, e.g.*, Sabbatino, 376 U.S. at 416.

104. *E.g.*, Gross v. German Found. Indus. Initiative, 456 F.3d 363, 392 (3d Cir. 2006) (letters from governmental entities not "acts of state"); Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) (suggesting that torture by government officials likely was not an "act of state"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1293–94 (3d Cir. 1979) (issuing a patent is not an "act of state").

105. *E.g.*, Agudas Chasidei Chabad v. Russian Fed'n, 528 F.3d 934, 952 (D.C. Cir. 2008) (Soviet act of state not protected when it occurred in Poland); F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co., 882 F.2d 281, 286 (7th Cir. 1989) (explaining that act of state applies to an expropriation only if it is "complete within the foreign state").

106. For example, in the words of one court of appeals, "the concept of the situs of a debt for act of state purposes differs from the ordinary concept." Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985).

107. *See, e.g.*, *id.* at 522; Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706, 715 (5th Cir. 1968).

108. *See supra* notes 23–33 and accompanying text (describing the scope of the doctrine and collecting cases).

American courts also may "sit in judgment" of acts of state that meet all of that doctrine's requirements. In *Environmental Tectonics*, the Supreme Court explained that the act of state doctrine stops U.S. courts from judging the *validity* of foreign acts, but it permits courts to inquire into the *motives* for those acts.[109] In that case, the Supreme Court allowed litigation to proceed even though the lower court would determine whether the Nigerian government awarded a government contract as a result of a bribe.[110] Even in act of state cases, therefore, U.S. courts may judge (and, if necessary, impugn) foreign sovereign acts.[111]

In sum, U.S. courts sit in judgment on foreign laws with respect to public policy values; they judge foreign private and public laws when they serve as inputs in domestic doctrinal analyses; and they assess and impugn putative acts of state.

4. Foreign Legal Systems

In addition to sitting in judgment on foreign legal *acts*, U.S. courts also make broader judgments about foreign legal *systems*. And, although it is difficult to measure, it certainly would not be out of line to suggest that such system-wide judgments may strike more deeply at national dignity than rulings about particular judgments or laws.

First, as mentioned above, U.S. courts will not dismiss cases under the doctrine of forum non conveniens unless there is an adequate alternative forum in a foreign state.[112] Applying this standard, U.S. courts sit in judgment on foreign legal systems generally.[113] Courts offer similar system-wide evaluations when considering forum selection clauses,[114] stays (*lis pendens*),[115] and antisuit injunctions.[116] American courts have

109. W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990).

110. *See id. See also* Envtl Tectonics Corp., v. W.S. Kirkpatrick & Co., 659 F. Supp. 1381, 1393 (D.N.J. 1987) (worrying that such a judgment could "impugn or question the nobility of a foreign nation's motivations").

111. At least one court has described a "corruption exception" to the act of state doctrine. *See* United States v. Labs of Va., Inc., 272 F. Supp. 2d 764, 772 n.5 (N.D. Ill. 2003).

112. *See supra* notes 99–100 and accompanying text.

113. According to one empirical study, between 1982 and 2006, courts denied forum non conveniens motions based on the lack of an adequate alternative forum 18% of the time. Michael T. Lii, *An Empirical Examination of the Adequate Alternative Forum in the Doctrine of Forum Non Conveniens*, 8 RICH. J. GLOBAL L. & BUS. 513, 526 (2009). Note, though, that a forum might be inadequate for reasons beyond systemic concerns, such as an expired statute of limitations.

114. *See, e.g.*, McDonnell Douglas Corp. v. Islamic Rep. of Iran, 758 F.2d 341, 346 (8th Cir. 1985); Petersen v. Boeing Co., 108 F. Supp. 3d 726, 731 (D. Ariz. 2015) (holding that Saudi Arabian courts were not "adequate").

115. *See, e.g.*, Turner Entm't Co. v. Degeto Film GmbH, 25 F.3d 1512 (11th Cir. 1994); Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680 (7th Cir. 1987).

denied forum non conveniens motions, for example, because they found the relevant foreign system to be too corrupt, too slow, or insufficiently independent.[117] In responding to a forum non conveniens motion naming the courts of Iran, one district court judge wrote: "I have no confidence whatsoever in the plaintiffs' ability to obtain justice at the hands of the courts administered by Iranian mullahs. On the contrary, I consider that if the plaintiffs returned to Iran to prosecute this claim, they would probably be shot."[118] Even in less extreme cases, and even when the courts ultimately conclude that a foreign system is adequate, U.S. courts must sit in judgment and give voice to criticisms of the foreign system.[119]

On the back end, U.S. courts sit in judgment on foreign legal systems when deciding whether to recognize and enforce foreign judgments.[120] In addition to the individualized scrutiny described above,[121] U.S. courts will not enforce judgments if the foreign legal system as a whole is problematic. The Supreme Court required, among other things, "a system of jurisprudence likely to secure an impartial administration of justice," and the Uniform Acts reject judgments rendered "under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[122] Although uncommon, U.S. courts

116. *See, e.g.*, Quaak v. Klynveld Peat Marwick Goerdeler Bedrijfsrevisoren, 361 F.3d 11, 16 (1st Cir. 2004); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 627 (5th Cir. 1996). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 53 (AM. LAW INST. 1971).

117. *E.g.*, Henderson v. Metro. Bank & Trust Co., 502 F. Supp. 2d 372 (S.D.N.Y. 2007) (finding Philippine judicial system inadequate due to excessive filing fee); Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1085 (S.D. Fla. 1997) (finding Bolivian judicial system to be "too corrupt"); Sablic v. Armada Shipping Aps., 973 F. Supp. 745, 748 (S.D. Tex. 1997) (finding that Croatia was not adequate due to instability and delay); Sangeorzan v. Yangming Marine Transp. Corp., 951 F. Supp. 650, 653–54 (S.D. Tex. 1997) (finding that Taiwan was not an adequate forum where defendant was forty-eight percent owned by Taiwanese government); Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1228 (3d Cir. 1995) (finding Indian courts subject parties to "intolerable" delay); Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A., 528 F. Supp. 1337, 1342–43 (S.D.N.Y. 1982) (expressing concerns with independence of Chilean judiciary).

Interestingly, two of the aforementioned decisions finding foreign systems to be inadequate were decided by the same judge in the same year. *See* Sablic, 973 F. Supp. 745; Sangeorzan, 951 F. Supp. 650. I do not intend to suggest any connection, but it must also be noted that the same judge was impeached in 2009. *See* H.R. Res. 520, 11th Cong. (2009).

118. Rasoulzadeh v. Associated Press, 574 F. Supp. 854, 861 (S.D.N.Y. 1983), *aff'd*, 767 F.2d 908 (2d Cir. 1985). *See also* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 29 (D.D.C. 2005) (denying forum non conveniens motion because suit in Indonesia may put plaintiffs at risk); Cabiri v. Assasie-Gyimah, 921 F. Supp. 1189 (S.D.N.Y. 1996) (same, Ghana).

119. *E.g.*, In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (discussing, *inter alia*, the competence of Indian lawyers and the delays of their courts).

120. *See* Hilton v. Guyot, 159 U.S. 113 (1895).

121. *See supra* notes 63–70 and accompanying text.

122. UFCMJRA, § 4(b)(1), 13 U.L.A pt. 2 (1963).

have refused recognition of foreign judgments based on these system-wide evaluations.[123] To give just a few examples, U.S. courts have held that Iran does not provide "civilized jurisprudence";[124] "Nicaragua lacks impartial tribunals";[125] "the Liberian judicial system was not fair and impartial and did not comport with the requirements of due process";[126] and that Moroccan "judges feel tremendous pressure to render judgments that comply with the wishes of the royal family."[127] In one oft-cited opinion, Judge Posner approved an English judgment, noting that this was a much easier case than "if the challenged judgment had been rendered by Cuba, North Korea, Iran, Iraq, Congo, or some other nation whose adherence to the rule of law and commitment to the norm of due process are open to serious question."[128] And, again, even if the courts ultimately enforce the judgment, these doctrines require courts to entertain such system-wide criticisms on a more regular basis.[129]

Finally, in some substantive areas of law, U.S. court judgments about foreign legal systems are data in domestic doctrines. For example, immigration and extradition law demand sweeping judgments about foreign systems prior to certain judicial actions.[130]

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123. *See* BORN & RUTLEDGE, *supra* note 100, at 1146–55 (collecting cases).

124. Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1409 (9th Cir. 1995).

125. Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1347 (S.D. Fla. 2009).

126. Bridgeway Corp. v. Citibank, 45 F. Supp. 2d 276, 287 (S.D.N.Y. 1999).

127. DeJoria v. Maghreb Petroleum Expl. S.A., 38 F. Supp. 3d 805, 814 (W.D. Tex. 2014). *See also* In re Perry H. Koplik & Sons, Inc., 357 B.R. 231, 244 (Bankr. S.D.N.Y. 2006) ("Where, as unfortunately is the case here, the judicial system [of Indonesia] has been shown to have systemic corruption, the Court cannot grant that judicial system's determinations comity under either state or federal law."). Of course, federal and state courts also have approved of many foreign court systems. *See, e.g.*, Soc'y of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir. 2000) (approving English court system); Genujo Lok Beteiligungs GmbH v. Zorn, 943 A.2d 573 (Me. 2008) (approving German courts); de la Mata v. American Life Ins. Co., 771 F. Supp. 1375 (D. Del. 1991) (approving Bolivian courts, but rejecting judgment on case-specific grounds); Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680 (7th Cir. 1987) (approving Belgian courts); Chou v. Shieh, No. G031589, 2004 WL 843708 (Cal. Ct. App. Apr. 20, 2004) (approving Taiwanese courts); S.B. v. W.A., 959 N.Y.S.2d 802 (N.Y. Sup. Ct. 2012) (approving Abu Dhabi courts with respect to divorce decree and order of custody). This practice is not a recent creation—the Supreme Court of Florida, for example, approved the Cuban court system in this context nearly one hundred years ago. Warren v. Warren, 73 Fla. 764 (Fla. 1917).

128. Soc'y of Lloyd's v. Ashenden, 233 F.3d at 477.

129. For example, in a decision recognizing a Romanian judgment, the Southern District of New York noted that "the record does demonstrate that the Romanian judicial system is far from perfect. As [defendant] points out, 'corruption remains a concern' in Romania and there 'is some evidence that [due process] guarantees are not always accorded.'" S.C. Chimexim S.A. v. Velco Enters. Ltd., 36 F. Supp. 2d 206, 214 (S.D.N.Y. 1999). The court also quoted the Carnegie Endowment regarding concerns about "serious shortcomings" in Romanian courts including "illegal behavior, particularly corruption by government officials; a common attitude at the higher levels of the power structure that the government and the state are above the law; and only weak institutional reform processes concerning both the law-making and law-enforcing processes." *Id.* at n.7.

130. *See, e.g.*, Baade, *supra* note 81 (collecting sources).

In sum, despite protestations against sitting in judgment of an act of state or public law, U.S. courts are willing to sit in judgment of an entire foreign legal system and, at times, deem it biased, corrupt, or uncivilized.

5. Foreign Interests

Lastly, a number of doctrines require that U.S. courts sit in judgment on foreign sovereign interests, attempting both to identify those interests and weigh their intensity against countervailing considerations.

"Interests analysis" approaches to conflict of laws, as their name suggests, require an assessment of a foreign state's interest in a particular case.[131] Having identified competing interests, U.S. courts must balance those interests, and in so doing, sit in judgment on the merit and intensity of the foreign state policy. Moreover, in some circumstances, U.S. courts applying conflict of laws principles ask whether a particular outcome violates *foreign* public policy.[132]

U.S. courts sit in judgment on foreign interests in other circumstances as well. American courts have invoked a foreign state's interest (or lack thereof) in assessing the reach of U.S. law,[133] or when deciding whether a foreign state's interest in state-court litigation is sufficient to trigger federal-court jurisdiction.[134] Finally, in resolving the discovery issues described above, courts consider the foreign state's interest in the law that may be violated.[135] Indeed, when the Supreme Court considered the effect of the Hague Evidence Convention on U.S. law, it explicitly rejected the concern of the court of appeals that U.S. courts should not sit in judgment on foreign state compliance with a treaty obligation.[136]

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131. *See generally* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAW (1963).

132. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (AM. LAW INST.1971).

133. In cases like *Kiobel v. Royal Dutch Petroleum Co.*, the Supreme Court limited the reach of U.S. law to avoid "unintended clashes" with foreign laws that could cause "international discord." 133 S. Ct. 1659, 1664 (2013) (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)). Foreign governments filed amicus briefs on both sides of the *Kiobel* case. *See, e.g.*, Brief for the Government of the Argentine Republic as Amicus Curiae in Support of Petitioners, Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013) (No. 10-1491); Brief of the Governments of the United Kingdom of Great Britain and Northern Ireland and The Kingdom of the Netherlands as Amici Curiae in Support of the Respondents, Kiobel v. Royal Dutch Petroleum, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 405480.

134. *E.g.*, Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

135. *See, e.g.*, United States v. First Nat'l. City Bank, 396 F.2d 897 (2d Cir. 1968) (discussing German interest in financial regulation).

136. *See* Société Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522 (1987).

In all of these cases, U.S. courts scrutinize foreign interests and are willing to trump them when appropriate.

C. Review

Part A reviewed situations in which U.S. courts abstain from sitting in judgment on foreign states. These decisions imply that sitting in judgment disrespects foreign sovereigns or harms U.S. foreign relations interests. Yet Part B highlighted myriad situations in which U.S. courts sit in judgment on foreign states, laws, systems, judgments, and interests, including putative acts of state and public laws. The range of targets and issues is broad:

TARGET OF JUDGMENT	DOCTRINAL CATEGORY
Foreign states	-FSIA exceptions for states -Common law exceptions for officials
Foreign judgments	-Recognition & enforcement of civil judgments -Criminal sentencing -Double jeopardy
Foreign laws and acts	-Conflict of laws -Supervening foreign illegality -Statutory incorporation -Fifth Amendment -Fourth Amendment -Civil discovery -Service of process -Venue -Double taxation -Foreign sovereign compulsion -Nonsovereign acts of state -Nonterritorial acts of state -Act of state motivations
Foreign legal systems	-Forum non conveniens -Forum selection clauses -*Lis pendens* -Antisuit injunctions -Recognition & enforcement of civil judgments -Immigration -Extradition

TARGET OF JUDGMENT	DOCTRINAL CATEGORY
Foreign interests	-Conflict of laws "interests analysis" -Extraterritoriality of U.S. law -Federal common law of foreign relations -Civil discovery

Before considering the affirmative case for revising these doctrines, it is important to consider them on their own terms. The division between the doctrines in Part A and Part B would make sense if acts of state and public laws were special in ways that made sitting in judgment of them too intrusive with respect to international comity.[137]

A clear-eyed review of the doctrinal landscape belies this comity explanation. First, as shown above, foreign acts of state and public laws are not immune from scrutiny. Courts may criticize the motives for acts of state, sit in judgment of acts of state that fall outside the doctrine's narrow limits, and evaluate public laws as datum. Nor is there any principled distinction between private and public law: law of either type may strike at important national values or private interests; the distinction between the two is notoriously blurry; and courts are not especially well-suited to draw such a line if called upon to do so.[138] In addition, if sitting in judgment on foreign acts of state or foreign public laws were truly exceptional, it is odd that courts have operationalized this assessment in contrary ways—validating all foreign acts of state as opposed to excluding all public laws.[139] Indeed, it is odd that the judiciary, not well known for its mastery of foreign relations, is the branch most frequently taking up this charge at all.[140] Finally, as made clear in Part B, U.S. courts sit in judgment on

137. *See infra* note 157 (collecting sources on comity). Alternatively, Professor Baade suggests that foreign public law is incorporated domestically in inverse proportion to its connection to the *lex causae—e.g.*, courts will not allow foreign public law to serve as the basis of a claim, but they will acknowledge public law as datum. Baade, *supra* note 81. This approach does not, however, explain why public law should be treated differently from private law, nor does it explain whether abstention or wholesale incorporation is preferred or account for relevant institutional and individual interests.

138. For related arguments, see, e.g., Joel P. Trachtman, *Conflict of Laws and Accuracy in the Allocation of Government Responsibility*, 26 VAND. J. TRANSNAT'L L. 975 (1994). In his defense of the public law taboo, McConnaughay seems to suggest an externality-based distinction between public and private law. *See* McConnaughay, *supra* note 12. But McConnaughay does not explain why we should ask courts to determine which externalities are sufficient to trump individual interests. *See infra* Part III.B.

139. *See supra* Part II.A.

140. Note that the decisions to cleave off acts of state and public laws, to define the contours of those categories, and to deem one valid and the other verboten, were laid down by courts. Even if

foreign legal systems and foreign interests in ways that seem to be more disrespectful than the insulated act of state and public law cases would be.[141]

At a minimum, therefore, this Article sits in a long line of works suggesting that doctrinal reasons do not always line up with doctrinal outputs.[142] But this Article attempts more. The remaining Parts explore how these questions might look if refracted through a different set of prisms.

III. STRUCTURAL APPROACH TO FOREIGN ACTS

Although the aforementioned doctrines may not achieve ideal coherence, our first impulse may be that additional attention is not justified. Perhaps it is best not to rock the boat.[143]

A number of reasons cut against this laissez faire approach. For one thing, certainly these doctrines are not inconsequential from the perspective of litigants.[144] Transnational cases are common in U.S. courts,[145] and it is conceivable that sovereign-debt litigation[146] in particular may provide more opportunities for U.S. courts to weigh in on these

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comity were the right measure, why would we expect adjudication to translate comity into legal doctrine in these areas? These institutional arguments are further developed below.

141. A related argument derives from the notion of "false conflicts" in conflict-of-laws analysis. *See* CURRIE, *supra* note 129. Professor Currie's approach to conflicts begins with a division between true and false conflicts. False conflicts come in two stripes: situations in which the two states regulate the same conduct in the same way, and situations in which only one state has an interest in regulation. (True conflicts involve two interested states with inconsistent regulations.) For one-interested-state false conflicts, there is no conflict that the forum needs to untangle. Some conflicts scholars discussing foreign law as datum suggest that those cases present false conflicts of this type—the forum has no interest in regulating, for example, the procedural rules governing foreign litigation. *See supra* note 81. Currie's definition of "interest" is misleading because, to the extent U.S. doctrines depend on foreign inputs, they have an "interest" in the result (whether or not it meets Currie's particular definition of "interest"). Perhaps more to the point here, individual and institutional interests turn on these resolutions, and those interests should drive doctrine in this area. *See infra* Part III.

142. For an example germane to this Article, see Professor Harold Koh's criticism of transnational cases in which judges fell into "doctrinal mismatches, [*e.g.*,] dismissing a case on judicial competence grounds that actually reflects comity and separation-of-powers concerns." Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2394 (1991).

143. *Cf.* HUES CORPORATION, ROCK THE BOAT (RCA Records 1974).

144. To give but one example, it is understood that most cases dismissed on forum non conveniens motions are never refiled. *See, e.g.*, Donald Earl Childress III, *Forum Conveniens: The Search for a Convenient Forum in Transnational Cases*, 53 VA. J. INT'L L. 157, 161 (2012) ("A successful forum non conveniens motion means that the case will not be heard in the United States and may not be heard elsewhere.").

145. *But see* Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (suggesting a modest decline in transnational litigation).

146. *See, e.g.*, W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67 (2014).

questions in the coming years. The role of courts in these doctrines is another reason to press ahead: many of the rules described in Part II are judge-made,[147] and that means that change could come from any of the fifty states, the District of Columbia, and the federal court system. Relatedly, work to draft the Fourth Restatement of Foreign Relations Law is ongoing,[148] and this project has particular significance for the development of the law in these areas. Notably, more than one thousand federal court decisions have cited the Restatements of Foreign Relations Law to date,[149] and there is no reason to think that this trend will abate with the fourth installment. Finally, one cannot discuss foreign law in U.S. courts without acknowledging the symbolic status that foreign law has taken among some on the political right.[150] This increased salience could mean more rapid change, again suggesting that considered attention is warranted at this time.

Having acknowledged that there are reasons to reconsider these doctrines, a second observation is that blanket solutions—rejecting or accepting all foreign inputs without sitting in judgment—are untenable. One subtext of the catalog of U.S. courts sitting in judgment is that there are various settings in which it makes sense to incorporate foreign law. A pure "taboo" approach[151] rejecting all foreign inputs simply ignores the descriptive reality facing courts in transnational cases.[152] The failure to incorporate some foreign acts also could disrupt institutional relationships[153] and upset individual expectations.[154] At the same time, the

147. *See supra* Part II.

148. *See Restatement of the Law Fourth, The Foreign Relations Law of the United States*, AM. LAW INST., https://www.ali.org/projects/show/foreign-relations-law-united-states.

149. For example, searching for "restatement" within four words of "foreign relations law" in Westlaw's federal courts database returns over 1,300 cases.

150. *See, e.g.*, Awad v. Ziriax, 670 F.3d 1111 (10th Cir. 2012) (enjoining proposed amendment to Oklahoma constitution). *See also* Aaron Fellmeth, *U.S. State Legislation to Limit Use of International and Foreign Law*, 106 AM. J. INT'L L. 107 (2012); Mark Rahdert, *Exceptionalism Unbound: Appraising American Resistance to Foreign Law*, 63 CATH. U. L. REV. (forthcoming).

151. Note that such an approach could derive from pro- or anti-comity sources. The public law taboo seemingly derives from respect for foreign states, though a similar outcome could arise from xenophobic disrespect—*e.g.*, the proposed state laws banning foreign law in domestic courts. *See id.*

152. *See supra* Part II.B.

153. For reasons of institutional authority and capacity, courts should follow legislative directions to incorporate foreign law. For example, if a state passes a law that prohibits double jeopardy in any form, courts, as faithful agents, must assess and incorporate foreign prosecutions as part of that determination. *See supra* note 73 and accompanying text. Similarly, whether forum non conveniens arises from statute or common law (with legislative acquiescence), faithful agents must identify adequate foreign forums before granting these motions. *See supra* notes 99–100 and accompanying text.

154. Individual interests in predictability and accuracy also support this approach. Expectation-informing law is not always domestic, so to the extent that courts aspire to honor settled expectations,

individual interests in predictability and fairness that call for incorporation of foreign acts also demand checks against unpredictability and unfairness in this context. Courts thus sit in judgment to protect parties from arbitrary or unpredictable outcomes. Avoiding extreme outcomes also tracks institutional interests: the power to sit in judgment allows courts in extreme situations to refuse to stamp certain foreign acts with the imprimatur of the United States.[155] And again, to the extent legislatures direct courts when or how to sit in judgment, those directives should be followed.[156]

So if now is the time to reconsider sitting in judgment, and if blanket approaches in either direction are not the answer, then what next? I am not the first to identify a need for better law in this area. In recent years there has been a boomlet in transnational litigation scholarship attending to comity issues in one guise or another.[157] These papers focus on the interests of foreign states, sovereign equality, U.S. judicial attitudes to foreign sources, and the international community of courts, among others.[158] Notice that all of these approaches are outward looking—they

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they may need to rely on foreign acts.

Further, to the extent that foreign acts produce "objective data"—for example, whether a foreign court is open to a particular plaintiff—an accurate judicial system would need to take them into account. Were courts to ignore these facts, they would risk inflicting injustice on litigants who happen to be the subject of multiple states' laws. Incarcerating a defendant twice for the same crime or ordering a party to violate a foreign law may violate fundamental due process notions, and courts must rely on foreign acts to assess the risks of these violations. Similarly, it would be unfair to individual parties to send them to biased judicial systems in forum non conveniens or to enforce judgments from biased systems.

155. Famously, in *Shelley v. Kraemer*, the Supreme Court refused to endorse a racial covenant on real property—the Court did not rule that the covenant itself was unconstitutional, but instead declined to allow the machinery of the state to enforce it. 334 U.S. 1 (1948).

156. Legislatively, forum non conveniens statutes may limit dismissals to adequate foreign forums, and judgment recognition statutes create exceptions to the presumption of enforceability. International treaties also could require courts to sit in judgment. For example tax treaties and extradition treaties may contain limitations that require courts to sit in judgment of the foreign legal regime. *See, e.g.*, Dodge, *Public Law Taboo*, *supra* note 12, at 193 (identifying tax treaties as an exception to the revenue rule).

157. *See, e.g.*, Dodge, *Comity*, *supra* note 18; Rutledge, *supra* note 18; Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014); Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010); Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. (forthcoming); Pamela Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. (forthcoming). This boomlet is perhaps part of a larger boom in transnational litigation scholarship more generally, including among many others, Whytock, *supra* note 143; Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

158. *See id.*

prioritize the "foreign" state or the "foreign" policy. Similarly, one would expect that the aforementioned work of the Restatement drafters would also inflect these issues with a foreign-focused approach.[159]

But in the vein of anti-exceptionalism,[160] this Article asks what sitting-in-judgment doctrine would look like from an internal institutional perspective on sitting in judgment. This approach reflects the concern that scholars of transnational law risk being distracted by the "foreignness" of these cases to the exclusion of basic questions about the separation of powers, federalism, and individual rights.[161] This triad, not some notion of international comity, could put these doctrines in a new (old) frame.

The balance of this Part explores what this comparative institutional analysis would tell us about how to treat sitting-in-judgment cases. This thought experiment can help to identify what might be missing from current proposals, and to consider whether these institutional considerations might answer some outstanding questions about sitting-in-judgment law. Part IV continues the experiment, applying this model to the particular doctrines described above. These Parts do not establish, once and for all, the normatively correct answers to all sitting-in-judgment cases. But, at a minimum, they should shift the burden such that we should demand good reasons to adopt "foreign"-specific approaches to issues otherwise provided for by domestic institutional considerations.

A. Separation of Powers: Institutional Authority

Acknowledging the need for a sitting-in-judgment check does not tell us whether the judiciary is the right judge. Part II reviewed situations in which courts sit in judgment or decline to do so, but the judiciary is not the only relevant institution. Congress frequently sits in judgment on foreign states when making decisions about foreign and military assistance, international trade agreements, and sanctions.[162] The Executive Branch also sits in judgment. In addition to decisions about recognition and

159. *See supra* note 146 and accompanying text.

160. *See supra* notes 19–22 and accompanying text. *See also* Clopton, *Replacing*, *supra* note 21 (advocating for use of standard modes of statutory interpretation in cases previously subject to presumption against extraterritoriality).

161. *See, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 284 (1998) (referring to "the three central but troubled institutions of American constitutionalism: federalism, separation of powers, and judicial protection of individual rights"); Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1216 (2011) (referring to "the three main axes of the Constitution: individual rights, federalism, and separation of powers").

162. *See, e.g.*, 22 U.S.C. §§ 8501–8551 (2012) (Iran sanctions).

diplomacy,[163] the Executive Branch has been tasked with making certain country-specific assessments such as identifying state sponsors of terrorism[164] and approving foreign government acquisitions of U.S. assets.[165] Decisions to negotiate international agreements with particular foreign states are also the province of the Executive Branch.[166] This Part considers the authority aspect of comparative institutional design, before turning to the capacity component in the next Part.

Even if one disputes the proper constitutional allocation of foreign-affairs powers,[167] it is indisputable that the political branches make laws that cabin the authority of federal courts or direct their operation. To that end, were the political branches to make choices about the treatment of foreign acts, it follows that courts should treat those decisions as binding (absent a constitutional objection). Political branch involvement could take multiple forms. First, the political branches could declare certain foreign acts to be taboo in U.S. courts—for example, the federal government has instructed courts to reject foreign defamation judgments unless they comply with the First Amendment;[168] and state statutes that purport to reject foreign law may bar the incorporation of foreign acts.[169] Second, the political branches could direct courts to treat certain foreign acts as presumptively valid—the United States attempted to negotiate a judgments treaty with the United Kingdom;[170] and one could imagine the act of state doctrine codified in a statute[171] or a treaty.[172] Third, the political branches could reallocate institutional responsibilities—forum non conveniens statutes, for example, often require courts to make systemic judgments about foreign legal systems;[173] and administrative

163. U.S. CONST. art. II, § 3.

164. Export Administration Act § 6(j), 50 U.S.C § 2405(j) (2014); Arms Export Control Act, § 40, 22 U.S.C § 2780 (2014); Foreign Assistance Act § 620A, 22 U.S.C § 2371 (2014).

165. Defense Production Act of 1950 (as amended) § 721, 50 U.S.C.A. § 4565 (effective Dec. 1, 2015).

166. U.S. CONST. art. II, § 2.

167. Consider, for example, the various opinions in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

168. 28 U.S.C. §§ 4101–4105 (2014).

169. *See supra* note 150 (discussing proposed Oklahoma constitutional amendment).

170. *See, e.g.*, Peter Hay & Robert J. Walker, *The Proposed Recognition-of-Judgments Convention between the United States and the United Kingdom*, 11 TEX. INT'L L.J. 421 (1976).

171. It seems, for example, that the federal government created an act of state rule for bank deposits in the Federal Reserve Act. 12 U.S.C. § 633 (2014).

172. Indeed, *Sabbatino*'s canonical statement of the act of state doctrine expressly reserved cases in which there existed "a treaty or other unambiguous agreement regarding controlling legal principles . . . ." 376 U.S. 398, 428 (1964).

173. To pick one example, a Virginia statute limits forum non conveniens dismissals to situations in which there exists a "fair" alternative forum. VA. CODE ANN. § 8.01-265 (2007).

exhaustion could be required for certain foreign-act claims.[174] Fourth, the political branches could lay out standards for sitting in judgment—a judgment-recognition statute could specify the criteria for enforceability,[175] including a reciprocity requirement.[176] At each level of analysis, therefore, the political branches can (and often should) move first.

It is not an accident that the foregoing examples include administrative actions, treaties, and legislation. None of these forms has a monopoly on political branch authority. Indeed, potential exceptions to the act of state doctrine reflect each of these modalities of political-branch participation. The *Bernstein* exception provides that the act of state doctrine does not attach when the Executive Branch expressly states that it need not apply.[177] The treaty exception says that, when applying a standard derived from an international treaty, the act of state doctrine does not bar a court from sitting in judgment.[178] And the Second Hickenlooper Amendment is a federal statute that rejects the act of state doctrine in certain cases.[179]

This discussion of institutional authority suggests that we can learn quite a bit about sitting in judgment without reference to international comity or foreign-affairs exceptionalism. Executive officials participating in public-law litigation and courts respecting treaties and statutes are not transnational-specific ideas. Instead, these conceptions rely on political judgments by political branches, pursuant to their formal constitutional authority.

B. Separation of Powers: Institutional Capacity

Alongside questions of authority are questions of capacity. If we presume that the Constitution allows the political branches to allocate

174. This administrative-exhaustion approach is common in federal government litigation. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2675(a) (insert date of cited edition). The Supreme Court has indicated that it might be amenable to an exhaustion requirement in ATS cases. Sosa v. Alvarez-Machain, 542 U.S. 692 n.21 (2004).

175. *See, e.g.*, UFCMJRA § 4.

176. *See, e.g.*, GA. CODE ANN. § 9-12-114(10) (2015); MASS. GEN. LAWS ANN. ch. 235, § 23A (2015).

177. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949) and 210 F.2d 375 (2d Cir. 1954). *But see* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972) (at least five justices declining to adopt *Bernstein* exception).

178. *See, e.g.*, Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422, 425 (6th Cir. 1984). *See also supra* note 172 (quoting *Sabbatino* regarding treaties).

179. 22 U.S.C. § 2370(e)(2) (2014) (no act of state protection for acts "in violation of the principles of international law" as applied to "claim[s] of title or other right to property" within the United States).

decisional authority, then it is capacity that should guide the exercise of that authority. In particular, the comparative mechanics of judicial and political resolution suggest a potential division of labor among the branches in sitting-in-judgment cases.

Turning first to the judicial process, U.S. courts are equipped to handle disputes that hew to their common-law roots.[180] A dispute is suited for common-law adjudication if it is legal, retrospective, bilateral, and constrained. By legal, I mean the admittedly fuzzy concept, distinct from politics, involving the principled adjudication of disputes.[181] By retrospective, I mean that the court reviews past acts rather than speculating on future behavior. By bilateral, I mean that the dispute closely resembles the typical two-party adjudication (though it need not be exactly two parties), in which a small number of interested players present their facts and arguments in court through the adversarial process. And by constrained, I mean that the decision primarily affects the parties to the dispute, rather than spilling over on to non-appearing third parties.[182] Notably, this analysis is agnostic about the source of law to be applied—the routine interpretation of foreign law is something well within the judicial competence. Further, there is no *per se* reason to think that foreign public laws and acts of state are less amenable to judicial interpretation than foreign private laws.[183] Instead, this analysis depends on the nature of the dispute and the institutional capacities of the branches.

In contrast to common-law adjudication, the political process is calibrated to produce stable systemic responses to higher stakes, polycentric disputes.[184] Parties set courts' agendas by bringing individual disputes when they are ripe for adjudication. But individual parties do not necessarily have the incentive to request a systemic ruling when it would

180. In another context, Professor Huq has explained that this institutional appraisal has "historical, pro-democracy, and efficiency foundations." Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1468 (2013).

181. For a classic articulation of the law-politics distinction, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Richard A. Posner, *Foreword: a Political Court*, 119 HARV. L. REV. 31 (2004) (contrasting political judging in constitutional cases with "doing law").

182. These last two limits call to mind Lon L. Fuller's discussion of polycentric disputes in *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

183. *See* Dodge, *Public Law Taboo*, *supra* note 12 (making these and other arguments in favor of judicial review of foreign public law).

184. Administrative-law doctrines like *Chevron* rely in part on the differences between political and judicial process described here. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

be in the social interest.[185] Political branches set their own agendas, thus overcoming this constraint. Similarly, while courts depend on parties to present relevant facts,[186] political branches have broader access to information and expertise. This is particularly important in cases with significant spillovers, as many affected parties would not be represented in court[187] and the litigating parties' incentives may not correlate with systemic incentives.[188] The political branches—more so than individual judges or the private litigants that appear before them—are repeat players in both international relations and the separation of powers, giving them both better information and an incentive to think more holistically about these cases and their consequences. Trading off individual versus social interests, for example, not only sounds in politics more than in law, but also depends on information and judgment beyond what the parties to a case may have at hand.[189] All of these reasons argue for the political branches to take the lead on systemic and polycentric cases. If this sounds familiar, it should: Article III doctrines such as standing, the case or controversy requirement, and the political question doctrine may be understood as tracking this division of labor.[190]

This institutional-capacity analysis also feeds back into earlier questions in this Article. The threshold decisions whether to incorporate foreign law and whether to sit in judgment are among those systemic issues within the capacity of the political branches. It may be, for example, that there are situations in which the international consequences are so severe that U.S. courts should not sit in judgment at all.[191] But the determination of which issues are most sensitive is itself a polycentric, multidimensional, political inquiry. The parties to an individual act of state case, for example, lack the information or incentives to represent the

185. This insight, for example, drives concerns with nonparty preclusion and motivates aggregation rules like the class action and mandatory joinder.

186. *See, e.g.*, Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 673–75 (2000) (praising executive flexibility vis-à-vis the courts)

187. Relatedly, a court adjudicating a low-value foreign judgment should not be inundated with experts and amici worried that the outcome could affect every possible future judgment from that foreign jurisdiction.

188. *See* Clopton, *Transnational Class Actions*, *supra* note 20 (discussing this concern in another context).

189. This approach tracks Professor Brilmayer's critique of judicial conflict-of-laws rules. *See* LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS 181–84 (1990).

190. *See, e.g.*, Huq, *supra* note 178 (making some of these arguments with respect to standing and the structural constitution).

191. For example, Congress has declared that litigation against foreign sovereigns outside of a narrow set of exceptions is inappropriate for U.S. courts. *See supra* notes 54–55 (citing FSIA).

relevant social interests that are at stake in a decision whether to adopt or abolish that doctrine.[192]

Finally, and again, note that comity and foreign-affairs exceptionalism are not necessary for this institutional-capacity analysis. The judiciary is equally disadvantaged in domestic and international polycentric disputes. And while the political branches may have different priorities or interests in foreign affairs, and they may gather data from different sources, their participation in regulation and litigation is not unique to international cases. International law (distinct from international comity) may differentiate some international cases.[193] But international law's relevance is also unexceptional as it is within the authority and capacity of the political branches to create international law and it is within the authority and capacity of the courts to interpret and apply it.[194]

C. Federalism

Federalism is a second structural factor that may offer guidance for sitting in judgment. Foreign-affairs federalism cases like *Zschernig v. Miller* directly implicate the federal-state balance,[195] and many comity decisions have deep federalism roots.[196] In keeping with the prior parts' attempts to imagine unexceptional transnational law, this Part considers sitting-in-judgment cases as subject to normal federalism analysis.

Turning first to institutional authority, the Constitution seems to answer many of the relevant sitting-in-judgment questions. The Supremacy Clause directs that federal law and treaties preempt state law, so to the extent that sitting-in-judgment issues are resolved in those enactments, state law takes a back seat.[197] The Foreign Sovereign Immunity Act, for example, takes much foreign-sovereign litigation out of state courts and moves it to federal courts.[198] Federal common law also controls in state courts, and therefore the act of state doctrine[199] and common-law immunity[200] apply

192. This logic augurs against judicial abstention—if abstention is appropriate, the political branches can so declare. *See infra* note 233 (discussing why it may be easier to overturn judicial action rather than inaction).

193. For further discussion of international law, see *infra* notes 230–37.

194. *See infra* notes 230–32 and accompanying text (discussing international law).

195. 389 U.S. 429 (1968).

196. *See, e.g.*, Ramsey, *supra* note 18.

197. U.S. CONST. art. VI.

198. *See supra* notes 54–62 and accompanying text. This federal court move, of course, is subject to Article III limits. *See supra* note 55 (discussing *World Watch v. American Airlines*).

199. *See supra* notes 23–33 and accompanying text.

200. *See supra* notes 59 and accompanying text.

equally in state and federal cases. Looking ahead, on issues from judgment recognition[201] to forum non conveniens[202] to forum selection,[203] there have been calls for uniform federal rules applicable in federal and state courts—often deriving their substance from international law.[204]

Institutional capacity concerns also shed light on federalism in sitting-in-judgment cases. Consider first those federalism challenges that involve the political branches. If we were to have a statute on forum selection, should it be federal or state?[205] In these cases, capacity seems to line up with authority. There are plausible arguments that the federal branches are more and better informed, more experienced, and less enthralled with parochial incentives than the state actors.[206] Within constitutional limits,[207] the federal government has the power to decide which issues fit those categories.[208]

Turning to the federal courts, however, it is not obvious that federal-court judges would be any more expert, or have access to any better information, than their state-court counterparts in adjudicating disputes involving foreign acts. Federal and state judges alike rely on parties to present information and then apply existing law to facts. Extant doctrines modulate which cases end up in state and federal courts[209]—reflecting an independent set of considerations[210]—and it does not seem that there should be a special rule for cases with a sitting-in-judgment element.[211] Of

201. *E.g.*, AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

202. *E.g.*, Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 524–28 (1993).

203. Stephen B. Burbank, *A Tea Party at the Hague?*, 18 SW. J. INT'L L. 629 (2011).

204. For example, the potential federal statute on forum selection, see *id.*, would implement The Hague Convention on Choice of Court Agreements, June 30, 2005, https://www.hcch.net/en/instruments/conventions/full-text/?cid=98.

205. *See supra* notes 203–04 and accompanying text.

206. *But see* Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649 (2002) (challenging the view that federal control of foreign affairs is necessary because of the externalities that would result from state action).

207. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077 (2014).

208. *See supra* notes 195–202 and accompanying text (discussing Supremacy Clause). Consistent with previous comments about polycentric disputes, similar arguments would favor federal political branches over state court lawmaking in these cases. *See supra* Part III.B.

209. *See, e.g.*, U.S. CONST. art. III; 28 U.S.C. §§ 1330–1369 (2012).

210. *See, e.g.*, Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg. Co., 545 U.S. 308 (2005); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justification for Federal Jurisdictions over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1 (1996).

211. *Cf.* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 63 (S.D. Tex. 1994) (finding federal-court jurisdiction because "Plaintiffs' state law claims, if well-pleaded, raise issues of international relations which implicate federal common law").

course, were Congress to conclude that on a particular class of cases federal judges were preferred, it has wide latitude to create federal-court jurisdiction in those cases.[212] But as a general matter, institutional capacity does not seem to answer the federal- versus state-court question for individual case resolution.

A somewhat different analysis applies when courts are operating in a lawmaking role, such as when they announce a common-law rule for acts of state.[213] Again, it is not obvious that the federal courts should win out based on information or expertise.[214] However, with respect to judicial lawmaking, the federal courts have the built-in institutional advantage of uniformity, as federal common law rules apply in state and federal courts.[215] The so-called "one voice" in foreign affairs federalism has been justifiably criticized,[216] but the core idea that a uniform approach is preferred *in some cases* is uncontestable. Assimilating this insight into existing jurisprudence, the uniformity interest should justify federal law displacing state law when courts are making law in these areas.[217]

A final federalism battleground involves lawmaking by federal courts versus state political branches.[218] In these circumstances, the federal courts retain their uniformity advantage when making common law,[219] but state political branches possess those capacities that favored political-branch resolution of polycentric disputes in the previous Part.[220] These questions thus involve difficult institutional balancing, though at a minimum they suggest that perhaps federal courts should be slightly warier of making

212. *See, e.g.*, U.S. CONST. art. III; 28 U.S.C. §§ 1330–1369.

213. *See supra* notes 23–33 and accompanying text.

214. *See supra* notes 184–88 and accompanying text.

215. *See supra* notes 197–202 and accompanying text.

216. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953 (2014) (collecting sources). I have argued elsewhere that federalism's one voice and separation of power's one voice can find accord in the narrow set of cases within the President's exclusive authority. *See* Zachary D. Clopton, *Foreign Affairs Federalism and the Limits on Executive Power*, 111 MICH. L. REV. FIRST IMPRESSIONS 1 (2012).

217. *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Stephen B. Burbank, Semtek*, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027 (2002). This is not to say that every sitting-in-judgment issue demands a federal solution—indeed, this Article stands in contrast to foreign-affairs exceptionalism. *See supra* notes 157–58 and accompanying text.

218. For further discussion, see generally Zachary D. Clopton & P. Bartholomew Quintans, *Extraterritoriality and Comparative Institutional Analysis: A Response to Professor Meyer*, 102 GEORGETOWN L.J. ONLINE 28 (2013) (responding to Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEORGETOWN L.J. 301 (2014)).

219. *See supra* notes 197–202 and accompanying text.

220. *See supra* notes 182–88 and accompanying text.

federal common law in areas primarily populated by state statutes (rather than state common-law rules).[221]

In sum, federalism requires an additional layer of institutional sensitivity.[222] We cannot simply adopt a one-size-fits-all answer to federal versus state, but instead we should ask about particular federal and state branches acting in particular capacities.

D. Judicial Approaches

This Part so far has focused on the vertical and horizontal divisions in sitting-in-judgment cases. This division has relied on structural considerations to suggest that only certain types of disputes are natural fits for courts. These same structural considerations also could offer guidance to courts about how they should exercise their authority to sit in judgment on foreign acts when called upon.

To begin with, for capacity and authority reasons, courts may look to the political branches for guidance on how to sit in judgment. As noted above, if Congress and the President rule foreign acts valid or excludable, courts, as faithful agents, should enforce these decisions. Moreover, the political branches may provide guidance on specific modalities, including reciprocity rules[223] or other standards.[224] Institutional capacity considerations also remind courts to focus their judgments on the parties who can provide the court with accurate information and who have the proper incentives to do so—the more spillovers to nonparties, the more political the decision will be.[225]

One feature of judicial rather than legislative resolution is the authority and competence to account for individual circumstances in individual cases—and sitting-in-judgment doctrine that is exclusively outward focused may ignore these concerns. For example, with respect to these individual interests, courts should not give their imprimatur to foreign acts

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221. *See supra* notes 213–15 (discussing federal common law).

222. Although sometimes applying simple federalism principles like preemption might avoid the tough foreign-relations questions, as Professor Ramsey observed, at other times invocations of "comity" have made controversial cases seem conventional. *See* Ramsey, *supra* note 18 (discussing, in particular, Pravin Banker Assocs. v. Banco Popular del Peru, 109 F.3d 850 (2d Cir. 1997), and Torres v. Southern Peru Copper Co., 113 F.3d 540 (5th Cir. 1997)).

223. *See infra* note 244 and accompanying text (discussing reciprocity).

224. *See supra* note 187 and accompanying text (discussing information asymmetries). Indeed, for the same authority and capacity reasons, the political branches should be encouraged to provide this guidance when possible.

225. *See supra* note 151 and accompanying text (discussing settled expectations).

that shock the conscience.[226] This observation is both commonsensical and consistent with many (though not all) existing doctrines in this area. Intersecting with this consideration is the notion of consent. Earlier discussions have suggested that honoring foreign acts furthers individual interests in predictability—individuals should be able to rely on law (foreign and domestic) when doing business abroad, negotiating international contracts, and choosing where to bring a transnational lawsuit.[227] That justification is particularly strong when the individual against whom the act is enforced consented to it. Thus, it should take an even more shocking outcome to overturn foreign acts to which a party consented. In addition, U.S. courts concerned about individual interests must be conscious of the consequences that stem from their decisions. Some of the doctrines described above involve courts compelling parties to take certain actions abroad—for example, compliance with a U.S. discovery order.[228] The foreign-law assessment in such a case involves considering whether the order would cause the party to violate foreign law and thus subject itself to foreign consequences. But courts have the capacity to judge these consequences independent of their sovereign status: It is the future harm, not its sovereign roots, that should worry courts.[229]

Courts applying the institutional approach described above need not be blind to international considerations—indeed, international law can be useful in achieving many of these goals. International law is the product of political branch choice—treaties are formally ratified by the political process,[230] and customary international law requires state compliance from legal obligation.[231] Courts are competent to determine the content of

226. Indeed, for this reason, many interjurisdictional doctrines are subject to public policy exceptions. *See, e.g.*, The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision."); Victor v. Sperry, 329 P.2d 728, 732–33 (Cal. Dist. Ct. App. 1958) (public policy and choice of law); UFCMJRA § 4(b)(3) (public-policy exception to judgment recognition).

227. *See supra* note 152 and accompanying text.

228. *See supra* note 95 and accompanying text.

229. This inquiry parallels domestic doctrines such as the irreparable harm standard for injunctive relief. *E.g.*, Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008). As such, it is within judicial competence and not foreignact-specific.

230. U.S. CONST., art. II, § 2 ("[The President] shall have power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.")

231. *See, e.g.*, Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1031, 1060 (identifying as a source of law "international custom, as evidence of a general practice accepted as law"); North Sea Continental Shelf, Judgment (Ger./Neth.; Ger./Den.), 1969 I.C.J. 4, ¶ 77 (Feb. 20) ("Not only must the acts concerned amount to a settled practice, but they must also be such,

international law, and courts presume that the political branches intend to follow international legal rules (while acknowledging the power of those branches to deviate from or change those rules).[232] International law also serves individual interests. International legal rules are stable and predictable; they provide notice to potentially affected parties; and, at least in the aggregate, they are unlikely to be significantly out of step with forum public policy.[233]

Both jurisdictional and substantive international law may be relevant in these cases. The international law of jurisdiction defines the reach of a state's laws, judicial acts, and enforcement authority.[234] When addressing the reach of a foreign state, a court could treat its acts as extending no further than international law allows.[235] This judgment reflects the authority of the political branches manifested in international law. It also protects individual interests, not only because international jurisdictional law is ascertainable, but also because the international law bases for jurisdiction track intuitive concepts of notice to individuals.[236] For these institutional and individual reasons, therefore, one aspect of sitting in judgment could be an assessment of whether the foreign act complies with international jurisdictional law. The same arguments also suggest substantive international law limits on foreign incorporation. The political branches implicitly reject violations of international law, and insulating parties from international-law violations protects individual interests.

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or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.").

232. *See, e.g*, Kevin L. Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115 (2015) (describing extensive role of international law in domestic legislative debate).

233. What if U.S. courts get international law wrong? Turning traditional process arguments on their head, one amicus curiae in *Sabbatino* suggested that foreign governments can use diplomatic channels to influence U.S. policy change—rather than normal arguments suggesting that aggrieved parties use diplomatic channels to seek redress. Brief for the Committee on International Law of the Association of the Bar of the City of New York as Amicus Curiae, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (No. 16),1963 WL 105634. Correcting judicial errors against foreign states may be easier than seeking redress from a foreign government or party via the U.S. State Department. *See, e.g.*, Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1376–77 (2014) (noting the Executive Branch's high success rate in seeking congressional overrides of adverse Supreme Court decisions).

234. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–88 (AM. LAW INST. 1987).

235. *Cf. Sabbatino*, 376 U.S. at 416 (limiting act of state doctrine to acts within sovereign's territory).

236. For example, individuals should understand that if they take actions with effects within a foreign state, then they could be subject to its laws. The international law of prescriptive jurisdiction (which applies to legislative acts) reaches not only a sovereign's territory and citizenship but also "counduct outside its territory that has or is intended to have substantial effect within its territory." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(1)(c) (AM. LAW INST. 1987).

Therefore, if a foreign act violates substantive international law, U.S. courts would be able to discredit it.[237]

In short, looking only at institutional considerations and structural values, we can learn a lot about when and how U.S. institutions should sit in judgment. Institutional capacity and authority drive the first cut of the analysis. And, once sitting in judgment is on the table, courts may look to structural considerations to decide individual cases on individual facts. This approach would not render all international considerations moot, but it would funnel those issues through traditional structural veins rather than asking courts to make multifarious judgments about the nebulous notion of international comity.

IV. APPLICATIONS

Part III of this Article explored a structural approach to sitting in judgment, and this Part asks how that structural approach would apply to the sitting-in-judgment cases described above. This Part begins with a discussion of those topics for which U.S. courts already sit in judgment—the foreign judgments, laws, systems, and interests described in Part II.B. This Part then reconsiders those doctrines for which U.S. courts have stayed their hands—acts of state, public laws, and foreign affairs federalism. Again, the goal here is to assess what domestic institutional analysis has to say about current law that claims to depend on external considerations.

A. Judgments, Laws, Systems, and Interests

American courts routinely sit in judgment on foreign judgments, laws, systems, and interests. What would the structural approach to foreign acts tell us about these doctrines?

Foreign judgment recognition incorporates many of the relevant considerations, so we begin there.[238] The first insight is that judgment-recognition decisions can be broken down into their constituent parts. Current doctrine leaves the entire recognition question to courts, except on the rare occasion that a statute or treaty plays a role.[239] But institutional capacity analysis shows that foreign judgment recognition is multifaceted

237. For an argument explaining the notice case for international-law violations, see Colangelo, *supra* note 155. And for a discussion of jurisdictional and substantive international law as tools of domestic statutory interpretation, see generally Clopton, *Replacing*, *supra* note 21.

238. *See supra* notes 102–27 and accompanying text (collecting examples).

239. *See supra* note 175 and accompanying text.

in meaningful ways. Reviews of the specifics of foreign judgments themselves (was this judgment procured by fraud?), and reviews of the details of underlying foreign proceedings (was the defendant given notice and an opportunity to be heard?), are the types of case-specific inquiries that courts handle every day. Parties have the best information in these situations, and they have the proper incentives to present such information to the court.[240]

Meanwhile, current judgment-recognition doctrine also calls for courts to pass judgments on foreign legal systems—can Nigeria produce fair judgments at all?[241] An institutional capacity analysis suggests that these questions are in a different register. Private litigants likely have no special insight into the general features of foreign legal systems; courts have no special competence in evaluating those systems; and the political branches, not tied to the vagaries of litigation, can offer stable systemic judgments that respond to general welfare concerns, diplomatic imperatives, and changing facts on the ground.[242] The "country report" approach from human rights[243] and the state-listing approach from terrorist financing[244] are potential models for political-branch involvement in this area. Of course, the federal political branches could delegate to the judiciary, but the delegation would require judicially manageable standards consonant with common-law adjudication.[245]

The last aspect of judgment recognition is the set of political choices that define the parameters of judgment-recognition law. Reciprocity is the best example.[246] In judgment recognition, courts applying reciprocity require a foreign state to enforce U.S. judgments as a prerequisite for enforcing that state's judgments. Putting aside whether reciprocity

240. *See supra* note 223 and accompanying text.

241. *See supra* note 108 and accompanying text.

242. Professor Whytock has argued that systemic due-process review is preferable to individual-case due-process review for judgment enforcement. Christopher A. Whytock, *Some Cautionary Notes on the 'Chevronization' of Transnational Litigation*, 1 STAN. J. COMPLEX LITIG. 467, 480–81 (2013). First, as explained *infra*, systemic review is valuable, but institutionally better suited for the political branches. Second, Whytock acknowledges that individual due-process review is important, but suggests that such review should occur in the rendering forum. This particular question of recognition practice is beyond the scope of this Article.

243. *See* Foreign Assistance Act, 22 U.S.C. §§ 2151n(d) & 2304(b) (1961).

244. *See supra* note 161.

245. *Cf.* Baker v. Carr, 369 U.S. 186, 217 (1962).

246. *See supra* note 173 and accompanying text. In addition to reciprocity requirements in traditional judgment enforcement cases, reciprocity rules may be imported into other procedural doctrines. For example, many U.S. courts will not certify class actions involving foreign plaintiffs if those plaintiffs are citizens of countries that do not treat U.S. class judgments as binding. *See* Clopton, *Transnational Class Actions*, *supra* note 20 (collecting cases and criticizing this practice).

works,[247] the adoption of a reciprocity requirement is itself a political judgment: it affects the interests of many parties, not just the parties to a particular enforcement proceeding; it requires information not readily presented in an individual litigation or available to any two appearing parties; and it involves the political tradeoff of individual interests versus societal ones.[248] Reciprocity requirements also may be linked with other matters of foreign policy,[249] and such rules may need updating on the schedule of politics, not litigation. And yet, reciprocity rules have at times been the product of judicial lawmaking,[250] and many judgment-recognition statutes give courts unfettered discretion to choose when reciprocity matters.[251] This need not be the case. Efforts to produce an international judgments convention could be revived,[252] or Congress could pass a statute requiring (or rejecting) reciprocity, as the American Law Institute has recommended.[253] Either a treaty or a statute would convert reciprocity from a system-wide inquiry to a foreign-law inquiry—has the foreign state adopted the convention or not?—which is more properly left to the courts.[254]

The structural approach also highlights a potential division when incorporating foreign laws.[255] When and if the political branches direct courts to evaluate foreign laws in a particular way, those directions should

247. *See, e.g.*, John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C. L. REV. 1109 (2014).

248. A reciprocity requirement in the long run may lead to more enforceable judgments, but in the near term it is not the fault of an individual litigant seeking recognition that the foreign state has decided not to recognize U.S. judgments. *See* Dodge, *Public Law Taboo*, *supra* note 12 (articulating this and other anti-reciprocity arguments).

249. Vaughan Black, *A Canada-United States Full Faith and Credit Clause?*, 18 SW. J. INT'L L. 595, 599 (2012) (noting that political branches "commonly enact legislation that singles out some country or countries for special treatment, normally in exchange for promises of comparable special treatment under the laws of those foreign states").

250. *E.g.*, Hilton v. Guyot, 159 U.S. 113 (1895).

251. FLA. STAT. § 55.605(2)(g) (2015); ME. REV. STAT. ANN. tit. 14, § 8505(2)(g) (2015); OHIO REV. CODE ANN. § 2329.92 (West) (2015); TEX. CIV. PRAC. & REM. CODE ANN. § 36.005(b)(7) (2015).

252. *See, e.g.*, A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE (John J. Barceló III & Kevin M. Clermont eds., 2002).

253. FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT § 7 (AM. LAW INST., Proposed Council Draft 2002).

254. This is the approach of the New York Convention with respect to arbitration, and it has the advantages of encouraging cooperation while dramatically simplifying the task of assessing reciprocity. *See* U.N. Conference on International Commercial Arbitration, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, art. I(3) (June 10, 1958). *But see* Yaad Rotem, *The Problem of Selective or Sporadic Recognition: A New Economic Rationale for the Law of Foreign Country Judgments*, 10 CHI. J. INT'L L. 505 (2010) (suggesting that this task is more difficult than it appears).

255. *See supra* notes 78–95 and accompanying text (collecting examples).

be heeded.[256] Individual interests also require state and federal courts sitting in judgment on foreign laws to protect against unconscionable results. Courts could reject foreign laws that trammel fundamental rights not because of a generalized distaste for foreign public laws but because courts are the guardians of the domestic judicial process. Consistent with institutional prerogatives and individual rights, international substantive and jurisdictional law may help set limits on foreign laws.[257] Current doctrines do not uniformly incorporate an international-law check, but they could.

Before leaving the discussion of foreign laws, it is important to address the risk of foreign states gaming the system. Knowing that U.S. courts will incorporate foreign laws, what if foreign states pass laws to benefit their citizens? The discovery and jurisdictional blocking statutes described above may be examples of this phenomenon.[258] A potential response derives from international law principles, which themselves reflect institutional and individual interests. International law in many forms embodies a norm of nondiscrimination.[259] Here, nondiscrimination requires mutuality[260]: The foreign law must not expressly target foreign proceedings or foreign citizens. A U.S. court applying this rule would reject a hypothetical law prohibiting French companies from disclosing shareholder information to non-French courts, both because it does not apply in French courts and because it treats French companies differently from U.S. companies doing business in France. By applying mutuality, U.S. courts can approximate which foreign laws are targeting U.S. loopholes with a rule that is predictable to parties and consistent with political-branch preferences expressed through international legal agreement.[261] And because the parties in these cases have the right

256. Professor Brilmayer thoughtfully explained why finality (among others) justifies treating foreign judgments differently than foreign laws for purposes of recognition. Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 100 (1984). She may be correct, but this point is orthogonal to the argument here—relevant doctrines may treat laws and judgments differently for consequentialist or deontological reasons, but with respect to the "sitting in judgment" aspect of the inquiry, the same considerations should apply.

257. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401–88 (AM. LAW INST. 1987).

258. *See supra* notes 96–97.

259. Consider, for example, the principle of national treatment embodied in Friendship, Commerce, and Navigation treaties and international trade agreements. *See, e.g.*, John F. Coyle, *The Treaty of Friendship, Commerce, and Navigation in the Modern Era*, 51 COLUM. J. TRANSNAT'L L. 302 (2013) (collecting sources and discussing these treaties).

260. *See, e.g.*, BRILMAYER, *supra* note 187 (discussing mutuality).

261. One problem with this approach is the risk of selective enforcement in foreign states—facially neutral laws will be enforced to game the system. However, shifting foreign gamesmanship

incentives to raise these issues (and judicial determinations need not extend beyond the case at bar), courts are well positioned to apply the mutuality rule.[262]

Judgments about foreign legal systems[263] also fit the model of political branch resolution. Much of this case was articulated above with respect to judgment recognition, and the same logic applies to legal-system judgments for forum non conveniens and other doctrines of this type.[264] The need for stable judgments about legal systems also augurs in favor of a federal solution—although states can adopt their own judgment recognition and forum non conveniens approaches, perhaps the federal political branches should make the necessary judgments about foreign legal systems.[265] Justice Scalia was right when he observed that current forum non conveniens doctrine "make[s] uniformity and predictability of outcome almost impossible."[266] At least with respect to its system-wide aspects, the federal political branches have the capacity and authority to do better.

Finally, for similar reasons, more of the consideration of foreign interests could be left to the political branches.[267] For example, perhaps the federal political branches rather than federal courts should decide whether foreign-relations issues are sufficient to demand federal-court jurisdiction.[268] Of particular note here is the role of foreign state participation in private litigation. In various areas, U.S. courts have been known to expressly or impliedly credit nonauthoritative foreign statements of interest.[269] These statements present two challenges for courts. First, when they relate to foreign interests, these statements are the result of a

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from legislation to enforcement increases the costs on foreign states because it requires the coordination of more parties. Further, we might think that conversion from de jure to de facto discrimination is valuable if it makes it more likely that de facto discrimination will be overruled or if it sends an expressive signal about equal treatment.

262. To say that courts can apply a mutuality rule is, of course, different than saying that courts should adopt mutuality rules on their own. That is where comparative institutionalism and international law come into play.

263. *See supra* notes 112–30 and accompanying text (collecting examples).

264. *See supra* notes 241–45 and accompanying text.

265. It is not that state courts are incompetent in international litigation, and indeed the structural approach calls for a reexamination of *Zschernig*. *See infra* Part IV.B. Instead, the concern is that *courts* are not competent to judge foreign legal *systems*.

266. American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994).

267. *See supra* notes 131–36 and accompanying text (collecting examples).

268. *See supra* note 209 and accompanying text (discussing *Sequihua*).

269. *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010) (noting foreign state objections to interference with foreign securities regulation via amicus briefs); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994) (referring to Ecuador's "strong objection").

diplomatic calculation that presumably is political.[270] Second, there are reasons to doubt the veracity of these statements. As low cost interventions, foreign state participation may not accurately reflect the magnitude and direction of foreign state interest. And because foreign states are not repeat players in court—at least in the same way as they are in international diplomacy—they have weak reputational incentives.[271] If U.S. courts announced in advance that such statements were inadmissible, then perhaps it would discourage parties from spending resources and exercising leverage to obtain such statements.[272]

B. Acts of State, Public Laws, and Preemption

This Part addresses cases in which U.S. courts have declined to sit in judgment: acts of state, public laws, and foreign-affairs preemption. Wholesale incorporation (acts of state) or abstention (public laws and federalism) is inconsistent with the structural approach. New doctrine thus may be appropriate.

With respect to the act of state doctrine,[273] the structural approach suggests that we should be dubious of the courts' conclusion that sitting in judgment on foreign sovereign acts is somehow more disrespectful than any number of other judgments.[274] Whether to have an act of state doctrine at all is a political question. In the (likely) absence of such political branch action, courts face a difficult decision about whether the cure of abolishing the doctrine would be worse than the disease.[275] Without taking sides on this question, the structural approach suggests certain cases in which courts should pare back existing act of state protections in furtherance of the separation of powers.[276] When Congress legislates that the act of state

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270. Of course, the State Department would be free to include such views in statements of interest in U.S. courts. *See, e.g.*, BORN & RUTLDGE, *supra* note 100, at 55–56l.

271. As noted above, the federal political branches are repeat players in litigation and thus have credibility constraints absent from foreign-state (and private) parties. *See, e.g.*, Huq, *supra* note 178, at 1443 (making a similar argument in structural constitution cases). For example, in some cases, foreign states have been known to change their positions on the interpretation of local law, seemingly with the intent to influence the outcome of litigation in U.S. courts. *See, e.g.*, Paul S. Vicary, Note, *Comity, Act of State, and Interpretation of Foreign Law: The Eleventh Circuit Missteps in* McNab v. United States, 16 FLA. J. INT'L L. 925 (2004) (collecting cases).

272. *Cf.* Childress III, *supra* note 18 (arguing for more such statements).

273. *See supra* notes 23–33 and accompanying text (discussing the doctrine).

274. *See supra* note 209 and accompanying text (discussing *Sequihua*).

275. It may be that the act of state doctrine's decades-long history justifies it as a result of settled party expectations, changing international law, or political branch acquiescence.

276. Although some act of state decisions claim to rely on separation-of-powers arguments to avoid sitting in judgment, *e.g.*, Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918), current doctrine does not always respect separation-of-powers interests when expressed by the political branches.

doctrine does not apply to expropriations, it should not.[277] Further, lower court decisions that have used the act of state doctrine (separate from sovereign immunity) to insulate foreign states from compliance with federal statutes should be reversed.[278] Perhaps more controversially, when the Executive Branch suggests that the doctrine does not apply (the *Bernstein* exception),[279] when the United States government is the plaintiff,[280] when the underlying foreign act violates international jurisdictional or substantive law,[281] or when state political branches legislate in the area,[282] structural analysis suggests that U.S. courts should decline to credit the foreign act. Although these limitations may be normatively appealing, the argument here is institutional—the political branches, not some normative priors, may dictate when the act of state doctrine does not apply.

Turning to public laws, the reflexive rejection of public-law claims and public-law judgments is also inconsistent with institutional analysis.[283] Because of the sensitive due process and separation-of-powers interests in criminal law, it would not be unreasonable for U.S. courts to decline those cases.[284] But when foreign laws address public-law topics such as securities fraud, employment discrimination, or consumer protection, particularly through mechanisms of private enforcement,[285] U.S. courts could hear those cases consistent with individual rights and international law. And if those assessments of foreign public laws are too

277. *See supra* note 177 (citing Second Hickenlooper Amendment). Indeed, courts applying this approach may reconsider whether political branch preference expressed in the Foreign Sovereign Immunities Act should trump the act of state doctrine in areas in which it creates federal-court jurisdiction. *See, e.g.*, Int'l Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1359 (9th Cir. 1981); Fogade v. ENB Revocable Trust, 263 F.3d 1274, 1293 (11th Cir. 2001).

278. *See supra* note 48 (collecting sources). This conclusion accords with Professor Harrison, *supra* note 47, though it is based on institutional considerations rather than Harrison's historical and doctrinal ones.

279. *See supra* note 175 (citing *Bernstein*).

280. *See, e.g.*, United States v. One Etched Ivory Tusk of African Elephant, 871 F. Supp. 2d 128 (E.D.N.Y. 2012); United States v. Giffen, 326 F. Supp. 2d 497, 502 (S.D.N.Y. 2004); United States v. Labs of Va., Inc., 272 F. Supp. 2d 764, 771 (N.D. Ill. 2003). Of course, these suits would be subject to statutory and constitutional constraints.

281. *See supra* notes 235–37 and accompanying text (discussing role of international law).

282. While *Sabbatino* suggested that states can adopt stricter act of state rules, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 n.23 (1964), this Article's approach suggests that federal courts should adopt a common-law rule that incorporates stricter *or looser* state legislative standards. For an example of federal common law incorporating state law, see United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979).

283. *See supra* notes 34–38 and accompanying text (collecting examples).

284. *See supra* note 34 (citing penal exception).

285. *See generally* Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

uncomfortable, then the political branches could say so—statutes, treaties, and executive participation are always available.

Finally, the doctrine of foreign-affairs preemption from *Zschernig v. Miller* represents another case in which the courts substituted their judgment for that of the political branches.[286] The statute in *Zschernig* reflected the policy judgment of state political branches.[287] To make matters worse from an institutional perspective, the United States government expressly disclaimed the position that the Oregon statute "unduly interfere[d] with the United States' conduct of foreign relations."[288] Instead, an approach that vindicated institutional and individual interests would allow state political branches to make political judgments that happen to touch on foreign affairs. Those state rules should respect the institutional capacities of the branches—*e.g.*, avoid situations in which courts make unconstrained, systemic judgments about foreign states or foreign relations.[289] The state rules also must be subject to federal political constraints. States cannot abrogate treaties or reverse preemptive federal statutes,[290] and courts should not be able to stay litigation in defense of federal foreign affairs interests when the federal government expressly disclaims those interests. And, of course, state political judgments would have to comport with constitutional protections for individual rights.[291]

V. CONCLUSION

Contrary to *Sabbatino*, *Zschernig*, and Judge Learned Hand, U.S. courts routinely sit in judgment on foreign judgments, laws, legal systems, and interests. This Article has cataloged myriad doctrines that involve sitting in judgment, from forum non conveniens to foreign law as datum to foreign states as amici in private litigation. In each of these areas, U.S. courts evaluate foreign sovereign acts and are willing to deem them

286. *See supra* notes 43–44 and accompanying text (discussing *Zschernig*).

287. Note that the state courts in *Zschernig* ostensibly followed statutory direction to consider the individualized inquiry regarding "the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'" Zschernig v. Miller, 389 U.S. 429, 431 (1968) (quoting OR. REV. STAT. § 111.070 (1957)).

288. Brief for the United States as Amicus Curiae at 6 n.5, Zschernig v. Miller, 389 U.S. 429 (1968) (no. 21), 1967 WL 113577.

289. If the *Zschernig* statute required courts to deem certain foreign states to be serial expropriators generally, that might be a different story.

290. U.S. CONST. art. V.

291. Similar institutional arguments caution against courts reading potentially extraterritorial legislation too narrowly. For further elaboration of this point, see generally Clopton, *Replacing*, *supra* note 21.

unsuitable for credit in a U.S. court. The fact that these doctrines are widespread, uncontroversial, and commonsensical undermines claims that international comity demands that courts stay their hands—either to incorporate every foreign public act or none. Not only do these doctrines fail to line up with comity, they do not need to. Instead, a structural approach to sitting in judgment reminds us that institutional and individual interests matter too. A structural approach suggests that institutional capacity and authority can help assign responsibility for sitting in judgment and crafting the relevant standards to the authorized and institutionally capable branches. And it suggests that legislative and executive choices may join with individual rights to produce predictable and consistent doctrinal standards.

A perennial question in transnational litigation is what, if anything, is distinctive from domestic litigation. This Article suggests two potential answers: foreign law and international law. First, tracking the observation of Professor Baumgartner, international litigation is different because it may require courts to consider and incorporate foreign law.[292] For reasons of fairness, predictability, efficiency, and authority, U.S. courts can and should incorporate foreign law in a host of doctrinal contexts. Second, tracking the observation of Professor Burbank, international litigation may be normatively distinctive if and when it relies on international law.[293] This Article was explicit on how (and why) international law has a place in these cases—it can define institutional authority, set substantive limits on U.S. decisions, and inform judicial interpretations of both foreign and domestic acts, to name a few.[294]

At the same time, these distinctions should not be taken too far. First, it is true that in transnational litigation U.S. courts account for foreign legal acts, but they ways that U.S. courts account for those acts are consistent with other sources. A U.S. court may stay litigation to allow for foreign adjudication,[295] but the same court may wait for private negotiation to resolve the dispute.[296] A party may be excused from contract performance because a change in foreign law made performance impracticable,[297] but

292. Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793 (2007).

293. Stephen B. Burbank, *The World in Our Courts*, 89 MICH. L. REV. 1456, 1473–97 (1991).

294. *See supra* notes 230–37 and accompanying text.

295. *See supra* note 174 and accompanying text.

296. Courts often stay proceeding in light of formal alternative dispute resolution or even informal settlement discussions.

297. *See supra* note 83 and accompanying text.

she also may be excused if an earthquake did the same.[298] And a U.S. court may enforce a foreign judgment,[299] but it also may enforce a domestic arbitral award.[300]

Second, with respect to international law, it is true that U.S. courts seek guidance from international legal norms in transnational litigation. But international law can be understood as one of many ways that political branch preferences are expressed and individual rights are protected. Treaties could create exceptions to the act of state doctrine and set reciprocity rules for judgment recognition,[301] but purely domestic statutes could do the same.[302] American courts could refuse to credit foreign acts that violate substantive international law,[303] but they also could refuse to credit foreign acts that violate the Constitution.[304] And while international law may be a source of substantive and procedural norms,[305] it is far from unique in this function.

In sum, to the extent transnational litigation is different, it is different in the details. The content of international law may be different than domestic law, but the constitutional allocation of lawmaking authority is transsubstantive. The content of foreign law may be different than contracts, but courts should account for real world conditions and consequences in all cases. For foreign-affairs reasons, sitting in judgment may be problematic in certain contexts, but the process of identifying those situations and creating doctrines to manifest those conclusions need not be any different than in domestic law and policy.

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298. *See* 1 AM. JUR. 2D *Act of God* § 3 (2005).
299. *See supra* note 63 and accompanying text.
300. *See* 9 U.S.C. §§ 1–6 (2012).
301. *See supra* notes 170–72, 178, 254 and accompanying text.
302. *See supra* notes 64, 179 and accompanying text.
303. *See supra* note 281 and accompanying text.
304. *See supra* note 67 and accompanying text (discussing First Amendment cases).
305. *See supra* note 234–37 and accompanying text.