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The Penal and Revenue Rules, State Law, and Federal Preemption

Permalink

<https://escholarship.org/uc/item/72r728fs>

ISBN

978-90-04-27891-2

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Publication Date

2014

The Penal and Revenue Rules, State Law, and Federal Preemption

William S. Dodge

Under two longstanding rules, U.S. courts will not enforce the penal and revenue laws of foreign nations, nor the judgments of foreign courts based upon such laws.¹ In *Pasquantino v. United States*, the U.S. Supreme Court referred to both the revenue rule and the prohibition against enforcing foreign penal laws as rules of common law.² The Court did not say, however, whether this meant state or federal common law. The question in *Pasquantino* was whether a U.S. prosecution under the federal wire-fraud statute for defrauding Canada of taxes should be barred by the revenue rule, given “the canon of construction that ‘[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.’”³ This presumption applies equally to state and federal common law,⁴ which is why the Court did not have to categorize the revenue rule. And in any event, the Court held in

* The Honorable Roger J. Traynor Professor of Law and Associate Dean for Research, University of California, Hastings College of the Law. My thanks to Paul Stephan for encouraging me to think hard about my preconceptions, to Scott Dodson and Mike Ramsey for helpful comments, and to Emily Goldberg and Christopher McKinnon for outstanding research assistance.

1 See RESTATEMENT (SECOND) OF CONFLICTS § 89 (1971) (“No action will be entertained on a foreign penal cause of action.”); *id.*, Reporter’s Note (discussing tax claims); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987) (“Courts in the United States are not required to recognize or to enforcement judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.”). See generally William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L.J. 161 (2002).

2 See 544 U.S. 349, 353 (2005) (referring to “the common-law revenue rule”); *id.* at 361 (noting that “[t]he rule against the enforcement of foreign penal statutes . . . tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed”).

3 *Id.* at 359 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)).

4 See *United States v. Texas*, 507 U.S. 529, 534 (1993) (rejecting argument that the “presumption favoring retention of existing law is appropriate only with respect to state common law”).

Pasquantino that the common-law revenue rule did not clearly prohibit prosecutions for evading foreign taxes when the wire-fraud statute was enacted.⁵

Lower federal courts, however, have considered the revenue rule to be *federal* common law.⁶ The cases making this assertion have involved claims by foreign governments to recover damages under the federal RICO statute for tax revenues lost to smuggling. Federal courts have uniformly held such claims to be barred by the revenue rule as an indirect enforcement of foreign tax laws.⁷ In one case, the foreign government brought suit not just under the federal RICO statute but under its state counterpart, a claim the district court held to be preempted because of the revenue rule's supposed status as federal common law.⁸ According to a recent count, 35 States have their own RICO statutes,⁹ and the preemption of such state statutes in cases brought by foreign governments to recover lost tax revenues makes a certain amount of sense. As the Second Circuit noted in what is still the leading case, the continuing vitality of the revenue rule rests on its "congruence with the international tax policies pursued by the political branches of our government."¹⁰ As discussed below, the United States has entered into tax treaties with many nations, only a few of which provide for collection assistance.¹¹ The Second Circuit concluded that "[d]eclining to apply the revenue rule in this case would arguably undermine

5 See *Pasquantino*, 544 U.S. at 560 ("We are aware of no common-law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes.").

6 See *Republic of Honduras v. Philip Morris Companies*, 341 F.3d 1253, 1256 (11th Cir. 2003) (adopting the revenue rule "as the rule of this circuit"); *Republic of Ecuador v. Philip Morris Companies, Inc.*, 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002) (referring to the revenue rule as "a federal common law rule"); *European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 235 n. 1 (E.D.N.Y. 2002) ("[T]his court understands the revenue rule to be a federal rule of common law").

7 See, e.g., *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 106 (2d Cir. 2001); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1255 (11th Cir. 2003). *Pasquantino* left the question open, see 544 U.S. at 355 n. 1, and the Second Circuit has since distinguished *Pasquantino* and reaffirmed its position. See *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005).

8 See *Republic of Ecuador*, 188 F. Supp. 2d at 1366 (noting that "the Florida legislature has no authority under the supremacy clause to eradicate a federal common law rule"); see also *European Community*, 186 F. Supp. 2d at 235 n. 1 (noting that, as a rule of federal common law, "[t]he revenue rule thus preempts any conflicting state law").

9 See G. Robert Blakey, *Time-Bars: RICO—Criminal and Civil—Federal and State*, 88 NOTRE DAME L. REV. 1581, 1592 n. 13 (2013) (giving citations).

10 *Attorney General of Canada*, 268 F.3d at 109.

11 See *infra* notes 121–31 and accompanying text.

the considered policy judgment of our political branches” and “would potentially allow Canada to obtain assistance it has not negotiated for.”¹² Letting foreign governments substitute state RICO claims for their federal ones would have the same effect, undercutting the federal policy not to provide collection assistance in the absence of a specific treaty provision.

But treating the revenue rule and its penal-law cousin as federal common law raises other problems. First, it would be a significant departure from the general rule that the conflict of laws and the recognition of foreign judgments are governed by state law in the United States.¹³ Second, it would call into question a number of state laws that do *not* appear to contravene any federal policy and seem otherwise unproblematic. For example, a number of States have enacted double-jeopardy statutes that bar prosecution for an offense of which the defendant has previously been convicted or acquitted by a foreign country.¹⁴ Such statutes clearly call for recognition of a foreign penal judgment, and if the penal rule were a rule of federal common law, they would seem to be preempted. But surely this would be federal overkill. Under the dual sovereignty doctrine, States are not constitutionally required to extend double-jeopardy protection based on foreign convictions and acquittals,¹⁵ but neither is such protection problematic. It contravenes no federal policy established by treaty or statute, and is a choice that ought to be open to the States.

This essay argues for a middle course that would preempt state laws that interfere with clear federal policies—like the U.S. policy against providing tax collection assistance without a treaty provision—but would leave States free to recognize foreign tax and penal laws and judgments when no clear federal policy prohibits it. Doctrinally, this means treating the penal and revenue rules as rules of *state* common law, but recognizing that (as in other areas) state law may be preempted by clear federal policies, in this context, particularly policies found in U.S. treaties. It is important to make clear at the outset that whether the penal and revenue rules are federal or state common law does *not* implicate the debate about whether customary international law should be

12 *Attorney General of Canada*, 268 F.3d at 122.

13 *See infra* Part II.

14 *See infra* notes 39–40 and accompanying text.

15 *See United States v. Studabaker*, 578 F.3d 423, 430 (6th Cir. 2009); *United States v. Villanueva*, 408 F.3d 193, 201 (5th Cir. 2005); *United States v. Rezaq*, 134 F.3d 1121, 1128 (D.C. Cir. 1998).

treated as federal or state law in the United States.¹⁶ The rules against enforcing foreign penal and tax laws are rules of domestic law and not rules of customary international law.¹⁷ Thus, the penal and revenue rules may be rules of state common law even if customary international law is considered to be federal common law, or *vice versa*.

Part I of this essay frames the issue by describing the contours of the penal and revenue rules. Part II notes that the conflict of laws and the recognition of judgments have generally been seen as questions of state law in the United States, and describes how the penal and revenue rules have been treated historically against that state-law background. Part III considers the case for treating the penal and revenue rules as federal common law, noting that the case is weaker than might be supposed and broader than necessary. Finally, Part IV sets forth an alternative theory of preemption—based on conflict with clearly established federal policy—that is narrower and more defensible than treating the penal and revenue rules as federal common law.

1 The Scope of the Rules

To appreciate the implications of allowing States to depart from the penal and revenue rules, or of federal law preempting such departures, it is useful to understand the contours of these two rules. Both rules developed at common law,¹⁸ and U.S. courts have frequently looked to the decisions of other common-law countries to define their scope.¹⁹ Nevertheless, whether a particular law or judgment falls within one of the rules is a question of U.S. law.²⁰

¹⁶ Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

¹⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (noting that “[n]o rule of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes”); International Law Association, *Report of International Committee on Transnational Recognition and Enforcement of Foreign Public Laws*, in REPORT OF THE SIXTY-THIRD CONFERENCE 719, 751 (1988) (observing that “there is no general rule of public international law prohibiting the transnational recognition or enforcement of foreign public laws as such”).

¹⁸ See generally Dodge, *supra* note 1.

¹⁹ See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 362–368 (2005); *Huntington v. Attrill*, 146 U.S. 657, 680–83 (1892).

²⁰ See *Huntington*, 146 U.S. at 483 (“The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears, to

On the scope of the penal rule, the Supreme Court's decision in *Huntington v. Attrill* is still the leading case. *Huntington* held that a law is "penal" for the purposes of this rule if "its purpose is to punish an offence against the public justice of the State" rather than "to afford a private remedy to a person injured by the wrongful act."²¹ Under this definition, not all suits brought by foreign governments are penal.²² Thus, a U.S. court has allowed the United Kingdom to recover funds embezzled by the defendants,²³ while a Canadian court has allowed the United States to enforce a judgment for clean-up costs under CERCLA.²⁴ Courts have also held that the penal rule does not bar a foreign government from seeking restitution for the benefit of private persons.²⁵

Suits by private parties may be barred under the penal rule if brought in the name of the state, as with a *qui tam* action.²⁶ But the rule does not bar claims under foreign competition law, for example, because the plaintiff seeks to recover based on its own injury, even though the plaintiff is sometimes

the tribunal which is called upon to enforce it, to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person.").

²¹ *Id.* at 673–74.

²² See *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 290 (1888) (noting that U.S. courts "have entertained suits by a foreign state . . . to enforce demands of a strictly civil nature").

²³ See *Bullen v. United Kingdom*, 553 So. 2d 1344, 1345 (Fla. App. 1989) (analogizing the foreign government to an ordinary judgment creditor). It made no difference to the court that the funds unlawfully retained by the defendants had been collected as Value Added Tax. See *id.*

²⁴ See *United States v. Ivey*, 139 D.L.R.4th 570, 574 (Ont. C.A. 1996) (noting that the CERCLA claim "is so close to a common law claim for nuisance that it is, in substance, of a commercial or private law character").

²⁵ See *United States Securities and Exchange Commission v. Manterfield*, [2009] EWCA Civ. 27, ¶ 24 (Eng. & Wales) (noting that "[t]he substance of what the SEC will seek to enforce . . . is the disgorgement of what they allege to be the proceeds of fraud"); *Evans v. European Bank Ltd.*, [2004] NSWCA 82, ¶ 83 (Austl.) (enforcing U.S. judgment under Federal Trade Commission Act for disgorgement proceeds of credit card fraud even though surplus might go to U.S. Treasury because "as a matter of substance, this is a proceeding designed to compensate persons who have been defrauded"). So long as the judgment is not penal, U.S. courts have considered it irrelevant that the judgment was rendered in a criminal proceeding or pursuant to a criminal statute. See *Mexican Nat'l R.R. Co. v. Slater*, 115 F. 593, 602–03 (5th Cir. 1902), *aff'd*, 194 U.S. 120 (1904); *Chase Manhattan Bank, N.A. v. Hoffman*, 665 F. Supp. 73, 76 (D. Mass. 1987).

²⁶ See *Huntington*, 146 U.S. at 673 (noting that *qui tam* actions "may stand on the same ground as suits brought for such a penalty in the name of the state or of its officers, because they are equally brought to enforce the criminal law of the state").

characterized as a “private attorney general.”²⁷ Neither are claims by private parties for multiple or punitive damages considered “penal.”²⁸

A tax claim, for purposes of the revenue rule, is “a claim for an assessment of a tax, whether imposed in respect of income, property, transfer of wealth, or transactions in the taxing state.”²⁹ The revenue rule has been held to bar both direct and indirect enforcement of tax claims.³⁰ Thus, courts have denied liquidators’ requests to recover assets to satisfy foreign tax claims.³¹ As noted above, U.S. courts have also rejected under the revenue rule efforts by foreign governments to use the federal RICO statute to recover tax revenues lost to smuggling.³² Although the question of indirect enforcement has arisen less frequently in a penal context, at least one court has held that the penal rule barred enforcement of a civil judgment on an appearance bond against a criminal defendant who fled the jurisdiction.³³

The fact that the penal and revenue rules bar both direct and indirect enforcement does not, however, prevent courts from taking account of foreign tax and penal laws and judgments in other ways. Some of these ways are quite well established. In determining whether performance of a contract should

27 See Dodge, *supra* note 1, at 189–93; F.A. Mann, *The International Enforcement of Public Rights*, 19 N.Y.U. J. INT’L L. & POL. 603, 614–15 (1987); see, e.g., *Old N. State Brewing Co. v. Newlands Services Inc.*, 58 B.C.L.R. 3d 144 (B.C.C.A. 1998) (Can.) (noting that “until the Attorney General of Canada invokes the provisions of the Foreign Extraterritorial Measures Act, treble damage awards based even on anti-trust laws are enforceable”).

28 See *Huntington*, 146 U.S. at 667–68; *S.A. Consortium Gen. Textiles v. Sun & Sand Agencies*, [1978] 1 Q.B. 279, 299–300 (C.A.) (“The word ‘penalty’ . . . means, I think, a sum payable to the state by way of punishment and not a sum payable to a private individual, even though it is payable by way of exemplary damages.”).

29 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 cmt. c.

30 See *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130 (2001) (“a court must examine whether the substance of the claim is, either directly or indirectly, one for tax revenues”); *QRS I APS v. Frandsen*, [1999] 3 All E.R. 289, 291 (C.A.) (“our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country”).

31 See *QRS*, [1999] 3 All E.R. 289; *Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516 (Ir. H. Ct. 1950), *aff’d*, [1954] A.C. 530 (Ir. S. Ct. 1951).

32 See, e.g., *Attorney General of Canada*, 268 F.3d at 131 (“[A]t bottom, Canada would have a United States court require defendants to reimburse Canada for its unpaid taxes, plus a significant penalty due to RICO’s treble damages provision. Thus, Canada’s object is clearly to recover allegedly unpaid taxes.”).

33 See *United States v. Inkley*, [1989] 1 Q.B. 255, 265 (C.A. 1988) (noting that “whole purpose of the bond was to ensure, so far as it was possible, the presence of the executor of the bond to meet justice at the hands of the state in a criminal prosecution”).

be excused on grounds of impracticability, for example, U.S. courts will consider whether the performance was prohibited by foreign law, which obviously would include foreign criminal law.³⁴ Similarly, in *Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, the U.S. Supreme Court took account of foreign criminal laws prohibiting the production of bank records in holding that dismissal of the complaint was too harsh a sanction for non-compliance with a discovery order.³⁵ In circumstances such as these, U.S. courts do not enforce foreign penal laws either directly or indirectly but rather treat them as facts about the world upon which the application of certain domestic laws must depend.

A number of States have also passed repeat-offender statutes that expressly require consideration of criminal convictions in other countries.³⁶ “Habitual criminal statutes do not punish defendants for their previous offenses, but for their persistence in crime.”³⁷ Because these laws consider foreign criminal convictions only for the purpose of determining how harshly to punish a *new* offense under U.S. domestic law, they do not violate the rule against enforcing foreign penal judgments.³⁸

34 See Uniform Commercial Code § 2–615(a) (excusing performance that “has been made impracticable . . . by compliance in good faith with any applicable foreign or domestic governmental regulation”); RESTATEMENT (SECOND) OF CONTRACTS § 264 (1981) (excusing performance that “is made impracticable by having to comply with a domestic or foreign governmental regulation or order”).

35 357 U.S. 197, 211 (1958) (“It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for nonproduction, and this excuse is not weakened because the laws preventing compliance are those of a foreign sovereign.”).

36 See, e.g., Cal. Penal Code § 668 (“Every person who has been convicted in any other state, government, *country*, or jurisdiction of an offense for which, if committed within this state, that person could have been punished under the laws of this state by imprisonment in the state prison, is punishable for any subsequent crime committed within this state in the manner prescribed by law and to the same extent as if that prior conviction had taken place in a court of this state.” (emphasis added)); see also Fla. Stat. Ann. § 775.084(1)(e); La. Rev. Stat. Ann. § 15:529.1A; 21 Okla. Stat. Ann. § 54; Tenn. Code Ann. § 40–35–106 (b) (5); 13 Vt. Stat. Ann. § 11 & § 11a.

37 Martha Kimes, *The Effect of Foreign Criminal Convictions under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT’L L. 503, 507 (1997).

38 In *Small v. United States*, 544 U.S. 385 (2005), the Supreme Court held that the federal felon-in-possession-of-a-firearm statute, 18 U.S.C. § 944(g)(1), did not apply to persons convicted in foreign courts. Unlike the state statutes mentioned in the text, this federal statute made no express mention of foreign convictions. It is worth noting, however, that no member of the Court thought the rule against enforcing foreign penal judgments to be

As noted above, however, four States have laws requiring consideration of foreign penal judgments—convictions and acquittals—in a different way, as a bar to prosecution for the same offense under the law of that State.³⁹ California used to have a similar double-jeopardy statute, but amended it in 2004 to remove the bar to prosecution and instead to give credit for time served abroad for the crime.⁴⁰ These state statutes do not simply use the fact of a foreign conviction to determine how harshly to punish a new offense under domestic law. They instead recognize the foreign criminal judgment as a bar to a domestic prosecution (or in California's case as an offset against the sentence) in much the same way that giving *res judicata* effect to a foreign civil judgment precludes a new lawsuit. It seems difficult to avoid the conclusion that such laws call for the direct enforcement of foreign penal judgments. That is not problematic if the penal rule is a rule of *state* common law, for state statutes can override state common law. But if the penal rule is instead a rule of *federal* common law, then state double-jeopardy statutes would be preempted to the extent they require recognition of foreign convictions or acquittals. Such preemption would be a departure from the general rule that the recognition and enforcement of foreign judgments in the United States is governed by state law, to which this essay now turns.

2 The State Law Background

In the United States today, both the conflict of laws (on which the enforcement of foreign law turns) and the recognition and enforcement of foreign judgments

implicated by the interpretation of the federal statute. This is particularly striking because *Small* was decided on the very same day the Court handed down *Pasquantino*, which considered how to construe the federal wire-fraud statute in light of the revenue rule. See *supra* notes 2–5 and accompanying text.

39 See, e.g., Idaho Code Ann. § 19-315 (“When an act charged as a public offense, is within the venue of another state, territory, or *country*, as well as of this state, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this state.” (emphasis added)); see also Miss. Code Ann. § 99-11-27; N.D. Cent. Code Ann. § 29-03-13; Wash. Rev. Stat. § 10.43.040. Under the dual sovereignty doctrine, such prosecutions are not barred by the Double Jeopardy Clause of the U.S. Constitution. See *supra* note 15.

40 See A.B. 1432, Stats. 2004, ch. 511, § 1, p. 4109 (codified at Cal. Penal Code §§ 656, 656.5, 656.6, 793, 793.5).

are generally governed by state law.⁴¹ It was not always thus. Before *Erie*,⁴² the conflict of laws was considered part of the general common law, which state and federal courts administered independently and without any obligation to follow the decisions of the other. The first *Restatement of Conflicts*—published in 1934, just four years before *Erie*—described its purpose “to present an orderly statement of the general common law of the United States,”⁴³ and its reporter Joseph Beale noted that “the federal and the state courts may differ in their interpretation.”⁴⁴ The same was true in the area of judgments, where state courts felt no obligation to follow the Supreme Court’s decision in *Hilton v. Guyot* requiring reciprocity as a condition for recognizing foreign judgments,⁴⁵ and the Supreme Court itself held that the recognition of foreign judgments by state courts did not present a federal question.⁴⁶

In 1938 *Erie* famously declared: “There is no federal general common law.”⁴⁷ Three years later, in *Klaxon*, the Supreme Court said this meant that “[t]he conflict of laws rules to be applied by the federal court in Delaware must conform

41 See *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941) (conflict of laws); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972) (enforcement of judgments).

42 See *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

43 RESTATEMENT OF CONFLICTS viii (1934); see also 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 1.12, at 10 (1935) (noting that the conflict of laws “is a branch of the ordinary private law of each country, and its based upon the same sources as general law”).

44 BEALE, *supra* note 43, § 3.3, at 22. During the late-nineteenth and early-twentieth centuries, the Supreme Court constitutionalized certain aspects of the conflict of laws. See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578, 592–93 (1897); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930). To this extent, conflicts rules became preemptive federal law, reviewable on appeal by the Supreme Court. See *Home Ins.*, 281 U.S. at 407 (“the objection that, as applied to contracts made and to be performed outside of Texas, the statute violates the Federal Constitution, raises federal questions of substance”). The Court began to withdraw from its experiment with constitutionalization in the 1930s, see, e.g., *Alaska Packers Assn. v. Industrial Accident Comm’n*, 294 U.S. 532 (1935); *Pacific Employers Ins. Co. v. Industrial Accident Comm’n*, 306 U.S. 493 (1939), and today the constitutional limits on choice-of-law are quite weak. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981) (requiring “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair”).

45 See, e.g., *Johnston v. Compagnie Générale Transatlantique*, 152 N.E. 121, 123 (N.Y. 1926).

46 See *Aetna Life Insurance Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

47 304 U.S. at 78.

to those prevailing in Delaware's state courts."⁴⁸ And, while the Supreme Court has never squarely addressed the question, lower courts and commentators have generally concluded that the recognition of foreign judgments is also governed by state law.⁴⁹ Over the years, there have been proposals to federalize the conflict of laws⁵⁰ or the recognition and enforcement of foreign judgments,⁵¹ but these have so far gained little traction.⁵²

Until recently, the penal and revenue rules were treated in much the same way as the rest of the law of conflicts and judgments. Before *Erie*, they were considered rules of general common law. The Supreme Court made this explicit in *Huntington v. Attrill*, where it characterized the penal rule as one of "general jurisprudence," which a federal court "must decide for itself, uncontrolled by local decisions."⁵³ After *Erie*, the penal and revenue rules were treated like other rules of conflicts and judgments law as questions of state law. In 1971, the *Restatement (Second) of Conflicts* stated that "no action will be entertained on a foreign penal cause of action" without any suggestion that this rule was one of federal common law from which the States could not depart by judicial decision or by statute.⁵⁴ With respect to the recognition and enforcement of foreign judgments, many States adopted Uniform Acts that reflect the penal and

48 313 U.S. at 496. In *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam), the Court made clear that *Klaxon* applies to cases involving the laws of other countries.

49 See, e.g., *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972) (applying Pennsylvania law); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 cmt. a ("Since *Erie v. Tompkins*, . . . it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, State courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.")

50 See, e.g., Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1 (1991); William Baxter, *Choice of Law and the Federal System*, 16 STAN L. REV. 1 (1963).

51 AMERICAN LAW INSTITUTE, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter ALI PROPOSED FEDERAL STATUTE].

52 In 2010, Congress did codify rules for the non-recognition of foreign defamation judgments in the so-called SPEECH Act. See 28 U.S.C. §§ 4101–05.

53 See 146 U.S. 657, 683 (1892).

54 See RESTATEMENT (SECOND) OF CONFLICTS § 89.

revenue rules by excluding tax and penal judgments from their coverage.⁵⁵ To my knowledge, there was no suggestion at the time that either act was drafted that the exclusion of tax and penal judgments was required by federal law.⁵⁶ Indeed, the savings clause in each of the acts expressly allows States to recognize at common law judgments that are not covered by the acts.⁵⁷

The Ninth Circuit briefly suggested in *British Columbia v. Gilbertson* that the revenue rule might be treated as federal law because of its “foreign relations overtones,” but found it unnecessary to decide whether state or federal law governed, since each would have denied enforcement of the Canadian tax judgment in question.⁵⁸ It was not until 2002, that federal courts began to hold that the revenue rule was a rule of federal common law. In *European Community v. Japan Tobacco, Inc.*, the district court held that the European Community’s smuggling and money-laundering claims under the federal RICO statute and state common law were barred by the revenue rule.⁵⁹ In a footnote, the district court stated that it “understands the revenue rule to be a federal rule of common

55 See Uniform Foreign Money-Judgments Recognition Act § 1(2) (defining “foreign judgment” as a money judgment “other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters”) [hereinafter 1962 Uniform Act]; Uniform Foreign-Country Money Judgments Recognition Act § 3(b) (providing that the act does not apply “to the extent that the judgment is: (1) a judgment for taxes; (2) a fine or other penalty; (3) a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations”) [hereinafter 2005 Uniform Act]. As of this writing, the 2005 Uniform Act has been adopted by 18 States and the District of Columbia. The 1962 Uniform Act is in force in an additional 15 States and the U.S. Virgin Islands.

56 The 1962 Uniform Act sought to obtain widespread state adoption by confining itself to “rules that have long been applied by the majority of courts in this country.” Prefatory Note, Uniform Foreign Money-Judgments Recognition Act, reprinted in *HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-FIRST YEAR* 242, 242 (1962). The 2005 Uniform Act simply repeated the exclusions found in the 1962 Act. See 2005 Uniform Act § 3, cmt. 1.

57 See 1962 Uniform Act § 7 (“This Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.”); 2005 Uniform Act § 11 (“This [act] does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of this [act].”)

58 597 F.2d 1161, 1163 (9th Cir. 1979). The Ninth Circuit also noted that under *Erie* and *Klaxon*, a federal court sitting in diversity would ordinarily apply state law to the enforcement of foreign judgments. See *id.*

59 186 F. Supp. 2d 231 (E.D.N.Y. 2002).

law.”⁶⁰ The district court cited the revenue rule’s “close association with federal and constitutional policy concerns, such as foreign relations and separation of powers” as well as the Supreme Court’s decision in *Banco Nacional de Cuba v. Sabbatino*⁶¹ holding that the act of state doctrine was a rule of federal common law, a decision on which the Second Circuit had relied heavily in an earlier revenue rule case.⁶² As a rule of federal common law, the district court noted, “[t]he revenue rule thus preempts any conflicting state law.”⁶³ With respect to the federal RICO claims, the district court’s assertions about federal common law were dictum, because (as explained above) the presumption against reading federal statutes to displace the common law applies equally to state and federal common law.⁶⁴ With respect to the European Community’s claims under state common law, a federal-common-law revenue rule should have had preemptive effect. The district court did not rest on that ground, however, saying simply instead that “[a]s a rule of common law, the revenue rule applies to common law rights of action,”⁶⁵ a line of reasoning that would have applied just as readily if the revenue rule were a rule of state common law.

One week later, in *Republic of Ecuador v. Philip Morris Companies, Inc.*, another district court similarly concluded that the revenue rule was a rule of federal common law in another case brought by a foreign government seeking tax revenues lost to smuggling.⁶⁶ The district court did not specifically state the basis for this conclusion, though it did note that the revenue rule was a judicial doctrine, like the act of state doctrine, based on separation of powers.⁶⁷ The court did, however, rely expressly on the revenue rule’s supposed status as federal common law to preempt Ecuador’s state RICO claims, noting that “the Florida legislature has no authority under the supremacy clause to eradicate a federal common law rule.”⁶⁸ On appeal, having consolidated cases brought by Honduras and Belize, the Eleventh Circuit affirmed.⁶⁹ The Court of Appeals

60 *Id.* at 235 n. 1.

61 376 U.S. 398, 425 (1964). For discussion of *Sabbatino* and other arguments for treating the revenue rule as a rule of federal common law, see *infra* Part III.

62 See 186 F. Supp. 2d at 235 n. 1 (citing Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103 (2d Cir. 2001)).

63 *Id.*

64 See *supra* note 4 and accompanying text.

65 186 F. Supp. 2d at 242.

66 See 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002) (referring to the revenue rule as “a federal common law rule”).

67 See *id.* at 1362.

68 *Id.* at 1366.

69 Republic of Honduras v. Philip Morris Companies, 341 F.3d 1253, 1256 (11th Cir. 2003).

neither distinguished among the claims brought under the federal RICO statute, the state RICO statute, and state common law, nor relied expressly on the preemptive force of a federal common law rule. But it did refer to the revenue rule “as the rule of this circuit,”⁷⁰ a phrase that would make no sense if the rule were one of state common law.

Thus, since the start of the twenty-first century, federal courts have departed from the general rule that the conflict of laws and recognition of foreign judgments are governed by state law and have begun to treat the revenue rule as a rule of federal common law that preempts state common-law and statutory claims. The courts’ analysis of this question, however, has been sketchy at best, resting on brief invocations of “foreign relations,” “separation of powers,” and the Supreme Court’s decision in *Sabbatino*. It is worth considering just how strong the case for federal common law might be.

3 The Case for Federal Common Law

Despite *Erie*’s holding that there is “no federal general common law,”⁷¹ the federal courts may create federal common law in limited instances.⁷² As the Supreme Court recognized in *Texas Industries*, such instances “fall into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law.”⁷³ The first category includes “international disputes implicating . . . our relations with foreign nations.”⁷⁴

The archetypal example of federal common law for disputes implicating our relations with foreign nations is the act of state doctrine.⁷⁵ In its “classic formulation,” the act of state doctrine provides that “the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”⁷⁶ In *Sabbatino*, the Supreme Court noted that the act of state

⁷⁰ *Id.* at 1256; see also *id.* at 1261 (“we adopt the revenue rule as the law of this circuit”).

⁷¹ *Erie Railroad v. Tompkins*, 304 U.S. 64, 78 (1938).

⁷² See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

⁷³ *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

⁷⁴ *Id.* at 641.

⁷⁵ *Texas Industries* cited *Sabbatino* as its example of a case implicating relations with foreign nations. See *id.*, at 641 n. 13.

⁷⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)); see also *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990) (holding that the act of state doctrine applies only when a “suit requires the Court to declare invalid, and thus ineffective as a rule of

doctrine was not required by international law,⁷⁷ and went on to hold that it was required by federal common law:

[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.⁷⁸

The Court described the “problems surrounding the act of state doctrine” as “intrinsically federal,”⁷⁹ and stated that they “should not be left to divergent and perhaps parochial state interpretations.”⁸⁰

Certainly, the strongest case for treating the penal and revenue rules as federal common law rests on *Sabbatino*. The district court in the *European Community* case relied explicitly on that decision,⁸¹ while the district court in the *Ecuador* case did so implicitly by citing the act of state doctrine as a precedent.⁸² But *Sabbatino*’s support for treating the penal and revenue rules as federal common law is not as powerful as it first appears. First, the *Sabbatino* Court itself suggested that States might depart in certain respects from its interpretation of the act of state doctrine. Second, the analogy to *Sabbatino* rests on the supposed similarity of the rationales for the act of state doctrine on the one hand and the penal and revenue rules on the other, a similarity that does not survive close scrutiny.

While *Sabbatino* held that the States were bound as a matter of federal common law to give foreign acts of state at least the same deference as the Supreme Court did in that case, the Court expressly left open the possibility

decision for the courts of this country the official act of a foreign sovereign” (internal quotation marks and citation omitted)).

⁷⁷ See *Sabbatino*, 376 U.S. at 421–22.

⁷⁸ *Id.* at 425.

⁷⁹ *Id.* at 427.

⁸⁰ *Id.* at 425.

⁸¹ See *European Community v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 235 n. 1 (E.D.N.Y. 2002).

⁸² See *Republic of Ecuador v. Philip Morris Companies*, 188 F. Supp. 2d 1359, 1362 (S.D. Fla. 2002).

that state courts might give foreign acts of state *greater deference*.⁸³ Because the act of state doctrine requires the enforcement of certain foreign acts of state, greater deference by the States would not conflict with the federal-common-law act of state doctrine. But because the penal and revenue rules require the *non-enforcement* of foreign penal and tax laws and judgments, greater deference by the States to such foreign legislative or judicial acts would conflict with a federal-common-law penal or revenue rule. One could argue that the penal and revenue rules are nevertheless federal common law from which the States are not free to depart, but this would be to go beyond *Sabbatino* and give the penal and revenue rules even greater preemptive force than the act of state doctrine. Or one could argue that, in the context of the penal and revenue rules, state freedom to afford greater deference to foreign legislative and judicial acts means that these rules cannot be treated as federal common law. In any event, it is clear that because of the different ways in which these rules operate—the act of state doctrine requiring enforcement of foreign acts and the penal and revenue rules requiring non-enforcement—one cannot mechanically apply what *Sabbatino* has to say about the relationship of federal and state law under the act of state doctrine to the penal and revenue rules.

The case for treating the penal and revenue rules as federal common law on the basis of *Sabbatino* also depends critically on the supposed similarity of the justifications for the act of state doctrine on the one hand and the penal and revenue rules on the other. In *Sabbatino*, the Supreme Court itself asserted the similarity. While acknowledging that the penal and revenue rules “presume[] invalidity in the forum whereas the act of state principle presumes the contrary,” the Supreme Court asserted that “the doctrines have a common rationale”—specifically, “to avoid embarrassing another state by scrutinizing its . . . laws.”⁸⁴ But upon examination, this rationale for the penal and revenue rules proves less than convincing.

The rationale was first articulated by Judge Learned Hand in *Moore v. Mitchell*.⁸⁵ Hand noted that courts would not enforce foreign laws or judgments

83 *Sabbatino*, 376 U.S. at 425 n. 23 (“We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.”).

84 *Sabbatino*, 376 U.S. at 437.

85 30 F.2d 600, 603–04 (2d Cir. 1929) (L. Hand, J., concurring). *Sabbatino* cited an Irish decision for the rationale, 376 U.S. at 437, but the Irish court had cited *Moore v. Mitchell*, quoting Hand at length. See *Peter Buchanan Ltd. v. McVey*, [1955] A.C. 516, 528 (Ir. H. Ct. 1950), *aff’d*, [1955] A.C. 530 (Ir. S. Ct. 1951).

that were contrary to its own public policy.⁸⁶ “This is not a troublesome or delicate inquiry when the question arises between private persons,” Hand reasoned, but the inquiry becomes more sensitive in the areas of penal and tax law.⁸⁷ “To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor.”⁸⁸ Although the Supreme Court in *Pasquantino* described public-policy review as “the principal evil against which the revenue rule was traditionally thought to guard,”⁸⁹ Hand’s reasoning suffers from serious flaws. First, it assumes that foreign penal and revenue laws are more likely to be found in violation of U.S. public policy than other foreign laws. This seems highly questionable. “After all, every State collects taxes, every State has a criminal law,” and such laws are broadly similar.⁹⁰ Second, it seems questionable that selective non-enforcement of foreign tax and penal laws is more offensive than blanket non-enforcement. As Robert Leflar noted long ago, the possibility of holding a foreign tax or penal law contrary to public policy “would seldom be more offensive than a flat refusal to permit any action at all.”⁹¹ Third, those foreign states most likely to pass penal or tax laws manifestly contrary to U.S. public policy are those the United States should be least concerned to offend. A policy that refuses enforcement to Canadian tax judgments in order to avoid offending Hitler’s Germany seems difficult to defend.⁹² If the possibility of offending foreign governments by finding their penal and tax laws inconsistent with U.S. public policy seems low (or the possibility of offending them by a blanket refusal to enforce such laws seems high), then the case for preempting state laws that would permit such enforcement seems much weaker than with the act of state doctrine.

Other rationales for the penal and revenue rules exist, but they do not support an analogy to the act of state doctrine or the case for preemption. Some courts and commentators have pointed to the supposed difficulty of applying

⁸⁶ *Moore*, 30 F.2d at 604 (L. Hand, J., concurring).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Pasquantino v. United States*, 544 U.S. 349, 368 (2005).

⁹⁰ Andreas F. Lowenfeld, *Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction*, 163 RECUEIL DES COURS 311, 421 (1976-II).

⁹¹ Robert A. Leflar, *Extrastate Enforcement of Foreign Penal and Governmental Claims*, 46 HARV. L. REV. 193, 217 (1932).

⁹² See Dodge, *supra* note 1, at 214–15.

foreign penal and tax laws,⁹³ but this seems doubtful. As one court has noted, “[t]here may be difficulty in interpreting foreign revenue laws but such difficulties are met with in relation to other foreign laws with which the Courts have on occasion to grapple.”⁹⁴ And even if one accepts this rationale, it provides no support for an analogy to *Sabbatino* or the creation of a preemptive rule of federal common law. If States should wish to shoulder the burden of deciding particularly difficult issues of foreign law, there would seem to be no federal policy against their doing so.

A final justification for the penal and revenue rules is the argument that courts should avoid furthering the governmental interests of a foreign sovereign.⁹⁵ This rationale does not support an analogy to the act of state doctrine but rather *distinguishes* the penal and revenue rules from that doctrine, which advances the interests of foreign sovereigns. Indeed, Justice White made precisely that point in his *Sabbatino* dissent.⁹⁶ This rationale may, however, support the case for federal preemption of state law in some instances. In rejecting foreign government claims under the federal RICO statute for tax revenues lost to smuggling, a number of U.S. courts have noted that allowing such claims would tend to undercut the federal government’s ability to ensure the reciprocal treatment of U.S. claims by negotiating treaties. As the district court asked in the *Ecuador* case, “Why would Ecuador negotiate a tax treaty with the Executive to recover lost taxes if it could pursue RICO’s treble damages in court?”⁹⁷ The same danger of undercutting the U.S. negotiating position exists

93 See *id.* at 209–12.

94 *Commissioner of Taxes v. McFarland*, [1965] 1 SA 470, 473 (Witwatersrand Local Div.). The Supreme Court also cast doubt on this rationale in *Pasquantino* when it noted that the federal rules give “federal courts sufficient means to resolve the incidental foreign law issues.” *Pasquantino v. United States*, 544 U.S. 349, 370 (2005).

95 See Dodge, *supra* note 1, at 215–19; *Pasquantino*, 544 U.S. at 369–70 (discussing the “risk of advancing the policies of Canada illegitimately”).

96 See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448–49 (1964) (White, J., dissenting) (noting that “our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign” and that “[t]hese rules demonstrate that our courts have never been bound to pay unlimited deference to foreign acts of state, defined as an act or law in which the sovereign’s governmental interest is involved”).

97 *Republic of Ecuador v. Philip Morris Companies*, 188 F. Supp. 2d 1359, 1364 (S.D. Fla. 2002); see also *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 122 (2d Cir. 2001) (“Declining to apply the revenue rule in this case . . . would potentially allow Canada to obtain assistance it has not negotiated for and that would be greater than the assistance our government would likely receive as a litigant in Canada’s courts.”).

with respect to state law claims—common-law or statutory—that would allow foreign governments to recover lost taxes.⁹⁸

The case for federal preemption of state laws that would recognize foreign tax claims is strong because, as explained in Part IV, there is a clear federal policy manifested in numerous tax treaties not to recognize such claims in the absence of a specific treaty provision providing for collection assistance. But such a clear federal policy does not always exist. For example, as noted above, some States have double-jeopardy statutes that bar prosecution under state law of a defendant who has been convicted or acquitted of the same offense by a foreign court.⁹⁹ To my knowledge, the United States has no federal policy on this subject, expressed in treaties or otherwise. Treating the penal and revenue rules as federal common law would sweep too broadly, preempting state law irrespective of federal policy. The better approach is to treat the penal and revenue rules as rules of state common-law, capable of alteration by state statute or judicial decision, but subject to preemption where a clear federal policy against recognition of foreign laws or judgments exists. Building on Justice Harlan's concurring opinion in *Zschernig v. Miller*,¹⁰⁰ Part IV sketches such an approach.

4 Preemption by Federal Policy

Zschernig v. Miller is not everyone's favorite case.¹⁰¹ Writing for the majority, Justice Douglas adopted a potentially broad theory of foreign affairs preemption and struck down a state escheat statute that conditioned the right of a non-resident alien to inherit property in Oregon on what the law of the alien's country said about the inheritance rights of U.S. citizens.¹⁰² Despite a concession by the Solicitor General that the state statute did not unduly interfere

98 Cf. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 377 (2000) (noting that a state act imposing sanctions on a foreign country “reduces the value of the [bargaining] chips created by the federal statute”).

99 See *supra* notes 39–40 and accompanying text.

100 See *Zschernig v. Miller*, 389 U.S. 429, 429–62 (Harlan, J., concurring).

101 For a sampling of scholarly opinions, see, e.g., Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Affairs Federalism*, 75 NOTRE DAME L. REV. 341 (1999); Carlos Manuel Vazquez, *W(h)ither Zschernig?*, 46 VILLANOVA L. REV. 1259 (2001).

102 See *Zschernig*, 389 U.S. at 430–31 & n. 1.

with the United States' conduct of foreign relations,¹⁰³ the Court held that the Oregon law was unconstitutional as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."¹⁰⁴ Concurring in the result, Justice Harlan took a narrower view. He rejected the majority's theory of dormant foreign affairs preemption and would have held that "in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations."¹⁰⁵ Harlan concurred in the result because he found such a conflicting federal policy in the 1923 treaty with Germany guaranteeing the right to inherit property.¹⁰⁶

The scope of foreign affairs preemption today remains controversial. Dissenting on behalf of herself and three other members of the Court in *American Insurance Association v. Garamendi*, Justice Ginsburg wrote: "We have not relied on *Zschernig* since it was decided, and I would not resurrect that decision here."¹⁰⁷ But the majority did rely on Justice Douglas's majority opinion in *Zschernig*, as well as on Justice Harlan's concurrence.¹⁰⁸ In a significant footnote, the Court suggested that the two approaches to preemption might be reconciled—that field preemption might be appropriate "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," but that Harlan's conflict preemption approach might make sense where a State had acted within "its 'traditional competence' but in a way that affects foreign relations."¹⁰⁹

The conflict of laws and the recognition of foreign judgments lie within the traditional competence of the States.¹¹⁰ Under Harlan's approach, the question would then be whether state laws departing from the penal and revenue rules would run afoul of "a conflicting federal policy."¹¹¹ Although Justice Ginsburg's

¹⁰³ See *id.* at 434 (quoting brief of the United States as *amicus curiae*).

¹⁰⁴ *Id.* at 432.

¹⁰⁵ *Zschernig v. Miller*, 389 U.S. 429, 458–59 (Harlan, J., concurring).

¹⁰⁶ See *id.* at 457. The Supreme Court had held in *Clark v. Allen*, 331 U.S. 503 (1947), that the treaty in question did not guarantee the right of German nationals to inherit personal property located in the United States. The *Zschernig* majority found it unnecessary to re-examine *Clark*, see 389 U.S. at 432, while Justice Harlan did and found *Clark* to be wrongly decided. See *id.* at 444–57 (Harlan, J., concurring).

¹⁰⁷ *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 439 (2003) (Ginsburg, J., dissenting).

¹⁰⁸ See *id.* at 417–20 (2003).

¹⁰⁹ *Id.* at 419 n. 11 (quoting *Zschernig v. Miller*, 389 U.S. 429, 459 (Harlan, J., concurring)).

¹¹⁰ See *supra* Part II.

¹¹¹ *Zschernig*, 389 U.S. at 459 (Harlan, J., concurring).

dissenting opinion in *Garamendi* did not expressly endorse Harlan's approach to foreign affairs preemption, the central question that divided the dissent from the majority was precisely how to determine the existence of a preemptive federal policy. For the *Garamendi* majority, a "consistent Presidential foreign policy" reflected in the statements of high-level executive officials was sufficient.¹¹² For the dissent, "[t]he displacement of state law by preemption properly requires a considerably more formal and binding federal instrument," and the fact that the U.S. executive agreement with Germany dealing with Holocaust-era claims did not even address disclosure laws like California's indicated the absence of a preemptive federal policy.¹¹³

Clearly, a conflicting federal policy may be established by an act of Congress. In *Crosby v. National Foreign Trade Council*, for example, the Supreme Court held that a state law barring state entities from companies doing business with Burma was preempted by a federal statute delegating discretion to the President to establish a flexible sanctions policy with respect to that country.¹¹⁴ Just as clearly, a conflicting federal policy may be established by the express terms of a treaty or executive agreement.¹¹⁵

The Supreme Court has also held that in some instances a preemptive federal policy may be expressed by the *absence* of a treaty or other international agreement. In *Holmes v. Jennison*,¹¹⁶ the question was whether Vermont could extradite a fugitive to Canada. Chief Justice Taney noted that "[s]ince the expiration of the treaty with Great Britain, negotiated in 1793, the general government appears to have adopted the policy of refusing to surrender persons, who, having committed offences in a foreign nation, have taken shelter in this."¹¹⁷ Taney found this federal policy to be expressed by the *absence* of extradition treaties.¹¹⁸ Moreover, Taney found the federal policy on extradition to preempt state authority with respect to extradition.

¹¹² See *id.* at 421–23.

¹¹³ *Id.* at 440–42 (Ginsburg, J., dissenting).

¹¹⁴ 530 U.S. 363 (2000).

¹¹⁵ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (holding Virginia debt confiscation statute preempted by Article 4 of the 1783 treaty of peace with Great Britain); *United States v. Belmont*, 301 U.S. 324 (1937) (holding New York law preempted by executive agreement recognizing the Soviet Union and assigning claims against it to the United States).

¹¹⁶ 29 U.S. (14 Pet.) 540 (1840).

¹¹⁷ *Id.* at 574.

¹¹⁸ See *id.* ("It is believed that the general government has entered into no treaty stipulations upon this subject since the one above mentioned; and in every instance where there was no engagement by treaty to deliver, and a demand has been made, they have uniformly

What avails it that the general government, in the exercise of that portion of its power over our foreign relations, which embraces this subject, deems it wisest and safest for the Union to enter into no arrangements upon the subject, and to refuse all such demands; if the state in which the fugitive is found, may immediately reverse this decision, and deliver over the offender to the government that demands him?¹¹⁹

Although the Court in *Holmes* was equally divided, a majority of the Supreme Court subsequently endorsed Taney's opinion, which is now considered to be the position of the Court.¹²⁰ *Holmes* does not mean that state law is preempted anytime it touches an area that could be the subject of a treaty. Such a rule would preempt the state law of judgments, as well as many other areas of regulation that the federal government has chosen to leave to the States. Rather *Holmes* teaches that sometimes the lack of treaties, as well as limits in treaties that do exist, reflect a clear federal policy to limit cooperation with other nations.

refused, and have denied the right of the executive to surrender, because there was no treaty, and no law of Congress to authorize it.”).

119 *Id.*

120 See *United States v. Rauscher*, 119 U.S. 407, 414 (1886) (noting that “there can be little doubt of the soundness of the opinion of Chief Justice TANEY, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government”); Goldsmith, *supra* note 101, at 1651 (describing Taney's opinion as “orthodoxy”). For more on *Holmes* and its reception, see Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1224–31 (2000).

Professor Swaine argues for recognition of a “dormant treaty power,” under which States would be precluded from activities “involving direct or indirect negotiating—put less formally, bargaining—with foreign powers on matters of national concern.” *Id.* at 1138. This would include “state measures contingent on the policies of foreign powers,” *id.* at 1141, for example, the Oregon statute at issue in *Zschernig*. See *id.* at 1234. While Professor Swaine's argument has the virtue of rooting preemption in a specific provision of the Constitution (the Treaty Power), it seems both too broad and too narrow. It seems too broad because it would invalidate state reciprocity requirements aimed at securing greater recognition for U.S. judgments abroad. See *id.* at 1271, n. 508. But cf. *Clark v. Allen*, 331 U.S. 503, 516–17 (1947) (rejecting the argument that reciprocity requirements in state inheritance statutes “entered the forbidden domain of negotiating with a foreign country”). It seems too narrow because States can intrude upon treaty negotiations not just by seeking changes in foreign law but also by giving away the United States' bargaining chips. State laws allowing foreign tax claims would be one example.

The United States has income tax treaties with 66 countries,¹²¹ but only five treaties in force—those with Canada, Denmark, France, the Netherlands, and Sweden—have provisions for general collection assistance.¹²² Even these treaties limit collection assistance in various ways. The relevant provision with Canada, for example, applies only to revenue claims that have been “finally determined,”¹²³ gives the government of the requested state discretion over whether to accept the claim,¹²⁴ and does not extend to taxpayers who are nationals of the requested state.¹²⁵ The issue of collection assistance was intensely debated in the Senate from 1946 to 1951, and while collection assistance provisions were approved in the treaties with France, Denmark, and the Netherlands (adding to the existing treaty with Sweden), they were rejected in treaties with Greece, Norway, and South Africa.¹²⁶ Subsequent treaties limited collection assistance to that necessary to

121 See <http://www.irs.gov/Businesses/International-Businesses/United-States-Income-Tax-Treaties---A-to-Z> (last visited Feb. 6, 2014).

122 See Protocol Amending the Convention with Respect to Taxes on Income and on Capital art. 15, U.S.-Can., Mar. 17, 1995, S. Treaty Doc. No. 104-4 (1995) [hereinafter 1995 U.S.-Canada Protocol]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 27, U.S.-Den., Aug. 19, 1999, S. Treaty Doc. 106-12 (1999); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital art. 28, U.S.-Fr., Aug. 31, 1994, S. Treaty Doc. No. 103-32 (1994) [hereinafter 1994 U.S.-France Treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 31, U.S.-Neth., Dec. 18, 1992, S. Treaty Doc. No. 103-6 (1993); Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income art. 27, U.S.-Swed., Sept. 1, 1994, S. Treaty Doc. 103-29 (1994).

123 1995 U.S.-Canada Protocol, *supra* note 122, art. 15 (adding Article XXVI A(2)).

124 See *id.* (adding Article XXVI A(3)) (“A revenue claim of the applicant State that has been finally determined may be accepted for collection by the competent authority of the requested State and . . . if accepted shall be collected by the requested State as though such revenue claim were the requested State’s own revenue claim finally determined . . .”). The treaties with Denmark, the Netherlands, and Sweden similarly grant discretion. The treaty with France, by contrast, provides that “[r]evenue claims of each of the Contracting States which have been finally determined *will* be accepted for enforcement by the State to which application is made and collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes.” 1994 U.S.-France Treaty, *supra* note 122, art. 28(2). In practice, foreign tax claims are collected by the IRS through its tax collecting procedures, not by foreign governments using U.S. courts. See Internal Revenue Manual § 5.1.8.7.7.

125 1995 U.S.-Canada Protocol, *supra* note 122, art. 15 (adding Article XXVI A(8)).

126 See Dodge, *supra* note 1, at 204-05.

ensure that the benefits of the treaties would be limited to those entitled to them.¹²⁷ When the Senate ratified the 1988 OECD Convention on Mutual Administrative Assistance in Tax Matters, it entered a reservation to Article 11 so that it would not be obligated “to recover tax claims of [other signatories] as if they were its own tax claims.”¹²⁸ In 1995, the United States and Canada concluded a protocol adding a provision on collection assistance to their existing treaty,¹²⁹ but this exception simply confirms the federal policy not to enforce foreign tax claims in the absence of a specific treaty provision.¹³⁰

¹²⁷ See, e.g., United States Model Income Tax Convention of November 15, 2006, art. 26(7) (“Each of the Contracting States shall endeavor to collect on behalf of the other Contracting State such amounts as may be necessary to ensure that relief granted by the Convention from taxation imposed by that other State does not inure to the benefit of persons not entitled thereto.”), *available at* <http://www.irs.gov/pub/irs-trty/model006.pdf> [hereinafter 2006 U.S. Model Tax Treaty].

¹²⁸ Convention on Mutual Administrative Assistance in Tax Matters, art. 11, 27 I.L.M. 1160, 1168 (1988). A Protocol amending the Convention to open it to non-OECD countries was opened for signature in 2010. Thirty-three countries are currently parties to either the original or the amended Convention. See http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention%2023_December_Jurisdictions.pdf (last visited Feb. 6, 2014). The United States has signed but not ratified the amended Convention.

¹²⁹ 1995 U.S.-Canada Protocol, *supra* note 122, art. 15.

¹³⁰ This is not to say that the U.S. policy is a wise one. As far back as 1834, Justice Story criticized the non-enforcement of foreign tax laws, noting that “[s]ound morals would seem to point to a very different conclusion.” JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 254 (1834). The current U.S. policy resulted from intense lobbying from the business community during the late 1940s and early 1950s, and reciprocal enforcement of tax laws and judgments would be mutually beneficial. See Dodge, *supra* note 1, at 203–05, 220–21. As mentioned, the OECD Convention, which 33 countries have joined, specifically provides for collection assistance, and the ALI has recommended that “[t]he United States should include in income tax treaties with selected treaty partners provisions authorizing reciprocal judicial recognition and enforcement of tax judgments rendered by courts of the treaty partner.” AMERICAN LAW INSTITUTE, INTERNATIONAL ASPECTS OF UNITED STATES INCOME TAXATION II, at 124 (1992). But whether the current U.S. policy is wise or not, it is clearly the policy of the federal government with respect to the enforcement of foreign tax claims.

U.S. tax treaties generally exclude state and local taxes from their scope.¹³¹ In *Barclays Bank PLC v. Franchise Tax Board of California*,¹³² the Supreme Court found such an exclusion relevant in considering whether California's worldwide combined reporting method of assessing state tax violated the "one voice" requirement of the Foreign Commerce Clause.¹³³ The Court looked the history of the U.S.-U.K. tax treaty, which would originally have prohibited the States from using combined reporting but was ratified by the Senate subject to the reservation that the relevant provision would not apply to state and local taxes.¹³⁴ This history reinforced the conclusion that "Congress implicitly has *permitted* the States to use the worldwide combined reporting method."¹³⁵ But to say that U.S. tax treaties do not limit the imposition of *state* taxes is not to say that States are free to assist in collecting *foreign* taxes. Foreign taxes *are* typically covered by the treaty and thus subject to the limitations contained in its collection assistance provision. Put more generally, the existence of a policy to permit States to tax freely expresses no exception to the separate policy reflected in U.S. tax treaties not to enforce foreign tax claims in the absence of a specific treaty provision.

It seems clear, then, that a state law permitting the collection of foreign tax claims other than pursuant to such a provision would violate federal policy and should therefore be preempted. This is obviously true when the claim is made by a foreign country with which the United States has an existing tax treaty. But it is also true where the claim is made by a country with which the United States has declined to enter such a treaty. As the district court noted in the *Ecuador* case, "the lack of a treaty is all the more reason why this Court must enforce the revenue rule. . . . An adjudication of Ecuador's claims would

¹³¹ See, e.g., 2006 U.S. Model Tax Treaty, *supra* note 127, art. 2(3)(b) (defining the U.S. taxes to which the Convention applies as the federal income taxes imposed by the Internal Revenue Code and the federal excise taxes imposed with respect to private foundations). Article 24's provision on non-discrimination, however, applies "to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof." *Id.* art. 24(7).

¹³² 512 U.S. 298 (1994).

¹³³ See *Japan Line, Ltd. v. Los Angeles County*, 441 U.S. 434, 453 (1979).

¹³⁴ See *Barclays*, 512 U.S. at 326–327.

¹³⁵ *Id.* at 326. The Court also found such implied permission in the failure of bills that would have prohibited state use of combined reporting to be enacted by Congress. See *id.* at 324–26.

eliminate Ecuador's incentive to negotiate a tax treaty with the Executive."¹³⁶ And *Holmes v. Jennison* teaches that the absence of treaties may reflect a federal policy just as clearly as their presence.¹³⁷

The United States has also chosen to depart from the penal rule by treaty in some instances. For example, the United States is party to two multilateral prisoner transfer treaties and several bilateral treaties that allow U.S. nationals convicted abroad to serve their sentences in the United States.¹³⁸ Congress has provided for the implementation of these treaties through legislation.¹³⁹ That legislation authorizes the Attorney General to act on behalf of the United States under existing treaties and to make arrangements with the States "for the confinement, where appropriate, in State institutions of offenders transferred to the United States."¹⁴⁰ Were a State to enforce a foreign prison sentence in the absence of such an arrangement by the Attorney General, it would conflict with the scheme established by this network of treaties and federal legislation.¹⁴¹

The United States has also agreed in some Mutual Legal Assistance Treaties (MLATs) to provide assistance in collecting criminal fines and forfeitures. The United States entered its first such MLAT with Canada in 1985, one article of which provided that "[t]he Parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in criminal prosecution."¹⁴² Restitution is not within

¹³⁶ *Republic of Ecuador v. Philip Morris Companies*, 188 F. Supp. 2d 1359, 1364–65 (S.D. Fla. 2002).

¹³⁷ See *supra* notes 116–20 and accompanying text.

¹³⁸ See Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867, 22 I.L.M. 530; Inter-American Convention on Serving Criminal Sentences Abroad, June 9, 1993, S. Treaty Doc. 104–35 [hereinafter Inter-American Convention]. The United States has bilateral treaties with Bolivia, Canada, France, Hong Kong, Mexico, Panama, Peru, Thailand, and Turkey. See <http://www.justice.gov/criminal/oeo/iptu/lists.html> (last visited Feb. 6, 2014).

¹³⁹ See 18 U.S.C. §§ 4100–4115.

¹⁴⁰ *Id.* §§ 4102(1) & (6).

¹⁴¹ Such enforcement might also violate Article I, Section 10 of the Constitution, which prohibits the States from "enter[ing] into any Treaty" and "without the Consent of Congress" from "enter[ing] into any Agreement or Compact . . . with a foreign Power." U.S. CONST. art. I, § 10.

¹⁴² Treaty on Mutual Legal Assistance in Criminal Matters art. XVII(2), Mar. 18, 1985, Can-U.S., S. Treaty Doc. No. 100–14 (1988), 24 I.L.M. 1092, 1098 (1985).

the penal rule,¹⁴³ but criminal fines and forfeitures are, which raises the question whether States may enforce criminal fines and forfeitures without treaty authorization.

As of 2012, the United States has MLATs with 63 countries.¹⁴⁴ Thirty-eight of these treaties provide for assistance in the collection of criminal fines and forfeitures, like the U.S. MLAT with Canada quoted above,¹⁴⁵ while an additional

¹⁴³ See *supra* note 25 and accompanying text.

¹⁴⁴ See 2 U.S. Department of State, International Narcotics Control Strategy Report: Money Laundering and Financial Crimes 20 (2012), available at <http://www.state.gov/documents/organization/185866.pdf>. This counts the 56 countries identified by the Department of State, plus seven mutual legal assistance relationships concluded pursuant to an MLAT with the European Union. See Agreement on Mutual Legal Assistance, U.S.-E.U., June 25, 2003, S. Treaty Doc. 109-13 (2006). The United States has various other mutual legal assistance agreements, including one with China. See International Narcotics Control Strategy Report, *supra*, at 20-21.

¹⁴⁵ The 38 treaties are those with Antigua & Barbuda, Argentina, Austria, the Bahamas, Barbados, Belize, Brazil, Canada, Cyprus, Dominica, Egypt, Estonia, Germany, Greece, Grenada, Hungary, India, Jamaica, Latvia, Liechtenstein, Lithuania, Malaysia, Mexico, Nigeria, Panama, Philippines, Poland, Romania, Russia, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, South Africa, Trinidad & Tobago, Ukraine, the United Kingdom, Uruguay, and Venezuela; the treaties with Malaysia and the United Kingdom exclude restitution. See Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Ant. & Barb., Oct. 31, 1996, S. Treaty Doc. 105-24; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Arg., Dec. 4, 1990, S. Treaty Doc. 102-18; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Austria, Feb. 23, 1995, S. Treaty Doc. 104-21; Treaty on Mutual Legal Assistance in Criminal Matters art. 14(2), U.S.-Bah., June 12, 1987, S. Treaty Doc. 100-17; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Barb., Feb. 28, 1996, S. Treaty Doc. 105-23; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Belize, Sept. 19, 2000, S. Treaty Doc. 107-13; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Braz., Oct. 19, 1997, S. Treaty Doc. 105-42; Treaty on Mutual Legal Assistance in Criminal Matters art. XVII(2), U.S.-Can., Mar. 18, 1985, S. Treaty Doc. 100-14; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Cyprus, Dec. 20, 1999, S. Treaty Doc. 106-35; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Dominica, Oct. 10, 1996, S. Treaty Doc. 105-24; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Egypt, May 3, 1998, S. Treaty Doc. 106-19; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Est., Apr. 2, 1998, S. Treaty Doc. 105-52; Treaty on Mutual Legal Assistance in Criminal Matters art. 13(2), U.S.-Ger., Oct. 14, 2003, S. Treaty Doc. 108-27; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Greece, May 25, 1999, S. Treaty Doc. 106-18; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Gren., May 30, 1996, S. Treaty Doc. 105-24; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Hung., Dec. 1, 1994, S. Treaty Doc. 104-20; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-India, Oct. 17, 2001, S. Treaty Doc. 107-3; Treaty on Mutual Legal Assistance in Criminal Matters art. 20(2),

13 provide for assistance with criminal forfeitures but not fines.¹⁴⁶ Significantly, 12 of these MLATs do *not* contain a provision on assistance with either fines

U.S.-Jam., July 7, 1989, S. Treaty Doc. 102–16; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Lat., June 13, 1997, S. Treaty Doc. 105–34; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Liech., July 8, 2002, S. Treaty Doc. 107–16; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Lith., Jan. 16, 1998, S. Treaty Doc. 105–41; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(1), U.S.-Malay., July 28, 2006, S. Treaty Doc. 109–22; Treaty on Mutual Legal Assistance art. 11(2), U.S.-Mex., Dec. 9, 1987, S. Treaty Doc. 100–13; Treaty on Mutual Legal Assistance in Criminal Matters art. XVII(1), U.S.-Nigeria, Sept. 13, 1989, S. Treaty Doc. 102–26; Treaty on Mutual Legal Assistance in Criminal Matters art. 14(2) [hereinafter U.S.-Nigeria MLAT], U.S.-Pan., Apr. 11, 1991, S. Treaty Doc. 102–15; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Phil., Nov. 13, 1994, S. Treaty Doc. 104–18; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Pol., July 10, 1996, S. Treaty Doc. 105–12; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Rom., May 26, 1999, S. Treaty Doc. 106–20; Treaty on Mutual Legal Assistance in Criminal Matters art. 18(1), U.S.-Russ., June 17, 1999, S. Treaty Doc. 106–22; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-St. Kitts & Nevis, Sept. 18, 1997, S. Treaty Doc. 105–37; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-St. Lucia, Apr. 18, 1996, S. Treaty Doc. 105–24; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-St. Vincent, Jan. 8, 1998, S. Treaty Doc. 105–44; Treaty on Mutual Legal Assistance in Criminal Matters art. 18(2), U.S.-S. Afr., Sept. 16, 1999, S. Treaty Doc. 106–36; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Trin. & Tobago, Mar. 4, 1996, S. Treaty Doc. 105–22; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(2), U.S.-Ukr., July 22, 1998, S. Treaty Doc. 106–16; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(1), U.S.-U.K., Jan. 6, 1994, S. Treaty Doc. 104–2; Treaty on Mutual Legal Assistance in Criminal Matters art. 22(2), U.S.-Uru., May 6, 1991, S. Treaty Doc. 102–19; Treaty on Mutual Legal Assistance in Criminal Matters art. XVI(2), U.S.-Venez., Oct. 12, 1997, S. Treaty Doc. 105–38.

¹⁴⁶ The 13 treaties are with Australia, Belgium, Czech Republic, France, Hong Kong, Ireland, Israel, Japan, Luxembourg, South Korea, Spain, Sweden, and Thailand. *See* Treaty on Mutual Legal Assistance in Criminal Matters art. 17(1), U.S.-Austl., Apr. 30, 1997, S. Treaty Doc. 105–27; Treaty on Mutual Legal Assistance in Criminal Matters art. 12(1), U.S.-Belg., Jan. 28, 1988, S. Treaty Doc. 100–16; Treaty on Mutual Legal Assistance in Criminal Matters arts. 18–20, U.S.-Czech, Feb. 4, 1998, S. Treaty Doc. 105–47 [hereinafter U.S.-Czech MLAT]; Treaty on Mutual Legal Assistance in Criminal Matters art. 11(4), U.S.-Fr., Dec. 10, 1998, S. Treaty Doc. 106–17 [hereinafter U.S.-France MLAT]; Treaty on Mutual Legal Assistance in Criminal Matters art. 18(3), U.S.-H.K., Apr. 15, 1997, S. Treaty Doc. 105–06 [hereinafter U.S.-Hong Kong MLAT]; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Ir., Jan. 18, 2001, S. Treaty Doc. 107–9; Treaty on Mutual Legal Assistance in Criminal Matters art. 17(1), U.S.-Isr., Jan. 26, 1998, S. Treaty Doc. 105–40 [hereinafter U.S.-Israel MLAT]; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(1), U.S.-Japan, Aug. 5, 2003, S. Treaty Doc. 108–12; Treaty on Mutual Legal Assistance in Criminal Matters art. 17, U.S.-Lux., Mar. 13, 1997, S. Treaty Doc. 105–11 [hereinafter U.S.-Luxembourg MLAT];

or forfeitures,¹⁴⁷ and of course the United States does not have MLATs with a large number of countries. In a few instances, U.S. MLATs express a policy of not enforcing a particular kind of penal judgments not just by omission but by express provision. The U.S. MLAT with Israel, for example, states that “the parties shall not be obligated to enforce orders of restitution or to collect fines or to enforce judgments imposing fines.”¹⁴⁸ In short, the United States has not authorized the enforcement of foreign criminal fines and forfeitures across the board but rather through a series of specific treaty provisions, extending that right to some countries but not to others, and sometimes to some kinds of

Treaty on Mutual Assistance in Criminal Matters art. 17(2), U.S.-S. Kor., Nov. 23, 1993, S. Treaty Doc. 104-1; Treaty on Mutual Legal Assistance in Criminal Matters art. 16(2), U.S.-Spain, Nov. 20, 1990, S. Treaty Doc. 102-21; Treaty on Mutual Legal Assistance in Criminal Matters art. 18(2), U.S.-Swed., Dec. 17, 2001, S. Treaty Doc. 107-12; Treaty on Mutual Legal Assistance in Criminal Matters art. 15(2), U.S.-Thai., Mar. 19, 1986, S. Treaty Doc. 100-18.

A number of U.S. MLATs expressly provide that assistance will extend to the enforcement of particular penal judgments. *See* U.S.-Czech MLAT, *supra*, art. 18(3) (“The Requested State may, to the extent permitted by its laws, give effect to any final legal determination given in the Requesting State forfeiting such proceeds or instrumentalities, or initiate its own legal action for the forfeiture of such assets.”); U.S.-France MLAT, *supra*, art. 11(4); U.S.-Hong Kong MLAT, *supra*, art. 18(3) (“Where a request is made for assistance in securing the confiscation or forfeiture of proceeds or instrumentalities of crime, such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting Party or initiating or assisting in proceedings in relation to the request.”); U.S.-Luxembourg MLAT, *supra*, art. 17(3); U.S.-Nigeria MLAT, *supra* note 145, art. XVII(2) (“Such assistance shall include . . . invoking the procedures of the Requested State for the recognition, confirmation, and enforcement of an order for the forfeiture of the proceeds or instrumentalities of criminal activities made by a court or other competent authority in the Requesting State.”).

147 These treaties include U.S. MLATs with Italy, Morocco, the Netherlands, Switzerland, and Turkey, *see* Treaty on Mutual Legal Assistance in Criminal Matters art. 18(2), U.S.-It., Nov. 9, 1982, S. Treaty Doc. 98-25; Treaty on Mutual Legal Assistance in Criminal Matters art. 12(2), U.S.-Morocco, Oct. 17, 1983, S. Treaty Doc. 98-24; Treaty on Mutual Legal Assistance art. 1, U.S.-Neth., June 12, 1981, S. Treaty Doc. 97-16; Treaty on Mutual Legal Assistance art. 1, U.S.-Switz., May 25, 1973, T.I.A.S. No. 8302, 27 U.S.T. 2019; Treaty on Extradition and Mutual Legal Assistance in Criminal Matters art. 21, U.S.-Turk., June 7, 1979, T.I.A.S. No. 9891, 32 U.S.T. 3111, as well as arrangements with Bulgaria, Denmark, Finland, Malta, Portugal, and Slovakia pursuant to an MLAT with the European Union. *See* Agreement on Mutual Legal Assistance, June 25, 2003, U.S.-E.U., S. Treaty Doc. 109-13.

148 U.S.-Israel MLAT, *supra* note 146, art. 17(4); *see also* U.S.-Czech MLAT, *supra* note 146, art. 20 (“Assistance shall not include collection of criminal fines.”); U.S.-France MLAT, *supra* note 146, art. 1(2)(b) (“This Treaty does not apply to . . . the enforcement of criminal judgments except for forfeiture decisions referred to in Article 11.”).

judgments but not to others. State laws that would enforce foreign criminal fines and forfeitures where the federal government has not chosen to do so would conflict with the federal policy of allowing such enforcement only pursuant to specific treaty provisions and, as in the tax area, would undercut the United States ability to negotiate future treaties providing for reciprocal treatment of U.S. fines and forfeitures.

On the other hand, some state laws recognizing foreign criminal judgments do not appear to violate any federal policy even though they would depart from the penal rule. The clearest examples are state double-jeopardy statutes that bar prosecution under state law when the defendant has been convicted or acquitted by a foreign country for the same offense.¹⁴⁹ In the context of prisoner transfer, federal law prohibits a subsequent prosecution for the same offense by the federal government or by the States,¹⁵⁰ as does the Inter-American Convention.¹⁵¹ But outside that context, there appears to be no federal policy either for or against extending double-jeopardy protection based on foreign criminal judgments. As Justice Harlan put it in *Zschernig*, “in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations.”¹⁵²

There are many kinds of state laws that might implicate foreign relations, and might even weaken the U.S. bargaining position in negotiations with other countries. The fact that most States recognize and enforce foreign judgments without requiring reciprocity undoubtedly weakens the position of U.S. negotiators seeking a judgments convention.¹⁵³ The American Law Institute's proposed federal judgments statute included a reciprocity requirement precisely “to create an incentive to foreign countries to commit to recognition and enforcement of judgments rendered in the United States.”¹⁵⁴ It is not enough to preempt state law that topic could be the subject of treaty negotiations, for that is true of many areas of law that the federal government has chosen to

149 See *supra* notes 39–40 and accompanying text.

150 18 U.S.C. § 4111.

151 Inter-American Convention, *supra* note 139, art. VII(1).

152 *Zschernig v. Miller*, 389 U.S. 429, 458–59 (Harlan, J., concurring).

153 Efforts to negotiate a comprehensive Hague Judgments Convention that would include the United States failed, but gave rise to a narrower Convention on Choice of Court Agreements, which the United States has signed but not ratified. For an overview of these developments, including documents, see http://www.hcch.net/index_en.php?act=text.display&tid=153 (last visited Feb. 6, 2014).

154 ALI PROPOSED FEDERAL STATUTE, *supra* note 51, § 7, cmt. b.

leave to the States. When, however, U.S. treaty practice has established a federal policy not to permit the enforcement of foreign tax or penal laws or judgments in the absence of a specific treaty provision, then preemption of state law is clearly called for.

5 Conclusion

This essay has argued that federal preemption of state law departing from the penal and revenue rules is sometimes appropriate, but not across the board on the basis of federal common law. For better or worse, the conflict of laws and the recognition of foreign judgments in the United States have generally been left to the States. The Supreme Court's decision in *Sabbatino* offers only limited support for treating the penal and revenue rules as federal common law, both because *Sabbatino* itself recognized the possibility of state deviations from the act of state doctrine and because the rationales underlying the penal and revenue rules are different from those underlying the act of state doctrine. The better approach is to treat the penal and revenue rules as state common law, capable of alteration by state statute or judicial decision, and to limit federal preemption to situations where "a conflicting federal policy"¹⁵⁵ exists. Under this approach, state laws enforcing foreign tax claims, foreign criminal sentences, and foreign criminal fines and forfeitures would be preempted, while state double-jeopardy statutes would not. Such an approach would protect federal prerogatives in foreign relations, but would also recognize that sometimes it is federal policy to leave even matters affecting foreign relations to the States.

¹⁵⁵ *Zschemig v. Miller*, 389 U.S. 429, 458–59 (Harlan, J., concurring).