Despite the diversity of perspectives in this volume, many of the contributors seem to agree on one thing: the existing state-based judgment-recognition system needs replacing. Of course, opinions here and elsewhere differ on what precisely should replace it; most favor either a treaty binding American courts through self-execution or congressional implementation, or a self-standing federal statute. Regardless (and except for a few dissenters still defending the state-based status quo), the bulk of scholars and policy-makers appears to favor “federalization,” that is, the adoption of a nationwide judgment recognition standard.

Proponents of federalization list several problems with the current state-based approach. They argue that it frustrates U.S. foreign policy by allowing foreign creditors to take advantage of state-based policies that lack reciprocity requirements. They also cite its general failure to adequately protect debtors. But perhaps the most often-cited bases for federalization are achieving predictability for litigants, and discouraging state-by-state forum shopping. For the purpose of this chapter, I place both of these justifications under the umbrella of achieving uniformity.

Not everyone agrees, however, on whether uniformity is normatively desirable, and surprisingly, there is just slightly more consensus on how uniform the current system actually is. While acknowledging minor statutory variation, some observers insist there are “surprisingly few fundamental differences in the approaches” among the states, and that courts have interpreted

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1 Visiting Associate Professor of Law, Georgetown University Law Center. This chapter was prepared as part of the Sokol Colloquium on Private International Law’s panel on Federalism, Foreign Affairs, and Foreign Judgments, held at University of Virginia School of Law in April 2013. I thank Donald Childress III, John Coyle, Paul Stephan, and Christopher Whytock for helpful comments on earlier drafts of the chapter.

2 This term can be confusing, as some commentators (such as Paul Stephan in the introductory chapter to this volume) use the term “federalists” to denote supporters of a state-based recognition/enforcement regime (in contrast with “nationalists,” who support a nation-wide system).

those approaches relatively uniformly. One commentator notes that the 2005 Uniform Recognition Act, which has been adopted in large part by a plurality of states, states that its purpose is “not to depart from the basic rules or approach of the 1962 Act.” In contrast, the majority calls the system a “dizzying patchwork,” noting the several different substantive models (the 1962 and 2005 Uniform Recognition Acts, and approaches based on Hilton v. Guyot and the Restatement) from which the state systems derive. In essence, then, much of the debate revolves around the concept and status of uniformity.

The purpose of this chapter is not to take a side in the normative policy dispute over a federalized versus state-based system. Instead, my goal is a narrow conceptual and methodological comment on that debate. First, I show how the debaters have largely misconceptualized uniformity, and I invite a reconsideration of how we view this component of the discourse. In that vein, I argue that “outcome” uniformity, i.e., past litigant and court behavior, can be observed empirically, and that that approach presents the most promising method to inform the policy debate. I note that because much of the recognition outcome is the product of judicial interpretation, there is a dearth of evidence showing that the federalized alternative would produce significantly more outcome uniformity than the current state-by-state approach. I finish by concluding that, while there may be good reasons for federalization, the uniformity justification currently lacks adequate theoretical and empirical support. That finding suggests that the practical consequences of choosing one approach over the other may not be all that meaningful.

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4 Recognition and Enforcement of Foreign Judgments: Hearing Before the H. Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary, 112th Cong. 6 (2011) (testimony of H. Kathleen Patchell) (stating that in 2005, “there was at least as high a degree of uniform interpretation [of the various state statutes] as one would expect to find if the courts had been interpreting one statute”).

5 Id. at 6 n. 9 (quoting Prefatory Note, 2005 Uniform Foreign Country Money Judgment Recognition Act).

6 159 U.S. 113 (1895).

7 John B. Bellinger III, “Recognition of Foreign Judgments: Balancing International, Federal, State, and Commercial Interests,” Riesenfeld Symposium on Recognition of Foreign Judgments, Boalt Hall Law School, Berkeley, CA (Mar. 13, 2013) (“Despite the efforts by the Uniform Law Commission to achieve uniformity among state laws . . . the laws are anything but uniform. Indeed, they are a dizzying patchwork.”).

8 Other contributors to this volume have aptly covered that ground. See, e.g., Timothy J. McEvoy, Common Law Versus Statutory Approaches to Enforcing Foreign Judgments (providing an Australian perspective on the debate); Linda Silberman, The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments (urging federalization through statute); Paul B. Stephan, Introduction (noting some benefits of the ALI’s proposed statute, such as stability and uniformity).