



## Foreign Country Judgments and the Res Judicata Puzzle: Whose Preclusion Law Should U.S. Courts Apply?

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**Abstract:** With the rise in global transactions, U.S. courts are often asked to decide what effect to give foreign judgments that involve related claims or issues. In the absence of a uniform rule, U.S. courts reach a variety of results, sometimes applying federal rules of res judicata (including claim preclusion and issue preclusion), sometimes applying state rules or state choice-of-law, and occasionally applying foreign rules of preclusion. The decision is complicated by doctrines peculiar to American law, including constitutional and statutory requirements of full faith and credit and “Erie” deference owed by federal courts to state court law. Neither comity nor statutes enacting a version of the Uniform Foreign Money-Judgments Recognition Act answer the question whose res judicata law to apply. Scholars have proposed a variety of approaches, including extension of full faith and credit to foreign judgments, abolition of Erie in the context of cases involving foreign parties or jurisdictions, and blanket application of federal law. As practitioners who deal with private international law cases, we recommend that U.S. courts apply U.S. law: federal law to cases involving federal questions, and state law in cases involving state law claims and diversity of citizenship. Our approach would simplify the process, avoid conflicts that arise when courts try to apply multiple doctrines, stave off expense and uncertainty that result when U.S. courts are asked to apply foreign laws of res judicata, and allow practitioners to anticipate results to a much greater degree than is now possible.



## I. Introduction.

American legal scholars have long-recognized and lamented the lack of guidance or authority governing the question “whose” res judicata law federal courts should apply to determine the effect of foreign country judgments.<sup>1</sup> Neither the doctrine of comity nor the Uniform Foreign Money-Judgments Recognition Act (the “Recognition Act”) (adopted by nineteen American states and the District of Columbia to date) answers the question. The problem is complicated by the interplay of doctrines peculiar to American law, including the “full faith and credit” afforded the judgments of other state (and usually federal) courts and the *Erie* rule<sup>2</sup> that requires federal courts ruling on state law claims to apply the substantive laws – including res judicata and choice-of-law – adhered to by the state in which they sit.<sup>3</sup>

Courts in the U.S. generally apply one or more of the above-listed doctrines to justify the application of foreign, federal, or state laws of preclusion. Many courts simply apply state or federal preclusion laws without explaining why, or in deference to the parties’ agreement, express or tacit. Uncertainty has led to inconsistencies not only among federal Courts of Appeals in different circuits, but among state and federal courts within the same circuit. As a result, practitioners cannot predict how a given court will give effect to a related foreign judgment, and can offer their clients little guidance how to respond to lawsuits abroad. Whether to bring some or all of a client’s counterclaims depends on whether the client has filed or plans to file suit in the U.S.; if the foreign suit is decided first, the U.S. court may or may not decide that the foreign judgment is res judicata as to claims brought in the U.S.

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<sup>1</sup> Res judicata refers to both claim preclusion and issue preclusion (also known as collateral estoppel). See *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S. Ct. 2161, 2171, 171 L. Ed. 2d 155 (2008) (explaining that “[t]hese terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as “merger” and “bar,” while issue preclusion encompasses the doctrines once known as “collateral estoppel” and “direct estoppel.”) (citation omitted). Our paper deals primarily with the principle of claim preclusion.

<sup>2</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>3</sup> We note that European scholars, courts, and attorneys are grappling with similar issues in applying the Brussels Regulation to the judgments of fellow member-states. See, e.g., Andrew Dickinson, Ideas Paper, “The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process” (28 March 2007), available at: [http://www.biicl.org/files/2976\\_discussion\\_paper.pdf](http://www.biicl.org/files/2976_discussion_paper.pdf), discussing the contrasting views of European authorities; and discussion in <http://conflictoflaws.net/2012/ecj-rules-on-res-judicata-of-judgments-declining-jurisdiction/>. We express no view as to the rules to be followed in the European Union.



The significance of the problem has unquestionably increased with the rise in global interaction, but it remains a puzzle. Legal scholars have proposed a variety of solutions over the years, but neither Congress nor the U.S. Supreme Court has addressed the issue or indicated a preference for any particular approach.

Some scholars debate the extent to which *Erie* should apply to foreign judgments.<sup>4</sup> Others favor a blanket rule adopting U.S. federal law or the preclusive laws of the nation that issued the judgment.<sup>5</sup> Scholars recommending this approach argue it is the best way to achieve uniformity and efficiency, but practitioners familiar with the realities of litigation are less sanguine.

Applying a foreign country's laws of res judicata (claim preclusion and issue preclusion) is unpredictable and expensive given the difficulties of identifying that law in the first place. U.S. courts usually determine foreign law by reviewing the declarations of experts (e.g., foreign attorneys) for each litigant. As may be expected, experts' descriptions often vary considerably depending on the position of the client retaining them. The trial court is left to "decide" as a matter of fact which of two (or more) experts is persuasive – leading to unpredictable results that are difficult if not impossible to challenge on appeal.<sup>6</sup>

In our view, American courts should apply the laws they know best, namely domestic laws of res judicata and collateral estoppel, when determining the preclusive effect of foreign judgments on civil and commercial cases in their own fora. In cases involving federal question jurisdiction, that will mean applying federal law. In cases involving federal courts presiding over

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<sup>4</sup> E.g., Donald Earl Childress III, "When Erie Goes International," 105 Nw. U. L. Rev. 1531 (2011); John Brummett, "Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed," 33 N.Y.L. Sch. L. Rev. 83, 83-85 (1988).

<sup>5</sup> E.g., Robert C. Casad, "Issue Preclusion and Foreign Country Judgments; Whose Law?" 70 Iowa L. Rev. 53, 77-78 (1984); cf. Daniel C. K. Chow, "Limiting Erie in A New Age of International Law: Toward A Federal Common Law of International Choice of Law," 74 Iowa L. Rev. 165, 224 (1988) (favoring a federal rule generally, but adding that federal and state courts should undertake this federal common law analysis on a case-by-case basis and apply a federal rule to an international choice of law issue only after a considered judgment that state law would compromise significant federal interests).

<sup>6</sup> While interpretation and application of res judicata law are issues of law reviewed de novo by the courts of appeals, a trial court's decision regarding the application of foreign law is generally reviewed for an abuse of discretion, and is rarely overturned on appeal.



diverse citizens, the question is more complicated. We recommend a flexible approach that retains *Erie* when the second suit involves state law claims brought by a citizen of that state.

## II. The Current State of U.S. Law: Courts Apply a Variety of Analyses, or No Analysis, with Disparate Results.

When suits are filed in the U.S. after parallel or related proceedings have been initiated outside the U.S., U.S. courts may allow the proceedings to go forward simultaneously, stay the proceedings until the foreign court has ruled, or stay or dismiss the case on grounds of *forum non conveniens*.<sup>7</sup>

If the case is stayed or the foreign court arrives at a judgment before its U.S. counterpart, the U.S. court may be faced with the problem of giving effect to the judgment, assuming it meets the requirements for recognition.<sup>8</sup>

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<sup>7</sup> U.S. courts may dismiss a suit on the basis of *forum non conveniens* if there is an available and adequate alternative forum and public and private factors identified by the U.S. Supreme Court in *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, (1981). See, e.g., Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 384 (1947) (forum non conveniens doctrine is designed to “limit[] the plaintiff’s choice of forums without permitting the defendant to escape or minimize his obligations”); 14D Wright, Miller & Cooper, *Federal Practice and Procedure* (\_\_\_ ed. 201\_), § 3828. One scholar has suggested that the rise in dismissals on forum non conveniens grounds is due to U.S. courts’ desire to avoid the application of foreign law. Donald Earl Childress III, *When Erie Goes International*, 105 Nw. U. L. Rev. 1531 (2011).

<sup>8</sup> The Recognition Act provides for recognition of foreign money judgments subject to mandatory and permissible reasons for refusal that vary from state to state. In California, “[a] court ... shall not recognize a foreign-country judgment if any of the following apply: (1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law. (2) The foreign court did not have personal jurisdiction over the defendant. (3) The foreign court did not have jurisdiction over the subject matter.” Cal. Code Civ. Proc. § 1716 (b) (West 2014). A California court may withhold recognition if “any of the following apply: (1) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend. (2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case. (3) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States. (4) The judgment conflicts with another final and conclusive judgment. (5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court. (6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action. (7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment. (8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law. (9) The judgment includes recovery for a claim of defamation unless the



Almost everyone agrees that most foreign judgments are entitled to res judicata as a matter of comity or respect to foreign nations. What is not clear is *whose* res judicata law should apply – that of the rendering state or nation or that of the forum? If the latter, the U.S. court must decide whether to apply federal or state law in cases involving state law claims.

As the leading U.S. treatise on procedural law observes, U.S. courts have reached inconsistent results in determining whose preclusion laws to apply to judgments rendered outside the United States.<sup>9</sup> Most state courts apply their own res judicata laws, often without discussion. Federal courts typically apply domestic laws of preclusion – federal law if the case involves federal claims or state law (or choice-of-law) if the court is sitting in diversity.<sup>10</sup>

Some courts sitting in diversity apply domestic law as a matter of routine, by agreement of the parties, or on the assumption that foreign law would be the same as domestic law in the absence of evidence to the contrary.<sup>11</sup> Of the courts that provide the reasons for their decisions, different types and levels of analysis lead to different results. Some federal courts apply the state’s res judicata law directly, while others apply the state’s choice-of-law principles to determine whether the state court would apply federal or its own law of res judicata.<sup>12</sup> The legal labyrinth often leads to inconsistent results within the same state, even when foreign country judgments are not at issue.

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court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions. Cal. Civ. Proc. Code § 1716(c).

<sup>9</sup> 18B Federal Practice and Procedure, *supra*, § 4473; *Andes v. Versant Corp.*, 878 F.2d 147, 149 (4th Cir. 1989) (“When dealing with the preclusive effect of a foreign nation money judgment, some courts have seemed to employ a strict full faith and credit approach, while others have employed the res judicata rules of the forum state. Still others have sought to develop special rules that would best serve the interests of the parties, and those of the courts of the foreign nation and of the relevant American jurisdiction.”).

<sup>10</sup> 18B Federal Practice and Procedure, *supra*, § 4473.

<sup>11</sup> *E.g.*, *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 303 n.4 (6th Cir. 2011) (applying Kentucky law of res judicata to determine effect of Ontario judgment where parties assumed Kentucky and Ontario would apply the same rules of res judicata); *Branca by Branca v. Security Benefit Life Ins. Co.*, 773 F.2d 1158, 1161 (11th Cir. 1985) (applying Florida law of res judicata without discussion); *United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) (discussing the possibility that foreign res judicata law might apply in an appropriate case, but deferring to agreement of the parties).

<sup>12</sup> See discussion *supra*, [to be added].



For example, California State Courts of Appeal have ruled that both California and federal law require California courts to apply California’s law of res judicata to determine the effect of a prior federal judgment.<sup>13</sup> Although the California Supreme Court has not yet ruled which rule applies in diversity cases, one Court of Appeal concluded that California’s law of res judicata would apply no matter what: If the Court “would apply the res judicata law of the state whose law the federal court was applying, ... that would be the law of California. If, however, our Supreme Court were to apply the law followed by the Ninth Circuit, it would apply “the law of the forum state, which in this case is California. Accordingly, whichever rule our Supreme Court would follow, the choice of law rule points to the res judicata law of California.”<sup>14</sup>

The problem is that, notwithstanding the Ninth Circuit precedent cited by this Court, other courts in the Ninth Circuit have reached different results, opining that California courts would apply *federal* res judicata law.<sup>15</sup>

The plot only thickens when the judgment in question is issued by a jurisdiction *outside* the United States, because few state courts have reached the issue whose preclusion law applies in those instances.<sup>16</sup>

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<sup>13</sup> *Butcher v. Truck Ins. Exchange*, 77 Cal. App. 4th 1442, 1452-55 (2000).

<sup>14</sup> *Id.* at 1455 (citing *Gramm v. Lincoln*, 257 F.2d 250, 255 n.6 (9th Cir. 1958) (federal court sitting in diversity is required to follow the law of the state in which it sits, including the law pertaining to res judicata)); see also *Jacobs v. CBS Broad., Inc.*, 291 F.3d 1173 (9th Cir. 2002) (holding that the preclusive effect of a prior Writers’ Guild determination on claims raised in a diversity action was determined by the res judicata and collateral estoppel laws of California, the state in which the federal court was sitting); *Priest v. Am. Smelting & Ref. Co.*, 409 F.2d 1229, 1231 (9th Cir. 1969) (“Since federal jurisdiction in this case is based upon diversity of citizenship, the district court and this court must apply the substantive law of the forum state, ... includ[ing] the law pertaining to collateral estoppel.”).

<sup>15</sup> *E.g.*, *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.1982) (holding that “a federal court sitting in diversity must apply the res judicata law of the state in which it sits,” but concluding that California would apply federal res judicata law to a prior federal judgment). Although *Costantini* has been criticized by California state courts of appeal for misconstruing California law on this point, *e.g.*, *Gamble v. Gen. Foods Corp.*, 229 Cal. App. 3d 893, 899, 280 Cal. Rptr. 457, 460 (1991), the California Supreme Court has yet to weigh in, and the case continues to be followed by California district courts within the Ninth Circuit applying California law. See *S. California Stroke Rehab. Associates, Inc., v. Nautilus, Inc.*, 782 F. Supp. 2d 1096, 1105 (S.D. Cal. 2011) (addressing conflicting approaches and declining to follow *Costantini*).

<sup>16</sup> Federal courts sometimes mistakenly determine that a state court has adopted a rule governing foreign judgments. In a diversity case involving an Australian judgment, for example, the Tenth Circuit Court of Appeals stated that “Kansas generally applies the res judicata rules of the foreign forum in determining what effect to give



In practice, very few U.S. courts apply the res judicata laws of foreign nations.<sup>17</sup> Judge Richard Posner of the Seventh Circuit recently remarked on the lack of consensus regarding the issue of whose law to apply in these circumstances, and queried whether foreign res judicata law should not be applied in appropriate cases as an extension of the principle of comity.<sup>18</sup> In the end, the Court did not decide whether it would be appropriate to apply foreign law to the case before it (which it was hesitant to do), but “bow[ed] to the parties’ tacit agreement” that it “decide the case under federal common law.”<sup>19</sup>

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that judgment.” *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 360 (10th Cir. 1996) (citing *Johnson Bros. Wholesale Liquor Co. v. Clemmons*, 233 Kan. 405, 661 P.2d 1242, 1245). The case the Court cited, however, did not involve a judgment rendered by another country, but by a different state within the U.S. The Kansas court applied the law of the other state pursuant to Full Faith and Credit, which has no bearing on judgments rendered by courts outside the U.S.

<sup>17</sup> *E.g.*, *Watts v. Swiss Bank Corp.*, 1970, 317 N.Y.S.2d 315, 318, 27 N.Y.2d 270, 274, 265 N.E.2d 739, 742, cited in Federal Practice and Procedure, *supra*, § 4473, fn.11; *Estate of Cleland*, 119 Cal.App.2d 18, 20 (1953) (applying Mexican law of res judicata to determine effect of Mexican judgment based on a California statute that has since been repealed); *Bank of Montreal v. Kough*, 612 F.2d 467 (9th Cir.1980) (applying *Cleland* by agreement of the parties).

<sup>18</sup> *United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) (citing conflicting views expressed in cases and law review articles, including Robert C. Casad, “Issue Preclusion and Foreign Country Judgments: Whose Law?,” 70 Iowa L.Rev. 53, 56–57 (1984) (recommending application of foreign laws of res judicata to determine preclusive effect of foreign judgments); *Hurst v. Socialist People’s Libyan Arab Jamahiriya*, 474 F.Supp.2d 19, 32–34 (D.D.C. 2007) (applying federal law of issue preclusion to Scottish judgment); *Alfadda v. Fenn*, 966 F.Supp. 1317, 1328–30 (S.D.N.Y.1997) (applying domestic law in favor of French law to determine preclusive effect of French judgment); *Watts v. Swiss Bank Corp.*, 27 N.Y.2d 270, 317 N.Y.S.2d 315, 265 N.E.2d 739, 742–43 (1970) (finding that French preclusion law would apply to French judgment, but applying New York law in the absence of evidence that New York law would differ from French law); Restatement (Third) of Foreign Relations Law § 481 comment c (1987) (“no rule prevents a court in the United States from giving greater preclusive effect to a judgment of a foreign state than would be given in the courts of that state”); Restatement (Second) of Conflict of Laws § 98 comment f (1971) (“Normally foreign rules will be applied to determine the effects of a foreign judgment as claim preclusion, as issue preclusion, and in binding nonparties, so long as the foreign rules are substantially the same as domestic rules.”); Fed. Prac. & Proc., *supra*, § 4473, pp. 398–411; Arthur T. von Mehren & Donald T. Trautman, “Recognition of Foreign Adjudications: A Survey and a Suggested Approach,” 81 Harv. L.Rev. 1601, 1677–81 (1968) (the more intricate and far-reaching applications of preclusive doctrines should probably be avoided in international recognition practice; and Hans Smit, “*International Res Judicata and Collateral Estoppel in the United States*,” 9 UCLA L.Rev. 44, 61–64 (1962) (proposing that courts limit the preclusive effect of foreign judgments).

<sup>19</sup> *Id.* at 685 (“Ordinarily a court will enforce the choice of law rule selected by the parties, no questions asked, unless they select a foreign law that would be too difficult for the federal court to apply; we have given the example of a stipulation to apply the Code of Hammurabi to a dispute arising from a contract.”) (citing *Tomic v. Catholic Diocese*, 442 F.3d 1036, 1042 (7th Cir.2006)).



### III. Full Faith and Credit and/or *Erie*? Should Either Doctrine Be Applied to Foreign Country Judgments?

#### A. Full Faith and Credit

The Full Faith and Credit Clause of the Constitution, U.S. Const., art. IV, § 1, and the Full Faith and Credit Act, 28 U.S.C. § 1738, provide that the States of the Union share sovereignty with the federal government and require courts within the United States to recognize and give effect to judgments of the courts of sister states. As the U.S. Supreme Court has explained, the doctrine was originally designed to “alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation[.]”<sup>20</sup>

While the Constitutional provision is directed only at state courts, many courts have held that the statute requires federal courts to give full faith and credit to state court judgments,<sup>21</sup> and vice versa.<sup>22</sup> Applying the principle of Full Faith and Credit, U.S. courts generally apply the rendering state’s rules to their issue-preclusion determinations.<sup>23</sup> Full Faith and Credit does not, however, apply to foreign judgments.<sup>24</sup>

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<sup>20</sup> *Williams v. North Carolina*, 317 U.S. 287, 295 (1942) (quoting *Milwaukee County v. White Co.*, 296 U.S. 268, 276-77 (1935)).

<sup>21</sup> *E.g.*, *San Remo Hotel, L.P. v. City & Cty. of San Francisco*, 125 S.Ct. 2491, 2500, 545 U.S. 323, , 162 L.Ed.2d 315 (2005); 710 F.2d 507, 512-13 (9th Cir. 1983); *see also* 18B Fed. Prac. & Proc., *supra*, § 4469 (citing cases).

<sup>22</sup> 18B Fed. Prac. & Proc., *supra*, § 4468 (citing cases). *But see Kopp v. Fair Political Practices Commn.*, 11 Cal.4th 607 (1995) (declining to defer to federal court’s interpretation of state statute).

<sup>23</sup> *See, e.g., Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75, 80–83, 104 S.Ct. 892, 895-97, 79 L.Ed.2d 56 (1984).

<sup>24</sup> *See, e.g., United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011) (“When the order is issued by a foreign court, a domestic court is not bound by the full faith and credit clause or statute to comply with the foreign jurisdiction’s preclusion rules”); *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) *aff’d*, 159 F.3d 41 (2d Cir. 1998) (“Neither the Full Faith and Credit Act nor the principles of federalism apply to the recognition of foreign country judgments. ‘Of course, significant differences come into play when we move from the federal system to the international arena. In the latter, no full faith and credit clause is operative.’”) (quoting Ruth B. Ginsburg, “Judgments in Search of Full Faith and Credit: The Last-In-Time Rule for Conflicting Judgments,” 82 Harv. L.Rev. 798, 805 (1969)). *See also Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1212 (9th Cir. 2006) (“There is currently no federal statute governing recognition of foreign judgments in the federal courts. [Citation.] The federal full faith and credit statute, 28 U.S.C. § 1738, governs only judgments rendered by courts of states within the United States.”).





Nor is there any reason to apply full faith and credit to foreign judgments. While some courts and scholars have invoked comity as a reason for applying a foreign court's preclusion laws to decide whether a subsequent or parallel proceeding should be merged or barred,<sup>25</sup> comity does not require U.S. courts to treat judgments rendered by the courts of foreign nations as they treat the judgments of U.S. courts.

In *Hilton v. Guyot*, the 1895 case that laid the foundation for U.S. comity law, the U.S. Supreme Court held that comity is not mandatory: it "is neither a matter of absolute obligation, on the one hand, nor a mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."<sup>26</sup>

The Supreme Court further explained that the judgments of foreign countries should generally be recognized by the courts of the United States "when the general requirements of comity are satisfied," namely, where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.<sup>27</sup>

Even then, as *Hilton* itself illustrates, recognition may be withheld. The *Hilton* Court determined that the French judgment under consideration met the foregoing test, but ultimately denied recognition because the French legal system did not provide for reciprocity.<sup>28</sup>

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<sup>25</sup> See, e.g., *United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011).

<sup>26</sup> *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

<sup>27</sup> *Id.* at 202-03.

<sup>28</sup> *Id.* at 210-28. The reciprocity requirement has largely gone by the wayside in modern American jurisprudence. See Ronald A. Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments," 74 U. Pitt. L.Rev. 491, 507 (2013); Christopher A. Whytock & Cassandra Burke Robertson,



While the doctrine of comity encourages U.S. courts to recognize foreign judgments that meet these requirements, it does not require them to do so, nor does it provide for anything like full faith and credit, or speak to the issue of whose preclusion laws to apply.<sup>29</sup>

The common law rule of comity continues to play a role in American law, but it has in recent years been supplemented by state statutes providing for the recognition of foreign money-judgments. In 1962, the National Conference of Commissioners on Uniform State Laws promulgated the 1962 Uniform Foreign Money-Judgments Recognition Act, which was revised in 2005.

The 2005 Recognition Act added several discretionary non-recognition grounds not found in the original Act. Recognition may be declined if (1) either the judgment or the cause of action is contrary to the public policy of either the state or the United States; (2) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or (3) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process.<sup>30</sup>

A number of states, including California, have adopted the 2005 Recognition Act. While this Act lends some clarity to U.S. recognition of foreign judgments, it is limited to enforcement

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“Forum Non Conveniens and the Enforcement of Foreign Judgments,” 111 Colum. L.Rev. 1444, 1468 (2011) (addressing the decline of reciprocity doctrine but noting that several states still include reciprocity among the grounds for recognition (or non-recognition) of foreign country judgments). Cf. Franklin O. Ballard, “Turnabout Is Fair Play: Why A Reciprocity Requirement Should Be Included in the America Law Institute’s Proposed Federal Statute,” 28 Hous. J. Int’l L. 199, 237 (2006) (urging that the reciprocity requirement should be retained “because fundamental fairness dictates that U.S. courts should hold international litigants to the same standards their countries impose upon U.S. litigants”).

<sup>29</sup> Addressing the issue of whose *res judicata* rules apply to determine the effect of a French decision, a federal District Court in New York concluded that “a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment,” rather than the law of the foreign country. *Alfadda v. Fenn*, 966 F. Supp. 1317 (S.D.N.Y. 1997) *aff’d*, 159 F.3d 41 (2d Cir. 1998). See *id.* at 1329 (explaining that, “France may utilize procedural methods other than issue preclusion to avoid repetitive litigation, provide fairness to litigants, and conserve judicial resources. ... Regardless of the mechanisms utilized by a foreign court to achieve its objectives, a United States court should not be confined to using the foreign court’s mechanisms or else forgo achieving its own objectives.”) (footnotes omitted).

<sup>30</sup> *E.g.*, Cal. Code Civ. Proc., § 1716.



of money judgments; it does not govern the enforcement of legal conclusions or even injunctions of foreign courts.<sup>31</sup>

The Act specifies that if the court finds that a foreign-country money judgment is entitled to recognition “to the extent the judgment grants or denies recovery of a sum of money,” it is “conclusive between the parties to the same extent as the judgment of a sister-state entitled to full faith and credit in this state would be conclusive,” and “enforceable in the same manner and to the same extent as a judgment rendered in this state.”<sup>32</sup> Courts have questioned what the term “conclusive” means,<sup>33</sup> but whatever it means, the Act cannot be read to determine the U.S. court’s choice of preclusion law outside the context of enforcing money- judgments, because the Act does not address issues such as the scope of injunctive relief or the res judicata effect to be given the foreign court’s legal conclusions.<sup>34</sup>

## **B. *Erie* and Its Progeny**

While courts applying res judicata in tandem with the Full Faith and Credit doctrine apply the preclusion law that would be followed by the rendering court, courts applying res judicata in tandem with the *Erie* doctrine usually apply the laws of the state in which they sit, even when grappling with the preclusive effect of a prior federal or state court judgment.

In *Erie Railroad Co. v. Tompkins*, the U.S. Supreme Court held that, with the exception of matters governed by federal constitutional, statutory, or treaty law, federal courts must apply the law of the state in which they are sitting.<sup>35</sup> This rule was extended in 1941 in *Klaxon Co. v.*

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<sup>31</sup> See, e.g., *Vedatech K.K. v. Crystal Decisions, Inc.*, No. C-03-04578 RMW, 2009 L1151778 (N.D. Cal. Apr. 28, 2009) *aff’d sub nom. Subramanian v. Crystal Decisions, Inc.*, 492 F. App’x 824 (9th Cir. 2012).

<sup>32</sup> *Hyundai Sec. Co. v. Ik Chi Lee*, 215 Cal. App. 4th 682, 689, 155 Cal. Rptr. 3d 678, 681 (2013) (citing Cal. Code Civ. Proc. § 1719).

<sup>33</sup> *Manco Contracting Co. (W.W.L.) v. Bezdikian*, 45 Cal. 4th 192, 201, fn.5, 195 P.3d 604, 610 (2008) (finding it difficult to distinguish between “conclusive” and “final” as used in the Act).

<sup>34</sup> The drafters of the Uniform Act suggested in written comments that U.S. courts should apply the res judicata law of the country that rendered the judgment, citing comments to the Restatement (Second) of Conflicts, which opine that an American court would likely apply the foreign rules if they are “substantially the same as the rules of the American court.” CA. B. An., S.B. 639 Assem., 7/3/2007 (quoting Restatement (Second) of Conflicts of Laws, § 98, cmt. (f)). The comments do not address which law to apply if the rules are not the same, however.

<sup>35</sup> 304 U.S. 64 (1938),



*Stentor Electric Manufacturing Co*, which held that a federal-diversity court must apply the choice-of-law rules of the state in which it is sitting.<sup>36</sup>

Unfortunately, application of *Erie* and *Klaxon* may themselves lead to different outcomes in the res judicata context. Some federal courts read *Erie* as requiring them to apply the preclusion laws of the state in which they sit, while others read *Klaxon* as requiring them to apply the choice-of-law principles of the state in which they sit to determine which res judicata law to apply. The first (and the majority) approach is reflected by the Fifth Circuit's decision in *Success Motivation Inst. of Japan Ltd. v. Success Motivation Inst., Inc.*<sup>37</sup> Applying *Erie*, the Court held that, "not only the recognition of the foreign country judgment, but also the preclusive effect of that judgment as to this case should be determined under [state] law."<sup>38</sup>

By contrast, in *Ventas, Inc. v. HCP, Inc.*, the Court applied the choice-of-law rules of the forum state to determine questions of res judicata<sup>39</sup>; see also *Kim v. Co-op Centrale Raiffeisen-Boerenleebank, B.A.* (applying Singapore's res judicata laws based on New York's choice-of-law rules).<sup>40</sup> While, as one scholar has observed, *Erie* and *Klaxon* "might lead to uniform application of law within a state," they often lead to "nonuniform application of law between federal courts of different states."<sup>41</sup>

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<sup>36</sup> 313 U.S. 487 (1941),

<sup>37</sup> 966 F.2d 1007 (5th Cir. 1992).

<sup>38</sup> *Id.* at 1009-10 (emphasis added) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)); accord *Sw. Livestock & Trucking Co. v. Ramon*, 234 F.3d 29 (5th Cir. 2000) (applying Texas res judicata law to determine effect of Mexican court's decision); see also *Priest v. Am. Smelting & Ref. Co.*, 409 F.2d 1229, 1231 (9th Cir. 1969) ("Since federal jurisdiction in this case is based upon diversity of citizenship, the district court and this court must apply the substantive law of the forum state, ... includ[ing] the law pertaining to collateral estoppel."); *Balasubramanian v. San Diego Cmty. Coll. Dist.*, 80 Cal. App. 4th 977, 991 (2000) ("Where, as here, an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right."); (citation omitted); accord, *Fujifilm Corp. v. Yang*, 223 Cal. App. 4th 326, 333 (2014) (rejecting appellant's request that it apply federal res judicata law).

<sup>39</sup> 647 F.3d 291, 303 n.4 (6th Cir. 2011).

<sup>40</sup> 364 F.Supp.2d 346, 349 (S.D.N.Y. 2005).

<sup>41</sup> Donald Earl Childress III, "When Erie Goes International," 105 Nw. U. L. Rev. 1531, 1543 (2011) (questioning the application of these cases to cases involving the preclusive effect of foreign state judgments); John Brummett, "Country Judgments in the United States and Federal Choice of Law: The Role of the Erie Doctrine Reassessed," 33 N.Y.L. Sch. L.Rev. 83, 83-85 (1988) (also criticizing application of Erie in foreign judgment cases).



In a 2001 decision, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, the U.S. Supreme Court addressed “whether the claim-preclusive effect of a federal judgment dismissing a diversity action on statute-of-limitations grounds is determined by the law of the State in which the federal court sits.”<sup>42</sup> The plaintiff in *Semtek* had sued the defendant in California state court alleging various business torts; the defendant removed the case to federal district court in California based on diversity of citizenship and successfully moved to dismiss the claims as barred by California's two-year statute of limitations. The district court dismissed the claims “in [their] entirety on the merits and with prejudice,” and the Ninth Circuit affirmed.<sup>43</sup> The plaintiff also sued the defendant in a Maryland state court alleging the same causes of action, which were not barred by Maryland's longer three-year limitations period. The Maryland court granted the defendant’s motion to dismiss the Maryland action, finding plaintiff’s case was barred by federal res judicata; the Maryland court of appeals affirmed.<sup>44</sup> The U.S. Supreme Court reversed, holding that the Maryland court should have applied the claim-preclusion rules of California, under the federal rule incorporating state law.<sup>45</sup>

Some courts and scholars have taken *Semtek* to mean that the second court must apply the res judicata laws of the forum that rendered the first judgment, but the case does not reach that far. The Court was careful to admonish that, “[t]his federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests. If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule.”<sup>46</sup> Furthermore, the Court did not address the rule to be applied when the second court is a federal court sitting in a different state than the first court. Would it apply the law of the state in which it sits, or the law of the state in which the first court sat? Nor did the Court address the rule to be applied when the first court is that of a foreign nation.

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<sup>42</sup> 531 U.S. 497, 499, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001))

<sup>43</sup> *Ibid.*

<sup>44</sup> *Id.* at 500.

<sup>45</sup> *Id.* at 509.

<sup>46</sup> *Ibid.*



#### IV. A Proposed Solution: U.S. Courts Should Apply U.S. Law

In grappling with this puzzle, courts and scholars have addressed a variety of goals, including uniformity, predictability, fairness, and deference to foreign courts. To achieve some or most of these goals, some have proposed a blanket rule that courts apply federal res judicata rules<sup>47</sup>; others have proposed that courts apply the law of the first forum<sup>48</sup>; and still others have proposed a more flexible approach that takes into account the interests of the parties and jurisdictions in a given case.<sup>49</sup>

Having litigated cases involving this prickly issue, we propose that, in cases that do not involve questions of public international law, courts in the U.S. should apply U.S. law.<sup>50</sup> They should apply federal preclusion law when federal interests are paramount, and state preclusion law when state law claims are involved, especially when suit is brought by a citizen of the state at issue. This approach may not lead to absolutely uniform results, or eliminate forum shopping, but it will provide a much greater degree of predictability and fairness to litigants without unduly sacrificing deference to the foreign court.<sup>51</sup>

In many cases it will not matter whose res judicata law applies. But in cases involving the laws of states like California that adhere to a narrow rule of res judicata, plaintiffs should have the benefit of that rule in California fora, even when a foreign court has ruled in a parallel

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<sup>47</sup> E.g., Robert C. Casad, "Issue Preclusion and Foreign Country Judgments; Whose Law?" 70 Iowa L.Rev. 53, 77-78 (1984) ("Relations between the United States and foreign sovereigns are matters normally committed to the federal, not the state governments. It would seem, then, that the law that prescribes the choice of law rule for determining the effect in America of foreign country judgments should be federal, not state.")

<sup>48</sup> E.g., Howard M. Erichson, "Interjurisdictional Preclusion," 96 Mich. L.Rev. 945 (1998).

<sup>49</sup> E.g., Daniel C. K. Chow, "Limiting Erie in A New Age of International Law: Toward A Federal Common Law of International Choice of Law," 74 Iowa L.Rev. 165, 224 (1988) (favoring a federal rule generally, but adding that federal and state courts should undertake this federal common law analysis on a case-by-case basis and apply a federal rule to an international choice of law issue only after a considered judgment that state law would compromise significant federal interests).

<sup>50</sup> Issues involving public international law are beyond the scope of this article.

<sup>51</sup> See *Alfadda v. Fenn*, *supra*, 966 F. Supp. at 1329 (declining to apply French law because, "[f]or example, ... France may utilize procedural methods other than issue preclusion to avoid repetitive litigation, provide fairness to litigants, and conserve judicial resources. ... Regardless of the mechanisms utilized by a foreign court to achieve its objectives, a United States court should not be confined to using the foreign court's mechanisms or else forgo achieving its own objectives. Thus, the Court concludes that a federal court should normally apply either federal or state law, depending on the nature of the claim, to determine the preclusive effect of a foreign country judgment") (footnotes omitted).



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or related suit. When the California legislature passes laws (*e.g.*, securities fraud laws) expressly designed to protect California residents, a California business should be able to invoke the protection of such laws, even when they enter into business arrangements with foreign companies. A California company should not be barred from suing in California simply because a foreign enterprise sued it in Europe based on a different transaction or primary right and the European court was the first to issue judgment. California's laws of *res judicata* should apply, whether or not the California case is removed to federal district court.

The approach we recommend would allow U.S. courts to apply the laws they know without getting stuck in *Klaxon* queries and without having to determine the *res judicata* laws of a foreign state based on often-conflicting expert opinions. *Res judicata* is complicated enough without viewing it through the lens of law developed under different circumstances and in light of different policies. Simplifying the law in this way will make things easier for courts and litigants, saving time and money for both. It will not encroach upon the deference due to foreign jurisdictions, whose interests will rarely be disturbed by the application of U.S. law to private actors who have elected to do business with extra-national entities.

It would no doubt be best for Congress or the U.S. Supreme Court to create a uniform rule, but in the meantime, nothing prevents U.S. courts from following the rules we recommend in civil and commercial cases among private parties.