"ACT OF STATE" IMMUNITY*

"Thou has committed fornication; but that was in another country and besides, the wench is dead."  CHRISTOPHER MARLOWE, The Jew of Malta.

Since conduct of international relations is an executive-legislative responsibility, it has been the practice for United States courts to decide cases involving foreign affairs in terms of the foreign policy of the other branches of government.1 When no executive policy is involved, according to conflict of laws principles, American courts are governed by the basic public policy of the forum in cases concerning private foreign rights or foreign law.2 However, in some cases concerning one or both of these fields, United States courts3 decline making the policy determination involved and, instead, apply a fixed rule which frequently produces results in conflict with related American values and objectives.

For example, although the long standing United States opposition to Fascist persecution4 has seen fruition in destruction of the German government and


1. Mexico v. Hoffman, 324 U.S. 30, 35 (1945); U. S. v. Pink, 315 U.S. 203, 227-34 (1942); U. S. v. Belmont, 301 U.S. 324, 329-30 (1937); U.S. v. Lee, 106 U.S. 196, 209 (1882); Kennett v. Chambers, 14 How. 38 (U.S. 1852); Williams v. Suffolk Insurance Co., 13 Pet. 414 (U.S. 1839); JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS (1933); Levitan, The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory, 55 YALE L. J. 467 (1946); for the point of view that United States courts have surrendered their independence established in the constitutional principle of separation of powers by considering themselves bound by executive determination of foreign policy, see Jessup, Has the Supreme Court Abdicated One of Its Functions, 40 AM. J. INT'L L. 168 (1946); see also Borchard, Extraterritorial Confiscations, 36 AM. J. INT'L L. 275 (1942), and Jessup, The Litvinov Assignment and the Pink Case, Id. at 282.

2. Restatement, Conflict of Laws § 612 (1934); Goodrich, Conflict of Laws 14 (2d ed. 1938); 1 Beale, The Conflict of Laws 59 (1935); Dicey, Conflict of Laws 25-30 (5th ed., Keith, 1932); Story, Conflict of Laws 341 (8th ed., Bigelow, 1883), and cases cited therein. Public policy of the forum is expressed in the constitution, statutes, common law and basic moral customs of the forum, and constitutes a requirement or specification which foreign law must satisfy to be applied. In conflicts cases in which the defense relies on rights created by foreign law, the courts will refuse to enforce foreign law which sharply conflicts with the forum's public policy, and will apply in its place the appropriate law of the forum.

3. While this comment is restricted to the United States rule, it should be noted that the British rule is substantially similar; see Luther v. Sager [1921] 3 K.B. 532, 548; Princess Paley Olga v. Weiss [1929] 1 K.B. 718; Holdsworth, The History of Acts of State in English Law, 41 Col. L. Rev. 1313 (1941); 92 L.J. 93 (1942); 86 L. J. 25 (1938). For continental aspects of the rule see Van Praag, Immunité de Juridiction Des États Étrangers, 15 Revue de Droit International et de Legislation Comparée 652 (3d ser. 1934), and 16 id. at 100 (1935); De Visscher, Les Gouvernements Étrangers en Justice, 3 id. at 300 (1922).

4. For a history of this policy including its application in the 19th century see
abrogation of discriminatory legislation in Germany, American courts abstain from questioning the validity of property rights resting solely on Nazi racial decrees. This divergence between judicial action and those policies which would otherwise here be controlling results from the automatic application by the courts of an international law principle granting immunity to foreign "acts of state".  

Usually phrased as the rule that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," the doctrine requires that a court decline jurisdiction of litigation involving private rights created by a foreign state's acts. Despite American antipathy for the act, and regardless of how violent a breach of the foreign nation's own historic principles is involved, it is stated that private rights arising out of such acts will not be questioned by United States courts. This rule has been applied even when there has been no definite official decision on recognition of the foreign government or when the foreign government

Kohler, The United States and German Jewish Persecution 35 (pamph. B'nai B'rith 1934).

5. While the rule is generally considered one of international law, it is closely related to the concept of "public policy" or "ordre public" in conflict of laws. For discussion of conflict of laws including this relationship see Harrison, Jurisprudence and the Conflict of Laws (1919); Cheshire, Private International Law 68-92 (2d ed. 1938).

6. "The expression 'act of state' usually denotes an executive or administrative exercise of sovereign power by an independent State or potentate, or by its duly authorized agents or officers. The expression, however, is not a term of art, and it obviously may, and is in fact often intended to, include legislative and judicial acts such as a statute, decree or order, or a judgment of a superior court," Mann, Sacrosanctity of the Foreign Act of State, 59 L. Q. REV. 42, 155 (1943).


8. "As for the very obnoxious and offensive character of the German decrees, the court is obliged to hold that governing law is no less controlling because it is bad law." Kleve v. Basler-Lebens-Versicherungs-Gesellschaft, 182 Misc. 776, 45 N.Y.S.2d 882 (Sup. Ct. 1943); see McCarthy v. Reichsbank, 259 App. Div. 1016, 20 N.Y.S.2d 450 (2d Dep't 1940), aff'd mem., 284 N.Y. 739, 31 N.E.2d 508 (1940).


10. It may be argued that the rule has been applied to governments not even recognized as de facto; 6 Williston, Contracts 5430 n. 14 (Rev. ed. 1938) ("Our courts accept the actual power of a foreign government to terminate contracts and annihilate titles within its own jurisdiction in spite of its non-recognition by the United States."); "Non-recognition . . . is no reason for regarding as of no legal effect the laws of an unrecognized government . . . ."; Salimoff v. Standard Oil, 263 N.Y. 220, 228, 186 N.E. 679, 683 (1933). See also Wulfschon v. Russian Republic 234 N.Y. 372, 375, 138 N.E. 24, 25 (1923) (dealing with sovereignty immunity from personal suit, when the court stated that "the result we reach depends upon more basic considerations than recognition or non-recognition by the United States"); Banque de France v. Equitable Trust Co., 33 F.2d 202, 207 (S.D.N.Y. 1929); Borchard, The Unrecognized Government in American Courts,
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has ceased to exist.\(^1\)

The actual working of the doctrine is well illustrated in the recent case of *Bernstein v. Van Hayghen Frères Société Anonyme*,\(^2\) in which the German plaintiff's privately owned shipline had been taken in Germany by Nazi racial decree and sold to the Belgian defendant.\(^3\) Normal jurisdictional requirements were satisfied since Bernstein, now an American citizen, had attached the defendant's New York assets in an action for conversion. However the Second Circuit Court, applying the act of state rule, affirmed the district court's dismissal of the suit for lack of jurisdiction, and the Supreme Court denied certiorari.

Speaking for the Second Circuit, Judge Learned Hand appears to have added a new element to the rule by suggesting that United States courts might accept jurisdiction over cases involving foreign acts of state if the executive had indicated conclusively that the courts should so act, but would dismiss where executive imprimatur was lacking. Since such an exception does not seem to have been suggested in earlier act of state cases,\(^4\) which, on the contrary, stated the rule as an unqualified inhibition on jurisdiction, it would seem a partial admission that acceptance of jurisdiction over foreign sovereign acts is a policy problem.

By contriving this exception, which in its implications undermines the rationale of the rule, the Second Circuit seemed to mitigate some of its apparent rigidity. But, by asserting that no clear executive policy had been declared,

26 AM. J. INT'L. L. 261, 268 (1932); Fraenkel, Juristic Status of Foreign States, Their Property and Their Acts, 25 Col. L. Rev. 544, 555, 568 (1925). But see Bernstein v. Van Hayghen Frères Société Anonyme, 163 F.2d 246 (C.C.A. 2d 1947), (Clark, J. dissenting at p. 253, stating that the rule has never been applied to cases where our Executives had not recognized the government as de facto or de jure.)


13. For general discussion of legal aspects of property taken in course of Jewish persecution, see Marx, *Case of German Jews vs. Germany* (1944), in which the author holds a "minority" reparations treaty as the only means of restitution, but accepts the act of state rule unquestioningly. See also Janowsky and Fagen, *International Aspects of German Racial Policies* 138 (1937).

14. For cases in the Second Circuit stating the doctrine without hint of such qualification see U.S. v. Watkins, 159 F.2d 50 (1947); U. S. v. Watkins, 159 F.2d 650 (1947); Banco de España v. Federal Reserve Bank, 114 F.2d 438 (1940); Hewitt v. Speyer, 250 Fed. 367 (1918); The Claveresk, 264 Fed. 276, 281 (1920). But cf. infra p. 118, where it is argued that Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) admits an exception to the rationale of the act of state immunities rule where there has been a clear declaration of executive policy.
the court was able to apply the rule with full effect and thus avoid a reexamination of the basic policy considerations involved. However, the tumultuous events of recent years suggest the need of an analysis of a rule which restricts courts to a completely amoral attitude regarding foreign acts of state.\textsuperscript{15} The rule is one of judicial invention, unsupported by legislative action. The doctrine as applied by United States courts does not rest on ancient precedent; its continued application is inconsistent with other principles of American law; and, as illustrated by judicial decisions involving Nazi racial decrees,\textsuperscript{16} it gives rise to an undesirable divergence between judicial action and public policy in matters affecting foreign affairs.

**Basis of the Concept in American Law**

Although stated as a fundamental of international law, review of American cases does not support assertions that the doctrine is a venerable judicial concept. It seems not to have been involved in those cases most frequently offered to show its long standing; secondly, it does not appear to be a necessary development from the old decisions cited as forming its original basis; and finally, it appears to rest on an arbitrary presumption made about 1910, not explained or justified in the opinions.

That the doctrine was not involved in nineteenth century decisions cited to show its long standing usage is illustrated by consideration of Justice Marshall's opinion in *Schooner Exchange v. McFaddon*,\textsuperscript{17} which is the earliest United States holding cited as establishing the rule.\textsuperscript{18} The fact situation in this case actually concerned the separate principle of a foreign sovereign's personal immunity from suit, since the American plaintiff was attempting to prosecute a claim in the federal courts against a warship of Napoleon which was currently in United States waters. The opinion dealt only with this latter issue, and Justice Marshall dismissed the action on the grounds that the immunity from personal suit which would be granted Napoleon if he were present would extend to his armed vessels.

Review of the reasoning in this decision indicates that the personal immunity of the sovereign which it concerned is not even a basis for the modern

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\item \textsuperscript{16} See note 33 infra for a list of cases involving Nazi racial decrees.
\item \textsuperscript{17} 7 Cranch 116 (U.S. 1812).
\item \textsuperscript{18} See 18 Austr. L. J. 173 (1944) for an Australian writer's attributing of state immunity doctrines to Justice Marshall; and Mann, *supra* note 15, for importance of these American cases in the English rule.
\end{itemize}
doctrine. Quoting from Vattel, the opinion rested on the fact that it was “impossible to conceive”\(^{19}\) that a foreign sovereign would send his ships, his agents, or go himself into a foreign country without an express or implied promise of immunity from judicial control. While a promise of personal immunity to the sovereign may be derived from these examples, the modern act of state doctrine is not a logical sequitur. That doctrine involves the further proposition that the immunity would extend to rights, property claims, or privileges which private citizens venturing into foreign states might prove were originally vested in them by acts of their sovereign.

A second aspect of the Schooner Exchange opinion, generally overlooked in subsequent cases, was the repeated assertion that the implied sovereign immunity was not a right protected by authoritative doctrines of international and constitutional law. It was described as a privilege, resting on a comity which host nations might withdraw if such were conceived to be within their national interest.\(^{20}\) This statement is in contrast with modern cases which not only extend the sovereign’s personal immunity to cover legal claims of private individuals resting on foreign sovereign acts, but also assert that such claims are immune from examination in terms of the public policy of the forum.\(^ {21}\)

Upon investigation, other cases cited to illustrate the doctrine’s long established position similarly appear actually to have involved only sovereigns’ immunity from personal suit.\(^ {22}\) The statement of the doctrine most often quoted in United States cases, and that cited by Hyde,\(^ {23}\) Moore\(^ {24}\) and Oppenheim\(^ {25}\) as authority in their treatises on International Law, is the pronouncement in Underhill v. Hernandez\(^ {26}\) that “the acts of the defendant were acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government.” However, in this connection the case is a more authoritative citation for the unfortunate results of courts giv-

20. Id. at 140, 143. See also The Santissima Trinidad, 7 Wheat. 283, 352–3 (U.S. 1822), referring to the immunity granted to foreign sovereign ships and saying “... it was not founded on any notion that a foreign sovereign has an absolute right ... it may be withdrawn upon notice at any time without just offense. ...”
21. “... [i]t can not be against public policy of this state to hold nationals to the contracts which they have made in their own country to be performed there under the laws of that country.” Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71, 90, 193 N.E. 897, 903 (1934). See The Claveresek, 264 Fed. 276, 281 (C.C.A.2d 1920).
22. L’Invincible, 1 Wheat. 238 (U.S. 1816); The Santissima Trinidad, 7 Wheat. 283 (U.S. 1822); Dow v. Johnson, 100 U.S. 158 (1875); United States v. Deikelman, 92 U.S. 520 (1875).
23. 1 Hyde, INTERNATIONAL LAW 734 (2d Rev. ed. 1945).
24. 2 Moore, INTERNATIONAL LAW DIGEST 30–2 (1906).
25. 1 Oppenheim, INTERNATIONAL LAW § 115 (4th ed., McNair, 1928); cf. § 115 of the 5th edition (1937) citing later decisions, in turn resting on the dicta of the Underhill case.
ing literal meaning to the careless phraseology of earlier decisions, for "acts of government" in the present sense were not involved. The plaintiff, an American citizen, was suing in an American court for damages received in Venezuela from Hernandez' activities in a local political uprising. Since Hernandez was acting as a Venezuelan army general, to support its dismissal of the action, it would seem that it was necessary only for the court to have cited the "superior orders" concept and to have stated that a sovereign's immunity from personal suit extends to those acting under superior orders on his behalf.

That such decisions do not support the modern rule may be shown in terms of a hypothetical action for conversion. The Underhill holding dismisses plaintiff where \( D_1 \) is a sovereign or agent of a sovereign, because American courts have traditionally declined to accept such jurisdiction. Now if \( D_1 \) sells the goods to \( D_2 \) (private citizen) it does not follow that plaintiff cannot sue \( D_2 \) merely because \( D_1 \) was beyond jurisdiction of the court. In order to extend \( D_1 \)'s immunity to \( D_2 \), we must say that \( D_1 \) was not only beyond personal suit, but that any rights related to him may "vest" beyond question in others. The closing of this gap between the present concept and precedents concerning the sovereign's personal immunity supplies the basis for the modern doctrine. Although not explained or justified in the cases, the step appears to have been accomplished by assuming that the basic nature of governments made the "vested rights" theory a rule of international law.

This type of analysis was exemplified by two opinions of Mr. Justice Holmes. In the first of these the court denied the right of a Hawaiian to sue the Hawaiian government, on the "logical and practical ground that there can be no legal right as against the authority which makes the law on which the right depends."\(^{27}\) It follows, therefore, that property rights taken by \( X \) nation from its citizen \( A \) and vested in citizen \( B \) cannot be questioned in \( X \) nation. The issue, however, is whether the relative rights of \( A \) and \( B \) can later be questioned in \( Y \) nation. But in the later American Banana Company\(^{28}\) case, Justice Holmes without explanation apparently assumed that his analysis of the rights of \( A \) and \( B \) in terms of \( X \) nation rested on factors so basic in the nature of governments as to apply by rule of law in \( Y \) nation.

In the American Banana Company case the plaintiff was suing on an alleged tort consisting of the defendant's incitement of the Costa Rican government

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27. Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907). *But see* American Bank and Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921), in which Justice Holmes saw no difficulty in supporting a legal right of a private citizen against the authority on which the right depended. Stating, "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified meaning in the conclusion"; Justice Holmes might well have added that selection of a premise for the judicial syllogism is in essence a policy choice and rarely a matter determined by mere inductive description.

to injure the plaintiff in that country. Since no tort existed unless the domestic acts of the Costa Rican government might be examined in a United States court with regard to the related claims of private individuals, the case presented the act of state doctrine in its modern form. In dismissing the action Justice Holmes stated that the "fundamental reason is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable."29 For this "fundamental reason" to be pertinent, one must first assume the answer to the basic question in the case; namely, whether legal rights and claims vested by one sovereign are beyond question by another. Moreover, while the holding rests on this unexplained premise, elsewhere within the opinion are contrary admissions that, in some instances private legal rights arising from one authority may be questioned by a second authority if required by the latter's public policy.

Although crystallized in the American Banana Company case, the act of state doctrine was applied to few cases until 19200 when widespread litigation arose from governmental actions in the course of the Russian Revolution. In these cases, United States courts uniformly declined examination of rights created by acts of the Russian government within its own territory.81 Without investigation or appraisal, the precedents described above were cited as establishing this immunity, and the modern doctrine was generally adhered to. Subsequent usage of the rule included its application to rights arising from acts of the Spanish Loyalist government,82 and it currently is given as a basis for refusal by United States courts to question individual property rights depending on Nazi racial decrees.83 From the above analysis, however, it appears that at the time of the first Russian cases, the doctrine was not an an-

29. Id. at 358.
30. In Oetjen v. Central Leather Co., 246 U.S. 297 (1918), and Ricaud v. American Metal Co., 246 U.S. 304 (1918) the doctrine was applied. Since the Oetjen case did not concern rights of United States citizens, it is perhaps the earliest holding of the full modern rule. The only authority cited in these cases for the rule was the Underhill and American Banana Co. cases described above.
cient and firmly established principle in American law. Its few direct precedents had occurred within the preceding twelve years\(^{34}\) and they rested on an unacknowledged basic premise in the form of the "vested rights" theory of law.

**Inconsistencies in Applying the Basic Principle**

Although the "act of state" rule has been generally adopted in recent years, consistent application has not been given to its basic premise that legal status once vested by the sovereign of the situs is beyond question in other nations. In closely related situations, adherence to basic conflict of laws principles has led American courts to review, in terms of the forum's public policy,\(^{35}\) rights and claims where legality had been originally established by acts or laws of foreign states.

According to orthodox doctrine, foreign acts of state are immune only as regards citizens and their property located within the acting state.\(^{36}\) That the rule has never applied to persons or property within the United States\(^{37}\) seems a reflection on its rationale, since most of the basic reasons given for the rule would apply equally to property in the United States, e.g., "comity", respect

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34. In the Bernstein case, *supra* note 11, at 249, Judge Hand said the rule had been in force for "at least thirty years." For another indication of the age of the rule, see section 115 of 1 Oppenheim, *International Law*, editions 1 through 4. The 4th edition published in 1928 contains the first statement of the rule, while the three earlier 20th century editions do not mention it.

35. Restatement, *Conflict of Laws* § 612 (1934); for opinion on use of public policy of the forum as a restriction on foreign law see Stimson, *Which Law Should Govern*, 24 Va. L. Rev. 748 (1938) (advocating abolition of the limitation); Nussbaum, *Public Policy and the Political Crisis in the Conflict of Laws*, 49 Yale L. J. 1027 (1940) (emphasizing public policy limitations where the forum is affected); Kosters, *Public Policy in Private International Law*, 29 Yale L. J. 745 (1920) (giving history and strong defense of the doctrine as a sovereign right); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 Yale L. J. 736 (1924) (discussing its legal basis); Note, 33 Col. L. Rev. 508 (1933) (listing ways in which the courts have used the limitation); Nutting, *Suggested Limitations of the Public Policy Doctrine*, 19 Minn. L. Rev. 195 (1935) (commenting on the rule from the classical view which held that courts were bodies which should refrain from policy decisions in the interest of uniformity).

36. Restatement, *Conflict of Laws* § 42 Comment (a) (1934) ("a state has no power to create rights or other interests beyond its boundaries"); see also 2 Hackworth, *Digest of International Law* 1, 165, 393 (1941); 2 Moore, *op. cit. supra* note 24, at 4, 7; Nussbaum, *Principles of Private International Law* 32-5 (1943) and authorities cited therein.

37. It is arguable that in United States v. Pink, 315 U.S. 203 (1942), the Supreme Court held Russian confiscation decrees effective against property located within the United States, and that foreign Acts of State accordingly may sometimes have extraterritorial effect. However, it would seem that the effect given to Russian acts in this case depended more on the particular provisions of the supporting Litvinov Assignment than on their status as acts of state. See Borchard and Jessup, *supra* note 1.
for foreign sovereigns, avoidance of friction between states. The extreme to which courts are willing to question acts of foreign states regarding property in America was shown by their continuing to recognize private property rights of Russian corporations within the United States long after the Communist government had attempted to confiscate all such property and had rescinded the laws on which the corporate identity rested.\textsuperscript{38}

Moreover, there are certain areas in which rights of foreign citizens originally vested within their own nation under its law have been subject to subsequent scrutiny in American courts. Such judicial review has been given in order to effect public policies resting on long established moral precepts. For example, United States courts denied some of the legal incidents of marriage to parties to polygamous, incestuous or miscegenetic\textsuperscript{39} marriage contracts formed under foreign law. Nor will contracts dealing with slavery\textsuperscript{40} or gambling\textsuperscript{41} be honored, regardless of the law or acts of the sovereign of the contracts' situs.

United States courts have questioned foreign judgments when called upon to enforce them, although the judiciary is a branch of the foreign government and its judgments are thus acts of state. The refusal to give validity to foreign judgments has included setting aside prize court decisions when proceedings were below a minimum standard required by the United States;\textsuperscript{42} restoration of property taken away by foreign criminal proceedings\textsuperscript{43} and review of foreign judgments based on fraud.\textsuperscript{44} It has been stated that in their effort to support a minimum standard of justice, United States courts will not enforce any judgment received abroad on an action which could not have been maintained in America.\textsuperscript{45}

Finally there is a growing category of acts committed in foreign nations


\textsuperscript{39} See Lorenzen, \textit{Polygamy and the Conflict of Laws}, 32 \textit{Yale L. J.} 471 (1923); Recognition of Polygamous Marriages, 1 \textit{Int'l L. Q.} 64 (1947); 2 Beale, \textit{op. cit. supra} note 2, at 687, 691 and cases cited therein.

\textsuperscript{40} Fales v. Mayberry, 8 Fed. Cas. 970, No. 4, 622 (C.C.D.R.I. 1815); 2 Beale, \textit{op. cit. supra} note 2, at 658; Dicey, \textit{op. cit. supra} note 2, at 25, 532-4; 2 Wharton, \textit{Conflict of Laws} 1182 (3d ed. 1905); Story, \textit{op. cit. supra} note 2, at 342.

\textsuperscript{41} 2 Beale, \textit{op. cit. supra} note 2, at 1237; Dicey, \textit{op. cit. supra} note 2, at 630-3; Wharton, \textit{op. cit. supra} note 40, at 1170–83; and cases cited therein.


\textsuperscript{43} Sabariego v. Maverick, 124 U.S. 261 (1888).

\textsuperscript{44} Schendel v. Chicago M. & St. P. Ry., 168 Minn. 152, 210 N.W. 70 (1926); Harrison v. Triplex Gold Mines, 33 F.2d 667 (C.C.A. 1st 1929); 2 Beale, \textit{op. cit. supra} note 2, at 1401–3; Goodrich, \textit{op. cit. supra} note 2, at 535.

\textsuperscript{45} Di Brimont v. Penniman, 7 Fed. Cas. 309, No. 3, 715 (C.C.S.D.N.Y. 1873); 2 Beale, \textit{op. cit. supra} note 2, at 1412; Dicey, \textit{op. cit. supra} note 2, at 470; Goodrich, \textit{op. cit. supra} note 2, at 540.
by foreign citizens which other states may admittedly measure in terms of their own policies and law. While these acts are theoretically limited to acts endangering the prosecuting state, acts causing harm in the prosecuting state, or international crimes such as piracy, they further exemplify that United States courts may use American law to decide the legality of actions occurring abroad although such actions may have been approved or supported by the sovereign of the situs. The conflict between these examples and the legal theories underlying act of state immunity is evidenced by comparing them with Justice Holmes' statement in the *American Banana Company* case, that, "for another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."40

**RECENT DECISIONS CONFLICT WITH ABSOLUTE ACT OF STATE IMMUNITY**

Both the charter creating the Nurnberg Tribunal and the actual trial constitute a precedent for an international law concept which opposes the granting of absolute immunity to foreign acts of state.

In direct contradiction to the act of state doctrine the charter gave the Nurnberg Court jurisdiction over the domestic acts of the German government against its own citizens before the war, and specified that "the fact that the defendant acted pursuant to the order of his Government . . . shall not free him from responsibility."40 It should be noted that this charter, as a multilateral executive agreement approved by twenty-three nations, is of high authority in American courts and a part of international law. While the

47. 2 *Hackworth, op. cit. supra* note 36, at 188-96; 2 *Moore, op. cit. supra* note 24, at 979-84; 1 *Hyde, op. cit. supra* note 23, at 798-800; and cases cited therein.
50. Art. 8, Charter of the International Military Tribunal, 1 *Nazi Conspiracy and Aggression* (Office of United States Chief of Counsel for Prosecution of Axis Criminality, 1946). See also Art. 7 of this Charter stating that "the official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment."
51. For varying opinions on the status of executive agreements see McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L. J. 181 and 534 (1945), holding executive agreements to have substantially the same legal status as treaties; Borchard, *Treaties and Executive Agreements—A Reply*, 54 Yale L. J. 616 (1945) and *Shall the Executive Agreement Replace The Treaty*, 53 Yale L. J. 664 (1944) presenting an opposite point
trial was conducted by an ad hoc international military tribunal and the position of the case as a general precedent remains to be established, it is at least one instance where international law recognized a minimum level of action below which sovereign acts will not be immune from foreign review.

A further conflict with the doctrine is found in the recent case of Republic of Mexico v. Hoffman, in which the Supreme Court held that not only was the granting of immunity to foreign states not an absolute rule of law, but that it was reversible error for courts to grant such immunity in areas where the executive had indicated a contrary policy. In this case the lower courts had granted immunity as a matter of law to a Mexican government owned fishing vessel which Hoffman was libeling in a damage action. The opinion pointed out that extending such immunity was a matter of public policy, and that the executive's established policies overrode judicial views on the subject—that, "it is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which of view. In these diametrically opposed articles are listed extensive bibliographical reference to treaties and case citations.

52. Reference U.N. General Assembly Resolution No. 95 (1), December 11, 1946, reprinted in part in 17 Dep't State Bull. 121 (1947); the U.N. Committee on the Progressive Development of International Law and Its Codification was instructed to include principles of the Nurnberg charter in its formulation of an international law code. Reference Document Presented to the U.N. General Assembly, A236, December 10, 1946, the committee's resolution stated that the U.N. General Assembly "affirms and recognizes the charter of the Nurnberg Tribunal and the judgment of the Tribunal."

53. Few cases have cited the Nurnberg verdict other than subsequent war criminal trials. For comment highly valuing Nurnberg's position in international and domestic law see Jackson, Putting the Nurnberg Law to Work, 25 For. AFFAIRS 440 (1947); see also Radin, International Crimes, 32 IOWA L. REV. 33 (1946); Jaspers, The Significance of the Nurnberg Trials for Germany and for the World, 22 NOTRE DAME LAW. 150 (1947); but see Wyzanski, Nurnberg in Retrospect, 178 ATL. MONTHLY 56 (1946).

54. See 1 Law Reports of Trials, U.N. War Crimes Commission (1947) for details of further application of the charter principles by the prosecuting nations. Over 24,000 persons had been tried for war crimes in Europe under the charter principles by December 1, 1946; 1 INT'L L. Q. 42 (1947); and trials are continuing in each of the four prosecuting nations.

55. 324 U.S. 30 (1945).

56. Reaction to this case was generally favorable, see Notes, 34 CALIF. L. REV. 441 (1946), 45 Col. L. REV. 80 (1945); 30 MINN. L. REV. 207 (1946). But see Jessup, Has the Supreme Court Abdicating One of Its Functions, 40 AM. J. INT'L L. 168 (1946), suggesting that courts have erred in relinquishing areas of discretion to the executive branch. Without considering that issue, it is sufficient to note that the granting of immunity was recognized as a policy problem. Where application of the act of state rule with its automatic extension of immunity would produce results at variance with American business interests, some courts have been inspired to avoid extending immunity by setting up definitions of acts of state which would exclude many sovereign acts. For an article illustrating such attempts and their failure to realize that the basic issue is one of policy, see Fox, Competence of Courts in Regard to 'Non-sovereign Acts' of Foreign States, 35 AM. J. INT'L L. 632 (1941).
the government has not seen fit to recognize." Thus, even regarding foreign sovereign vessels, American courts now recognize that extension of immunity is a policy matter.

**Position of the Concept in International Relations**

An objective appraisal of international relations would seem to highlight the inconsistency in American foreign policy implementation which the courts' application of the act of state immunity rule produces. Viewed realistically, international relations would seem to be the process by which members of the world community seek across national boundaries such representative values as power, wealth, knowledge, respect and wellbeing, and use any one or all of these values to affect the production and distribution of any one or all of them. And the implementation of foreign policy may best be described as the use of national power and other resources for the fullest achievement of values in interactions with other nations. Thus, to one interested in a rational international policy, any exercise by a national government of official power which affects one of these values in a foreign nation is a concern of international relations.

An analysis of recent German-American relations in these terms would seem to point up the actual consequences of the act of state immunity doctrine. The 'United States' declaration of disapproval of the first Nazi anti-Jewish actions in 1933 was an attempted use by the United States of respect as a base value to affect German conscience and thus to influence Germany's according of respect, in the sense of equal access to all values, to its own citizens. Our later protests and the recall of the American ambassador in 1938, in response to further German persecution, had the added intent and effect of decreasing respect for Germany among other nations. As Nazi actions became more adverse to American foreign policy, the United States used its wealth to oppose Nazi wealth and power through such actions as government restrictions on trade with Germany and finally by lend-lease to her enemies. The President used his power to oppose German wealth-seeking by freezing American assets of German-conquered states. With the advent of war, the

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57. 324 U.S. 30, at 35.
58. The analytical system employed in this section is in great part derived from that developed by Professors Lasswell and McDougal. For a more detailed exposition of the method of analysis, see Lasswell and McDougal, *Legal Education and The Public Policy*, 52 Yale L. J. 203 (1943); McDougal, *Speech*, at May 1947 Meeting of American Society of International Law, reprinted in *Proceedings of American Society of International Law* (1947).
59. Dept't State Press Release, No. 187, at 294; No. 183, at 201-3; No. 182, at 196 (1933); No. 305, at 99 (1935). See also Adler and Margalith, *American Intercession on Behalf of Jews in the Diplomatic Correspondence of the United States* 349-84 (1943).
60. Peace and War (Dept't State) 60, 439 (1943).
United States added physical power to its other resources in implementing its foreign policy.

In terms of this analysis, the act of state doctrine as applied by our courts constitutes a completely contradictory use of one branch of American governmental power to support Nazi conversion of Jewish assets into wealth required for its plans. It was a use of American authoritative power to support Nazi goal-seeking at a time when all other American resources were being marshalled against the Germans. To assert that the policy was merely neutral, or that it prevented courts from being involved in political problems, would appear to rest on a failure to note the functional equivalency of inaction and action in terms of policy consequences.

From the perspective of its actual results, refusal of an American court to question a property transaction fostered by a Nazi racial decree can scarcely be described as neutral. On the contrary, its effect is to marshal to the defense of such property the full societal protection of American courts, police facilities, fire departments, and other governmental agencies. It is thus as effective support for the decree as that given by a German court. Whether or not such support is to be given is a policy question and accordingly should not depend on a narrow rule of law. As a major decision regarding the degree to which the United States will use its power in affecting basic moral principles, the courts should make this decision in the light of that policy decreed by the legislature or executive, or in the absence of official statements, in the light of its own best conceptions of the public policy of the forum.

ARGUMENTS SUPPORTING THE CONCEPT

One of the arguments most frequently advanced to support the doctrine is that it rests on the "comity" or courtesy among nations.62 This defense would seem to indicate that courts have not understood their function of looking to forum public policy in cases involving international relations. That extensions of "comity" should be a matter of policy and not of automatic judicial rule is suggested by the recent anomalous extension of comity by the courts to one government which the executive refused officially to recognize, and to others which had ceased to exist.63 The position seems untenable when the courts persist in automatically extending "comity" to a government which the United States has destroyed and whose laws we have abrogated.64


63. For examples of cases where the court applied the doctrine to governments which had not been officially recognized, see note 10 and to governments which had ceased to exist, see note 11 supra.

64. Paragraph 2, U.S. Zone Law No. 52, Military Government Gazette, Issue A (June 1946); Article 1, Law No. 1, Official Gazette of Allied Control Council for Germany No. 1 (Oct. 1945), freezing all property taken under racial decrees, abrogating the decrees and providing that rights based thereon shall not be respected. All major nations
Since, in the geometry of classic international law, the absolute independence and perfect equality of each sovereignty is a basic proposition, it may be argued that abandoning the act of state immunity would violate its corollary that no nation has the right to "intervene" in the domestic affairs of another. However, this argument dissolves upon careful analysis of the actual nature of international intercourse. As pointed out above, any transaction between nations which involves a use of their respective resources and affects the extent to which they can achieve their basic values is intervention. If this analysis is correct, then the support given by United States courts to foreign acts of state is intervention in so far as it lends American power to support foreign wealth transactions and adds the respect of the United States to international respect for the foreign nation concerned. Thus, abandoning the act of state doctrine, while it may not harmonize with the classic international law concept of sovereign states existing free from interaction or mutual intervention, is merely an application of the principle that use of United States governmental power to intervene in foreign national affairs is a policy problem requiring integration in the whole of national policy.

A closely related reason often given for the doctrine is that the judging of one nation's acts by the courts of another would "vex the peace of nations." The anomaly resulting from the courts' unquestioned adherence to this reasoning is illustrated by judicial action on Nazi racial decrees where it appears that, in order to avoid vexing the peace, courts will not judge acts of a foreign government when it has been destroyed in war by their own nation. As suggested by the fact that the political branch of the United States government controls recognition of foreign governments and declarations of war, actions taken concerning the peace of nations would seem to be a matter of policy and should not be subject to an inflexible legal rule.

Requiring the courts to make a policy decision as to whether rights created by act of a foreign state will be respected in a given case would seem to present no serious administrative problem. In litigation involving a right resting on a foreign state's act, the official executive position would control the immunity to be given, with the policy of the forum being effective within these broad limits. When no executive views had been established, the immunity would depend on basic principles of the forum, or on a specific executive

have denounced these decrees and announced that property rights resting thereon would not be honored; see Inter-Allied Declaration of London, 5 January 1943, reprinted in 8 DEPT STATE BULL. 21 (1943); for acts of individual governments in exile see GOVERNMENTS-IN-EXILE ON JEWISH RIGHTS, pamph. American Jewish Committee (1942).


67. See Russian Republic v. Cibriario, 235 N.Y. 255, 259; 139 N.E. 259, 260 (1923), when the court said "... the rule of comity is our only guide. This rule is always subject to one consideration. There may be no yielding if to yield is inconsistent with
statement, obtained as at present, in the manner established by the Supreme
Court in Ex parte Mir. Under the procedure outlined in the Mir case,
each of the contesting parties would be able to raise the immunity issue by
obtaining an official statement from the State Department, or by encouraging
the Executive to set forth appropriate suggestions to the court through the
Attorney General or some other law officer under his direction.

It has been argued that submitting foreign acts of state to the test of United
States policy would constitute a judicial arrogation of executive functions
and would embarrass the executive. Neither of these objections, however,
seems valid. Bringing United States court decisions into harmony with
national policy is hardly an arrogation of executive power. On the contrary
the present judicial practice of granting unquestioned act of state immunity
when the executive has not spoken appears to be an abdication of the judicial
function of safeguarding public policy within the limits established, and when
the executive has set a definite policy it appears to be a denial of executive
control over foreign affairs.

It is difficult to perceive how abandoning the doctrine would embarrass the
executive since in each instance the court would either be following an offi-
cially announced government policy or would be enforcing a forum policy,
subject to discretionary modification by executive intervention as outlined in
Ex parte Mir. On the other hand, embarrassment results from the present
doctrine. For example, in recent discussions with Russia the United States
indicated officially that it believed that property taken through racial decrees
by the Nazi government should be returned to original owners and thus not be
considered subject to reparation claims. The pronouncement by United
States courts that title to such property vests beyond question as a complete

our public policy. . . . Such public policy may be interpreted by the courts. It is fixed
by general usage and morality or by executive or legislative declaration.” See articles
cited note 1 supra for comment on the degree to which the political branches should con-
trol the courts in cases concerning international policy.

68. 254 U.S. 522 (1921); for discussion of this procedure see Compania Española de
Navegacion Maritima v. The Navemar, 303 U.S. 68, 74 (1938); and Notes, 25 Am. J.
Int’l L. 83 (1931), 45 Col. L. Rev. 80 (1945), and 50 Yale L. J. 1088 (1941).

Sutherland, 254 Fed. 126, 129 (S.D.N.Y. 1918); The Gul Djemal, 296 Fed. 563, 567
(S.D.N.Y. 1921).

70. Jessup, supra note 56, at 169.

71. For discussion of the judiciary’s relation to action by the political branch, mainly
focused on recognition of foreign governments, see Comment, 41 Col. L. Rev. 1072
(1941); Déak, The Plea of Sovereign Immunity in the New York Court of Appeals, 40
Col. L. Rev. 453 (1940). However, the rule should be considered apart from issues of
recognition. Recognition is merely one indication of executive policy; it does not consti-
tute approval of 100% of the recognized government’s acts; see Borchard, supra note 10.

72. See note 68 supra.

73. Statements by Secretary of State Marshall, reprinted in 16 Def’t State Bull.
793 (1947); Id. at 653.
transfer as an act of the German state is an embarrassing divergence of governmental opinion on the international law relating to this question.

Abandonment of absolute act of state immunity would occasionally result in the property claims of private citizens being respected in some nations and not in others. Such a situation is undesirable because it makes property transactions non-uniform and insecure. Since escape from these evils inspired some of the most fruitful developments in conflict of laws doctrine, it is not surprising that many treatises in the conflicts field oppose judicial discretion in honoring foreign laws and thus provide strong support for the act of state rule. However, it should be noted that such arguments evolved in the relative stability of the past when modern exigencies could not be anticipated, and were designed to avoid a narrow provincialism which used minor peculiarities in foreign rights and laws as an excuse for imposing the policy of the forum. Today the current danger is not intolerant insularity, but an isolation tolerating attacks on the basic concepts of our society.

Without deprecating their validity and importance in normal situations, rules designed to promote security and uniformity may nevertheless be qualified by the public policy of the forum. Recent years have shown that security in property transactions, like all other security, ultimately rests on acceptance by all nations of a minimum standard of conduct. By measuring rights created by foreign states against forum policy, United States courts, it would seem, would aid in preserving this minimum standard. The fact that such action may occasionally give rise to uncertainty in property transactions seems comparatively unimportant, for it will only arise as part of an attack on a much greater threat to security.

74. This problem seemed important to the court in Banco De España v. Federal Reserve Bank, 114 F.2d 438, 444 (C.C.A.2d 1940), where the court said that the rule "... is not entirely a matter of comity ... persons who dealt with the former Spanish government are entitled to rely on the finality and legality of that government's acts ... ."

75. 3 BEALE, op. cit. supra note 2, at 1651; CHESHIRE, PRIVATE INTERNATIONAL LAW 138-9 (2d ed. 1938); NOUSBAUM, op. cit. supra note 36, at 112-6; 3 BEALE, CASES ON THE CONFLICT OF LAWS, 515, 517 (1902); Beach, Uniform Interstate Enforcement of Vested Rights, 27 YALE L. J. 656 (1918); Goodrich, Foreign Facts and Local Fancies, 25 VA. L. REV. 26 (1938); Nutting, op. cit. supra note 35; Cavers, A Critique of the Choice-of-Law Problem, 47 HARV. L. REV. 173 (1933).

76. "So long as the basic rights of man are denied in any substantial portion of the earth, men everywhere must live in fear of their own rights and their own security." President Truman, speech at Monticello, July 4, 1947, reprinted in 17 DEP'T STATE BULL. 80, 81 (1947). The short-run elevation of immediate security over long-run moral stability is evidenced in law journal comments during the appeasement years and is exemplified in reaction to United States' court's upholding of Nazi racial decrees in 1935. See Notes, 23 VA. L. REV. 288 (1936), 24 VA. L. REV. 922 (1937); Comment, 45 YALE L. J. 1463 (1936); 17 B. U. L. REV. 102 (1937). But see 38 COL. L. REV. 1490 (1938) for a comment properly realizing the policy considerations of the problem.
CONCLUSION

The present time would appear to be highly propitious for abandoning the doctrine of act of state immunity. There is increased recognition in many quarters that each state must lend its powers to protect minimum basic rights of foreign citizens from encroachment by their own governments. And the suits of victims of German discriminatory law facilitate abandoning the doctrine since here the courts are granting immunity to the publicly disapproved and officially condemned Nazi racial decrees.

Judge Hand's suggestion in the Bernstein case that act of state immunity should be subject to control by official executive policy does not, of itself, satisfy the objections to the rule. United States courts have a fundamental duty of upholding basic public policy; the automatic judicial granting of immunity in the absence of executive policy is an abdication of this responsibility. The granting of immunity constitutes support to acts of foreign states and should be made in each case as a conscious policy decision.

When an official executive position regarding specific acts has been outlined, or is received in the course of an action, it should be controlling. In the absence of such indication, the traditional public policy of the forum should be the guide. It is to be hoped that the Supreme Court will reverse the existing rule and end the unpleasant spectacle of United States courts extending immunity to persecution and its profiteers.

77. President Truman, speech at Baylor University, March 6, 1947, Peace, Freedom and World Trade, reprinted in 16 DEPT STATE BULL. 481 (1947); United States protests over curtailment of civil liberties in Bulgaria, 16 DEPT STATE BULL. 1218 (1947); same re Rumania, 17 id. at 38 (1947); Acheson, Requirements of Reconstruction, 16 DEPT STATE BULL. 991 (1947).