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The Preclusive Effect Of Foreign-country Judgments In The United States And Federal Choice Of Law: The Role Of the Erie Doctrine Reassessed

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THE PRECLUSIVE EFFECT OF FOREIGN-COUNTRY JUDGMENTS IN THE UNITED STATES AND FEDERAL CHOICE OF LAW: THE ROLE OF THE *ERIE* DOCTRINE REASSESSED

I. INTRODUCTION

The constitutional development of the United States as a federal republic has given this nation, with its independent systems of state and federal courts, a wide range of experience in confronting the choice-of-law issues associated with the *intersystem*[1] recognition of judgments. For example, when a judgment is rendered by the judicial system of one state and is presented for recognition in the judicial system of another state, or the federal court system, the recognizing forum must decide whether its or the rendering forum's res judicata rules will determine the preclusive effect of the judgment. A similar choice-of-preclusion-law problem emerges when the rendering forum is a foreign country and the recognizing forum is a court in the United States. Moreover, when the recognizing forum is a federal court exercising subject-matter jurisdiction through diversity of citizenship,[2] the question arises whether the doctrine of *Erie Railroad Co. v. Tompkins*[3] and the Rules of Decision Act[4] require the court to apply the law of the

1. The term "intersystem" refers to legal questions arising between two or more judicial systems. *See* Casad, *Intersystem Issue Preclusion and the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 510, 511 (1980) [hereinafter Casad, *Intersystem*]. The term "interjurisdictional" has also been used. *See, e.g.*, Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 626 (1985). The terms "interstate" and "international" are subcategories of the foregoing terms. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971).

2. United States federal district courts have original subject-matter jurisdiction over all civil actions where there is diversity of citizenship among the parties. 28 U.S.C. § 1332 (1982). Such a controversy must be between citizens of different states, between a citizen of a state and an alien, or between a foreign country as plaintiff and a citizen of a state, and is subject to a jurisdictional amount of $10,000. *Id.* For further discussion of federal-diversity jurisdiction, see 13B C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 3601-42 (1984).

In this Note, the phrase "federal-diversity court" refers to a federal court exercising jurisdiction in this manner.

3. 304 U.S. 64 (1938). For a discussion of the *Erie* doctrine, see *infra* notes 85-113 and accompanying text.

4. 28 U.S.C. § 1652 (1982) (corresponds to Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92). The current version states: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." *Id.*

state in which it is sitting to the choice-of-preclusion-law issue. While the full faith and credit clause[5] of the United States Constitution and its implementing statute[6] regulate the intersystem-preclusive effects given domestic judgments,[7] no similar nationally binding rule governs the preclusive effects given foreign-country judgments by this nation's courts.[8]

It has been suggested that federal law should govern a question

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5. U.S. CONST. art. IV, § 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved and the effect thereof." *Id.*

6. 28 U.S.C. § 1738 (1982) (corresponds to Act of May 26, 1790, ch. 11, 1 Stat. 122). The statute provides, in pertinent part: "Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.*

7. The United States Supreme Court has taken the position that the full faith and credit clause and section 1738 require that at least as much preclusive effect be given a domestic judgment in the recognizing forum as it would receive in the forum which rendered it. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 96 (1980) (observing that by enacting section 1738, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so . . . ."); Davis v. Davis, 305 U.S. 32, 40 (1939) ("[Section 1738] extended the rule of the constitution to all courts, federal as well as state"); Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 135 (1912) (full faith and credit clause requires that "[t]he general effect of a judgment of a court of one State when relied upon as an estoppel in the courts of another State is that which it has, by law or usage, in the courts of the State from which it comes.").

8. *See* Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912) (full faith and credit clause does not apply to foreign-country judgments); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971) (in applying Pennsylvania law to the recognition of a British judgment, the court stated that Pennsylvania recognizes foreign-country judgments on the basis of comity, not full faith and credit), *cert. denied*, 405 U.S. 1017 (1972); South Ionian Shipping Co. v. Hugo Neu & Sons Int'l Sales Corp., 545 F. Supp. 323, 325 (S.D.N.Y. 1982) (recognition of a Greek judgment in United States courts is permissive, and based upon principles of comity, not full faith and credit); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1011 (E.D. Ark. 1973) (full faith and credit clause inapplicable to recognition of Canadian judgment).

The United States government has attempted to provide a firmer basis for the recognition and enforcement of foreign-country judgments by negotiating several treaties, none of which has yet been ratified by the United States Senate. *See, e.g.*, Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, Oct. 26, 1976, United States-United Kingdom (unratified), *reprinted in* 16 I.L.M. 71 (1977). For a discussion of this treaty, see Bishop & Burnette, *United States Practice Concerning the Recognition of Foreign Judgments*, 16 INT'L LAW. 425, 427 (1982) [hereinafter Bishop & Burnette, *U.S. Practice]*; Von Mehren, *Enforcement of Foreign Judgments in the United States*, 17 VA. J. INT'L L. 401, 413-14 (1977) [hereinafter Von Mehren, *Enforcement]*. A legal basis for recognizing foreign-country judgments is provided by the UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1986). For a list of the 16 states that have adopted the Act, see 13 U.L.A. 261 (Supp. 1986).

which so clearly touches upon the relations between this and other nations.[9] Federal-diversity courts, however, have considered themselves bound by the *Erie* doctrine to apply state choice-of-preclusion-law rules in determining the preclusive effect of foreign-country judgments.[10]

The purpose of this Note is to suggest why the *Erie* doctrine does not require federal-diversity courts to follow state law when selecting the preclusion rules to apply in recognizing a judgment rendered in a foreign country.

II. The Recognition of Foreign-Country Judgments in the United States: An Overview

The judgments of one judicial system—foreign or domestic—may be accorded two types of effect by another judicial system: recognition

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9. *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981) (the *Erie* doctrine notwithstanding, the issue whether to apply state or federal law to the recognition of a foreign-country judgment seems a national rather than a state one); Her Majesty v. Gilbertson, 597 F.2d 1161, 1163 (9th Cir. 1979) (preclusive effect given Canadian tax judgment implicates foreign relations concerns, suggesting that question should not be decided merely by reference to state law); *Toronto-Dominion Bank*, 367 F. Supp. at 1011 (suits involving foreign-country judgments necessarily involve relations between the United States and foreign governments; therefore, they are better governed by a single uniform rule); *see also* Homburger, *Recognition and Enforcement of Foreign Judgments*, 18 Am. J. Com. L. 367, 384-85 (1970) (principles enunciated by the Supreme Court in Hilton v. Guyot, 159 U.S. 113 (1895), are squarely within the enclave of federal common law which binds the states); Note, *Alternative Theories for Establishing a Federal Common Law of Foreign Judgments in Commercial Cases: The Foreign Affairs Power and the Dormant Foreign Commerce Clause*, 16 Va. J. Int'l L. 635, 642 (1976) (recognition of foreign-country judgments in commercial cases affects United States foreign policy and national security interests; state action may be preempted by evolving federal common law of foreign affairs); Comment, *Judgments Rendered Abroad—State Law or Federal Law?* 12 Vill. L. Rev. 618, 618 (1967) (the *Erie* doctrine notwithstanding, the pre-eminence of the federal government in international law and foreign relations, and the expanding concept of federal common law, appear to indicate that absent a federal statute or treaty, the Supreme Court will have the final decision in this area).

10. *See, e.g.*, Royal Bank of Canada v. Trentham Corp., 665 F.2d 515, 515 (5th Cir. 1981) (court determined that Texas court would apply Alberta law despite lack of reciprocity); Sangiovanni Hernandez v. Dominicana de Aviacion, C. Por A., 556 F.2d 611, 614 (1st Cir. 1977) (judgment of court in Dominican Republic should be given res judicata effect in Puerto Rico court); British Midland Airways, Ltd. v. International Travel, Inc., 497 F.2d 869, 871 n.2 (9th Cir. 1974) (applying State of Washington's rule of comity to a judgment of England's High Court of Justice); *Somportex*, 453 F.2d at 440 (applying Pennslyvania rule of comity to a judgment of England's High Court of Justice); *Gilbertson*, 597 F.2d at 1163 (applying Oregon and federal reciprocity rules to deny the enforcement of a British Columbia tax judgment); Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885, 892 (N.D. Tex. 1980) (in the absence of Texas law on recognition of foreign judgments, applying generally accepted principles of law to the recognition of a judgment of England's High Court of Justice).

and enforcement.[11] A foreign-country judgment is recognized when a court in this country determines that the judgment is valid, and that because a certain matter was addressed in the foreign-country judgment, it should not be litigated further in the United States forum.[12] The foreign-country judgment is, therefore, conclusive on the merits of the original claim and is given some preclusive effect.[13] A foreign-country judgment is enforced in the recognizing forum when, in addition to being recognized, a party to the original action is given the affirmative relief to which the judgment entitles him.[14] It follows then that the recognition of a foreign-country judgment is a condition precedent to its enforcement.[15]

Recognition practice between the individual states and between the federal system and the states is controlled by the United States Constitution's full faith and credit clause[16] and its implementing statute.[17] They require each state court system, as well as the federal court system, to accord one another's judgments at least as much preclusive effect as would have been accorded the judgment in the forum that rendered it.[18]

The recognition of foreign-country judgments, however, is not governed by the Constitution's full faith and credit clause.[19] The recognition of foreign-country judgments is a practice derived from the recognizing forum's policies, rather than any mutually binding body of law.[20]

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11. Sainz v. Sainz, 36 N.C. App. 744, 748, 245 S.E.2d 372, 375 (1978) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 introductory note (1971)); Von Mehren, *Enforcement, supra* note 8, at 401.

12. *Sainz*, 36 N.C. App. at 748, 245 S.E.2d at 375; Bishop & Burnette, *U.S. Practice, supra* note 8, at 427-28; Von Mehren, *Enforcement, supra* note 8, at 401.

13. *See supra* note 12 and accompanying text. This is to be distinguished from giving a foreign-country judgment mere prima facie evidence status in subsequent proceedings. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 234 (1895) (Fuller, C.J., dissenting) (in summarizing the majority's decision to grant a new trial, the Chief Justice explained: "[A]lthough no special ground exists for impeaching the original justice of a judgment . . . the right to retry the merits of the original cause . . . should be accorded in every suit on judgments recovered in countries where our own judgments are not given full effect, on that ground merely"; a French judgment is *"prima facie* evidence only of the justice of the plaintiff's claim"); Svenska Handelsbanken v. Carlson, 258 F. Supp. 448, 450-51 (D. Mass. 1966) (Swedish judgment is merely "prima facie evidence of the correctness of the underlying cause").

14. *See supra* note 12 and accompanying text.

15. *Id.*

16. U.S. CONST. art. IV, § 1.

17. 28 U.S.C. § 1738 (1982).

18. *See supra* note 7 and accompanying text.

19. Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912) (state court failure to accord conclusive effect to foreign-country judgment presents no federal question reviewable by the United States Supreme Court since the full faith and credit clause applies only to the states).

20. Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Sum-*

The most often cited policy basis for recognizing a foreign-country judgment in the United States is that of *comity*.[21]

The United States Supreme Court, in *Hilton v. Guyot*,[22] has defined comity as neither an absolute obligation nor a mere courtesy and expression of good will.[23] Rather, comity is the recognition that this nation gives to the legislative, executive, and judicial acts of a foreign nation, after balancing the competing interests of international duty and convenience against the rights of our own citizens and other persons who are under the protection of our laws.[24]

In *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*,[25] the United States Court of Appeals for the Third Circuit, relying principally on *Hilton*, refined this definition by describing comity not as a rule of law but as a principle of practice, convenience, and expediency.[26] The court stated that comity is an expression of this nation's understanding of both its international duty to assist the legal systems of sister nations and its duty to safeguard the rights of persons protected by our own laws.[27]

Generally, the judgments of foreign countries are recognized by the courts of the United States when the general requirements of comity[28] are satisfied.[29] Courts in the United States, therefore, will generally recognize a foreign-country judgment if: (1) there is a final judg-

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mary View of the Situation in the United States, 4 INT'L LAW. 720, 722 (1970) [hereinafter Ginsburg, *Recognition*].

21. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163-64 (1895) (the first Supreme Court case claiming comity as the policy basis for recognizing foreign-country judgments in the United States); Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (recognizing and enforcing an Israeli judgment on the basis of comity); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440-41 (3d Cir. 1971) (recognizing and enforcing a British judgment on the basis of comity), *cert. denied*, 405 U.S. 1017 (1972); *see also* Bishop & Burnett, *U.S. Practice*, *supra* note 8, at 430 (comity is the predominant policy basis for the recognition and enforcement of foreign-country judgments in the United States).

22. 159 U.S. 113 (1895).

23. *Id.* at 163.

24. *Id.* at 163-64.

25. 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

26. *Id.* at 440.

27. *Id.*

28. *Hilton*, 159 U.S. at 202-03, 205-08. For a discussion of the general requirements of comity, see *infra* text accompanying notes 30-40.

29. *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981) (applying the *Hilton* requirements to the recognition and enforcement of an Israeli judgment); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440-41 (3d Cir. 1971) (applying the *Hilton* requirements to the recognition and enforcement of a British judgment), *cert. denied*, 405 U.S. 1017 (1972); Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 892 (N.D. Tex. 1980) (applying the *Hilton* requirements to the recognition of a British declaratory judgment).

ment[30] after a full and fair trial on the merits of the claim;[31] (2) the foreign court had jurisdiction over the subject matter;[32] (3) the court had jurisdiction over the parties or res;[33] (4) the defendant received

30. A judgment is final "if it is not tentative, provisional, or contingent, and represents the completion of all steps in the adjudication of the claim by the court, short of its execution or enforcement . . . ." Acha v. Beame, 570 F.2d 57, 63 (2d Cir. 1978) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 41 comment b (Tent. Draft No. 1, 1979)). Generally, a foreign-country judgment must be final before it will be recognized in the United States. *See, e.g.*, Ritchie v. McMullen, 159 U.S. 235 (1895) (a judgment rendered by a competent foreign jurisdiction, with due notice and in the absence of fraud, which would be conclusive in that foreign country, held to be conclusive of the merits in an action brought in the United States); Coulborn v. Joseph, 195 Ga. 723, 730, 25 S.E.2d 576, 579 (1943) (application of *Ritchie* to hold conclusive and enforceable the judgment and the rights accrued under the judgment by the courts of Georgia, when issues in a divorce action were adjudicated by a court of competent jurisdiction in a foreign country whose laws and judicial system are in harmony with the laws and systems of the United States); Growe v. Growe, 2 Mich. App. 25, 33-34, 138 N.W.2d 537, 540-41 (1965) (enforcement of a foreign alimony judgment on the grounds that the foreign judgment was final and did not offend the laws of the United States, disadvantage United States citizens, flout United States public policy, nor provide any other reason for non-enforcement); Kordoski v. Belanger, 52 R.I. 268, 268, 160 A. 205, 206 (1932) (order of a foreign tribunal for child support payments which could be varied from time to time by the rendering judge held not to be a "final judgment," thus rendering it unenforceable in Rhode Island).

31. *Hilton*, 159 U.S. at 202, 205.

32. *Id.*

33. *Id.* As a general rule applying to domestic judgments, the adequacy of notice and personal jurisdiction issues underlying the judgment may only be raised in subsequent recognition and enforcement proceedings if the judgment was obtained by default, *i.e.*, the issues were not actually and fully litigated either by a special appearance or a trial on the merits of the claim. *See* Baldwin v. Iowa State Traveling Men's Ass'n., 283 U.S. 522, 525 (1931) (court allowed defendant to receive default judgment and then challenge that judgment on jurisdictional grounds in a collateral proceeding). A similiar rule applies to contesting subject-matter jurisdiction in subsequent proceedings. Durfee v. Duke, 375 U.S. 106, 112 (1963) (applying *Baldwin* standard to subject-matter jurisdiction).

Some courts in the United States have applied these general domestic rules to foreign-country judgments. *See, e.g., Somportex*, 453 F.2d at 443-44 (decision concerning jurisdictional issue was held to be a proper matter to be decided by the British court); Christopher v. Christopher, 198 Ga. 361, 376, 31 S.E.2d 818, 828-29 (1944) (a judgment by a foreign court which was held void because it was obtained by fraudulent representations concerning jurisdiction was held reviewable by Georgia court); Mercandino v. Devoe & Raynolds, Inc., 181 N.J. Super. 105, 107, 436 A.2d 942, 943 (App. Div. 1981) (Italian judgment recognized in the United States because the Italian court had subject-matter and personal jurisdiction, and the recognition of the judgment did not offend the policies of the enforcing state); Caruso v. Caruso, 106 N.J. Eq. 130, 148 A. 882, 884 (N.J. 1930) (New Jersey Supreme Court prohibited from considering which Italian court had jurisdiction because that jurisdictional matter was one for the Italian courts to decide).

Other courts in this country have, however, re-examined the merits of jurisdictional and notice issues according to United States due process standards. *See, e.g.*, Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 895-96 (N.D. Tex. 1980) (jurisdiction over United States nationals by foreign courts must be determined by the standards of

sufficient notice of the proceeding and had an opportunity to be heard;[34] (5) the judgment was not obtained through fraud;[35] and (6) there are no special reasons why this nation's comity should not be extended to the recognition of the judgment.[36]

If "special reasons" do exist, then comity should not be extended to a foreign-country judgment. One such special reason would be if the foreign-country judgment implicates or violates the recognizing forum's public policy.[37] Judgments enforcing a foreign nation's revenue or penal laws are also excluded from the extension of comity.[38] Sometimes, a foreign-country judgment may not be afforded conclusive effect unless the rendering country would give the same effect to a comparable judgment rendered by a United States court.[39] The recent trend, however,

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judicial power under the due process clause of the fourteenth amendment, not by foreign standards); Bank of Montreal v. Kough, 430 F. Supp. 1243, 1247-48 (N.D. Cal. 1977) (foreign judgment concerning jurisdiction over defendant who did not consent to foreign jurisdiction will not be upheld unless the foreign court at least complies with the requirements of fair play and substantial justice under the due process clause of the United States Constitution), *aff'd*, 612 F. 2d 467 (9th Cir. 1980); Du Quesnay v. Henderson, 24 Cal. App. 2d 11, 12, 74 P.2d 294, 295 (Dist. Ct. App. 1937) (existence of jurisdiction held always to be a proper subject of inquiry in connection with any foreign-country judgment of a foreign court offered for recognition in a United States court).

The British judicial system, as a system of jurisprudence likely to be an impartial administrator of justice, closely parallels our own, and therefore, its judgments have generally been held in high esteem by United States courts. *See, e.g.*, British Midland Airways, Ltd. v. International Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974) (British judgment upheld on the grounds that the British judicial system is closely related to the judicial system of the United States); *Hunt*, 492 F. Supp. at 894 (British court's assertion of jurisdiction upheld); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), (English procedure held to comport with United States' standards of due process), *cert. denied*, 405 U.S. 1017 (1972).

34. Hilton v. Guyot, 159 U.S. 113, 202, 205 (1895).

35. *Id.* at 202.

36. *Id.* at 202, 206.

37. *See, e.g.*, Sangiovanni Hernandez v. Dominicana de Aviacion, C. Por A., 556 F.2d 611, 614 (1st Cir. 1977) (a strong public policy to protect the interests of minors in tort actions precluded giving conclusive effect to a Dominican Republic tort judgment involving a minor); Rosenbaum v. Rosenbaum, 309 N.Y. 371, 374-76, 130 N.E.2d 902, 903-04 (1955) (as a matter of public policy a Mexican divorce decree could not be recognized); *see also* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 1, para. 2, 13 U.L.A. 263 (1986) (a recognizable foreign-country judgment does not include "a judgment for support in matrimonial or family matters").

38. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413-14 (1963) (it is a well established principle in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states); Her Majesty v. Gilbertson, 597 F.2d 1161, 1164-65 (9th Cir. 1971) (recognition of the penal or tax judgments of a foreign nation, which furthers the governmental interests of that nation, is beyond the competence of a United States domestic court); *see also* UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 1, para. 2, 13 U.L.A. 263 (1986) (a recognizable foreign-country judgment does not include a "judgment for taxes" or a "fine or penalty").

39. *See, e.g.*, *Hilton* 159 U.S. at 210 (rule of reciprocity requires that a foreign coun-

seems to favor the opposite view.[40]

While the Constitution's full faith and credit clause is not directly applicable to the recognition of foreign-country judgments, the clause has influenced the development of foreign-country judgement recognition practice in the United States,[41] sometimes confusing rather than clarifying the problem.[42] Even so, the policies underlying full faith and credit and foreign-country judgment recognition practice are analo-

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try give the same conclusive effect to a comparable United States judgment if the United States is to recognize the foreign judgment); Royal Bank of Canada v. Trentham Corp., 665 F.2d 515, 516 (5th Cir. 1981) (Texas law prior to Uniform Foreign Country Money-Judgment Act held to require reciprocity as a precondition to recognition and enforcement of judgment entered in a foreign country); *Gilbertson*, 597 F.2d at 1165-66 ("[W]hile reciprocity may no longer be a requirement, it certainly remains a factor which may be considered in deciding whether to recognize a foreign country's judgment for taxes."); Kohn v. American Metal Climax, Inc., 332 F. Supp. 1331, 1351 (E.D. Pa. 1970) (reciprocity considered as a factor in determining whether or not to recognize a Zambian decree), *aff'd*, 458 F.2d 255 (3d Cir.), *cert. denied*,, 409 U.S 874 (1972).

40. For cases rejecting the reciprocity rule, see, *e.g.*, Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885, 898-99 (N.D. Tex. 1980) (allowed recognition of British judgment even though in England similar American judgment would not be recognized because American courts since *Hilton* have decisively moved away from a reciprocity requirement as a condition to recognition); Fairchild, Arabatzis & Smith Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 615 n.4 (S.D.N.Y. 1979) (pointing out that the New York Court of Appeals in Johnston v. Compagnie Generale Transatlantique, 242 N.Y. 381, 151 N.E. 121 (1926), rejected reciprocity as a condition precedent to the exercise of comity); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009, 1013-14 (E.D. Ark. 1973) (under Arkansas law, reciprocity is not imposed as a condition to giving conclusive effect to judgment of a foreign nation); Bank of Montreal v. Kough, 612 F.2d 467, 471 (9th Cir. 1980) (pointing out that the draftsmen of the Uniform Foreign Money-Judgment Act "consciously rejected reciprocity as a factor . . . in recognition of foreign money judgments . . . ."); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971) (British judgment recognized despite lack of reciprocity), *cert. denied*, 405 U.S. 1017 (1972). Commentators also see the trend as moving away from the requirement of reciprocity. *See, e.g.*, Von Mehren & Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & POL'Y IN INT'L BUS. 37, 46 (1974) (American decisions since *Hilton* have moved "decisively away from the requirement of reciprocity as a condition of recognition."); Comment, *The Reciprocity Rule and Enforcement of Foreign Judgments*, 16 COLUM. J. TRANSNAT'L L. 327, 343 (1977) (rejection of reciprocity seems to be the prevailing judicial sentiment).

41. *See, e.g.*, Scott v. Scott, 5 Cal. 2d 249, 251, 331 P.2d 641, 643 (1958) (Mexican separate maintenance decree treated like a Nevada judgment entitled to full faith and credit); Compagnie du Port de Rio de Janero v. Mead Morrison Mfg. Co., 19 F.2d 163, 166 (D. Me. 1927) (while recognition of foreign-country judgments on the basis of comity is a matter of discretion, the full faith and credit clause affirmatively establishes it between the states).

42. *See, e.g.*, Atlantic Ship Supply, Inc. v. M/V Lucy, 392 F. Supp. 179, 183 (M.D. Fla. 1975) (the court not only recognized a Costa Rican decree on the basis of comity, but also erroneously gave it full faith and credit, which is constitutionally reserved for domestic adjudications), *aff'd*, 553 F.2d 1009 (5th Cir. 1977).

gous.[43] These policy bases are: (1) the promotion of finality, or repose, and judicial economy;[44] (2) the encouragement of the initial selection of the most appropriate forum for litigation;[45] (3) the promotion of fairness to litigants consistent with their legitimate expectations;[46] (4) the fostering of a desirable working order between different judicial systems;[47] and (5) the promotion of the recognition of domestic judgments in other jurisdictions.[48]

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43. Peterson, *Res Judicata and Foreign Country Judgments,* 24 OHIO ST. L.J. 291, 305-06 (1963) [hereinafter Peterson, *Res Judicata*]. *Contra* Smit, *International Res Judicata and Collateral Estoppel in the United States,* 9 UCLA L. REV. 44, 45-46 (1962) [hereinafter Smit, *International Res Judicata*]. Not only did Professor Smit consider full faith and credit to be inapplicable to the recognition of foreign-country judgments—a view with which this and all other commentators on this subject have no quarrel—but he also dismissed, with very little analysis, any analogy between the policies underlying full faith and credit and those supporting foreign-country judgment recognition practice. *Id.* at 45-46. He arrived at his conclusion largely because of his belief that all intersystem recognition practice is founded upon the single policy basis of res judicata. *Id.* at 56. Inasmuch as a foreign-country judgment will have been rendered under a judicial system significantly different from our own—this is especially true when the judgment is the product of a civil law system—Professor Smit concluded that the doctrine of res judicata was significantly weaker in its application to foreign-country judgments than it was to domestic ones. *Id.* at 62. Therefore, it only logically followed that Professor Smit should find that full faith and credit at the domestic level—where a desire for repose is stronger—has no relationship to recognition practice at the international level.

44. See Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?,* 70 IOWA L. REV. 53, 61 (1965) [hereinafter Casad, *Issue Preclusion*]; Peterson, *Res Judicata, supra* note 43, at 306-07; Von Mehren & Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach,* 81 HARV. L. REV. 1601, 1602-03 (1968) [hereinafter Von Mehren & Trautman, *Survey and Approach*]. These are the policies underlying res judicata doctrine. *See* Allen v. McCurry, 449 U.S. 90, 96 (1980); Semler v. Psychiatric Inst. Inc., 575 F.2d 922, 927 (D.C. Cir. 1978); Southwest Airlines Co. v. Texas Int'l Airlines, 546 F.2d 84, 94 (5th Cir.), *cert. denied,* 434 U.S. 832 (1977).

45. Casad, *Issue Preclusion, supra* note 44, at 61; Von Mehren & Trautman, *Survey and Approach, supra* note 44, at 1604. This policy concern seems closely related to those of judicial economy and procedural fairness, as well as respect for the integrity of other judicial systems.

46. Casad, *Issue Preclusion, supra* note 44, at 61; Von Mehren & Trautman, *Survey and Approach, supra* note 44, at 1603-04.

47. Casad, *Issue Preclusion, supra* note 44, at 61; Peterson, *Res Judicata, supra* note 43, at 305-06; Von Mehren & Trautman, *Survey and Approach, supra* note 44, at 1604. In domestic recognition practice, governed by full faith and credit, this policy concern would be directed toward fostering state and federal intersystem harmony and national unity. *See* Smit, *International Res Judicata, supra* note 43, at 46. In foreign-country-recognition practice, this policy concern would be directed toward fostering greater international order in intersystem judgment recognition and preclusion practice. *See* Casad, *Issue Preclusion, supra* note 44, at 61; Peterson, *Res Judicata, supra* note 43, at 305-06; Von Mehren & Trautman, *Survey and Approach, supra* note 44, at 1604.

48. Casad, *Issue Preclusion, supra* note 44, at 61; Peterson, *Res Judicata, supra* note 43, at 306-07. This policy concern seems closely related to that of fostering greater order in intersystem judgment recognition and preclusion practice. While the full faith and

III. The Preclusive Effect of Foreign-Country Judgments and Federal Choice-of-Law

A. *Intersystem Preclusion as a Choice-of-Law Problem*

The preclusive effects of prior adjudications are referred to collectively as the doctrine of res judicata.[49] This doctrine is divisible into two types of effects: claim preclusion and issue preclusion.[50] Claim preclusion refers to the effect of a judgment in foreclosing relitigation of a claim,[51] and may also foreclose litigation of a matter that was never raised, but which could have been advanced in the prior proceeding.[52] Claim preclusion treats a judgment as the full measure of relief to be accorded the same parties, or their privies, on a single claim.[53] A judgment in the plaintiff's favor merges his claim,[54] and a judgment for the defendant bars further suits on the claim.[55] Issue preclusion or, as it is often called, collateral estoppel,[56] is the common-law rule that a final

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credit clause mandates this policy at the domestic level, comity justifies it at the international level.

49. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984); Semler v. Psychiatric Inst., Inc., 575 F.2d 922, 927 & n.29 (D.C. Cir. 1978); Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594, 596 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977).

50. *See supra* note 49. This terminology has recently been adopted by the United States Supreme Court. *See Migra*, 465 U.S. at 77 n.1 (utilizing the view of the Restatement (Second) of Judgments (1982)). The writings of the late Professor Vestal popularized the use of this terminology. *See, e.g.*, Vestal, *Rationale of Preclusion*, 9 St. Louis U.L.J. 29, 29-30 (1964) [hereinafter Vestal, *Rationale*].

51. The phrase "cause of action" is used interchangeably with the term "claim." *See, e.g., Migra*, 465 U.S. at 86; Nevada v. United States, 463 U.S. 110, 130 (1983).

52. *See Migra*, 465 U.S. at 77 n.1 ("Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit."); Federated Dep't Stores Inc. v. Moite, 452 U.S. 394, 396 (1981) ("A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.").

53. Montana v. United States, 440 U.S. 147, 153 (1979) (quoting Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897)).

54. Jones v. City of Alton, 757 F.2d 878, 879 n.1 (7th Cir. 1985); Semler v. Psychiatric Inst., Inc., 575 F.2d 922, 927 (D.C. Cir. 1978).

55. *Jones*, 757 F.2d at 879 n.1; *Semler*, 575 F.2d at 927 (D.C. Cir. 1978); Moch v. East Baton Rouge Parish School Bd., 548 F.2d 594, 596 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977).

56. *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 158 (1984); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979). The phrases "estoppel by judgment," "judicial estoppel," and "estoppel by verdict" are also used. *See, e.g.*, Nevada v. United States, 463 U.S. 110, 128 (1983) (using the phrase "estoppel by judgment"); Cauefield v. Fidelity & Casualty Co., 247 F. Supp. 851, 855-56 (E.D. La. 1965) (using the phrase "judicial estoppel"), *aff'd*, 378 F.2d 876 (5th Cir.) *cert. denied*, 389 U.S. 1009 (1967); Redfern v. Sullivan, 111 Ill. App. 3d 372, 375, 444 N.E.2d 205, 208 (1982) (using the phrase "estoppel by verdict").

judgment[57] forecloses relitigation of a particular issue of fact or law, by parties to the prior suit, or their privies, that has been actually raised, litigated, and was necessary to the prior judgment.[58]

Federal courts generally regard the preclusive effect of federal-question judgments to be a matter of federal law.[59] Moreover, most federal circuits have also held the preclusive effect of federal-diversity judgments to be a question of federal law.[60] Thus, as a matter of federal common law, the federal courts have developed their own preclusion rules, performing a function similar to that filled by state courts or the courts of foreign countries. In this sense, the federal courts are administering the *intramural*[61] law of their own judicial system. When federal courts consider the preclusive effect of foreign-country judgments, they become part of an intersystem judicial process, wherein a choice-of-preclusion law is required. The court must determine whether the res judicata law of the rendering foreign judicial system or that of some other judicial system—such as the federal system or the judicial system of the state in which the federal court is sitting—should govern the judgment's preclusive effect.

If the preclusion laws of every state of the United States and every foreign nation were identical to the preclusion law of the federal courts, choice-of-preclusion law questions would be moot.[62] In this regard, however, there is no consistency among the various United States

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57. For the definition of "finality," see *supra* note 30.

58. *Mendoza,* 464 U.S. at 158 (1984); Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 323-24 (1971) (quoting Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942)); *Semler,* 575 F.2d at 927 n.29.

59. *See Blonder-Tongue,* 402 U.S. at 324 n.12; Heiser v. Woodruff, 327 U.S. 726, 733 (1946).

60. *See, e.g.,* Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1496-97 (D.C. Cir. 1983) (as an independent judicial system, the federal courts must have the power to determine the scope of its judgments); Aerojet-General Corp. v. Askew, 511 F.2d 710, 716 (5th Cir. 1975) (federal diversity judgment treated like a federal question judgment when choosing which preclusion law applies); Williams v. Ocean Transp. Lines, Inc., 425 F.2d 1183, 1189 (3d Cir. 1970) (substantial federal interest in precluding a multiplicity of related claims justifies the use of federal preclusion law); Kern v. Hettinger, 303 F.2d 333, 340 (2d Cir. 1962) (applying state preclusion law would be destructive to important federal procedural interests). *But see* Gasbarra v. Park-Ohio Indus., 655 F.2d 119, 122 (7th Cir. 1981) (compelled by *Erie* to apply state preclusion law to federal diversity judgments); Murphy v. Landsburg, 490 F.2d 319, 322 n.4 (3d Cir. 1973) (in federal diversity cases, state preclusion law applies), *cert. denied,* 416 U.S. 939 (1974).

61. The term "intramural" refers to legal questions arising within a single judicial system. RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 2 (1982); Casad, *Intersystem, supra* note 1, at 511.

62. Choice-of-law questions become relevant only when legal issues arise that have a significant relationship to more than one judicial system, each system having different substantive or procedural rules. *See* W. REESE & M. ROSENBERG, CASES & MATERIALS ON CONFLICT OF LAWS, ch. 1 at 1-3 (8th ed. 1984); D. VERNON, CONFLICT OF LAWS; CASES, PROBLEMS AND ESSAYS, § 1.01 (1973).

and foreign-country jurisdictions.

In the area of claim preclusion, many federal courts have expanded the scope of its applicability by adopting the Second Restatement of Judgments' expansive definition of what constitutes a single claim.[63] Additionally, in the area of issue preclusion, the federal courts have abandoned the mutuality requirement.[64] The doctrine of mutuality states that a party cannot take advantage of the issue-preclusive effect of a prior adjudication unless he would have been bound by it had it been an adverse decision.[65] In the federal courts, a stranger to a prior proceeding may use issue preclusion against those who were parties, or their privies, whenever it appears, from the circumstances of the case, that this would be fair to permit it.[66] Most domestic state judicial systems have joined the federal courts in expanding the scope of claim and issue preclusion.[67] Some states, however, still adhere to a

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63. *See, e.g.,* Manego v. Orleans Bd. of Trade, 773 F.2d 1, 5 (1st Cir. 1985), *cert. denied,* 475 U.S. 1084 (1986); United Home Rentals, Inc. v. Texas Real Estate Comm'n., 716 F.2d 324, 328 & n.9 (5th Cir. 1983), *cert. denied,* 466 U.S. 928 (1984); Container Transp. Int'l, Inc. v. United States, 468 F.2d 926, 928-29 (Ct. Cl. 1972); *see also* Nevada v. United States, 463 U.S. 110, 130-31 n.12 (1983) (citing the RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) approach as more pragmatic than that of the RESTATEMENT OF JUDGMENTS).

The RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) defines the dimensions of a claim in terms of all the rights and remedies connected to the transaction out of which the action arose. The scope of the transaction itself is to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, and whether it would be convenient for trial, or expected by the parties, that the facts be treated as part of a single transaction.

64. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-33 (1979) (abandons mutuality doctrine in favor of a "full and fair opportunity to litigate" approach); Blonder-Tongue Laboratories v. Univ. of Ill. Found., 402 U.S. 313, 322-27 (1971) (notes trend of federal courts to limit mutuality doctrine; overrules doctrine only in specific patent cases).

65. For a discussion of the doctrine of mutuality, see *Parklane,* 439 U.S. at 326-27; *Blonder-Tongue,* 402 U.S. at 320-21.

66. *See Parklane,* 439 U.S. at 330-31. Strangers to the prior adjudication may employ issue preclusion defensively or offensively in federal court. When a plaintiff seeks the benefit of preclusion, it is used offensively; when a defendant seeks its protection preclusion, is used defensively. United States v. Mendoza, 464 U.S. 154, 159 n.4 (1984). It remains true, however, that genuine strangers to the prior proceeding cannot be bound by it. *See Parklane,* 439 U.S. at 327 n.7 ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

67. For cases employing the RESTATEMENT (SECOND) OF JUDGMENTS transactional definition of a claim for preclusion purposes, see Beegan v. Schmidt, 451 A.2d 642, 645 (Me. 1982); Hughes v. Salo, 203 Mont. 52, 659 P.2d 270, 275 (1983); Duquesne Slag Prod. Co. v. Lench, 490 Pa. 102, 198, 415 A.2d 53, 56 (1980). For cases abandoning the mutuality requirement for employing issue preclusion, see Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892, 895 (1942); Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959-60 (1969); Lucas v. Velikanje, 2 Wash.

narrower definition of what constitutes a single claim,[68] while others still require the presence of mutuality before a party may take advantage of issue preclusion.[69] Moreover, in the international sphere, the nations outside of the Anglo-American common-law tradition have extremely limited preclusion law.[70] This fact has been largely attributed to the different social imperatives of most of the civil law nations' judicial systems.[71]

Thus, when a federal court is presented with a foreign-country judgment to be recognized and given some degree of preclusive effect, it is often faced with a choice among differing federal, state, and foreign preclusion rules, each vying for acceptance. The law ultimately applied will depend upon whether the court applies federal or state choice-of-law rules in making that determination.

App. 2d 888, 894, 471 P.2d 103, 107 (1970).

68. A minority of states permit accident victims to split, into separate suits, what would, in the federal courts and most states, be considered a single claim for property damage and personal injury. *See, e.g.*, Holmes v. David H. Bricker, Inc., 70 Cal. 2d 786, 789, 452 P.2d 647, 649, 76 Cal. Rptr. 431, 433 (1969) (causes of action for injuries to person and property are separate and are recognized as such by California procedural rules); Stephan v. Yellow Cab Co., 30 Ill. App. 3d 996, 998-99, 333 N.E.2d 223, 223-25 (1975) (property damage and personal injury are two distinct wrongs which create two separate causes of action); Humble Oil & Ref. Co. v. Church, 100 N.J. Super. 495, 500, 242 A.2d 652, 654 (1968) (property damage claim, personal injury claim, and claim for contribution constitute separate claims for relief even though they arise from one tortious act); Reilly v. Sicilian Asphalt Paving Co., 170 N.Y. 40, 43-45, 62 N.E. 772, 773-74 (1902) (following the common law view that claims for personal injuries and property damage are distinct).

69. A minority of states still adhere to the mutuality doctrine, whereby a party against whom issue preclusion cannot be asserted, cannot assert it himself. *See, e.g.*, Daigneau v. National Cash Register Co., 247 So. 2d 465, 466 (Fla. Dist. Ct. App. 1971); Lukacs v. Kluessner, 154 Ind. App. 452, 290 N.E.2d 125 (1972); Howell v. Vito's Trucking & Excavating Co., 386 Mich. 37, 191 N.W.2d 313 (1971); Armstrong v. Miller, 200 N.W.2d 282 (N.D. 1972).

70. For a survey of the preclusion law of several foreign countries, see Casad, *Issue Preclusion, supra* note 44, at 62-70. Establishing the law of a foreign country is a fundamental problem. For a general survey of the issues and procedures involved, see Schmertz, *Modern Procedural Framework for Establishing the Law of a Foreign Country*, 28 PRAC. LAW. 63 (1982); Sprankling and Lanyl, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT. L. 3 (1983). Under FED. R. CIV. P. 44.1, a party who intends to raise an issue of foreign-country law must give reasonable notice to his adversary and to the court. In determining the content of a foreign country's law, the court may consider all relevant evidence, whether or not it is submitted by the parties or is admissible under the FEDERAL RULES OF EVIDENCE. For an in-depth analysis of the federal system's approach under 13 FED. R. CIV. P. 44.1, see Sass, *Foreign Law in Federal Courts*, 29 AMER. J. COMP. L. 97 (1981).

71. *See* Von Mehren & Trautman, *Survey and Approach, supra* note 44, at 1604, 1675.

B. *The Erie Doctrine and Choice-of-Preclusion Law: The Present Status of the Law*

When a party presents a foreign-country judgment to a federal court to be recognized and given preclusive effect, the issue before the court is whether state or federal choice-of-law rules govern that case.

When the jurisdiction of the recognizing federal forum is predicated upon a federal question, it is well settled that federal intramural law governs the choice-of-preclusion law issue.[72]

If the jurisdiction of the recognizing federal forum is based upon diversity of citizenship, the question arises whether the rights of the parties are governed by state law, including state conflict-of-laws rules, pursuant to *Erie Railroad Co. v. Tompkins*[73] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[74] or whether they are governed by federal common law, including *Hilton v. Guyot*.[75] Suits involving foreign nations or nationals and foreign-country judgments necessarily involve the relations between the United States government and foreign governments, and for that reason, it has been suggested that the recognition of foreign-country judgements should be governed by a single uniform rule.[76]

While it can be argued that a general rule of federal law should govern foreign-country judgments, it appears that federal-diversity courts have universally concluded that *Erie* and *Klaxon* govern the recognition of foreign-country judgments, and therefore, state choice-of-preclusion law rules should be applied.[77] Thus, with each state free to formulate its own choice-of-preclusion law rules, and federal-diversity courts seemingly bound to apply them when recognizing a foreign-country judgment, United States Supreme Court decisions in this area have had little precedential value.[78]

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72. *See, e.g.*, Kohn v. American Metal Climax, Inc., 458 F.2d 255, 269-70 (3d Cir. 1972), *cert. denied*, 409 U.S. 874 (1973); Overseas Motors, Inc. v. Import Motors, Inc., 375 F. Supp. 499, 511 (D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

73. 304 U.S. 64 (1938). For a discussion of the *Erie* doctrine, see *infra* notes 85-113 and accompanying text.

74. 313 U.S. 487 (1941) (in an action in a Delaware federal court for breach of a New York contract, the applicability of New York statute is a question of conflict-of-laws, that must be determined with reference to Delaware law). For a discussion of *Klaxon*, see *infra* notes 90-92, 94 and accompanying text.

75. 159 U.S. 113 (1895) (a foreign judgment rendered in a court having jurisdiction is prima facie evidence only, and not conclusive on the merits of the claim).

76. For authorities suggesting that a single uniform rule should be applied, see *supra* note 9 and accompanying text.

77. For cases holding that state law must be applied, see *supra* note 10 and accompanying text.

78. *See* Ginsburg, *Recognition*, *supra* note 20, at 724 (under the prevailing view that federal courts must apply the law of the state in which they sit in determining the effect

In applying local rules of claim and issue preclusion—as directed by state choice-of-law rules—some courts in the United States have given foreign-country judgments a broader effect than they would have been given in the forum which rendered them.[79] Most courts in this country, however, have looked—in accordance with state choice-of-law rules—to the more limited preclusion law of the rendering foreign forum.[80] Thus, the national uniformity essential to an increased ordering in the recognition of foreign-country judgments within this country, as well as important federal interests in a uniform administration of preclusion law within its own judicial system,[81] has given way to local autonomy and intra-state uniformity. This result is due to federal-diversity courts misapplying the *Erie* doctrine in this area of the law.

In criticizing the approach taken by federal-diversity courts on this issue,[82] commentators have traditionally focused on the constitutional preeminence of the federal government in foreign relations as creating an exception to the application of the *Erie* doctrine to the recognition of foreign-country judgments.[83] Instead, the focus of atten-

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to be given a foreign-country judgment, the Supreme Court's ruling in *Hilton* has scant precedential value, even for the federal judiciary).

79. *See, e.g.*, Fairchild, Arabatzis & Smith, Inc. v. Prometco (Produce & Metals) Co., 470 F. Supp. 610, 614-16 (S.D.N.Y. 1979) (employing New York law to determine the preclusive effect of a British judgment when the preclusive effect of the judgment would have been the same under the laws of either forum); Feuchter v. Bazurto, 22 Ariz. App. 427, 427-29, 528 P.2d 178, 179-80 (1974) (Arizona preclusion law applied to a Mexican judgment because it is accorded the same respect as a sister state judgment); Succession of Fitzgerald, 192 La. 726, 189 So. 116, 117-18 (La. 1939) (relying on the Louisiana Civil Code to give a Nicaraguan judgment the same preclusive effect as a state judgment would be given); Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 275-77, 265 N.E.2d 739, 742-44, 317 N.Y.S.2d 315, 318-20 (1970) (employing New York preclusion law presumptively when the law of the foreign country was not shown to be different from that of the state nor raised as an issue by the parties).

80. *See, e.g., In re* Cleland's Estate, 119 Cal. App. 2d 18, 258 P.2d 1097, 1098 (1953) (final judgment of a foreign country having jurisdiction shall have the same effect in California as it would be given in the country which rendered it); Bata v. Bata, 39 Del. Ch. 258, 261-64, 163 A.2d 493, 504-11 (1960) (Swiss and Dutch judgments not given issue preclusive effect because the courts of these countries do not recognize issue preclusion doctrine), *cert. denied*, 366 U.S. 964 (1961); Cannistraro v. Cannistraro, 352 Mass. 65, 71, 223 N.E.2d 692, 695 (1967) (Italian decree is to be given no more preclusive effect by Massachusetts courts than it would be given by Italian courts); Schoenbrod v. Siegler, 20 N.Y.2d 403, 409, 230 N.E.2d 638, 644, 283 N.Y.S.2d 881, 885 (1967) (Mexican decree not given preclusive effect because Mexican courts would not bar the plaintiff from collaterally attacking it).

81. For a discussion of the federal judicial system's interest in greater uniformity in foreign-country judgment recognition practice and the administration of its preclusion law, see *infra* notes 131-39 and accompanying text.

82. For authorities critical of this approach, and suggesting instead that a uniform rule be applied, see *supra* note 9 and accompanying text.

83. For authorities utilizing this approach, see *supra* note 9 and accompanying text.

tion should be on the general inapplicability of the *Erie* doctrine to a federal-diversity court's choice of law when it recognizes a foreign-country judgment and gives it some degree of preclusive effect. In this situation, a federal-diversity court's choice-of-preclusion law is beyond the scope of the *Erie* doctrine. This is demonstrated by an analysis of the doctrine itself, and an examination—within the context of foreign-country judgment recognition—of the policies underlying both it and preclusion doctrine.[84]

C. *The Scope of the Erie Doctrine*

In *Erie Railroad Co. v. Tompkins*,[85] the United States Supreme Court held that the Rules of Decision Act[86] requires federal courts—except in matters governed by federal constitutional, statutory, or treaty law—to apply the law of the state in which they are sitting.[87] Whether the state law to be applied was of legislative or judi-

84. *See* Hanna v. Plumer, 380 U.S. 460 (1965) (choices between state and federal law are to be made with reference to the policies underlying the *Erie* doctrine).

85. 304 U.S. 64 (1938). The case involved a suit in tort for negligence brought in a New York federal court by a Pennsylvania citizen against a New York corporation. *Id.* at 69. The issue ultimately addressed by the Court was whether the duty of care owed to the plaintiff by the defendant railroad was governed by Pennsylvania common law or federal general common law. *Id.* at 70-71. The Court held that Pennsylvania common law was controlling. *Id.* at 80.

86. 28 U.S.C. § 1652 (1982). For the text of the statute, see *supra* note 4.

87. *Erie*, 304 U.S. at 78. The Court in *Erie* expressly overruled Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), which held that the Rules of Decision Act did not require federal-diversity courts to follow state judicial decisions—as distinguished from legislative enactments—in the area of commercial law. *Swift*, 41 U.S. at 19. In such cases, the Court held, state common law was not part of the "laws of several states" to be regarded as rules of decision by United States courts. *Id.* at 17-18.

The *Swift* doctrine engendered two major criticisms. First, by giving federal courts the power to create their own general common law, the *Swift* doctrine encouraged forum shopping, especially by corporate litigants. *Erie*, 304 U.S. at 74-77. Second, and most important, was the federalism concern that the *Swift* doctrine had eroded the states' legitimate authority to regulate their own affairs through a uniform exercise of their substantive law. *Id.* at 78-79. There were forceful arguments made in Supreme Court dissents prior to *Erie* that federal-diversity courts acting pursuant to the *Swift* doctrine had usurped state lawmaking authority. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532-36 (1928) (Holmes, J., dissenting). For a survey of other attacks on the *Swift* doctrine by Supreme Court dissenters, see Shreve, *From Swift to Erie: An Historical Perspective*, 82 MICH. L. REV. 869, 875 n.41 (1984).

The *Swift* doctrine still has its champions, however, who feel it would have led to state-federal intersystem uniformity by promoting the development of a single national general common law which would displace that of the individual states. *See, e.g.*, Keefe, *In Praise of Justice Story: Swift v. Tyson and "The" True National Common Law*, 18 AMER. U.L. REV. 316 (1969); Note, *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1969).

cial origin was irrelevant to its applicability.[88] The Court declared that "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."[89] This prohibition was extended into the area of conflict-of-laws in the much-criticized[90] case of *Klaxon Co. v. Stentor Electric Manufacturing Co.*[91] In *Klaxon,* the Supreme Court held that the choice-of-law rules applied by a federal-diversity court must conform to those prevailing in the state courts of the state in which it is sitting.[92]

The choice between state and federal common law in *Erie* involved competing standards of duty in tort law.[93] In *Klaxon,* the federal court's choice of law involved two competing state standards of con-

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88. *Erie,* 304 U.S. at 78.

89. *Id.* at 78. On the same day the court purported to extinguish "federal general common law," it employed "federal common law" to a controversy between two states over rights to a river. In Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), the Court held that the apportionment of the water of an interstate stream between two states is a federal question, and therefore, a matter of " 'federal' common law upon which neither the statutes nor the decisions of either State can be conclusive." *Id.* at 110. Thus, *Erie* notwithstanding, there still exists a body of federal common law governing interstate conflicts which is binding upon state and federal courts. *See* Friendly, *In Praise of Erie—and of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 405, 407 (1964).

90. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). *Klaxon* has generally been criticized for two principal reasons. First, by making a federal-diversity court's choice-of-law contingent upon the conflict-of-laws rules of the state in which it is sitting, *Klaxon* encourages forum shopping by plaintiffs. C. WRIGHT, LAW OF FEDERAL COURTS § 57 at 369 & nn.24-25 (4th ed. 1983). Second, since the federal judiciary has no interest in which state's law is applied, it is in the best position to formulate a more rational and uniform body of conflict-of-laws rules. *Id.*

91. 313 U.S. 487 (1941). The case involved a suit for breach of contract brought in a Delaware federal court by a New York corporation against a Delaware corporation. *Id.* at 494. The issue addressed by the Court was whether Delaware or federal conflict-of-laws rules governed the question of whether the measure of contract damages was to be determined with reference to New York or Deleware law. *Id.* at 495-96. Relying upon its decision in *Erie,* the Court held that Delaware law controlled the federal-diversity court's choice-of-law. *Id.* at 496.

92. *Id.* at 496. The Court disposed of this difficult question in a single paragraph, in which it gave as its sole reason for so holding, that "[a]ny other ruling would do violence to the principle of uniformity within a state upon which the [*Erie*] decision was based." *Id.*

It is the purpose of this Note to suggest why federal-diversity courts may determine the preclusive effect of foreign-country judgments without referring to state choice-of-law rules, and without doing violence to the principle of uniformity. For discussion of this principle within the context of foreign-country judgment recognition and choice-of-preclusion law, see *infra* notes 143-44 and accompanying text.

93. *Erie,* 304 U.S. at 69-70.

tract damages.[94] In both cases, the underlying subject matter was what is commonly understood to be a matter of *substantive* law.[95] Similarly, virtually all of the cases that composed the doctrine of *Swift v. Tyson*,[96] which *Erie* expressly overruled,[97] involved issues of substantive law.[98] Moreover, it was substantive law that was most directly and obviously contemplated by the term "rules of decision" in the Rules of Decision Act, which *Erie* reinterpreted.[99]

The fundamental problem addressed by *Erie* was the disequilibrium that was created in our system of federalism by the *Swift* doctrine's interference with state substantive law.[100] By permitting fed-

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94. *Klaxon*, 313 U.S. at 494-96.

95. Traditionally, courts have drawn a distinction between laws which are substantive in character and those which are procedural in character. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945); Hanna v. Plumer, 380 U.S. 460, 465-66 (1965); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 10-11 (1941) (discovery rules are procedural, not substantive); Nordmeyer v. Sanzone, 315 F.2d 780, 782 (6th Cir. 1963) (the award of damages for delay upon the affirmance of a money judgment is a procedural matter, not a substantive one); Frito-Lay Inc. v. Wapco Constructors, Inc., 520 F. Supp. 186, 190 (M.D. La. 1981) (procedural matters established by statute may be presumed to have retroactive effect, while substantive matters are presumed only to have prospective effect).

Substantive law is that body of rules which creates, defines, and regulates the legal rights, duties, and obligations which form the basis of claims which people make upon one another and recognize as valid. *Frito-Lay*, 520 F. Supp. at 190 (quoting Manuel v. Carolina Casualty Ins. Co., 136 So. 2d 275, 277 (La. Ct. App. 1961)); United States v. Oliveira, 489 F. Supp. 981, 982 (D.S.D. 1980) (quoting Bagsarian v. Parker Metal Co., 282 F. Supp. 766, 769 (N.D. Ohio 1968); *see also* Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, 85 YALE L.J. 678, 696 (1976).

Procedural law is that body of rules which directs the course of legal proceedings, prescribes methods of enforcement of substantive rights, and generally structures and regulates the judicial process. *Nordmeyer*, 315 F.2d at 782 (quoting Kellman v. Stoltz, 1 F.R.D. 726, 728 (N.D. Iowa 1941)); *Frito-Lay*, 520 F. Supp. at 190 (quoting *Manuel*, 136 So. 2d at 277); *Oliveira*, 489 F. Supp. at 982 (quoting *Bagsarian*, 282 F. Supp. at 769); Note, *The Law Applied in Diversity Cases: The Rules of Decision Act and the Erie Doctrine*, at 678, 696.

96. 41 U.S. (16 Pet.) 1 (1842). For a discussion of the *Swift* doctrine, see *supra* note 87.

97. *See Erie*, 304 U.S. at 79-80.

98. *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (a federal diversity action where a contract was enforceable under federal general common law rules but unenforceable under Kentucky state common law); *see also Erie*, 304 U.S. at 75-76 & nn.11-19 (citing *Swift* doctrine cases and indicating the various provinces of state substantive law into which they intruded).

99. *See* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445-46 (1946) (rules of decision are those laws by which substantive rights are adjudicated); *see also Erie*, 304 U.S. at 78-80 (the Rules of Decision Act requires federal courts to apply all of a state's substantive law).

100. Hanna v. Plumer, 380 U.S. 460, 474-75 (1965) (Harlan, J., concurring); Guaranty Trust Co. v. York, 326 U.S. 99, 109-10 (1965); *see Erie*, 304 U.S. at 78-80.

eral-diversity courts to ignore state common law in favor of an independent body of federal general common law, the *Swift* doctrine had thwarted each state's power to formulate its own substantive policies,[101] and to have those policies effectuated through the uniform administration and enforcement of state-created rights and obligations in all courts sitting within the state.[102] The *Erie* decision was primarily a response to this problem.[103]

The effect of the *Erie* decision was to make all of a state's substantive rules—statutory and common law—binding upon federal-diversity courts sitting within the state, while leaving them free to employ federal law in matters of procedure, subject only to congressional action and regulation by higher federal courts.[104]

Although the *substance-versus-procedure* distinction can be misused,[105] it seems that the distinction has continued validity in *Erie* analysis. While in *Guaranty Trust Co. v. York*[106] the Supreme Court suggested that a state's law is binding upon a federal-diversity court whenever disregarding the state's law would significantly affect the outcome of the litigation,[107] the Court did not overrule prior cases which had employed the substance-versus-procedure criteria.[108] Furthermore, every procedural variation between state and federal law is likely to have a significant impact on the outcome of a case if it is tried

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101. *Erie*, 304 U.S. at 79. For a further discussion of the *Swift* doctrine, see *supra* note 87.

102. *Erie*, 304 U.S. at 75.

103. *See Guaranty Trust*, 326 U.S. at 109; Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

104. *Hanna*, 380 U.S. at 465; Kellman v. Stoltz, 1 F.R.D. 726, 727 (N.D. Iowa 1941). In *Erie*, Justice Brandeis asserted that Congress is powerless to declare "substantive rules of common law applicable in a state." *Erie*, 304 U.S. at 78. On the other hand, Justice Reed observed in his concurring opinion that "no one doubts federal power over procedure." *Id.* at 92.

105. This fact was made clear in *Guaranty Trust*. Writing for the Court, Justice Frankfurter stated that, " '[s]ubstance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." *Id.* at 108. As this language seems to suggest, the terms "substance" and "procedure" can be useful if an effort is made to properly identify the problem and its variables.

The Court then went on to hold that, because differences between state and federal statutes of limitation will substantially affect the outcome of cases brought in federal rather than state court, federal-diversity courts must apply the relevant state rule. *Id.* at 109.

106. 326 U.S. 99 (1945).

107. *Id.* at 109.

108. *See Hanna*, 380 U.S. at 464 (quoting with favor the substance-versus-procedure test employed by the Court in Sibbach v. Wilson & Co., 312 U.S. 1 (1941)). In *Sibbach*, the Court held that discovery rules are procedural, and therefore, the federal rules must prevail over conflicting state rules. *Sibbach*, 312 U.S. at 11-14.

in a federal rather than a state court.[109] When important federal procedural interests have been threatened in the past by competing state interests, the Supreme Court has, however, always vindicated the federal-diversity court's choice of the federal rule.[110]

While *Erie* and its progeny generally require federal-diversity courts to follow state rules—whether labeled substantive or procedural—where they will have a substantial impact upon the outcome of the litigation,[111] countervailing considerations of federal policy require, under certain circumstances, that federal-diversity courts disregard

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109. *Hanna*, 380 U.S. at 468; Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445-46 (1946). Assume, for example, that state and federal courts within a given state have different procedural requirements governing the adequacy of service of process on defendants. If a party brings an action and serves process on the defendant in a manner that complies with federal rules but not state rules, the outcome of the suit will depend upon whether the action is brought in federal or state court. *See Hanna*, 380 U.S. at 469.

110. *See, e.g., Hanna*, 380 U.S. at 469 (since the difference between the Massachusetts and federal rule governing the adequacy of service of process had little influence on plaintiff's choice of forum, a federal-diversity court should apply the federal rule, even though the difference between the two rules was outcome determinative); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958) (since the federal policy favoring jury decisions of disputed fact questions outweighs the *Erie* policy of uniform enforcement of state-created rights and obligations, federal law alone should govern the allocation of judge and jury functions in a federal-diversity case); *Mississippi Publishing Corp.*, 326 U.S. at 445-46 (the federal rule which permits service of process anywhere within a state is procedural, and therefore, not subject to state law limitations imposed by *Erie*); *Sibbach*, 312 U.S. at 10-11 (discovery rules are procedural, and therefore, *Erie* does not require a federal-diversity court to ignore federal discovery rules and apply state rules instead).

In Walker v. Armco Steel Corp., 446 U.S. 740 (1980), the Supreme Court was called upon to determine whether state law or the Federal Rules of Civil Procedure governed the commencement of actions in federal-diversity courts with respect to the tolling of state statutes of limitations. *Id.* at 741. Following its earlier decision in Ragan v. Merchant's Transfer & Warehouse Co., 337 U.S. 530 (1949)—a case factually indistinguishable from *Walker*—the Court held that, in federal diversity, the state rule of commencement controls the tolling of the applicable state statute of limitations. *Walker*, 446 U.S. at 752-53. *Walker* and *Ragan* do not represent a retreat by the Supreme Court from the defense of important federal procedural interests threatened by *Erie*. Rather, these are cases where the federal system's interest in having its commencement rule applied is weak, if not nonexistent, and the state's interest is very strong. *See id.* at 751-52. Since the federal commencement rule— FED. R. CIV. P. 3—governs the timing requirements of the other rules of the Federal Rules of Civil Procedure, but has no bearing on statutes of limitations, the purposes behind the federal commencement rule would not be thwarted by the application of the state commencement rule to the tolling of its own statute of limitations. *Id.* at 751. On the other hand, applying the federal rule in this situation would not advance any legitimate federal interest, but would frustrate an integral part of the state's strong substantive interests in its statute of limitations. *Id.*; *Ragan*, 337 U.S. at 534. Consequently, the Court found "no direct conflict between the federal rule and the state law." *Walker*, 446 U.S. at 752. Where federal interests are neither implicated nor threatened, *Erie* clearly compels the application of state law. *See id.* at 751-52.

111. *Byrd*, 356 U.S. at 536-37; *Guaranty Trust*, 326 U.S. at 109.

state rules.[112] When, for example, a federal-diversity court's choice between applying federal or state law implicates a strong federal policy interest and no countervailing state substantive interest, the court should not follow the state rule.[113]

D. *The Erie Doctrine and Federal Choice-of-Preclusion Law in the Foreign-Country Judgment Setting*

Whether preclusion doctrine and, consequently, choice-of-preclusion law, are matters of substance subject to the constraints of *Erie,* or are matters of procedure, has been greatly disputed among the federal circuits. Some federal courts have summarily held that preclusion doctrine is a matter of substantive law to which the *Erie* doctrine is applicable and which state law controls.[114] Other federal courts have questioned this conclusion, and after carefully analyzing the policy interests underlying both the *Erie* doctrine and preclusion doctrine, have reached different results.[115]

The Supreme Court has expressly disapproved of the use of labels such as "substantive" and "procedural" to characterize and quickly dispose of *Erie* doctrine issues.[116] Rather, it is the character of the policy interests underlying the choice between federal and state law, not

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112. *Byrd,* 356 U.S. at 537-38.

113. *Id.*

114. *See, e.g.,* Kuehn v. Garcia, 608 F.2d 1143, 1147 (8th Cir. 1979), *cert. denied,* 445 U.S. 943 (1980); Maher v. City of New Orleans, 516 F.2d 1051, 1056 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976); Ellis v. Ford Motor Co., 628 F. Supp. 849, 854 (D. Mass. 1986); Midcontinent Broadcasting Co. v. Dresser Indus., Inc., 486 F. Supp. 858, 860 n.1 (D.S.D. 1980). In each case, the courts relied directly upon either *Erie, Guaranty Trust,* or Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982), to support their contention that all preclusion rules are substantive, and therefore, pursuant to the *Erie* doctrine, a federal-diversity court must refer to state law when deciding preclusion doctrine issues. Neither *Erie* nor *Guaranty Trust* involved a preclusion-doctrine issue, nor did they suggest in *dicta* that the Rules of Decision Act, 28 U.S.C. § 1652 (1982), applied to such issues. Although *Kremer* did involve a domestic choice-of-preclusion-law issue, the Court found the full faith and credit statute, 28 U.S.C. § 1738 (1982), not the Rules of Decision Act, to be controlling. *Kremer,* 456 U.S. at 466-68.

115. *See, e.g.,* Answering Serv. Inc. v. Egan, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (*Erie* applies only when the underlying cause of action is state-created, and only to those aspects of preclusion law which can be characterized as substantive); *id.* at 1506-07 (Scalia, J., concurring) (the close nexus between federal preclusion doctrine and the Federal Rules of Civil Procedure places federal choice-of-preclusion law beyond the scope of *Erie);* Semler v. Psychiatric Inst., Inc., 575 F.2d 922, 927-28 (D.C. Cir. 1978) (*Erie* requires the application of state law to preclusion issues only in the absence of an overriding federal interest).

116. *See* Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1180 (3d Cir. 1972) (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 107-09 (1945), as disapproving of the use of labels in deciding *Erie* issues).

mere labels, that is dispositive of *Erie* doctrine issues.[117] Therefore, when a federal-diversity court must determine whether, and to what extent, a foreign-country judgment presented to it for recognition is to be given preclusive effect, merely characterizing the choice-of-preclusion law as either substantive or procedural cannot dispose of the question of whether *Erie* requires the court to apply the forum state's choice-of-law rules or those of the federal system.[118] Instead, a form of interest analysis[119] is required, whereby the policy concerns underlying the competing federal and state choice-of-preclusion-law rules are examined and weighed.[120] This, in turn, requires an exploration of the policy interests underlying federal and state preclusion law within the context of the recognition of foreign-country judgments.

When a federal-diversity court recognizes a foreign-country judgment and decides what body of preclusion law—foreign or domestic—is to be applied to the judgment, at least six federal policy concerns underlying that choice can be identified. Three are procedural in character and three are substantive in character.

The procedural policy interests underlying the federal court system's choice-of-preclusion law are the same procedural policy interests which underly its intramural preclusion law:[121] (1) the desire for repose

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117. Hanna v. Plumer, 380 U.S. 460, 467 (1965).

118. *See supra* notes 105, 116-17 and accompanying text.

119. Interest analysis is the technique of determining the true extent of conflict between the rules of two or more jurisdictions vying for acceptance through an examination of the policies underlying them. *See* Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 178 (1959) (when a legal issue implicates conflicting rules of law of two forums, the court should decide which forum's rule applies by determining what the policy interests underlying each rule are, and whether those interests are implicated by the facts of the case). For a more extensive discussion of interest analysis as a choice-of-law methodology, see B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963), and R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (3d ed. 1986).

The form of interest analysis this Note embraces involves balancing or weighing the competing federal and state policy interests implicated by a federal-diversity court's choice of law. This type of interest balancing was introduced into *Erie* doctrine analysis by the Supreme Court in Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958). *Byrd* involved a negligence suit brought in a federal-diversity court. *Id.* at 526-27. The issue addressed by the Court was whether federal or state law governed the question whether the defendant was entitled to a jury determination of the factual issues raised by one of his affirmative defenses. *Id.* at 528. After examining and balancing the federal policy favoring jury determinations of disputed factual issues against the state's interest in the uniform enforcement of rights and obligations it had created, the Court held that the federal policy should prevail.

120. *See Byrd*, 356 U.S. at 537-39 (advocating an analysis of the policy interests underlying the federal and state rules vying for acceptance).

121. *See* Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1507 (D.C. Cir. 1984) (Scalia, J., concurring) (the desire for repose, the conservation of judicial resources, and the prevention of the use of the courts as instruments of harassment pertain to judicial adminis-

sought from the formal resolution of controversies;[122] (2) the promotion of judicial efficiency and conservation of resources;[123] and (3) the concern that parties before the court be treated fairly.[124]

While all three of these procedural policy interests can also be identified in most state judicial systems in the United States,[125] at least one is of particularly strong concern in the federal system with respect to the preclusive effects given to foreign-country judgments. The federal system's broad preclusion doctrines help promote the conservation of severely taxed federal judicial resources.[126] A leading reason for the expansion of the scope of federal preclusion law is a growing aversion to spending resources to relitigate claims and issues.[127] Moreover, judi-

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tration and are classically procedural and the business of the forum court).

122. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 382 (1985); Nevada v. United States, 463 U.S. 110, 129-30 (1983); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 485 (1982); Semler v. Psychiatric Inst., Inc., 575 F.2d 922, 927 (D.C. Cir. 1978); Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977).

123. *See* Montana v. United States, 440 U.S. 147, 153-54 (1979); *Semler*, 575 F.2d at 927; *Southwest Airlines*, 546 F.2d at 94; *see also* Resnik, *Precluding Appeals*, 70 CORN. L. REV. 603, 611 (1985) ("Resource conservation is a familiar and persistent motif in the literature of the courts. Of late, as courts appear overused and underproductive, interest in economy has increased.").

124. *See Semler*, 575 F.2d at 927 (the doctrine of res judicata serves the policy purpose of protecting the party relying on the prior adjudication from vexatious litigation); *Southwest Airlines*, 546 F.2d at 94 (the doctrine of res judicata serves the policy purpose of protecting parties from harassment or coercion resulting from repetitious lawsuits); *see also* Parklane Hoisery Co. v. Shore, 439 U.S. 322, 330-31, 327 n.7 (1979) (a party should be able to use collateral estoppel—issue preclusion—offensively only when it would be procedurally fair).

125. *See, e.g.*, Reilly v. Reid, 45 N.Y.2d 24, 28, 379 N.E.2d 172, 175, 407 N.Y.S.2d 645, 647-48 (1978) (preclusion doctrine serves considerations of judicial economy and fairness to litigants); Exner v. Exner, 268 Pa. Super. 253, 257, 407 A.2d 1342, 1344 (1979) (preclusion doctrine serves to expedite the consideration of individual cases, establish certainty and finality of court judgments, and protect the party relying on the prior judgment from vexatious litigation). *But see* Sukut Constr., Inc. v. Cabot, Cabot & Forbes Land Trust, 95 Cal. App. 3d 527, 532, 157 Cal. Rpt. 289, 292 (Cal. Ct. App. 1979) (the primary purpose of preclusion doctrine is to lessen vexatious litigation and expense to parties); Brown v. Globe Tool & Eng'g Co., 337 So.2d 894, 899 (La. Ct. App. 1976) (in reaffirming the state's mutuality requirement, the court stated that judicial economy and crowded dockets alone cannot provide the basis for barring a party from relitigating issues decided in a prior judgment).

126. *See* Blonder-Tongue Laboratories, Inc. v. University of Illinois Found., 402 U.S. 313, 348-49 (1971) (the reduction of docket overcrowding in the federal courts is one effect of the elimination of the mutuality requirement for asserting issue preclusion); *see also* Federated Dep't Stores v. Moite, 452 U.S. 394, 401 (1981) (the Court noted that it found one of its 50-year-old preclusion doctrine precedents "even more compelling in view of today's crowded dockets"). For a discussion of docket overcrowding in the federal courts of appeals, see Carrington, *Crowded Dockets and the Courts of Appeals: Threat to the Function of Review and National Law*, 82 HARV. L. REV. 542 (1969).

127. For a discussion of the importance of resource conservation within the frame-

cial economy is particularly compelling in the federal system, where liberal claim and party joinder requirements under the Federal Rules of Civil Procedure[128] are intended to dispose of as many controversies as possible in a single adjudication.[129] Expansive federal preclusion doctrines complement the Rules and advance their objective by penalizing piecemeal litigation and encouraging the disposition of as many claims and issues as possible in the first instance.[130]

The federal judicial system also has three important substantive policy concerns in the preclusive effects given to foreign-country judgments. These concerns are: (1) the concern of every independent judicial system in maintaining its institutional identity and integrity, and in having litigation within its courts administered in an internally uniform and consistent manner;[131] (2) the promotion of greater international order in intersystem judgment recognition and preclusion practice;[132] and (3) the promotion of an increased acceptance of this nation's judgments by the judicial systems of foreign countries.[133]

The federal courts are an independent system for administering justice to litigants who have properly invoked its jurisdiction.[134] A strong policy concern and essential characteristic of the federal system is the manner in which it gives preclusive effect to prior judgments, whether they are of domestic or foreign origin.[135] Thus, the federal judicial system has an important interest in seeing that when it accords

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work of federal procedural rules and preclusion doctrine, see *supra* note 123 and accompanying text, and *infra* notes 128-29 and accompanying text.

128. *See, e.g.*, FED. R. CIV. P. 18(a) (a party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or alternate claims, as many claims as he has against the opposing party); FED. R. CIV. P. 20(a) (all persons may join in one action as plaintiffs or be joined as defendants, if they assert any right to relief or a right to relief is asserted against them, that arises out of the same transaction, occurrence, or series of transactions or occurrences, and if there is any question of fact or law that is common to all of these persons).

129. *See* Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1506-07 (D.C. Cir. 1984) (Scalia, J., concurring); Aerojet-General Corp. v. Askew, 511 F.2d 710, 717 (5th Cir.), *cert. denied*, 423 U.S. 1026 (1975); John Alden Life Ins. Co. v. C.A. Cavendes, Sociedad Financiera, 591 F. Supp. 362, 364 (S.D. Fla. 1984).

130. *See supra* note 129 and accompanying text.

131. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958); Hunt v. Liberty Lobby, Inc., 707 F.2d 1493, 1496 (D.C. Cir. 1983); Hazard, *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 82-83 (1985) (preclusion doctrine expresses a strong public policy in favor of stability of judicial decisions and is one of the legal system's methods of maintaining consistency in what its law is).

132. *See supra* note 47 and accompanying text.

133. *See supra* note 48 and accompanying text.

134. *Byrd*, 356 U.S. at 537.

135. *Hunt*, 707 F.2d at 1496; Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F.2d 1177, 1181-82 (3d Cir. 1972); Williams v. Ocean Transport Lines, Inc., 425 F.2d 1183, 1189-90 (3d Cir. 1970).

preclusive effect to any judgment—domestic or foreign—it does so in a uniform manner.[136] This interest seems best served when federal-diversity courts apply a uniform federal choice-of-preclusion law rule, rather than making reference to the diverse rules of the individual states.[137] Moreover, such a uniform federal rule would offer greater predictability to other nations as to the outcome of federal choice-of-preclusion law determinations, thus clarifying the effect that their judgments will be given in this country.[138] Important federal interests in encouraging both a greater international ordering in judgment recognition practice, and a greater acceptance of our nation's judgments abroad, would thereby be promoted.[139]

As has already been indicated, state judicial systems share with the federal courts many of the same procedural interests concerning choice-of-preclusion law.[140] The state in which the federal-diversity court sits has a substantive interest in court's choice-of-preclusion law to the extent that that choice-of-law implicates the concerns of the state in effectuating the behavioral expectations and demands embodied in its substantive law.[141] By establishing the conditions under which its final judgments preclude relitigation of a particular claim or issue originally adjudicated under its substantive law, a state determines how the substantive principles advanced by that body of law are ultimately vindicated.[142] When, however, the judgment presented for

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136. *See supra* notes 131, 134-35 and accompanying text. Uniformity and, therefore, certainty in the exercise of preclusion law is essential to its purposes. "Uncertainty intrinsically works to defeat the opportunities for repose and reliance sought by the rules of preclusion, and confounds the desire for efficiency by inviting repetitious litigation to test the preclusive effects of the first effort." 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4407 at 49 (1981).

137. For cases employing state choice-of-law rules to foreign country judgments, see *supra* notes 79-80 and accompanying text.

138. Comment, *Conflict of Laws—Recognition of Judgments—Federal Courts are to Apply State Laws on Recognition of Foreign Judgments*, 8 TEX. INT'L L.J. 247, 253 (1973); *see* von Mehren, *Enforcement, supra* note 8, at 408 (a single federal rule would give foreign courts a better understanding of United States law governing the recognition of their country's judgments).

139. *See* Golomb, *Recognition of Foreign Money Judgments: A Goal Oriented Approach*, 43 ST. JOHN'S L. REV. 604, 635, 642 (1969) (a uniform federal rule governing foreign-country judgment recognition practice is more likely to secure the recognition of American judgments in foreign countries than will the present system of referring to the rules of the individual state); von Mehren, *Enforcement, supra* note 8, at 408 (a uniform federal rule would make United States recognition practice more predictable to foreign nations, give them greater confidence that their judgments will be recognized in this country, and thus make them more willing to recognize our judgments).

140. *See supra* note 125 and accompanying text. The federal interest in judicial economy, however, seems particularly strong. *See supra* notes 126-30.

141. *See supra* notes 100-04 and accompanying text.

142. *See* Comment, *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 829-30 (1952) (suggesting how substantive interests underlying the law of commercial

recognition in a federal-diversity court has been rendered in a foreign country, the underlying claim has not been adjudicated under the substantive law of the forum state. Therefore, the state does not have the same substantive interest in the ultimate effect of the foreign judgment in subsequent proceedings, nor in the federal court's selection of the preclusion law to be applied to it. The only forum with a substantive interest in the vindication of the underlying claim in subsequent judicial proceedings would seem to be the foreign-country forum which rendered the original judgment.

This result is supported by the *Erie* doctrine. The fundamental policy concern underlying the *Erie* doctrine is the promotion of the uniform enforcement and administration of the rights and obligations that are created within a state, and with which the federal courts have no power to interfere.[143] When a federal court recognizes a judgment rendered by a foreign country's judicial system and gives it some degree of preclusive effect, it is not enforcing or giving effect to a state-created right or obligation, but one of a foreign nation. Therefore, the state substantive interest which the *Erie* doctrine protects—the uniform administration and enforcement of state-created rights and obligations—is not implicated when a federal-diversity court recognizes a foreign-country judgment and gives it preclusive effect.[144]

It follows then that when a foreign-country judgement is recognized, any interests of the forum state in a federal-diversity court's choice-of-preclusion law are purely procedural in character. On the other hand, the federal judicial system has several substantive interests as well as a strong procedural interest in utilizing its own choice-of-preclusion law rules. In the past, when strong federal interests have been at stake and no countervailing state substantive interests were at risk, the *Erie* doctrine has not been used by the United States Supreme Court to displace federal law.[145] When evident federal interests are at stake, such as those implicated when a foreign-country judgment is recognized and given preclusive effect, they have been vindicated.[146]

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transactions and domestic relations might be advanced when courts permit successive lawsuits).

143. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-38 (1958); Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945).

144. *See* Answering Serv., Inc. v. Egan, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (*Erie* requires the use of all of a state's substantive law, including those aspects of its preclusion law that can be characterized as substantive, only when the cause of action at issue arises from a state-created right); *see also Byrd*, 356 U.S. at 537-38 (the *Erie* doctrine promotes the uniform enforcement of state-created rights and obligations); *Guaranty Trust*, 326 U.S. at 108-09 (when a federal-diversity court adjudicates a state-created right, it cannot substantially alter the enforcement of that right).

145. *See supra* note 110 and accompanying text.

146. *See id.*

In keeping with relevant Supreme Court precedent, it is appropriate to suggest that the *Erie* doctrine is inapplicable as a choice-of-law directive for federal-diversity courts in the foreign-country judgment setting.

IV. CONCLUSION

In the area of foreign-country judgment recognition and choice-of-preclusion law, the federal government's interest in a uniform national body of law is strong. The United States government's legislative and executive branches have, however, been relatively silent. When the federal judiciary has spoken to this problem as a matter of federal common law—as in *Hilton v. Guyot*—the individual states have considered themselves constitutionally free to chart their own course and to develop local recognition and choice-of-preclusion-law rules. This result is largely attributable to the misapplication of the *Erie* doctrine by federal-diversity courts when they address foreign-country judgment choice-of-law problems.

It is clear that *Erie* and its progeny compel federal-diversity courts to apply the substantive law of the forum state, including its substantive choice-of-law rules. If, however, important federal procedural and/or substantive interests are implicated by the federal-diversity court's choice-of-law and no state substantive interests are involved, federal law should prevail. When recognizing a foreign-country judgment, a federal-diversity court's choice-of-preclusion law presents the latter situation. When a federal court recognizes a foreign-country judgment and gives it some type of preclusive effect, important procedural and substantive interests of the federal judicial system are implicated. On the other hand, the interests of the forum state are purely procedural. These very same federal and state interests are implicated when the issue before the federal court is a choice-of-preclusion law question.

Therefore, when a federal-diversity court recognizes a foreign-country judgment, the *Erie* doctrine does not compel it to determine the judgment's preclusive effect by referring to the choice-of-preclusion-law rules of the state in which it is sitting.

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