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JUDGES AS COSMOPOLITAN TRANSNATIONAL ACTORS

Paul Schiff Berman[†]

The topic of this panel refers specifically to the relationship between international law and domestic *constitutional* law, but in my paper I would like to expand the frame a bit. As Harold Hongju Koh's keynote lecture for this symposium made clear,¹ transnational legal process is not only found in the dialogue among constitutional courts about constitutional issues. It is also the more general idea that domestic judicial decisions should take into account a broader interest in a smoothly functioning international legal order and therefore, in the words of Justice Blackmun, "reflect the systemic value of reciprocal tolerance and goodwill."² According to this vision, judges owe their allegiance to an international system of norms, not simply to their own domestic law.³ For example, the Second Circuit recently ruled that a U.S. discovery statute "contemplates international cooperation, and such cooperation presupposes an on-going dialogue between the adjudicative bodies of the world community."⁴ This statement is distinctive, both because its focus on "adjudicative bodies of the world community" seems to transcend individual territorial courts and because it emphasizes dialogue among courts rather than mere deference.

† This is an edited transcript of a presentation delivered as part of *International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers Between National, Foreign, and International Law?*, a symposium held at the University of Tulsa College of Law on October 29, 2004. Thanks to Marilee Corr and Allison Raggio for research assistance.

1. Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA COMP. & INT'L L. J. 1 (2004) (remarks in this issue).

2. *Société Nat'l Industrielle Aérospatiale v. United States Dist. Court*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

3. As then-Chief Judge Breyer has written, the appropriate inquiry for judges is how to "help the world's legal systems work together, in harmony, rather than at cross purposes." *Howe v. Goldcorp Inv. Ltd.*, 946 F.2d 944, 950 (1st Cir. 1991).

4. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).

But beyond that one particular case, we must ask: how does the idea that U.S. courts should be interested in a cooperative and smoothly functioning international legal system actually play out in day-to-day adjudication? And to answer *that* question, we must consider how courts view their own domestic law in cases implicating multinational concerns, how they view foreign law, and how they negotiate the differences between foreign and domestic norms. Such transnational issues arise not only when courts negotiate the relationship between international law and U.S. constitutional law, but also in the interaction of foreign law and U.S. domestic law in ordinary statutory or common law cases. Moreover, by considering these broader relationships among legal norms within an interlocking multinational system, we ask fundamental questions of law and globalization.⁵

In *Hoffman-LaRoche v. Empagran, S.A.*,⁶ a case from this past term, the U.S. Supreme Court ruled that the Sherman Act⁷ would not apply extraterritorially to regulate alleged anticompetitive activity that took place overseas, at least to the extent that the relevant harm was suffered only by foreign plaintiffs.⁸ Significantly, Justice Breyer, writing for the Court, added this statement: "If America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat."⁹ In thinking about transnational legal process, it might be useful to consider this idea of legal imperialism and how to avoid the over-imposition of U.S. norms to transnational disputes.

I will argue that the best way to avoid legal imperialism is for judges to think of themselves as cosmopolitan transnational actors. In his paper earlier in this symposium, Eric Posner cautioned that Koh's brand of transnational legal process could result in the specter of cosmopolitan activist judges striking down democratically enacted legislation.¹⁰ But, at least in the vision of cosmopolitanism I will outline today, we might just as

5. For further discussion of law and globalization, see Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. ____ (forthcoming 2005).

6. 124 S. Ct. 2359 (2004).

7. 15 U.S.C. §1 (2000 & Supp. II 2002).

8. *Hoffman-LaRoche*, 124 S. Ct. at 2366-67.

9. *Id.* at 2369.

10. Eric Posner, *Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23 (2004) (remarks in this issue).

easily see cosmopolitanism leading to a kind of restraint; because a cosmopolitan perspective might actually cause judges to refrain from overly aggressive assertions of parochial norms. By considering the importance of the international system and by thinking of how courts should relate to each other and enforce each other's norms, judges might act more cautiously and not reflexively apply their norms to every case within their jurisdiction. From this perspective, Justice Breyer's interpretation of the Sherman Act itself reflects such cosmopolitan restraint.¹¹

In order to explore this idea of cosmopolitanism, I thought we might look to the three mechanisms by which our legal system has traditionally sought to avoid legal imperialism or legal parochialism in day-to-day adjudication: jurisdiction, choice of law, and recognition of judgments. All three of these inquiries implicate fundamental questions about how we can have a legal system in a multi-state and multi-national world where lots of people have different norms and where commercial activity, capital flows, communications, and people cross borders much more frequently. How do legal systems, which are traditionally territorially-based, deal with such questions? This is a very large subject and today I will just briefly mention three cases (one implicating jurisdiction, one choice of law, and one judgment recognition) in order to see how they would play out from a more cosmopolitan perspective.¹²

The jurisdiction case has already been discussed at great length earlier in this conference. It is *Rasul v. Bush*,¹³ the Guantanamo detainees case. Of course, we have thus far discussed the case in terms of habeas corpus, but we can also think of it as a case involving the nature of legal jurisdiction. At root level, the issue in *Rasul* is whether U.S. courts have jurisdiction over this off-shore regulatory haven.¹⁴ Such a question is functionally equivalent to the one that arises when corporations attempt to avoid local taxation or other regulatory regimes simply by relocating beyond the territorial bounds of a jurisdiction. The only difference is that here we have the U.S. Government operating off-shore and claiming that the mere physical location of the detention facility deprives the U.S. courts of jurisdiction.

11. *Hoffman-LaRoche*, 124 S. Ct. at 2369.

12. For a further discussion of cosmopolitanism as a framework for considering jurisdictional questions, see Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 314 (2002).

13. 124 S. Ct. 2686 (2004).

14. *Id.* at 2687.

In the choice of law context, I turn to a recent Fourth Circuit case involving a web site with the domain name www.barcelona.com.¹⁵ In that case, Mr. Joan Nogueras Cobo (“Nogueras”), a Spanish citizen, registered barcelona.com with the Virginia-based domain name registrar, Network Solutions.¹⁶ Subsequently, Nogueras formed a corporation under U.S. law, called Bcom, Inc.¹⁷ Despite the U.S. incorporation, however, the company had no offices, employees, or even a telephone listing in the United States.¹⁸ Nogueras (and the Bcom servers) remained in Spain.¹⁹ The Barcelona City Council asserted that Nogueras had no right to use barcelona.com under Spanish trademark law and demanded that he transfer the domain name registration to the City Council.²⁰ The Fourth Circuit, though, insisted on applying U.S. trademark law and ruled against the City.²¹

Finally, with regard to recognition of judgments, consider *Telnikoff v. Matusevitch*,²² a case decided a few years ago by the Maryland Supreme Court. This was a libel action between two British citizens concerning writings that appeared in a British newspaper.²³ After a complicated sequence of proceedings in the United Kingdom, a jury ruled for the plaintiff and ordered damages. However, Matusevitch moved to Maryland and subsequently sought a declaratory order that the British libel judgment could not be enforced in the United States, pursuant to the First Amendment.²⁴ The Maryland Supreme Court ultimately ruled that, because British libel law violates the speech-protective First Amendment standards laid out by the U.S. Supreme Court in *New York Times v. Sullivan*²⁵ and its progeny, the British judgment violated Maryland public policy and could not be enforced.²⁶

15. *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617 (4th Cir. 2003).

16. *Id.* at 620.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 621.

21. *Id.* at 630. For further discussion of this case, see Paul Schiff Berman, *Towards a Cosmopolitan Vision of Choice of Law: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. ____ (2005, forthcoming).

22. 702 A.2d 230 (1997).

23. *Id.*

24. *Id.*

25. 376 U.S. 254 (1964).

26. *Telnikoff*, 702 A.2d at 249.

Each of these three cases is complicated by the fact that we have territorially based legal sovereigns addressing what is essentially non-territorially based legal or personal activity. So, the question is: how should courts address such cases?

One way of responding is what I would call “universalism.” Now, some people think of cosmopolitanism itself as a universalist vision, but I want to distinguish the two concepts. A universalist approach would emphasize that we are all members of a single “world community,” and universalists would therefore seek international harmonization as a way of removing the “conflict” from the conflict-of-laws analysis. Although this vision is attractive in its idealism, it strikes me as misguided for several reasons. First, it asks that we see ourselves *solely* as citizens of the world and therefore dissolves the multirootedness of community affiliation into one global community. Second, it fails to capture the extreme emotional ties people still feel to distinct transnational or local communities.²⁷ Thus, universalism tends to ignore the very attachments people hold most deeply. Third, as Anupam Chander has pointed out, the aspiration that we become solely citizens of the world is at least partly based on an internationalization of John Rawls’ theory of justice²⁸ and is therefore subject to the same criticism Rawls has long faced: that his theory assumes a Self detached from the social and cultural context that makes such a Self possible.²⁹ Fourth, an ongoing system of universal governing norms poses such a strong challenge to our current notions of nation-state sovereignty that, as a practical matter, it seems unlikely to be adopted widely in the foreseeable future. Fifth, and perhaps most important, in order to create a set of universal legal norms, one needs to presuppose a world citizenry devoid of both particularist ties and normative discussion about the relative importance of such ties. Thus, universalism cuts off debate about

27. See, e.g., Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT’L L. 359, 374 (1996) (“The powerful pull of loyalty exerted by the imagined nation demonstrates that, even in the age of science, a loyalty system based on romantic myths of shared history and kinship has a capacity to endure.”).

28. See Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, 41 NOMOS XLI 12, 36 (Ian Shapiro & Lea Brilmayer eds., 1999) (noting that a number of philosophers take a global version of Rawls’ theory of justice as their starting point).

29. See Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1047 (2001) (criticizing cosmopolitanism because it embraces an image of the Self that “removes the aspects that make the self special”). Chander ascribes this position to cosmopolitanism. While I agree with his critique, I believe he is actually targeting what I call “universalism.” As this discussion makes clear, I view cosmopolitanism as the recognition of multiple attachments, not the desire for a single world citizenry.

the nature of overlapping communities just as surely as territorialism or parochialism does.

A cosmopolitan conception of conflicts of law, in contrast, makes no attempt to deny the multirootedness of individuals within a variety of communities, both territorial and non-territorial. Indeed, the basic tenet of cosmopolitanism, as I define it, is the acknowledgment of multiple communities, rather than the erasure of all communities except the most encompassing. Thus, although a cosmopolitan conception of conflicts of law often seeks to acknowledge and accommodate transnational and international norms, it does not require a universalist belief in a single world community.

In other articles, I have attempted to develop a cosmopolitan approach to conflicts of laws that looks not solely to territorial connection, but to community affiliation more generally.³⁰ I do not have time here to describe this approach in detail, but briefly, a cosmopolitan conception would first consider the community affiliations of the parties and the effects of various rules on the polities of the affected states. Second, whereas most traditional choice-of-law regimes require a choice of one national norm, a cosmopolitan approach permits judges to develop a hybrid rule that may not correspond to any particular national regime. Third, international treaties, agreements, or other statements of evolving international or transnational norms may provide relevant guidance. Fourth, courts could consider community affiliations that are not associated with nation-states, such as industry standards, norms of behavior promulgated by non-governmental organizations, community custom, and rules associated with particular activities, such as internet usage. Fifth, building on Justice Breyer's idea of legal parochialism, courts could take into account traditional conflicts principles. For example, choice-of-law regimes should not develop rules that encourage a regulatory "race to the bottom" by making it easy to evade legal regimes. These factors only begin to scratch the surface of what a cosmopolitan approach might entail, but we can at least begin to glimpse some of the contours of this approach by considering the cases I just described through a cosmopolitan lens.

With regard to jurisdiction, jurisdictional rules (at least in the United States) were traditionally grounded in the territorially-based power of a sovereign. Thus, because a person physically present in a state literally could be seized by state law enforcement officials, the courts of that state

30. See Berman, *supra* note 21; Berman, *supra* note 12.

could legitimately subject the person to their jurisdiction.³¹ In the twentieth century, territorially-based jurisdictional rules were loosened, and as most of you know, the United States Supreme Court's primary jurisdictional test now requires only that the defendant in a lawsuit have sufficient contacts with the relevant state to satisfy a "traditional conception of fair play and substantial justice."³² Nevertheless, this rule, like its predecessor, maintains a territorial focus because it revolves around "contacts" with a territory. Similarly, in the tax context, the overwhelming majority of bilateral income tax agreements focus on whether a business maintains a "permanent establishment" in a particular jurisdiction.³³ Such jurisdictional analysis enables regulatory evasion because entities can physically locate outside of a jurisdiction without much effort and (at least sometimes) escape oversight. This regulatory evasion is similar whether it is an entity claiming that it is not in "X" state and therefore cannot be subject to its jurisdiction, or a business saying it does not have a "permanent establishment" in "Y" country and cannot be taxed there, or the U.S. Government saying it is operating a detention facility in Guantanamo outside the territorial borders of the United States and therefore cannot be subject to federal court oversight. An exclusive focus on territory makes such arguments possible. In contrast, a case such as *Rasul*³⁴ is an easy one if you look at community affiliation. Here, you have a facility completely controlled by the U.S. Government, staffed by U.S. military officers acting at the behest of U.S. governmental policy. To say that it is somehow not affiliated with the United States and therefore not subject to U.S. jurisdiction seems wrong from a cosmopolitanism point of view.

With regard to choice of law, again the traditional conception in the United States focused on territory. Thus, a cause of action was deemed to accrue in some specific location, and the law of that location would be applied.³⁵ "Localizing" a transaction was often difficult, however, and

31. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (ruling that a State has power to decide the "civil status and capacities of its inhabitants" and to regulate how property may be handled, but that "no State can exercise direct jurisdiction and authority over persons or property without its territory").

32. *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

33. See, e.g., ORG. FOR ECON. COOPERATION & DEV., MODEL TAX CONVENTION ON INCOME AND ON CAPITAL, art. 7, § 1 (2003) (stating that an enterprise of one state doing business in another shall not be taxed in the second state unless it has a permanent establishment there).

34. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

35. See JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); see also RESTATEMENT (FIRST) OF THE LAW OF CONFLICT OF LAWS (1934).

efforts to do so frequently involved seemingly arbitrary distinctions. In response, a second wave of scholarship focused instead on what were referred to as "governmental interests,"³⁶ but this framework turned out to rest on a very parochial idea of what counts as a governmental interest. Indeed, it often seemed that, according to interest analysis, the government's only relevant interest was in seeing one of its own citizens win the particular case at issue.³⁷

Such a parochial conception of interests reminds me a bit of Eric Posner's idea that nation-states pursue interests internationally that necessarily derive solely from their own domestic systems.³⁸ In Posner's vision, nation-states simply have interests, and these interests just exist, totally separate from anything that happens internationally. To me, governments have a strong interest in being part of an international system, and even their seemingly domestic interests are inevitably affected by the fact that they are imbedded in such a system.³⁹ Indeed, they have a long-term stake in a reciprocal series of benefits and burdens that will make the international system work. In a cosmopolitan conception, therefore, we would focus less on territoriality and more on community affiliation. And we would take more seriously the broader governmental interests of states as part of a transnational system.

From this perspective, the *Barcelona.com*⁴⁰ case becomes relatively easy because the case concerns a Spanish individual and a Spanish city fighting over a Spanish domain name that itself refers to a Spanish city. The idea that this dispute should be adjudicated under U.S. law because of where the domain name registry company is or because the Spanish citizen created a dummy corporation in the United States does not take into account what is really going on. A U.S. court taking a cosmopolitan approach, therefore, would need to be restrained and not assume that U.S. trademark law should apply extraterritorially.

With regard to recognition of judgments, it is important to understand that for state-to-state transactions in the United States, there is no public policy exception to the Constitution's Full Faith and Credit Clause.⁴¹ Therefore, a valid judgment issued by one state must be enforced by every

36. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

37. For a more detailed exposition of this argument, see Berman, *supra* note 21.

38. See Posner, *supra* note 10.

39. See, e.g., Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749, 1752 (2003).

40. 330 F.3d at 628-29.

41. See, e.g., *Baker v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (making clear that there is no public policy exception to the Full Faith and Credit due judgments).

other state. This is true even when the judgment being enforced would be *illegal* if issued by the rendering state.⁴² Of course, within a single, relatively homogenous country, the idea of one state enforcing another state's judgment does not seem quite so significant because the variations from state to state are likely to be relatively minor. Yet, while the decision to enforce a judgment surely will be less automatic when the judgment at issue was rendered by a *foreign* court, many of the same principles are still relevant. Most importantly, what we might call the "conflicts values" that underlie the Full Faith and Credit command should be part of the judgment recognition calculus. Thus, courts should acknowledge the importance of participating in an interlocking international legal system, where litigants cannot simply avoid unpleasant judgments by relocating. Indeed, in a cosmopolitan world, there is no need for inherent suspicion of foreign judgments. As in the choice-of-law context, deference to other courts will have long-term reciprocal benefits. Particularly when the parties have no significant affiliation with the forum state, there is little reason for a court to insist on following domestic public policies in the face of such competing conflicts values.

This is not to say, of course, that foreign judgments should always be enforced. Indeed, even in a cosmopolitan system, one would expect that judges might sometimes interpose local public policies where they would not in the domestic state-to-state setting. However, if we acknowledge the importance of the conflicts values effectuated by strong judgment recognition, we will necessarily reject the idea that a court is simply *unable* to enforce a judgment because such a judgment could not have been issued by the court in the first instance. Instead, we will appreciate that enforcing a foreign judgment is fundamentally different from issuing an original judgment; indeed, judgment recognition implicates an entirely distinct set of concerns about the role of courts in a multistate world.

42. See, e.g., *Estin v. Estin*, 334 U.S. 541, 546 (1948) (stating that the Full Faith and Credit Clause "ordered submission . . . even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, which the Constitution designed, demanded it"); see also *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 277 (1935) ("In numerous cases this court has held that credit must be given to the judgment of another state, although the forum would not be required to entertain the suit on which the judgment was founded"); *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908) (stating that the judgment of a Missouri court was entitled to full faith and credit in Mississippi even if the Missouri judgment rested on a misapprehension of Mississippi law).

In most areas of law, U.S. courts have generally invoked these conflicts values and enforced foreign judgments as a matter of comity.⁴³ The Second Restatement codifies this idea, noting that a “judgment rendered in a foreign nation . . . will, if valid, usually be given the same effect as a sister State judgment.”⁴⁴ While courts enforcing foreign judgments (as opposed to domestic ones) have applied a public policy exception to avoid enforcing particularly egregious rulings,⁴⁵ the public policy exception has been construed very narrowly.⁴⁶ Accordingly, courts only refuse to enforce “where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”⁴⁷

In stark contrast to this general policy of respecting foreign judgments, however, courts in the United States have often refused to recognize foreign judgments in cases arguably implicating constitutional concerns, as in the libel case I discussed earlier. Instead, courts generally have assumed, as the Maryland court did in *Telnikoff*, that enforcing an “unconstitutional” judgment is itself a violation of the U.S. Constitution. As a result, courts have effectively imposed U.S. constitutional norms onto foreign disputes even in circumstances where the dispute has little connection with the United States.⁴⁸

There is no reason, however, to think that the U.S. Constitution is necessarily implicated in an enforcement action. First, it is debatable whether the simple enforcement of a judgment creates the requisite state action to raise a constitutional issue.⁴⁹ Second, with regard to interstate

43. See Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 176 (2004) (noting that, since the nineteenth century, “the United States has been at the vanguard of enforcing foreign judgments”).

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971).

45. See The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective in the U.S. Dec. 29, 1970); see also Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1991) (requiring courts to enforce judgments or arbitral awards unless there is fraud or if doing so would be repugnant to the public policy of the enforcing forum).

46. See Rosen, *supra* note 43, at 177-79 (surveying U.S. case law on enforcement of foreign judgments).

47. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971).

48. See Rosen, *supra* note 43 (providing an insightful critique of this practice).

49. In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court ruled that the Equal Protection Clause precluded a court from enforcing a private, racially restrictive covenant. In so doing, the Court determined that, although the covenant itself was entered into by private actors who were not subject to the commands of the Fourteenth Amendment, the action by the courts in enforcing the covenant was sufficient state action to trigger constitutional scrutiny. See *id.* at 14. *Shelley*, therefore, appears to block judicial

harmony, a refusal to enforce the British libel judgment effectively imposes U.S. First Amendment norms on the United Kingdom. Such parochialism in judgment recognition, as in choice of law, is cause for concern. Third, while it is true that constitutional concerns could conceivably generate sufficient public policy reasons to refuse to enforce a judgment, the libel dispute in *Telnikoff* did not in any way implicate U.S. public policy because neither party had any particular affiliation with the United States at the time of the events at issue.

Thus, even if U.S. constitutional values or public policy considerations might *sometimes* require a court to refuse to enforce a judgment, there is no basis for a categorical rule preventing enforcement, and little reason to refuse to enforce a validly issued foreign judgment absent significant ties between the dispute and the United States. Instead, courts should take seriously the conflicts values that would be effectuated by enforcing the foreign judgment, weigh the importance of such values against the relative importance of the local public policy or constitutional norm, and then consider the degree to which the parties have affiliated themselves with the forum. Only then can courts take into account the multistate nature of the dispute and the flexible nature of community affiliation in a cosmopolitan world.

enforcement of a private agreement (or a foreign order) that would be unconstitutional. Courts, in refusing to enforce foreign “unconstitutional” judgments, have explicitly relied on *Shelley*. See, e.g., *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisémitisme*, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001), *rev’d. on other grounds*, 379 F.3d 1120 (9th Cir. 2004). However, since the time *Shelley* was issued, courts and commentators have backed away from the sweeping ramifications of *Shelley*. This is because, under *Shelley*’s reasoning, any private contract that is being enforced by a police officer or court would be transformed into state action. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed., The Foundation Press 1988) (arguing that *Shelley*’s approach, “consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement”). Although generations of legal realists and critical legal studies scholars have articulated similarly sweeping conceptions of state action, see Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1279-81 (2000) (surveying these critiques), courts have largely resisted *Shelley* and have limited its holding only to the context of racially restrictive covenants. Indeed, even in cases implicating the First Amendment, “with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements inhibiting speech does not trigger constitutional review, despite the fact that identical legislative limitations on speech would have.” See Rosen, *supra* note 43, at 192-95 (collecting cases). Thus, it is not clear how robust *Shelley* still is and whether it would truly pose a constitutional bar in an action to enforce a foreign judgment. See Rosen, *supra* note 43, at 186-209 (discussing *Shelley* and its implications for judgment recognition).

Finally, I should just take one moment to distinguish the Alien Tort Claims Act,⁵⁰ since it has been a much talked about statute during this conference. At first glance, it might seem that a cosmopolitan approach would reject the idea that an alien with little connection to the United States suing another alien with little connection to the United States could do so under U.S. law. After all, that would seem to be a sort of extraterritorial application of U.S. law, like the trademark statute in *Barcelona.com*⁵¹ or the antitrust act in *Empagran*.⁵² However, the Alien Tort Claims Act is different because the statute itself already imports a cosmopolitan perspective into U.S. law by explicitly referring to the law of nations.⁵³ Indeed, as the U.S. Supreme Court recognized this past term, the international norms to be applied under the Alien Tort Claims Act are only those major crimes or human rights violations for which there is a strong transnational consensus.⁵⁴ Thus, the statute is a reflection of cosmopolitan deference to global norms, not a parochial imposition of local ones.

To conclude, it seems to me that those who embrace transnational legal process should not limit themselves to asking courts to pay more attention to *international* law or foreign *constitutional* norms. In addition, judges should take seriously their role within a transnational system even in ordinary domestic law cases having multinational elements. We can already see signs that judges are embracing a transnationalist vision in certain areas, such as bankruptcy. Where once courts simply adjudicated bankruptcies independently, based on the presence of assets in their territorial jurisdiction, global insolvencies are now often dealt with by courts working cooperatively.⁵⁵ It is only through that kind of day-to-day awareness that we get a true transnational system. Otherwise you get a segmented system where countries have unlimited power to assert jurisdiction or apply legal norms to any case with an element arising within their territorial borders, but where they have no power to apply their norms to cases (like those involving the military detention centers at

50. 28 U.S.C. § 1350 (2000).

51. 330 F.3d 617.

52. 124 S. Ct. 2359.

53. 28 U.S.C. § 1350.

54. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768-69 (2004).

55. See generally Jay Lawrence Westbrook, *Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum*, 65 AM. BANKR. L.J. 457 (1991); see also Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Dialogue*, 28 LAW & POL'Y INT'L BUS. 1037 (1997); Anne-Marie Slaughter, *Focus: Emerging Fora for International Litigation (Part 2): A Global Community of Courts*, 44 HARV. INT'L. L.J. 191, 214 (2003).

Guantanamo) that happen to be located outside those borders. In such a world, control of the domain name system (for example) will depend almost exclusively on where the .com registry is located. That may be fine for us right now because it is in the United States,⁵⁶ but in the future the registry could be relocated anywhere in the world. Would we want the trademark law for the internet to depend on such an arbitrary fact? Instead, I would argue that domestic judges, thinking of themselves as cosmopolitan transnational actors, need to (1) consider a broader web of community affiliations rather than simply resolve conflicts disputes based solely on territorial contacts; and (2) recognize that they are imbedded in an international system where they cannot and should not simply assert parochial interests to the maximum extent they can. Only through such a vision is transnational legal process possible. Thank you very much.

56. *Barcelona.com*, 330 F.3d at 623.

