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EXPORTING THE CONSTITUTION

Mark D. Rosen*

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INTRODUCTION

*Associate Professor, Chicago-Kent College of Law, Illinois Institute of Technology. I would like to give special thanks to Graeme Dinwoodie for enlightening discussions, excellent comments, and an unending willingness to debate the issues addressed in this Article. I also wish to thank Kathy Baker, Rick Brooks, Philip Hamburger, Dean Hal Krent, Marty Redish, Kara Stein, Joan Steinman, Margaret Stewart, Dina Warner, and participants at a faculty workshop at the Northwestern University School of Law and at the Scholarship Workshop at the University of Chicago Law School. The author also wishes to disclose that he consulted on one of the cases discussed in the body of the Article, *Yaboo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d. 1181 (N.D. Cal. 2001). All errors, of course, are my own.

If a foreign government enacts a law that would be unconstitutional if passed in the United States, can a foreign judgment based on that law be enforced in an American court? For example, can an American court enforce an English judgment based on English defamation law, which is more pro-plaintiff than the First Amendment permits American law to be? American courts to date uniformly have said “no,” concluding that to enforce such a foreign judgment itself would be unconstitutional.¹ This Article argues that these courts’ analysis is mistaken: While such foreign judgments may well be “*Un-American*” insofar as they come from non-American polities and reflect political values that are at variance with American constitutional law, neither the foreign judgments themselves nor their enforcement by an American court is unconstitutional. Categorically refusing to enforce such Un-American Judgments is tantamount to imposing U.S. constitutional norms on foreign countries.

Much is at stake, for enforcement questions frequently arise and, when they do, they implicate a wide range of parties and interests. In today’s global economy, plaintiffs often prevail only to find post-judgment that the defendant or its assets are outside the jurisdiction of the ruling court. Without voluntary compliance or adequate pre-judgment attachment – both of which frequently are absent – the plaintiff can recover only if she can enforce the judgment in the court of a country where the losing party or its assets can be found. In addition to the plaintiff’s obvious interests in enforcing the judgments, the country whose court issued the judgment also typically desires enforcement. Laws typically advance social policies, and not enforcing the foreign judgment can impede the country that issued the judgment from advancing its chosen social policy. The issuing country might retaliate if its judgments are not enforced, refusing to enforce judgments from the other jurisdiction in the future. The legal uncertainties attending enforcement disputes can impose economic burdens, encumber international business, and foul diplomatic relations.

The American courts’ mistaken constitutional analysis has begotten pernicious consequences. It has hidden the hard policy choices that must be made in determining whether to enforce foreign judgments, obscuring the fact that the more political branches of government are best institutionally suited to making such value-laden judgments.² The erroneous constitutional analysis narrows the scope of the President’s power to pursue an executive agreement or to negotiate an enforcement treaty with other countries, thereby depriving

¹See *infra* Part I.B.

²See Mark D. Rosen, *Should Un-American Foreign Judgments Be Enforced?*, 88 MINN. L. REV. xx (forthcoming Spring 2004) [hereinafter “*Un-American Judgments*”].

the President and Congress of powers in respect of foreign affairs³ that are constitutionally theirs to exercise.⁴ Moreover, the courts' faulty analysis has resulted in outcomes that are unfair from virtually any normative perspective.⁵

This is a particularly opportune time to correct the constitutional misperceptions concerning Un-American Judgments. Under the auspices of the Hague Conference on Private International Law, the United States is in the process of negotiating an international treaty dealing with the enforcement of foreign judgments.⁶ Particularly because the issues implicated by whether foreign judgments are enforced are wide-ranging and significant, it is important that American negotiators not be constrained by illusions of constitutional limitations when they attend to their task of forging a multilateral treaty.

The Article is in five parts. Part I explains the weighty considerations that are implicated by the question of whether foreign judgments are to be enforced and shows that American courts almost always enforce run-of-the-mill foreign judgments under a comity analysis. Part II demonstrates that courts have used a different approach – a constitutional analysis – when confronting foreign judgments based on laws that American politics cannot constitutionally enact. These courts uniformly have concluded that they were constitutionally barred from enforcing such foreign judgments on account of the rule famously announced in *Shelley v. Kraemer*.⁷

Parts III and IV explain why, contrary to these courts' conclusions, the Constitution does not prevent the enforcement of Un-American Judgments. Part III argues that the American courts' approach is anomalous under contemporary state action doctrine. Although judicial enforcement surely constitutes state action, consistency as between domestic and foreign judgments requires that the substance of the foreign law not be attributed to the state. *Shelley* notwithstanding, American courts today routinely enforce

³While the Constitution explicitly grants to the Senate alone the power of providing advice and consent in respect of treaties, see U.S. CONST. Art. II, §2, cl. 2, the Congress in practice often plays a far greater role in foreign affairs than this might suggest. Of particular relevance here, many international matters that likely would fit within the treaty power, such as NAFTA, recently have been understood as requiring approval by both houses of Congress. See generally Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* 108 HARV. L. REV. 799 (1995). Conversely, it also is well established that the President may enter into so-called "executive agreements" with foreign countries, which require approval from neither house of Congress. See generally *American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2386-87 (2003).

⁴It is well-established that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957); *De Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890) (similar).

⁵See Rosen, *Un-American Judgments*, supra note 2, at xx.

⁶See Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters, <http://www.hcch.net/e/conventions/draft36e.html>.

⁷334 U.S. 1 (1948).

restrictions on speech that arise from domestic contracts that could not have been enacted into law due to the First Amendment. Judicial enforcement of such private agreements regularly is held to not trigger First Amendment scrutiny. The Article argues that this robust line of case law is normatively desirable, and then explains why foreign judgments premised on foreign countries' laws are not meaningfully different from domestic claims based on private contract for purposes of the state action doctrine. Accordingly, if the state action doctrine does not prevent American courts from enforcing contractual limitations that could not have been enacted into general law – and it does not – the doctrine also should not preclude the enforcement of Un-American Judgments.

Having disposed of the analysis that has been relied upon by American courts to date, the Article in Part IV considers an intriguing argument recently advanced in the scholarly literature that would appear to circumvent the state action problem identified in Part III.⁸ It has been proposed that a legal requirement that foreign judgments be enforced constitutes a “generally-applicable” legal rule that triggers First Amendment scrutiny if and when its application imposes significant effects on speech. Part IV shows that such an approach is not consistent with contemporary law concerning incidental burdens on fundamental rights. Nor would such an approach be normatively desirable, Part IV contends, for it reproduces the difficulties that plague the recent courts' troubled state action analysis.

After showing in Parts III and IV that the Constitution does not answer the question whether American courts should enforce Un-American Judgments, Part V considers several costs of the over-constitutionalization that the Article has diagnosed. First, the illusion of unconstitutionality has hidden the fact that whether Un-American Judgments are to be enforced is not predetermined by the Constitution, but instead must be decided on the basis of policy. Second, as an institutional matter, the belief that enforcement implicated the Constitution meant, in practice, that enforcement determinations fell exclusively within the judiciary's purview. Dispelling the specter of unconstitutionality enables one to see that the executive and legislative branches properly play an important, if not the dominant, role in formulating our country's policy with regard to the enforcement of Un-American Judgments. Third, eliminating the misconception of unconstitutionality illuminates the fact that the courts to date have utilized a wholly American-centered analysis that categorically disregards a range of considerations that, on virtually any normative theory, are relevant to deciding whether Un-American Judgments should be enforced. A short conclusion

⁸See Molly S. Van Houweling, *Enforcement of Foreign Judgments, the First Amendment, and Internet Speech: Notes for the Next Yahoo! v. LICRA*, 24 MICH. J. INT'L L. 697, 703-04, 713-16 (2003).

follows.

I. THE ENFORCEMENT OF SIMPLE FOREIGN JUDGMENTS

As mentioned above, whether foreign judgments are enforced affects not only the parties to the foreign lawsuit, but also the sovereign interests of the country that has issued the judgment, the interests of the country that is being asked to enforce the judgment, and the stability of the international business and legal system.⁹ Due undoubtedly to this array of interests, a system of cooperation among countries has emerged with regard to the enforcement of foreign judgments.¹⁰ Indeed, the United States has been at the vanguard of enforcing foreign judgments, beginning with the late nineteenth century Supreme Court decision of *Hilton v. Guyot*.¹¹ Since then, courts in this country have analyzed enforcement questions under the doctrine of comity and almost always have enforced foreign judgments.

Accurately describing the case law, the Restatement (Second) of Conflict of Laws states that a “judgment rendered in a foreign nation . . . will, if valid, usually be given the same effect as a sister State judgment.”¹² Because the Constitution almost categorically requires one State to enforce sister State judgments,¹³ the Restatement rule means that “valid” foreign judgments will be enforced by American courts. Foreign judgments are deemed to be “valid” if the foreign court properly asserted personal jurisdiction and if the foreign tribunal utilizes procedures that are not fundamentally unfair.¹⁴ If these conditions are met, the Restatement instructs, the foreign judgment should be enforced unless “the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.”¹⁵ This last caveat is what typically is spoken of as the public policy exception.¹⁶ Statutes and treaties that address the enforcement of specific types of judgments or their analogues – such as the Uniform Foreign Money-Judgments Recognition

⁹See *infra* Part I.

¹⁰See generally EUGENE SCOLES, PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, CONFLICT OF LAWS 1194-99 (3rd ed. 2000).

¹¹159 U.S. 113 (1895). The *Hilton* Court articulated a comity doctrine under which foreign judgments generally would be enforced, *id.* at 163-65, though it did not enforce the judgment before it on the ground that France would not have enforced the United States judgment.

¹²REST. (2D) OF CONFLICT OF LAWS, §117 comment c; see also *id.* at § 98 (“A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned.”). No reported cases have rejected the Restatement’s approach to the enforcement of foreign judgments.

¹³See *Baker v. General Motors Corp.*, 522 U.S. 222, 223 (1998). The first court’s judgment must be enforced even if its based on a law that is antithetical to the second state’s public policy. See *id.* at 233.

¹⁴See REST. (2D) OF CONFLICT OF LAWS, § 92.

¹⁵*Id.*, §117, comment c.

¹⁶This stands in dramatic contrast to the law that is applicable in the purely domestic context, for the Supreme Court has ruled that there is no public policy exception that permits a court to refuse to enforce the judgment of a sister state. See *Baker v. General Motors Corp.*, 522 U.S. 222, 233(1998) (“our decisions support no roving ‘public policy exception’ to the full faith and credit due judgments”).

Act and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards – are structured along the same lines as the Restatement. They require that a United States court enforce the judgment or arbitral award unless there is fraud or if doing so would be repugnant to the public policy of the enforcing forum.¹⁷

Both caveats to the general rule of enforcement have been construed narrowly. Consider first the requirement that procedures not be fundamentally unfair. In one representative case, a court enforced a Brazilian judgment despite the fact that under Brazilian law “(1) no witnesses of any party may be subpoenaed, (2) testimony of corporate employees is inadmissible, (3) there is no available process for requiring testimony of indispensable U.S. witnesses; (4) there is no right of cross-examination, and (5) the parties may neither conduct pre-trial discovery nor subpoena documents.”¹⁸ The court concluded that “[a]lthough Brazilian norms of procedure differ from ours, that is not a basis for their condemnation as falling short of the minimum due process standards in the Anglo-American sense.”¹⁹

Consider next the second caveat. The vast majority of American courts have interpreted the public policy exception very narrowly. Most commonly, enforcement is deemed to violate public policy only if enforcing the judgment is deemed to be “repugnant”; a common formulation is that “[t]he public policy exception to the doctrine of comity is usually invoked only in the rare instance ‘where the original claim is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’”²⁰ Courts refer to the public policy exception as a “high standard”²¹ that is “narrow in scope,”²² and as a doctrine that is available only in “exceptional cases”²³ or the “rare case.”²⁴ As another court has accurately stated:

¹⁷See, e.g., 13 U.L.A. 419 (1980) (Uniform Foreign Money Judgments Act: a foreign money judgment “is enforceable in the same manner as the judgment of a sister-state which is entitled to full faith and credit,” subject only to the caveats listed in §4); *Antco Shipping Co., Ltd. v. Sidermar S.p.A.*, 417 F. Supp. 207, 213 (S.D.N.Y. 1976) (discussing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the implementing United States legislation).

¹⁸*Panama Processes, S.A. v. Cities Service Co.*, 796 P.2d 276, 285-86 (Ok. 1990).

¹⁹*Id.* at 286. Unfortunately, the court simply asserted its conclusion by means of *ipse dixit* reasoning, providing no guidance as to why these procedural variations did not undermine fundamental fairness. The court’s opinion is representative, however, of the tendency of American courts not to reject foreign judgments on the ground that foreign procedures do not meet the requirements of fundamental fairness.

²⁰*Will of Brown*, 505 N.Y.S.2d 334, 341-42 (N.Y. Surrogate’s Court 1986).

²¹See, e.g., *McCord v. Jet Spray International Corp.*, 874 F. Supp. 436, 439 (D. Mass. 1994); see also *id.* (“The fact that Massachusetts and Belgium law differ with respect to employment contracts does not make Belgium’s law contrary to Massachusetts’ public policy.”).

²²See, e.g., *Milhoux v. Linder*, 902 P.2d 856, 861 (Colo. Ct. App. 1995).

²³See, e.g., *Panama Processes, S.A. v. Cities Service Co.*, 796 P.2d 276, 283 (Ok. 1990).

²⁴*Schwartz v. Schwartz*, 676 N.Y.S.2d 479 (N.Y. Sup. Ct. 1998); see also *id.* (“Under the doctrine of comity, New York State courts must recognize judgments rendered in a foreign country absent some showing of fraud in the procurement of the foreign judgment, or a determination that recognition of the judgment would do violence to some strong public policy of this State”).

[C]ourts in the United States normally will not deny recognition merely because the law or practice of the foreign country differs, even if markedly from that of the recognition forum As Judge Cardozo observed: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”²⁵

This is consistent with the instructions of the Restatement (Second) of Conflict of Laws, which provides that foreign judgments should be enforced even if “the original claim could not have been maintained in a State of the United States.”²⁶

Case holdings are consistent with this judicial rhetoric.²⁷ Courts consistently have enforced foreign judgments even if they would have refused to entertain suit on the original claim on grounds of public policy. For example, one state court enforced a Canadian judgment based on the tort of seduction and criminal conversation despite the fact that the state legislature had abolished actions for alienation of affections and criminal conversation as contrary to the state’s public policy.²⁸ Stated the court, “our public policy is not contravened by the enforcement of a money judgment arising from causes of action proscribed [under state law] but which are recognized in the jurisdiction where the acts took place, and the comity of nations calls for

²⁵See *Milboux*, 902 P.2d at 861 (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (NY 1918), and enforcing Belgian judgment, though it was based on Belgian law providing a 30-year statute of limitations). The *Milboux* case did not differentiate between public policy in relation to the application of law (as was the issue in *Loucks*) and public policy in relation to judgments (this issue in *Milboux*). This is the norm. See, e.g., cite. I leave for another day the question of whether the scope of public policy should vary as between laws and judgments.

²⁶*Id.*

²⁷A similar pattern arises in the related context of judicial enforcement of foreign arbitral awards. The United States has joined an international convention on the enforcement of foreign arbitral awards that contains a public policy exception. As one scholar has observed, “the courts have given the public policy defense [of the international convention] so narrow a construction that it now must be characterized as a defense without meaningful definition [and consequently leaves] the defense pragmatically useless if not altogether nonexistent.” Berglin, *The Application in United States Courts of the Public Policy Provision of the Convention on the Recognition of Foreign Arbitral Awards*, 4 Dick J. Int’l L. 167, 169 (1986). Consider a case in which an American company providing services to a company in Egypt was unable to complete its contractual obligations when Egypt broke diplomatic relations with the United States and ordered all Americans out of the country, prompting the State Department to order the company to cease performance of its contract. See *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974). The International Chamber of Commerce issued an award in favor of the Egyptian company, and the Second Circuit enforced the award over the American company’s invocation of the public policy exception. “To deny enforcement of this award largely because of the United States’ falling out with Egypt in recent years,” stated the court, “would mean converting a defense intended to be of narrow scope into a major loophole in the Convention’s mechanism for enforcement. We have little hesitation, therefore, in disallowing [the American company’s] proposed public policy defense.” *Id.* Consider how extraordinarily narrow a conception of the public policy exception this reflects: it does not violate U.S. policy to enforce an award for breach of contract where the breaching party had been ordered to cease work on the contract by the United States State Department in response to a foreign country breaking diplomatic relations with the United States.

²⁸*Neporany v. Kir*, 173 N.Y.S.2d 146, 147 (1958).

giving full effect to this foreign judgment.”²⁹ Another court gave effect to a “quickie” Mexican divorce that had been issued to the state’s residents, even though the divorce was based on grounds that were not predicates for divorce in that state.³⁰ In one of the few cases outside the context of Un-American Judgments where an American court has refused to enforce a foreign judgment, the court stressed that it refused enforcement not because Canadian law differed from American law, but because enforcement would have violated American public policy insofar as the party seeking enforcement was a fugitive from justice who was “not entitled to call upon the resources of the court for determination of his case.”³¹

In short, the thresholds under both the fundamental unfairness and public policy exceptions are high, with the result that United States courts almost always enforce foreign judgments.³²

II. THE EXCEPTIONAL TREATMENT OF UN-AMERICAN JUDGMENTS

American courts have analyzed matters very differently, however, when the foreign judgment touches on matters concerning speech or the press, and have declined to enforce such foreign judgments. Two of these negative decisions are gathering precedential force,³³ as courts have begun to rely on their analyses³⁴ and scholarly commentators generally have praised

²⁹*Id.* at 148.

³⁰*Rosenstiel v. Rosenstiel*, 209 N.E. 2d 709 (NY 1965), *cert. denied*, 384 U.S. 971 (1966).

³¹*Jaffe v. Snow*, 610 So. 2d 482, 485-87 (Fla. Ct. App. 1993). Mr. Jaffe posted bail after he was indicted in Florida. He thereafter fled to Canada, failing to show for his trial. The company that had posted his bail sent bondsmen to Canada to forcefully return Jaffe to the United States, as Florida law permitted. Such forceful abduction, however, was both tortious and criminal under Canada law. The bondsmen were successful; Jaffe was returned, tried, and convicted. After conviction, Jaffe was indicted on charges relating to organized crime. Soon thereafter, his conviction was overturned on technical grounds. Freed from jail on the overturned conviction, he posted bond for his second indictment and fled once again to Canada. In their new frozen home, Jaffe and his wife successfully sued the bondsmen in Canada for having committed a tortious abduction on Canadian soil. Jaffe’s wife initiated an action in a Florida court to enforce the Canadian judgment.

The state court in *Jaffe v. Snow* refused to enforce the judgment on the ground of public policy. The court made clear, however, that it did not refuse to enforce the judgment simply because Canadian law differed from American law in respect of forceful abductions. Rather, enforcing the judgment would have violated public policy because Jaffe was a fugitive from justice and, as such, was “not entitled to call upon the resources of a court for determination of his case.” *Id.* at 485. Furthermore, the court reasoned that because he “flout[ed] the orders of courts in this state” and already was in contempt of court, he should not be permitted to “benefit from his own wrongful act.” *Id.* at 485-87.

³²See also *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (U.S. courts “ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States.”); *State v. Meyer*, 613 P.2d 132 (Wash. App. 1980) (“The doctrine of comity directs that we give full effect to foreign judgments, except in extraordinary cases.”).

³³They are: *Bachchan v. India Abroad Publications, Inc.*, N.Y.S.2d 661 (N.Y. Sup. Ct. 1992), and *Telnikoff v. Matesovitch*, 702 A.2d 230 (Md. Ct. App. 1997).

³⁴See *Abdullah v. Sheridan Square Press, Inc.*, 1994 WL 419847 *1 (S.D.N.Y. 1994) (adapting this constitutional analysis to the choice of law context; relying on *Bachchan* in refusing to apply British defamation law); *Desai v. Hersh*, 719 F. Supp. 670, 676-77 (N.D. Ill. 1989), *aff’d on other grounds*, 954 F.2d

them.³⁵

A. *Bachchan*. The first important decision came in the defamation case of *Bachchan v. India Abroad Publications, Inc.*³⁶ The plaintiff, Mr. Bachchan, was an Indian national who resided in either England or Switzerland. The defendant, India Abroad Publications, was a New York news service with a subsidiary in England. India Abroad transmitted reports abroad and printed newspapers in the United States and England. The story in question reported that Swiss authorities had frozen a bank account belonging to Mr. Bachchan because the account was connected to a company that had been charged with paying kickbacks to obtain contracts with the Indian government. The story had been written by a reporter in London and wired by India Abroad to a news service in India. From there, the story had appeared in two Indian newspapers, copies of which were distributed in the United Kingdom. The story also was reported in an issue of the defendant's New York newspaper, India Abroad. The company's English subsidiary printed and distributed a copy of India Abroad in England.³⁷

The report about Mr. Bachchan was incorrect. Bachchan sued for defamation in England on account of the false news reports that appeared in the newspapers in England (but not the story published in the New York newspaper). The English court applied English defamation law and awarded Bachchan a £40,000 judgment to be paid by India Abroad and its reporter. Because the defendant's assets were in the United States, however, Bachchan sued in New York to enforce the British judgment.³⁸

The New York court declined to enforce the foreign judgment on both constitutional and statutory grounds. The *Bachchan* court's constitutional

1408 (7th cir. 1992) (adapting this constitutional analysis to the choice of law context; suggesting that "first amendment protections" may extend to publications occurring out of the United States such that an American court would be constitutionally disabled from applying a foreign country's laws to publications occurring within their borders.)

³⁵See, e.g., LAURA R. HANDMAN & ROBERT D. BALIN, THE INTERFACE BETWEEN FOREIGN AND U.S. DEFAMATION LAW: THE FIRST AMENDMENT GOES GLOBAL: 9 LIBEL DEFENSE RESOURCE CTR. 50 -STATE SURVEY 1992-93, at xix (Henry R. Kaufman ed., 1993) (praising *Bachchan*); Comment, Jeff Sanders, *Extraterritorial Application of the First Amendment to Defamation Claims Against American Media*, 19 N.C.J. INT'L L. & COM. REG. 515, 552 (1994) (concluding that *Bachchan* was correctly decided); Eric P. Enson, *A Roadblock on the Detour Around the First Amendment: Is the Enforcement of English Libel Judgments in the United States Unconstitutional?*, 21 LOY. L.A. INT'L & COMP. L.J. 159, 160 (1999) (adopting reasoning of *Bachchan* and *Matusевич*); Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM/ENT L.J. 235, 256-62 (1994) (praising *Bachchan*). One scholar recently has provided a sharp critique of the courts's state action analysis, but ultimately concludes that the question of whether (what I call) Un-American Judgments should be enforced nonetheless may trigger constitutional scrutiny. See Van Houweling, *Notes on the Next Yahoo!*, *supra* note 8, at 713-16.

³⁶585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

³⁷*Id.* at 661.

³⁸See *End Run*, *supra* note 35, at 246 & n. 85 (noting that Mr. Bachchan's attorney argued that "assets were unavailable in Britain").

holding turned on the fact that there are substantive differences between English and American defamation law. The court concluded that the United States Constitution precluded enforcement of a foreign libel judgment based on foreign law unless the law met “the safeguards for the press which have been enunciated by the courts of this country.”³⁹ English defamation law did not pass muster under this test because it is more favorable to plaintiffs than American law. Under English law, published statements that adversely affect a person’s reputation are *prima facie* defamatory. Statements of fact are deemed to be false, and the defendant bears the burden of establishing their truth.⁴⁰ Furthermore, English defamation law does not distinguish between public and private figures. By contrast, the United States Supreme Court has ruled that the First Amendment allows a public official to recover damages for defamation only if she establishes by clear and convincing evidence that the defendant published allegedly defamatory material with “‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴¹

Mr. Bachchan would have qualified as a public figure under American law if U.S. law had been applicable; he was a former member of Parliament and the brother and manager of a movie star.⁴² Furthermore, the report concerned a matter of public concern; an international scandal concerning defense contracts. Thus, in contrast to what would have been necessary under U.S. defamation law, Mr. Bachchan had not been required under English law to show that the press defendant acted with malice; the fact that the story about him was false was sufficient to make India Abroad liable under English law. Because England “lack[ed] an equivalent to the First Amendment to the United States Constitution,” the *Bachchan* court concluded, “enforcement of the English judgment would violate the First Amendment.”⁴³

B. *Telnikoff*. Consider next the case of *Telnikoff v. Matusевич*.⁴⁴ Matusевич, an English citizen of Russian descent, wrote a letter in England that was published in the Daily Telegraph, an English newspaper, that concerned the BBC’s recruitment policies for their Russian service. In the

³⁹*Id.* at 662.

⁴⁰*Id.* at 663; see generally *Telnikoff v. Matusевич*, 702 A.2d 230, 247-49 (Md. Ct. App. 1997)(citing English law and legal treatises).

⁴¹*New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁴²*Bachchan*, 585 N.Y.S. 2d at 663.

⁴³*Id.* at 664-65. The court’s statutory holding was derivative of its constitutional analysis. It refused to enforce the foreign judgment on the ground that it was “repugnant to the public policy of this state,” and it determined that this test was met because English law did not conform to the First Amendment’s defamation requirements. *Id.* at 662.

⁴⁴This dispute between these parties appeared not only on England but also in several jurisdictions in the United States. See *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. Ct. App. 1997); *Matusевич v. Telnikoff*, 877 F. Supp. 1 (D. D.C. 1995), *aff’d by* 159 F.3d 636 (D. C. Cir. 1998)(unpublished opinion).

letter, Matusевич incorrectly accused Telnikoff of being anti-semitic and racist. Both men were residents of England at the time of the letter's publication.⁴⁵ Telnikoff sued Matusевич in an English court for defamation. The plaintiff prevailed after a full and fair trial,⁴⁶ and was awarded £240,000 in damages. Before plaintiff had collected his judgment, Mr. Matusевич took a new job, relocating himself and his assets to the United States.

Mr. Telnikoff then sought to enforce the English judgment in a court in the United States. He sued in Maryland state court and the Superior Court for the District of Columbia. In response, Mr. Matusевич filed a declaratory judgment action in federal district court, requesting a determination that the British judgment could not be enforced. The federal district court ruled in favor of Mr. Matusевич. Like the court in *Bachchan*, the federal court in *Telnikoff* concluded that "recognition and enforcement of the foreign judgment in this case would deprive the plaintiff of his constitutional rights" under the First Amendment due to the differences between American and English libel law.⁴⁷ The federal court also based its holding on Maryland statutory law, ruling that "libel standards that are contrary to U.S. libel standards would be repugnant to the public policies of the State of Maryland and the United States" and therefore did not have to be enforced under Maryland's Uniform Foreign-Money Judgments Recognition Act.⁴⁸ The federal court's statutory analysis was parasitic on its constitutional determination; English law was deemed "repugnant" simply because it did not provide the First Amendment's protections.

Mr. Telnikoff appealed. After hearing oral argument, the United State Court of Appeals certified a question to the Court of Appeals of Maryland, asking whether recognition of Telnikoff's foreign judgment would be repugnant to the public policy of Maryland.⁴⁹ Although Maryland's high court correctly understood that it had not been asked to decide "whether recognition of the English judgment would directly violate the First Amendment,"⁵⁰ the court's analysis of whether recognition would violate

⁴⁵*Telnikoff*, 702 A.2d at 256 (Chasanow, J., dissenting).

⁴⁶The procedural history of the English defamation case is somewhat complicated. After the English trial court had found in favor of the defendant, plaintiff Telnikoff appealed to the first level appellate court, the Court of Appeal, which affirmed, and then to the House of Lords. The House of Lords affirmed in part and reversed in part. It remanded the case with the instruction that when determining whether the letter was comment or fact – a legally relevant distinction under English defamation law – the jury should examine the letter by itself and not in context with Telnikoff's original article, to which the defendant's letter had responded. The jury then returned a verdict in Telnikoff's favor. *Id.* at 234-35.

⁴⁷*Matusевич*, 877 F. Supp. at 4.

⁴⁸*Id.* at 2-4 (declining to enforce British judgment pursuant to Md. Code Ann., Cts. & Jud. Proc. Section 10-704(b)(2), which states that a foreign judgment need not be recognized if "the cause of action on which the judgment is based is repugnant to the public policy of the State").

⁴⁹*Telnikoff*, 702 A.2d at 236.

⁵⁰*Id.* at 239 & n. 15.

Maryland public policy turned almost entirely on a review of the First Amendment's requirements and the observation that British libel law does not incorporate the First Amendment's protections.⁵¹ The Maryland court quoted approvingly from *Bachchan* that “[t]he protection to free speech and the press embodied in [the First A]mendment would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the U.S. Constitution.”⁵² And the court's final words were largely a quotation from the well-known Supreme Court opinion of *Hustler Magazine v. Falwell*:⁵³

“At the heart of the First Amendment,” as well as Article 40 of the Maryland Declaration of Rights and Maryland public policy, “is the recognition of the fundamental importance of the free flow of ideas and opinions on matter of public interest and concern.” The importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of *Telnikoff's* English libel judgment.⁵⁴

In an unpublished opinion, the United States Appeals Court for the District of Columbia affirmed the district court's opinion.⁵⁵

C. *Yahoo!*. The most recent decision involving the enforcement of Un-American judgments is *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*.⁵⁶ Yahoo! is a California-based Internet Service Provider from whose website people can readily access Yahoo! auction sites. French law prohibits the exhibition of Nazi propaganda and artifacts for sale⁵⁷ – a content-based restriction that no American polity could enact due to the First Amendment. Computer terminals in France were able to access an auction site through Yahoo! on which Nazi memorabilia was offered for sale. As a consequence, two French non-profit organizations dedicated to eliminating anti-Semitism sued Yahoo! in a French court for violating France's anti-Nazi law. The High Court of Paris determined that it was technologically possible for Yahoo! to block access to select sites (like the Nazi auction sites) only for

⁵¹See *id.* at 239 (“While we shall rest our decision in this case upon the non-constitutional ground of Maryland public policy, nonetheless in ascertaining that public policy, it is appropriate to examine and rely upon the history, policies, and requirements of the First Amendment . . . In determining non-constitutional principles of law, courts often rely upon the policies and requirements reflected in constitutional provisions.”); *id.* at 240-51.

⁵²*Id.* at 250 (quoting *Bachchan*, 585 N.Y.S. 2d at 664).

⁵³485 U.S. 46, 50 (1988).

⁵⁴*Telnikoff*, 702 A.2d at 251 (internal citation to *Hustler Magazine* omitted).

⁵⁵See *Matusevitch v. Telnikoff*, 159 F.3d 636 (D.C. Cir. 1998) (table opinion); 1998 WL 388800.

⁵⁶169 F. Supp. 2d 1181 (N.D. Cal. 2001).

⁵⁷See Article R. 645-2 of the French penal code, referenced at www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm.

computers sitting in France.⁵⁸ It ordered Yahoo! to do so, prescribing a penalty of 100,000 Francs (approximately U.S. \$13,300) for each day of non-compliance.⁵⁹

The Yahoo! computers that were ordered to be reconfigured and Yahoo!'s assets, however, were located in the United States.⁶⁰ Yahoo! filed an action in a United States district court,⁶¹ seeking a declaratory judgment that enforcing the French order would violate the First Amendment. Relying on *Bachchan* and *Telnikoff*,⁶² the district court granted Yahoo!'s motion, finding that “the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet.”⁶³ The district court’s reasoning was terse. Citing to *Shelley v. Kraemer*,⁶⁴ the case in which the Supreme Court ruled that the Equal Protection Clause precluded a court from enforcing a racially restrictive covenant, the court simply asserted that

[t]he French order prohibits the sale or display of items based on their association with a particular political organization and bans the display of websites based on the authors’ viewpoint with respect to the Holocaust and anti-Semitism. A United States court constitutionally could not make such an order. *Shelley v. Kraemer*. The First Amendment does not permit the government to engage in viewpoint-based regulation of speech absent a compelling governmental interest, such as averting a clear and present danger of imminent violence.⁶⁵

The district court accordingly granted Yahoo!'s motion for summary judgment.⁶⁶ The case was appealed to the Ninth Circuit on non-constitutional

⁵⁸*Yahoo!*, 169 F. Supp. 2d at 1191 & n. 10 (noting the “French Court’s factual determination that Yahoo! does possess the technology to comply with the French order”).

⁵⁹*Yahoo!*, 169 F. Supp. 2d at 1185.

⁶⁰The French Court’s order provided that no assessed penalties could be collected from Yahoo! France, a subsidiary of Yahoo! whose site was in compliance with the French law. *Id.*

⁶¹French law accorded Yahoo! the opportunity to appeal the French Court’s order, but this Yahoo! did not do. This raises the interesting question of whether the U.S. District Court should have required Yahoo! to first have exhaust its French remedies before seeking a declaration that an American court would not enforce the judgment. As a doctrinal matter, this could have been accomplished by means of abstention for the purpose of minimizing friction as between the United States and other countries. *Cf.* *Turner Entertainment Co. v. Degeto Film GmbH*, 25 F.3d 1512, 1521 (11th Cir. 1994) (United States court abstains pending resolution of German litigation).

⁶²*See Yahoo!*, 169 F. Supp. 2d at 1192.

⁶³*Yahoo!*, 169 F. Supp. 2d at 1194; *see also id.* at 1191-92 (noting that “the purpose of the present action is to determine whether a United States court may enforce the French order without running afoul of the First Amendment.”); *id.* at 1189 (identifying the French order and then stating that “[a] United States court constitutionally could not make such an order”); *id.* at 1194 (granting Yahoo!'s motion for summary judgment seeking a declaration that “the First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet”).

⁶⁴334 U.S. 1 (1948). I discuss *Shelley* at length below in Part II.B.1.

⁶⁵*Yahoo!*, 169 F. Supp. 2d at 1189.

⁶⁶*Id.*

grounds,⁶⁷ but the appeal was dropped before the Ninth Circuit had an opportunity to rule.

III. THE COURTS' MISTAKEN STATE ACTION ANALYSIS

This Part III explains why the courts's constitutional analysis is mistaken. The First Amendment does not preclude an American court from enforcing a foreign judgment that is based on substantive law that an American polity could not have enacted due to the First Amendment because the substance of the judgment would not be attributed to the court for purposes of the state action doctrine. Attribution to the court occurs only if the underlying legal right was created by an American polity.⁶⁸ There is no state action as regards the enforcement of Un-American Judgments because the underlying legal right was not created by an American polity. This Part also explains why this aspect of contemporary state action doctrine is normatively desire.

A. *Threshold Considerations Concerning the Constitution's Applicability*: With the exception of the Thirteenth Amendment's ban on slavery, the United States Constitution limits governmental units, not individuals.⁶⁹ It follows from this that "the First Amendment protects individuals only from government, not private, infringements upon speech rights."⁷⁰ Furthermore, not all governments are subject to the Constitution's constraints. For about the first half of our country's history, for example, the First Amendment and the other guarantees found in the Bill of Rights were limitations that operated only against the federal government.⁷¹ While most of the Bill of Rights have been incorporated against the states under the Fourteenth Amendment, several provisions still do not apply to states.⁷² And it is well established that the Constitution does not impose limitations on non-U.S. polities, such as tribal governments⁷³ and foreign countries.

Accordingly, it is clear that the First Amendment has absolutely

⁶⁷The French parties argued in their appeal that the U.S. court lacked jurisdiction over them.

⁶⁸As discussed below in Part II.B.3(c), the case of *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), makes clear that state action also will be found where a court acts pursuant to a specially created legislative procedural device. In such cases, however, only the court's procedures constitute state action. The underlying privately created right is not attributed to the state under the state action doctrine. *See infra* p. 24. This means that even if there were a special statutory procedure for enforcing foreign judgments (that, for example, for adopted by Congress pursuant to an international treaty), it would not be unconstitutional to enforce an Un-American judgment. *Id.*

⁶⁹*See* *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991).

⁷⁰*George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) ("the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state.").

⁷¹*See* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

⁷²*See* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 483-84 (2d. ed. 2002).

⁷³*Talton v. Mayes*, 163 U.S. 376, 381-83 (1896). For a more recent statement of this principle, *see* *Olyphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210-11 (1978).

nothing to say about the French legislature's decision to enact a law that engages in viewpoint discrimination by singling out Nazi artifacts. The First Amendment similarly is mute in respect of a French court's application of the French law and its issuance of a judgment, even against an American citizen, assessing penalties or an injunction in response to the law's having been violated. The First Amendment (or any other United States constitutional provision) potentially comes into play only when a court in the United States – a governmental entity governed by the Constitution – is asked to enforce the foreign judgment.

The issue thus is to what extent, if any, an American court's enforcement of legal rights not created by an American polity triggers United States constitutional protections. There is a large set of cases that has explored this question in the context of contractual rights, that is, legal rights created not by an American polity but by private actors.⁷⁴ This body of law is part of what is known as the state action doctrine, and *Shelley v. Kraemer*⁷⁵ – the case in which the Supreme Court declared that a state court violates the Equal Protection Clause when it enforces a racially restrictive covenant contained in a contract between private parties – is one of the most famous cases in this field.⁷⁶ This Article, however, is concerned with legal rights created not by private individuals via contract, but by a foreign country's regulations. There is virtually no case law set in this particular context aside from the recent Un-American Judgment cases we have just discussed. To the extent these cases include any state action analysis at all, as analytical correctness requires, they have relied exclusively on *Shelley v. Kraemer* (which, as stated above, deals with a privately created right).

After examining *Shelley* in Part III.B.(1), this Part shows that the cases deciding not to enforce Un-American Judgments have relied on an extension of *Shelley* that has never been made. Courts today regularly enforce private contractual terms that inhibit speech in ways that the Constitution would disallow an American government from doing. Contemporary state action doctrine relies heavily on the distinction between “private” activity that is immune from constitutional regulation and “public” activity that is subject to

⁷⁴Below I discuss and critique the position that even contractual rights are properly viewed as being public. See *infra* Part II.B.3.

⁷⁵334 U.S. 1 (1948).

⁷⁶This question of whether judicial enforcement of a legal right not created by government makes the substance of the right attributable to the government for constitutional purposes also arises with regard to *federal* courts. Although virtually all such questions have arisen in the context of state court enforcement of contracts, the same analysis that follows in text would apply to federal courts, for the Supreme Court regularly invokes the state action doctrine when seeking to determine whether an entity is to be considered part of the federal government for purposes of subjecting it to constitutional limitations. See, e.g., *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 973-74 (1995) (relying on state action doctrine with regard to state governments to determine whether federal corporation Amtrak's rejection of artist's lease of billboard space was subject to First Amendment constraints).

constitutional limitation, and characterizes as private those legal rights that have not been created by an American polity, even when a party enforces that legal right in an American court. Part III.B. then defends the current doctrine against the criticisms that have been leveled against the “public”/”private” distinction by generations of progressive legal scholars. Finally, Part III.C. explains why foreign law should be treated no differently than a private contract for purposes of determining whether enforcement amounts to state action.

It follows that an American court’s enforcement of an Un-American Judgment is no more unconstitutional than the enforcement of a contractual provision that an American polity could not have constitutionally enacted as a statute. In today’s beyond-*Shelley* world, this means that the enforcement of Un-American Judgments does not raise constitutional issues, and the First Amendment analysis found in such cases as *Bachchan*, *Telnikoff*, and *Yahoo!* is wholly misplaced.

B. *The State Action Doctrine*

1. *Shelley v. Kraemer*. To analyze whether court orders constitute state action, one must begin with the case of *Shelley v. Kraemer*.⁷⁷ In 1911, thirty property owners, who together owned forty-seven mostly contiguous parcels of land in Missouri, signed a private contract intended to run with the land, that accordingly was recorded thereafter. The agreement was a restrictive covenant providing that a condition precedent to the sale of any and all properties was that they should not be occupied by “any person not of the Caucasian race.”⁷⁸ In exchange for valuable consideration, Mr. and Mrs. Shelley, who were African-Americans, received a warranty deed to one of the parcels of land subject to the restrictive covenant from one Mr. Fitzgerald. Kraemer, an owner of one of the other parcels of land, thereafter sued in state court, asking the court to enforce the agreement and divest title out of the Shelleys. The Supreme Court of Missouri ruled that the covenant should be enforced.

The United States Supreme Court famously reversed, holding that judicial enforcement of the restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment.⁷⁹ Arriving at so normatively attractive an outcome, however, was not doctrinally simple. The chief obstacle was the understanding that “the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private

⁷⁷334 U.S. 1 (1948).

⁷⁸*Id.* at 4-5.

⁷⁹*Id.* at 21.

conduct, however discriminatory or wrongful.”⁸⁰ Thus even though “restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance,”⁸¹ the restrictive covenant in this case did “not involve action by state legislatures or city councils.”⁸² The Court accordingly held that the restrictive agreements “standing alone cannot be regarded as a violation of any rights guaranteed by the Fourteenth Amendment” and hence were not themselves unconstitutional.⁸³

But the Court’s analysis did not end there. Though the restrictive covenant itself could not be said to be “action by the State” triggering the Fourteenth Amendment,⁸⁴ the Court ruled that “the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment.”⁸⁵ After all, the “full coercive power of government” was being used to “to deny to petitioners, on the grounds of race or color, the enjoyment of property rights.”⁸⁶ Furthermore, because enforcement orders came from courts, the “judicial action in each case bears the clear and unmistakable imprimatur of the State.”⁸⁷

One analytical step remained. After establishing that a court’s order to enforce a contract constituted state action, the question became what aspects of the enforcement order were attributable to the State. Without explanation, the Court determined that the substantive provisions of the contract themselves were appropriately deemed to be action of the state. (As will be discussed below, this is not the only plausible answer to the question⁸⁸). Under the *Shelley* Court’s approach, the question became whether a state could have enacted into general law the contract’s substantive provision.⁸⁹ Because it could not have, it readily followed that enforcing the restrictive covenant also violated the guarantee of equal protection.⁹⁰

As discussed above, several of the courts that categorically have refused to enforce foreign judgments relied heavily on *Shelley*. Their analysis cleaves

⁸⁰*Id.* at 13.

⁸¹*Id.* at 11.

⁸²*Id.* at 12.

⁸³*Id.* at 13.

⁸⁴*Id.*

⁸⁵*Id.* at 14.

⁸⁶*Id.* at 19.

⁸⁷*Id.* at 19-20.

⁸⁸See *supra* at p. 24.

⁸⁹See *Shelley*, 334 U.S. at 21.

⁹⁰*Id.* at 20-21.

quite closely to the holding in that case.⁹¹ The approach under *Shelley* is to ask whether the substantive provision of the contract the court is asked to enforce could have been enacted into general law by the state. Applying this analysis to the foreign judgments in *Bachchan*, *Telnikoff*, and *Yahoo!* readily yields the following result: because the First Amendment prevents a state from adopting England's defamation law or France's hate speech law, an American court's enforcement of a foreign judgment based on the English or French law likewise would violate the First Amendment.

2. The Modern Case law. The problem with the recent cases' categorical refusal to enforce foreign judgments is not that they misunderstand *Shelley*, but that they have overlooked that *Shelley* has been importantly narrowed by subsequent case law. *Shelley*'s holding was troubling to American courts and commentators alike because, under its reasoning, every private contract that a party wishes to judicially enforce triggers state action such that the substantive provisions of the contract are attributed to the state.⁹² "Such application [erodes] the distinction between public and private action."⁹³

The following hypothetical helps illustrate the distinction between "public" and "private" action and highlight what is at stake in determining the scope of the state action doctrine. Imagine that the principal of a private school in New York does not want any books concerning the Nazis to be sent to his school, and that he enters into a contract with a New York bookseller that provides that "Nazi materials shall not be shipped" to the school. If the state legislature sought to enact such a provision into general law, such viewpoint discrimination would trigger strict scrutiny under the First Amendment and almost certainly would be struck down.⁹⁴ The question presented under the state action doctrine is as follows: if the bookseller breaches the contract by sending Nazi materials to the private school, would the principal's attempt to enforce his rights under the contract by suing in court constitute state action such that the substantive contractual provisions are

⁹¹As an analytical matter, a more direct precedent for *Bachchan*, *Telnikoff* and *Yahoo!* would have been Barrows v. Jackson, 346 U.S. 249, 254-55 (1953). Relying on *Shelley*, the Court in *Barrows* held that an award of monetary damages by a state court in favor of one of the covenantors violates equal protection. *Id.* at 260. Like *Barrows*, and unlike *Shelley*, *Bachchan* and *Telnikoff* concerned damages, not injunctive relief. Like *Barrows*, and unlike *Shelley*, the defendants in *Bachchan*, *Telnikoff* and *Yahoo!* were covenantors. The three courts' reliance on *Shelley* rather than *Barrows*, however, does not change the analysis above in text. The *Barrows* Court itself based itself solely on *Shelley*, and the analysis that follows in the text is equally applicable to *Barrows*.

⁹²See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed. 1988)(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.").

⁹³*Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 253 (Cal. App. 2001).

⁹⁴See Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL OF RIGHTS J. 647, 651 (2002) (noting that the Court has only "very rarely" upheld content-based restrictions under the compelling government interest test).

attributed to the state, as *Shelley's* analysis would suggest?⁹⁵ If so, then judicial enforcement of this provision of the contract would violate the First Amendment. As a practical matter, such an outcome would shrink the scope of autonomy people had in creating contractual obligations; the only contractual provisions that would be judicially enforceable would be those that a state could enact as general law, and an unenforceable contractual provision is worth little, if anything. It is in this sense that *Shelley* threatened to erase the distinction between “private” action (*e.g.*, the principal and bookseller’s contract) and “public” action (*i.e.*, action of the state legislature in prohibiting Nazi materials in state schools).

In fact, as even critics of the distinction between public and private action concede,⁹⁵ and as those familiar with American legal culture undoubtedly know as an intuitive matter, courts would enforce the principal’s contract.⁹⁶ As shown below, American courts regularly issue orders that would have been subject to constitutional constraints (and in all likelihood found to be constitutionally infirm) if they had been enacted by a state legislature as a general law. Arguments that such court orders qualify as state action under *Shelley*, and accordingly trigger constitutional scrutiny, have been regularly rebuffed. The general rule outside the context of racial discrimination appears to be as follows: the underlying legal right will be attributed to the state under the state action doctrine only if government is the source of the underlying right.⁹⁷

(a) *Judicial Enforcement of Limitations on Speech.* First, consider several cases that concerned the question of whether the judicial enforcement of private contracts limiting speech constituted state action. Plaintiffs in one case sued in state court to enforce a provision in a lease agreement that prohibited tenants from distributing unsolicited newspapers.⁹⁸ The defendants cited to *Shelley* and argued that enforcement of the provision would constitute state action, triggering heightened scrutiny under the First Amendment.⁹⁹ An appeals court in California rejected this argument and issued the requested

⁹⁵See, *e.g.*, 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, 1268 (2000) (noting that courts have been “unmoved” and “most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private.”) [hereinafter, Berman, *Cultural Value*].

⁹⁶The case that most directly supports this proposition is *Rendell-Baker v. Kohn*, 457 U.S. 830, 834, 842 (1982), where the Court found no state action when a private school that received virtually all its funding from the government (from 90 to 99% over a several year period) fired a teacher on the basis of her speech.

⁹⁷See also *infra* note 68 (explaining the *Lugar* rule with regard to statutory procedures). It is important to note that although contemporary state action law has not extended *Shelley's* rule outside the context of racial discrimination, it has not addressed the state action doctrine’s application to issues of racial discrimination. For more on this point, see *infra* note 132.

⁹⁸*Golden Gateway Center v. Golden Gateway Tenants Association*, 26 Cal. 4th 1013 (Cal. 2001).

⁹⁹*Id.* at 1034.

injunction, reasoning that “[a]lthough the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action, it has largely limited this holding to the facts of those cases.”¹⁰⁰ Thus, even though the Constitution would have imposed limitations had an American polity created the restriction on newspaper solicitation, there was no state action (and hence no constitutional limitations that were applicable) where a court enforced a restriction that had not been created by an American polity, but instead had been created by private parties through contract. The source of the legal right hence was constitutionally dispositive: because the right to not receive unsolicited newspapers had its source in private contract rather than legislation, judicial enforcement of the right did not constitute state action.

Indeed, with virtually no exceptions, courts have concluded that the judicial enforcement of private agreements that inhibit speech do not trigger constitutional review despite the fact that identical legislative limitations on speech would have.¹⁰¹ Consider, for example, the Kansas Supreme Court’s ruling that judicially enforcing a restrictive covenant barring the posting of signs does not qualify as state action.¹⁰² In finding *Shelley* to be inapplicable, the Kansas court rejected the position that “the test to be employed is whether a valid ordinance could be passed prohibiting the conduct proscribed in the restrictive covenant.”¹⁰³ In other words, the court explicitly rejected the view that the source of the underlying right is irrelevant to state action analysis. In another case, a Pennsylvania court held that judicial enforcement of a condominium association’s prohibition on the posting of “for sale” signs was not state action and consequently did not trigger First Amendment concerns.¹⁰⁴ Yet another state appellate court confronted the question of whether the First Amendment precluded it from enforcing a settlement agreement in which a person had agreed not to publicly criticize a certain type of psychological therapy.¹⁰⁵ Despite the fact that the party’s speech was deemed to be in the public interest, the court determined that enforcement did not constitute state

¹⁰⁰*Id.* For more on the fact that *Shelley* has been limited to the racial context, *see infra* note 132.

¹⁰¹A few older decisions have held otherwise. *See, e.g.*, *Franklin v. White Egret Condominium, Inc.*, 358 So.2d 1084, 1087-88 (Fla. Dist. Ct. App. 1977) (enforcement of restrictive covenant barring children under the age of 12 to be unconstitutional), *aff’d by* 379 So.2d 346 (Fla. 1979); *West Hill Baptist Church v. Abbate*, 261 N.E.2d 196, 200 (Ohio Common Pleas 1969) (finding that judicial enforcement of restrictive covenant excluding houses of worship constitutes state action). I have not found recent cases that have similarly held.

¹⁰²*Linn Valley Lakes Property Owners Association v. Brockway*, 824 P.2d 948, 951 (Kan. 1992).

¹⁰³*Id.* The Kansas Supreme Court did not provide much in the way of explanation as to why the facts it relied on to distinguish *Shelley* mattered. The Court’s ready limiting of *Shelley* suggests the extent to which *Shelley*’s approach simply does not comport with the deeper contemporary legal culture; *Shelley*’s inapplicability was so obvious to the court as not to require significant discussion.

¹⁰⁴*Midlake on Big Boulder Lake, Condominium Association v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. Ct. 1996).

¹⁰⁵*State v. Noah*, 9 P.3d 858 (Wash. App. Ct. 2000), *review denied by* *Calof v. Casebber*, 22 P.3d 802 (Wash. 2001).

action and upheld the agreement. The court rejected the argument, based on *Shelley*, that “judicial enforcement of a settlement agreement constitutes state action.”¹⁰⁶ The court’s analysis was unaffected by the fact that free speech rights were at issue. Upholding the settlement agreement, the court said that “[s]tate enforcement of a contract between two private parties is not state action, even where one party’s free speech rights are restricted by that agreement. Therefore, the settlement agreement . . . contains no constitutional First Amendment infirmity precluding its enforcement.”¹⁰⁷

In another case, CompuServe, the Internet Service Provider, claimed that another company committed trespass by sending unsolicited e-mails to CompuServe’s computer systems. CompuServe sought a preliminary injunction enjoining the defendant from sending its unsolicited advertisements to the e-mail addresses that were maintained by CompuServe.¹⁰⁸ In response to CompuServe’s request, the defendant argued that it had “the right to continue to send unsolicited commercial e-mail to plaintiff’s computer systems under the First Amendment.”¹⁰⁹ The district court rejected this, holding that “the mere judicial enforcement” of rights founded even on state law – in this case, a trespass law – did “not alone render [the court] a state actor.”¹¹⁰ The court then enjoined the defendant from sending unsolicited mail to CompuServe. In another case involving an Internet Service Provider’s attempt to block unsolicited e-mails, a different federal district court similarly rejected the argument that “the Court’s participation with the litigant in issuing or enforcing an order which impinges on another’s First Amendment rights” constitutes state action.¹¹¹

(b) *Enforcement of Arbitration Orders and Due Process.*

Other courts have found no state action in cases where their orders could have been said to implicate constitutional rights other than the First Amendment. For example, several courts have been confronted with the question of whether court involvement in the arbitration process constitutes state action. One federal court in the Southern District of New York rejected the claim that court approval of the use of arbitration itself created state action, noting that under such an approach “all arbitrations could be subject to due process limitations through the simple act of appealing the arbitrators’ decisions to the court

¹⁰⁶*Id.* at 870.

¹⁰⁷*Id.* at 871 (emphasis supplied).

¹⁰⁸*See* *CompuServe Incorporated v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

¹⁰⁹*Id.* at 1025.

¹¹⁰*Id.* at 1026. *See infra* note 122 (questioning this analysis).

¹¹¹*Cyber Promotions v. America Online, Inc.*, 948 F. Supp. 436, 444-45 (E.D. Pa. 1996). The court’s observation in this case was only dicta, however, because the party wishing to block the e-mails had the technology to do so. The court accordingly was not asked to issue an order enjoining the other party from sending the unwanted e-mails.

system.”¹¹² In another case, the United States Court of Appeals for the Eleventh Circuit confronted the question of whether judicial enforcement of an arbitration award for punitive damages constituted state action implicating due process protections. The petitioner’s argument was straightforward. The Supreme Court had ruled in the case of *Pacific Mutual Life Insurance Co. v. Haslip*¹¹³ that due process demands that courts use specific procedures before imposing punitive damages.¹¹⁴ Arbitration panels that issue punitive damages, however, do not utilize the *Haslip* procedures. Indeed, as the federal appeals court noted,

in the arbitration setting we have almost none of the protections that fundamental fairness and due process require for the imposition of this sort of punishment. Discovery is abbreviated if available at all. The rules of evidence are employed, if at all, in a very relaxed manner. The factfinders (here the panel) operate with almost none of the controls and safeguards assumed in *Haslip*.¹¹⁵

The appellate court nevertheless held that judicial enforcement of arbitral awards of punitive damages did not constitute state action.¹¹⁶ There were two steps in the appellate court’s reasoning process. First, “the state action element of a due process claim is absent in private arbitration cases” despite the fact that Congress has regulated the arbitration process.¹¹⁷ Second, a court’s *confirmation* of an arbitral award, even one for punitive damages, does not constitute state action.¹¹⁸ In so ruling, the court limited *Shelley*:

The holding of *Shelley* . . . has not been extended beyond the context of race discrimination Instead, the concept of state action has since been narrowed by the Supreme Court We likewise decline to extend *Shelley* and hold that the mere confirmation of a private arbitration award by a district court is insufficient state action to trigger the application of the Due Process Clause.¹¹⁹

(c) *Limited Instances where Judicial Action Constitutes State*

¹¹²United States v. American Soc’y of Composers, Authors and Publishers, 708 F.Supp. 95, 96-97 (S.D.N.Y.1989).

¹¹³499 U.S. 1 (1991).

¹¹⁴See *Haslip*, 499 U.S. at 1; *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994).

¹¹⁵*Id.* at 1190 (quoting *Lee v. Chica*, 989 F.2d 883, 889 (8th Cir.) (Beam, J., concurring in part and dissenting in part), *cert. denied*, 510 U.S. 906 (1993)).

¹¹⁶*Davis*, 59 F.3d at 1190.

¹¹⁷*Id.* at 1191. The court cited to many other decisions that came to this same conclusion, including *Federal Deposit Ins. Corp. v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n. 9 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *Elmore v. Chicago & Illinois Midland Ry. Co.*, 782 F.2d 94, 96 (7th Cir. 1986); and *International Association of Heat and Frost Insulators and Asbestos Workers Local Union 42 v. Absolute Environmental Services, Inc.*, 814 F. Supp. 392, 402-03 (D. Del. 1993).

¹¹⁸*Id.* at 1191-92.

¹¹⁹*Id.* For more discussion on the fact that *Shelley* has not been extended beyond race discrimination, see *infra* note 132.

Action. In limited circumstances judicial enforcement will qualify as state action. One example is where the legal right asserted by the party is judicially created. In *Coben v. Cowles Media*,¹²⁰ for example, the plaintiff's only possible basis for recovery was the common law doctrine of promissory estoppel. The Supreme Court held that the application of this state-law doctrine "in the absence of a contract creates obligations never explicitly assumed by the parties. These legal obligations would be enforced through the official power of the Minnesota courts. Under our cases, that is enough to constitute 'state action' for purposes of the Fourteenth Amendment."¹²¹ By contrast, the cases surveyed above in which no state action was found involved circumstances in which the legal rights sued upon were created by the parties themselves pursuant to contract.¹²² The mere fact that state law did not proscribe such agreements was not enough to make the substance of the parties' agreement attributable to the state for purposes of the state action doctrine.

A second circumstance where a court's activities have been found to constitute state action is where the remedy applied by the court was created by the state legislature. For example, in the case of *Lugar v. Edmondson Oil Co.*,¹²³ the Supreme Court found state action where a creditor had obtained a writ of prejudgment attachment from a state court. The Court's ruling turned on the fact that the complaining party's deprivation was "caused by the exercise of some right or privilege created by the state"¹²⁴ – namely, the "procedural

¹²⁰501 U.S. 663 (1991).

¹²¹*Id.* at 668.

¹²²*See, e.g.*, *State v. Noah*, 9 P.3d 85, 871 (Wash. App. Ct. 2000), *review denied by Calof v. Casebeer*, 22 P.3d 802 (Wash. 2001) (distinguishing *Coben* case on the basis that "[i]n *Coben*, the state created the duty before it enforced that duty. Unlike *Coben*, judicial enforcement of the settlement agreement does not require application of a state common law doctrine to create the duty enforced. For the existence of a First Amendment violation, state action is required. State enforcement of a contract between two private parties is not state action, even where one party's free speech rights are restricted by that agreement. Therefore, the settlement agreement between [the parties] contains no constitutional First Amendment infirmity precluding its enforcement."). It is difficult, however, to reconcile *Coben* with the *CompuServe* case discussed above, where the district court held that enforcement of a *state* common law nuisance rule did not constitute state action.

¹²³457 U.S. 922 (1982).

¹²⁴*Id.* at 937. Without this second requirement "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.* After all, it could be said that the source of a court's authority *always* comes from an American polity (and hence satisfies the first prong) insofar as the state or federal government created the court. Without offering a principled explanation, the Supreme Court appears to have read a caveat into the first prong: unusual court procedures that go beyond some unstated and undefended baseline group of court powers will be deemed to satisfy the test, but not those procedures that are part and parcel of judicial process, such as a "mere . . . general statute of limitations." *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485 (1988). In a recent case the Court appears to have conjoined the two pronged test into one, holding that "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Id.* at 486.

scheme created by the statute.”¹²⁵ While *Lugar*’s reasoning and result are sensible, it is important to understand why the case is not a reincarnation of *Shelley*. Even when *Lugar* and its progeny¹²⁶ find court action to constitute state action, not all aspects of what is enforced are attributable to the state and accordingly subject to constitutional limitations; attributed to the state are the (statutory) rules that govern the attachment procedure,¹²⁷ but not the underlying legal right on which the party is suing. To illustrate, under the rule of *Lugar*, the judicial enforcement procedures by which Mr. Shelley could have had his deed removed from him constitute state action. It is only under the approach of *Shelley*, however, that the underlying contractual right on which Mr. Shelley sued would be attributed to the state under the state action doctrine. This explains why *Lugar* does not lead to the conclusion that a United States treaty commitment to enforce foreign judgments would make it unconstitutional to enforce Un-American judgments. Even if judicial enforcement were treated as a legal right created by an American polity under the treaty power, state action would extend only to the procedures of enforcement, not to the underlying (foreign) legal right itself.

At this point, it is important to respond to a challenge that some readers have brought to this Article’s focus on *Shelley*. They have objected that the most compelling precedent for analyzing the enforcement of foreign judgments is provided by *Marsh v. Alabama*,¹²⁸ not *Shelley*. In *Marsh*, the Supreme Court applied the First Amendment to a “company town” that refused to allow solicitation of its inhabitants without prior written permission. Even though the “town” was not incorporated under state law, but was owned entirely by a company, the Court found state action. If a company town can qualify as a state actor, the argument goes, then surely England or France – two full

¹²⁵*Id.* at 941. *Lugar* involved the peculiar circumstance of a plaintiff trying to establish that a private individual qualified as a state actor and hence was directly liable under 42 U.S.C. §1983. A second requirement identified by the *Lugar* Court is that “the party charged with the deprivation must be a person who may fairly be said to be a state actor” because, *inter alia*, “he has acted together with or has obtained significant aid from state officials.” *Id.* at 937. The Court deemed the private party’s “joint participation with state officials in the seizure of disputed property” sufficient to satisfy this second test. *Id.* at 941-42.

¹²⁶*See, e.g., Tulsa*, 485 U.S. at 486-87 (holding that although a general statute of limitations does not trigger state action, a state probate code’s “nonclaim statute” does qualify as state action because the statute is not “self-executing” insofar as it begins to run only after the probate court has done all sorts of things; due process accordingly requires actual notice to reasonable ascertainable creditors); *Davis Oil Co. v. Mills*, 873 F.2d 774, 781 & n. 12 (5th Cir. 1989) (foreclosure sale constituted state action; “In this case, as in *Lugar* and the other prejudgment attachment cases, the claim is not simply that the private defendant acted “with the knowledge of and pursuant to” the state procedural scheme in conducting a private sale. Under the Louisiana procedure, the sheriff seizes the property and advertises and conducts the sale. State law provides that property sold pursuant to this procedure will pass, free of all junior encumbrances, to the purchaser;” due process does not require actual notice, however); *Argonaut Financial Services, Inc.*, 164 B.R. 107 (N.D.Cal.1994) (bankruptcy proceedings are state action, requiring actual notice to creditors).

¹²⁷*See Lugar*, 457 U.S. at 941-42. Similarly, the Court has determined that the special statute of limitations known as a “nonclaim statute” is properly attributable to the state. *See Tulsa*, 485 U.S. at 486-87.

¹²⁸326 U.S. 501 (1946).

fledged polities – should.

With all due respect, I believe this argument to be without merit. Put aside the fact that it is the American courts that have analyzed Un-American Judgments that have invoked *Shelley*. Never mind, as well, that *Marsh* is an outlier that has been limited.¹²⁹ *Marsh* is not the relevant precedent because the company town in *Marsh* operated within the territorial boundaries of the United States and in effect regulated citizens of the United States. To the extent the company town was akin to a polity, it accordingly stood in for an *American* polity when it sought to manage the solicitation of materials. The same cannot be said for English defamation law and French hate speech law: both regulations come from *foreign* countries, and the United States Constitution cannot be said to apply to foreign countries under any intelligible theory.¹³⁰

To quickly summarize, *Shelley* is anomalous. The overwhelming weight of contemporary case law has held that judicial enforcement of legal rights does not mean that those substantive legal rights are attributable to the state under the state action doctrine.¹³¹ Concerned that *Shelley*'s approach threatened to dissolve the line between public and private action, the vast majority of courts have limited *Shelley* to the context of racial discrimination.¹³² Finally, the recent

¹²⁹The Court has held that the constitution does not apply to privately owned shopping centers, *see* *Hudges v. National Labor Relations Board*, 424 U.S. 507, 520 (1976), and countless lower courts have ruled that enforcing the regulations adopted by condominiums does not constitute state action. *See supra* Part II.B.2(a).

¹³⁰One caveat is in order: perhaps U.S. constitutional limitations should apply to foreign regulations adopted at the behest of the United States such that the foreign country functioned as an agent of the United States. The British defamation and French hate speech laws clearly do not qualify as such regulations.e

¹³¹For two older cases that are exceptions, *see supra* note 101.

¹³²*See, e.g.*, *Davis v. Prudential Securities, Inc.*, 59 F.3d 1186, 1191-92(11th Cir. 1996) (“The holding of *Shelley*, however, has not been extended beyond the context of race discrimination); *Midlake on Big Boulder Lake v. Cappuccio*, 673 A.2d 340, 342 (Pa. Super. 1996) (“there is no state action for constitutional purposes in the absence of a finding that racial discrimination is involved as existed in the *Shelley* case”). Relatedly, some cases have limited *Shelley* to circumstances where courts not only enforced a contract but had made determinations as to whether a person was an African-American. *See, e.g.*, *In Fallis v. Dunbar*, 386 F. Supp. 1117, 1120 (N.D. Ohio 1974), *aff'd* 532 F. 2d 1060 (6th Cir. 1976) (distinguishing on the basis that “*Shelley v. Kraemer* required the state court to find that the prospective buyer was black . . .”); *Noah*, 9 P.3d at 870 (“In *Shelley*, the state action was more than mere judicial enforcement. The courts had to identify prospective African-American purchasers, determine the scope of the racially restrictive covenants and enforce them against the African-Americans.”); *see also* *Lebron v. National Railroad Passenger Corp.*, 12 F.3d 388, 392, *rev'd on other grounds*, 115 S. Ct. 961 (1995) (Second Circuit’s statement of state action doctrine reflects the understanding that race is treated differently under the state action); *see generally* Erwin Chemerinsky, *State Action*, 618 P.LI/Lit 183, 200 (1999) (noting that “the Court has been much more likely to apply the exceptions in cases involving race discrimination than in cases involving other constitutional claims”).

Such differential treatment as between race and other constitutional values has been criticized by some commentators. *See id.* (“Yet, this distinction seems difficult to defend. State action is about whether the Constitution should apply because of the government’s involvement or because the act is one that is traditionally governmental in nature. It is unclear why this inquiry depends at all on the particulars of the constitutional claim”). The Supreme Court has not had an occasion to revisit the state action

Supreme Court cases of *Cowles* and *Lugar* are not to the contrary, for both lines of cases find state action only in respect of legal rights that are created either judicially or by the legislature. Where court activity does constitute state action under these cases, all that is attributed to the state for purposes of constitutional constraints is the activity arising from judicial or statutory creation, not the underlying privately created legal rights that are being enforced.

3. Normative Considerations. The analysis above shows that, as a purely descriptive matter, the distinction between “private” activity not reached by the constitution and “public” activity that is subject to constitutional limitations is an important part of contemporary state action doctrine. Whether such distinctions between public and private¹³³ are wise, however, is another question. For generations, many legal scholars – most notably, those associated with the schools of legal realism and critical legal studies – have mounted arguments against the public/private distinction.¹³⁴ This section explains the shortcoming of critics’ arguments as applied to the state action doctrine. Contrary to the critics’ claims, the distinction is not *illogical*. Instead, the distinction reflects cultural values. Indeed, the longstanding resilience of the public/private distinction despite generations of critique suggests that the distinction reflects deeply grounded American cultural values, which this section identifies. The twin facts that the distinction is not illogical and that it reflects deep American values together justify this Article’s continued use of the public / private distinction.

(a) *The Classical Critique.* The core of the classical critique is that “the state always plays a major role, implicitly or explicitly, in

doctrine in the context of race in recent years. Perhaps our post-*Shelley* jurisprudence is best understood as suggesting that racially restrictive covenants should be unenforceable on grounds of public policy rather than the Constitution. Other vehicles for disallowing enforcement are federal statute or state law.

¹³³The public/private distinction can be found in many places in contemporary law aside from the doctrine of state action. For example, it has appeared in equal protection jurisprudence, *see* *Ball v. James*, 451 U.S. 355, 366-67 (1981), free speech doctrine, *see* *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), and state constitutional law, *see* *Parochiaid v. Engler*, 566 N.W. 2d 208 (Mich. 1997); *see generally* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1244 (1996) (“Of course, the public/private distinction, even if theoretically problematic in the way that legal realists claim, is firmly rooted in constitutional jurisprudence.”).

¹³⁴Early legal realist critiques include: Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (arguing that property rules are best understood as delegated public powers rather than private “rights”); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. QU. 470 (1923); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Horowitz, *The Misleading Search for “State Action” Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961). More recent versions of the argument include Duncan Kennedy, *The States of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Morton J. Horowitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1426 (1982); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 242-68 (1987).

any legal relationship.”¹³⁵ This is because “[a]ll private actions take place against a background of laws.”¹³⁶ For example, law affirmatively permits activities or implicitly permits them by failing to prohibit them.¹³⁷ Furthermore, “individual choices are strongly influenced by the context of state-created law.”¹³⁸ “Explicit government actions on such things as fiscal and monetary policy, licensing of occupations, zoning, and education, among many other subjects, determine the environment in which individual decisions are made, and determine, in significant degree, the costs and benefits of alternative personal choices.”¹³⁹ For these reasons, many have argued that it makes no sense to even attempt to draw a line between public and private action. Any such attempt is inherently “incoherent.”¹⁴⁰ I shall refer to this as the classical critique of the public/private distinction.

(b) *Inadequacy of the Classical Critique.* Analysis of the strength of the classical critique of the public/private distinction must begin with the empirical observation that the distinction has “survive[d] both as a matter of constitutional doctrine and popular intuition.”¹⁴¹ Is the durability of the public/private distinction the regrettable result of courts having been deaf to logic?¹⁴² I shall suggest otherwise: the distinction’s durability reflects an aspect of American culture of which courts and legal analysts appropriately ought to take account.

First, if we observe the logical end point of the classical critique, we see that it virtually eliminates the realm of “private,” for practically *no* laws can be said to be axiomatic; alternatives, or no regulation at all, almost always are plausible. The classical critique thus suggests that virtually all, if not all, activity undertaken by a person under any legal regime is appropriately attributed to the state and hence is properly subjected to constitutional limitations. That this conclusion likely is startling to most people suggests that the classical critique omits some relevant considerations.

Indeed it does. What the classical critique neglects can be identified by

¹³⁵Berman, *Cultural Value*, *supra* note 95, at 1279.

¹³⁶*Id.*

¹³⁷*See* Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 334 (1993).

¹³⁸Berman, *supra* note 95, at 1279.

¹³⁹Kay, *supra* note 137, at 334-35.

¹⁴⁰Berman, *Cultural Value*, *supra* note 95, at 1279. All the essays referenced above make use of this critique of the distinction between public and private. *See* sources cited *supra* note 134.

¹⁴¹*Id.* at 1278. Similar observations concerning the doctrine’s durability have been made by many others. *See, e.g.*, Horwitz, *supra* note 134, at 1427 (noting that the distinction between public and private is “still . . . alive and, if anything, growing in influence”).

¹⁴²For such a suggestion, *see* Horwitz, *supra* note 134, at 1427; *cf.* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 504-5 (1985) (concluding that early scholars were “successful in demonstrating the incoherence of the state action doctrine”).

means of a two step argument. First, all the classical critique establishes is that there always is state involvement – what I’ll call “government agency” – in individuals’ decisionmaking. That there always is some government agency is only half the story, however, for it still may be meaningful to identify individual agency. There may be individual agency where the legal consequence of an individual’s action is the result of the action’s interaction with the law. This is true even where the law that determines the action’s consequence could have been different, and where the law is not the choice of the individual, but has been imposed upon her. To be sure, individuals under such circumstances have constrained autonomy insofar as they operate subject to a non-axiomatic set of rules that they have not chosen. Nevertheless, individual agency surely is present when an individual’s action is deliberate and the person can predict how her action will interact with the operative law to produce a result.

An analogy to the physical sciences might be useful to clarify this point. Under current understandings, the laws of physics are not invariable but are context dependent; one set of physical principles appears to govern physical behavior at the atomic and sub-atomic levels (quantum mechanics) whereas another set of laws (Newtonian mechanics) operates on larger systems. Similarly, the gravitational force to which people are subject is greater on the Earth than the Moon. Most people would not conclude from this that a person who behaved in a manner that (for example) predictably resulted in her being propelled forward while on Earth did not act autonomously because the physical laws that govern the consequences of her actions are only one among at least two possible sets of laws. Rather, we typically attribute human agency to the decision of a person to act in accordance with non-axiomatic physical laws to which she is subject when the physical laws are known such that the consequence of her action is readily predictable.

Second, advocates of the classical critique typically believe that erasing the distinction between public and private action ineluctably follows from the understanding that government agency always is present.¹⁴³ The critics’ conclusion, however, is based on a contestable jurisprudential position. Their conclusion rests on the premise that it is jurisprudentially unfounded as an *a priori* matter to utilize a binary characterization scheme (*e.g.*, one that asks: is it private or public?) when the object being categorized has elements of both.

¹⁴³Alternatively, the argument of critics of the public/private distinction can be understood to be that the government agency component overwhelms individual agency so that it is appropriate to conclude that there always is state action so long as there is some government agency. If so, some argument must be proffered as to why this is so. I have not found it. Moreover, one would expect that the conclusion of whether individual agency or government agency predominates would vary from context to context. Proponents of this version of the classical critique, however, do not appear to make context-specific arguments, but instead typically conclude that there always is state action. The absence of any such argument suggests that this argument boils down to the claim that there is *only* government agency, and any such assumption is incorrect for the reasons described above in text.

The critics assume that sharp legal categories are appropriate only when working with “pure” objects that are readily fit into only one or the other category.

The critics’ underlying jurisprudence asks too much of law. Our world is complex, and seldom if ever is the reality that the law seeks to characterize wholly pure in composition. At the same time, law by its nature is a social institution that seeks to simplify decisionmaking and action-taking by identifying as legally relevant only a handful of the infinite considerations that characterize any given circumstance. As a result of these two things – the reductive nature of law and the complex character of life – there seldom if ever are circumstances where a given legal category is coterminous with a pure reality in the world. Rather, reality is complex, and legal categories simplify analysis by shoe-horning complex phenomena into simplified categories. Doing so is bound to distort reality; that is, an item identified as “x” almost always will also have some “non-x” characteristics.¹⁴⁴

This does not mean that all legal questions are “hard.” What typically makes a legal question “not hard” is not that a legal category corresponds to a pure reality, but that a given situation is most plausibly characterized one way or the other. What determines whether a given situation is “most plausibly characterized” one way or the other is not logic but judgment. The mere fact that subjective judgment is involved, however, does not mean that the judgment necessarily will be controversial. The judgment is a product of the socially constructed intuitions, values, and ideology that constitutes a culture. To the extent there is a rich and widely shared culture, it is to be expected that there will be widespread agreement as regards many if not most judgments.¹⁴⁵

It is at this point that the endurance of the public/private distinction becomes analytically relevant. Because one always can locate an aspect of government agency in respect of any activity that a person undertakes insofar as some polity could have proscribed it, the approach taken by *Shelley* cannot be said to be *illogical*. As discussed above, however, it is equally true that one meaningfully can speak of individual agency under circumstances where the result of the action is a product of the non-axiomatic laws with which the

¹⁴⁴This is not to deny that legal fictions should not deviate too much from the reality they attempt to capture. If they do, they likely will not function effectively and also might misinform people about the nature of the world. See Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469, 550-51 (2000).

¹⁴⁵Litigation is not the set of data to consult to check the extent to which there exists a shared culture. Indeed, litigated cases are better described as records of failed common understandings. A better place to look to check if the point made in text is valid is to ask whether lawyers generally are able to understand what law instructs. Though there always are ambiguities at the margins, the answer unquestionably is yes, as is attested to by the everyday world of transactional lawyering in which attorneys give advice to their clients and draft agreements on the basis of an understanding of what the law instructs.

action interacts. We thus are presented with a situation where there is an admixture of government and individual agency. As shown above, American case law consistently has concluded that much of the time the component of individual agency predominates. This reflects not logical necessity, but commonly held American political cultural values.

(c) *Cultural Values Behind the Distinction.* Accordingly, the type of argument that critics of the public/private distinction must advance is not one of logic but normativity: for instance, they must convince people that a court's enforcement of a contract is more plausibly construed as state action than a vindication of private ordering. I am skeptical that the critics can succeed in convincing many people of this. Several contemporary critics of the public/private distinction agree that their arguments are not likely to sway the masses, and that the public/private distinction is here to stay.¹⁴⁶ With this I agree. But to the extent these contemporary critics' conclusions rest on the belief that the distinction's resilience reflects a lack of analytical clarity on the part of the general public,¹⁴⁷ I object. Rather, the distinction's durability reflects values that are an important part of our country's larger political culture.

To see this, it is necessary to briefly identify the cultural values behind the distinction. Judicial opinions have identified three benefits. The first concerns autonomy: maintaining the distinction retains a larger sphere for individuals to order their lives as they so choose.¹⁴⁸ To draw on the hypothetical discussed above,¹⁴⁹ the distinction between public and private allows the principal of the private school to exercise viewpoint discrimination in circumstances that a government could not. Moreover, the expanded range of options that a hard distinction between public and private makes available to the principal has beneficial cascading effects. The hard distinction allows for

¹⁴⁶See *Cultural Value*, *supra* note 95, at 1268 (“Although the [argument that there is no coherent distinction between public and private] may be correct, its appeal seems limited. Indeed, not only have courts been unmoved, but my guess is that most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between public and private. Most of us like to believe that there are spheres of privacy in which we exist, untouched by the state. The argument that such private spheres are illusory, and that our activities are inextricably bound up in the state, therefore, is unlikely to be persuasive.”); Kay, *supra* note 137, at xx (trying to explain the durability of the public / private distinction notwithstanding the “persuasive” critiques of the distinction that critics have provided).

¹⁴⁷This would appear to be implicit in Professor Berman's account insofar as he simultaneously states that he finds the incoherence critique convincing, see *Cultural Value*, *supra* note 95, at 1279-80, and concludes that most Americans are likely to resist scholarly attempts to erode the distinction between public and private, see *id.* at 1268.

¹⁴⁸To be sure, this conception of autonomy is not axiomatic. Under Aristotelian and certain religion approaches to personhood, for example, it is thought that appropriate constraints paradoxically increase autonomy. The notion is that limitations permit the development of virtue, which is the prerequisite to true choice. See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1066 & n. 50 (1998). For purposes of this Article, which concerns American culture, it is not problematic to utilize the American conception of autonomy, even if it is not axiomatic.

¹⁴⁹See *supra* p. 18.

a broader array of societal institutions; in this case, the creation of schools that create distinctive environments. Parents accordingly have a richer cluster of options among which they can choose, expanding their effective autonomy, as well. Indeed, in the First Amendment context in particular, erasing the distinction between public and private threatens to impose an orthodoxy on citizens by disallowing citizens to discriminate on the basis of viewpoint (in this case, for instance, disallowing citizens from sending their children to a school that expresses disdain for books that champion fascist ideas). In this sense, ignoring the distinction between public and private threatens to destroy what many believe to be the core concern of the First Amendment, the protection against a government-created orthodoxy.¹⁵⁰

The second and third standard reasons courts have proffered to justify the distinction between public and private – separation of powers and federalism – are institutional mechanisms for advancing the democratic ideal of limiting the scope of judiciary so as to retain space for democratic politics. In a jurisprudential world in which there are hearty federal constitutional doctrines, the absence of a strong distinction between public and private would dramatically increase the power of courts in relation both to the other branches of the federal government (separation of powers) and the states (federalism). Consider the hypothetical once again. Under contemporary doctrine, the principal is not constitutionally foreclosed from contracting with the bookseller so as to keep certain materials from the school's bookshelves. States could decide that such provisions are unenforceable as a matter of state contract, or state constitutional, law. Similarly, Congress could regulate some of these materials if it wanted.¹⁵¹ The decision of whether to allow such contractual provisions accordingly falls to either the States or Congress under contemporary law. Under a *Shelley*-type analysis, by contrast, the courts would make the determination as a matter of federal constitutional law.¹⁵²

To conclude, the critics of the public/private distinction bear the

¹⁵⁰For a comprehensive discussion of this point, see Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 U.C.L.A. L. REV. 1537, 1617-33 (1998).

¹⁵¹This is true at least with respect to contracts with booksellers that engaged in interstate commerce (and accordingly could be regulated under the Commerce Clause). Other booksellers perhaps could be regulated by Congress pursuant to its powers under Section 5 of the 14th Amendment; Congress has the power to proscribe activities that are not themselves unconstitutional if Congress' regulation is congruent and proportional to a possible constitutional violation. See *City of Boerne v. Flores*, 521 U.S. 507, 532-33 (1997). A plausible argument could be made that regulating bookseller contractual provisions touches closely enough upon First Amendment concerns to satisfy this standard, though it is far from certain that such an argument would succeed.

¹⁵²Of course, federalism concerns still would be implicated if a *state* court applied the *Shelley* analysis to determine that enforcement of the provision were unconstitutional. Under such circumstances, after all, the state court merely would be applying federal constitutional law, which trumps competing state law under the Supremacy Clause. The fact it was a state governmental actor that was required to apply federal law accordingly would not reduce the threat to federalism concerns.

burden not of pointing out flaws in reasoning, but of remaking critical aspects of our country's political culture. Popular opposition to erasing the public/private distinction and making all contract claims (for example) subject to constitutional limitations is not illogical, for both individual agency and state agency are present in all contracts. The widespread popular tendency to view contracts as belonging to the "private" realm likely reflects deeply held American cultural values that favor expanding individual autonomy and preserving room for democratic politics by limiting the role of courts. That the public/private distinction is not illogical and that it reflects deeply held cultural values are two strong justifications for this Article's continued use of the distinction.

C. *The Analogy Between Private Contracts and Foreign Countries' Regulations.* The analysis above established that United States courts routinely have held that the enforcement of legal rights created via private contract does not constitute state action. The contemporary doctrine rejects the approach adopted in *Shelley* and instead embraces a strong public/private distinction. The question raised in the context of the enforcement of foreign judgments, however, is somewhat different. In those cases, the source of the legal right is foreign law, not "private" contract. This does not matter, however, for purposes of the state action doctrine. Here I intend to explain why foreign public law should be treated analogously to private contract for purposes of the state action doctrine.

To be sure, this position at first may sound wildly inconsistent. After all, I have identified and defended a hard public/private distinction in one corner of state action doctrine (*i.e.*, the enforcement of domestic contracts should be deemed to be purely private action) and now advocate abandoning the public/private distinction in another (enforcement of foreign courts' judgments).

A careful consideration of the state action doctrine, however, discloses why this disparate treatment is warranted.¹⁵³ The state action doctrine is a method for determining if an American polity has acted in such a manner that the Constitution properly is applied to it.¹⁵⁴ In determining whether and to what extent a court's activity qualifies as state action, all that matters is whether an American polity is the origin of the legal right. If so, then there is state action to the extent that the American court is acting pursuant to the direction given it by an American polity. However, if the American court is acting

¹⁵³Indeed, it is not unusual for a single term to have different meanings in different contexts. *See, e.g.,* *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (holding that "substantial nexus" means one thing in the context of due process and something else in respect of the dormant commerce clause).

¹⁵⁴*See Lugar*, 457 U.S. at 937 (summarizing state action case law as "insist[ing] that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State").

pursuant to legal rights not created by an American polity, it should not matter for purposes of today's post-*Shelley* world of state action doctrine what the precise source of those legal rights are. Whether they are contractual rights negotiated by individuals or regulations imposed by a foreign country upon a consenting individual, there can be no attribution of it to the United States court under contemporary state action doctrine because the right's source is not an American polity.¹⁵⁵

The equivalence for purposes of the act of state doctrine of private contracts and foreign regulations can be illustrated by considering three hypothetical cases. Hypothetical A is the purely domestic case (discussed above¹⁵⁶) in which a New York bookseller and a private school principal in New York enter into a contract that contains a material provision stating that "Bookseller shall not ship Nazi materials to the private school." Although an American court's enforcement of such a provision would qualify as state action under a strict reading of *Shelley*, a contemporary court would not rule that enforcing such a contractual provision implicates the First Amendment, notwithstanding the fact that New York could not have enacted the contractual provision into general law.¹⁵⁷ In short, this first hypothetical is a paradigm of the private ordering that the post-*Shelley* case law shields from constitutional scrutiny.

Consider next Hypothetical B, which involves an international setting in which contract once again is the source of the legal right.¹⁵⁸ Imagine a New York bookseller and a private school principal in Holland. A material provision in their contract reads exactly as the provision above, that the "Bookseller shall not ship Nazi materials to the private school." If enforcing the purely domestic contract in hypothetical A does not qualify as state action – and it does not – it is difficult to see why enforcing Hypothetical B's contract would constitute state action. This is sensible, for the foreign identity of the purchaser surely has no bearing on the question of whether the New York

¹⁵⁵Indeed, a strong argument can be made that an American court's enforcement of a domestic contract implicates state action concerns *more* than does enforcement of a foreign court's judgment. The law of contract could be said itself to qualify as state action insofar as state-made law determines which contracts are enforceable and which are not. Recognizing foreign judgments can fairly be characterized as reflecting less of an American polity's sanction of the substantive content of the legal claims insofar as principles of international cooperation motivate the recognition of foreign judgments. It accordingly could be argued that because American courts by and large do not treat the enforcement of domestic contracts as state action, it follows *a fortiori* that enforcement of foreign judgments also should not qualify as state action.

¹⁵⁶See *supra* at 18.

¹⁵⁷This hypothetical, as well as the subsequent two, concern judicial application of law rather than the enforcement of judgments. Making use of laws simplifies the hypotheticals' fact patterns, but does not undermine their lesson. This is so because there is no reason to believe that enforcing judgments implicates state action any more than does application of law.

¹⁵⁸See *supra* note 157.

court's enforcement of the contract constitutes state action. In short, for purposes of the New York court's state action analysis, the international dimension of this second hypothetical is wholly irrelevant.¹⁵⁹

Our last case, Hypothetical C, concerns an international setting in which foreign law is the source of the legal right. Imagine that the same New York bookseller and a principal of a French school have a contract for the delivery of books. Imagine further that a French noncriminal law¹⁶⁰ provides that "booksellers shall not ship Nazi materials to French schools," and that the law provides a civil remedy for noncompliance. The question is whether, for state action purposes, an American court's enforcement of this French law¹⁶¹ is meaningfully different from a court's enforcement of the contract with the Dutch principal in Hypothetical B.

I do not see why it should be. To begin, the French regulation readily can be conceptualized as a mandatory contractual term imposed by the French government,¹⁶² thereby narrowing the gap between Hypotheticals B and C. Even if one were to resist this argument, however, the conclusion that there is no meaningful distinction between the two hypotheticals would not change. The fact that the source of the legal right sued upon in Hypothetical C is a French regulation rather than a contract entered into with the Dutch person in Hypothetical B is of no relevance to post-*Shelley* state action doctrine. The doctrine is concerned with identifying when a branch of the American government acts in such a manner that constitutional limitations appropriately are applied to it.¹⁶³ What matters under current doctrine is whether the law motivating a court's actions comes from an American polity. If it does not – as is true in all three hypotheticals – then there is no state action. So long as the source is not an American polity, the precise source of the legal requirement simply is not relevant to contemporary state action analysis.¹⁶⁴

¹⁵⁹To simplify matters, I assume for present purposes that a New York court had personal jurisdiction over the Dutch principal and that the contractual provision would be enforceable under Dutch law. These considerations have no bearing on the state action analysis, though they would complicate other aspects of the legal analysis.

¹⁶⁰I specify a non-criminal foreign law because there is a well-established doctrine under which one sovereign will not enforce foreign criminal judgments. *See, e.g.*, *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825). For a critique of this doctrine, *see* Robert A. Leflar, *Extrastate Enforcement of Penal and Government Judgments*, 46 HARV. L. REV. 193 (1932).

¹⁶¹*See supra* note 157.

¹⁶²*Cf.* *John Hancock Mut. Life Insur. Co. v. Yates*, 299 U.S. 178 (1936) (holding that New York statute providing that false statement in insurance application regarding medical treatment constitutes material misrepresentation voiding policy is "a term of the contract" and must be applied by Georgia court).

¹⁶³*See Lugar*, 457 U.S. at 937 (summarizing state action case law as "insist[ing] that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State").

¹⁶⁴This is not to suggest that the Constitution never could be relevant. For instance, the categorical refusal to enforce judgments from certain foreign countries could violate equal protection challenge if courts lacked a rational basis for doing so. This is not a resurrection of the rule of *Shelley*, for the court's action would constitute state action because it reflected a *governmental* rule that foreign judgments not be enforced. Any such constitutional challenge, however, would have nothing to do with the substance of

IV. INCIDENTAL EFFECTS OF A GENERAL RULE TO ENFORCE FOREIGN JUDGMENTS

The courts that have refused to enforce Un-American Judgments on the theory that doing so would be unconstitutional have relied on the state action analysis that this Article critiqued above in Part III. A different approach to ground the conclusion that enforcing Un-American Judgments implicates constitutional questions recently has been advanced in the scholarly literature, though as yet it has not been relied on by any court. The contention is that the rule “enforce foreign judgments” is a “generally applicable rule” that triggers constitutional scrutiny if it has a “significant negative effect” on speech.¹⁶⁵ The logic presumably would generalize to include enforcement of Un-American Judgments that had significant effects on other fundamental rights, as well.¹⁶⁶ I will call this the “incidental effects of enforcement” approach (or “IEE” for short).

IEE might appear at first to circumvent the obstacles confronting state action analysis insofar as it locates an actual *governmental* rule – the rule of “enforce foreign judgments.” This Part IV shows, however, that although generally applicable rules sometimes can trigger First Amendment scrutiny, this is true only of rules of a type that would not include a rule that courts are to enforce foreign judgments. I will argue here that IEE would require a problematic expansion of the current doctrine that would reproduce many of the problems found in the courts’s state action analysis that was critiqued in Part III. Most prominently, IEE risks erasing the public/private distinction.

A. *Current Doctrine.*

1. Black Letter Law. The question for present purposes is whether a rule of general application that nonetheless imposes a significant effect on speech might trigger constitutional scrutiny. If it can, and if “enforce foreign judgments” is such a general rule, then the American courts’ determinations that the enforcement of Un-American Judgments raises constitutional questions is not *per se* incorrect.¹⁶⁷ If, on the other hand, “enforce foreign judgments” is not the type of general rule with respect to which even significant speech effects can trigger constitutional scrutiny, then the conclusion remains that enforcement of Un-American Judgments does not raise constitutional concerns.

the legal rights that are encapsulated in the judgment, and accordingly is unrelated to the question of whether Un-American judgments can be constitutionally enforced.

¹⁶⁵Van Houweling, *The Next Yahoo!*, *supra* note 8, at 703-04.

¹⁶⁶Cf. Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996).

¹⁶⁷The propriety of the conclusion that constitutional scrutiny is warranted would turn on whether enforcing the Un-American Judgment at issue would impose a “significant” effect on speech.

To begin, as a purely descriptive matter, “general” laws that incidentally burden speech sometimes generate constitutional scrutiny. In *United States v. O’Brien*,¹⁶⁸ for instance, the Court applied the First Amendment to a federal statute that prohibited the knowing destruction or mutilation of draft cards. The law was “general” insofar as it was not aimed at expression; it not only was content-neutral, but it “expressly restrict[ed a] noncommunicative activit[y].”¹⁶⁹ It nonetheless had an incidental effect on speech insofar as defendant O’Brien had burned his draft card as a communicative act of political speech.¹⁷⁰ In *United States v. Albertini*,¹⁷¹ the Court applied First Amendment review to a federal statute that prohibited any person from entering a military base after being ordered not to by a commanding officer.¹⁷² The federal statute once again was general, but it had incidental speech effects when applied to a person who entered a military base for the purpose of criticizing the nuclear arms race.¹⁷³

As commentators have recognized, the major doctrinal challenge with regard to constitutionalizing incidental burdens is identifying the appropriate stopping point. The problem is that “[v]irtually every government decision is likely to have some incidental effect on some constitutionally protected value.”¹⁷⁴ In the context of speech, for example, consider “environmental and minimum wage laws that raise the price of newspapers, thus dampening public debate; laws that convert public parks to parking lots, thus eliminating public forums, and laws that tax income, thus reducing the amount of money individuals have to spend on expressive activities.”¹⁷⁵ Subjecting all laws that impose incidental burdens to either strict or heightened review accordingly “would jeopardize government’s ability to function, because [it] would require judicial scrutiny, if not judicial invalidation, of nearly all government regulation.”¹⁷⁶

¹⁶⁸391 U.S. 367 (1968).

¹⁶⁹Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105 (1987).

¹⁷⁰See *Incidental Burdens*, *supra* note 165, at 1202.

¹⁷¹472 U.S. 675 (1985).

¹⁷²To be sure, the constitutional review applied in both *O’Brien* and *Albertini* was highly deferential. See Stone, *Content-Neutral Restrictions*, *supra* note 168, at 110-111. What is relevant for present purposes, however, is whether the Court applies *any* constitutional scrutiny to generally applicable laws, not what level of scrutiny is applied.

¹⁷³472 U.S. at 678.

¹⁷⁴Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 784 (1985); see *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (“every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.”); Stone, *Content-Neutral Restrictions*, *supra* note 168, at 105 (noting that the “number of laws” that “have an incidental effect of free speech . . . is virtually limitless.”).

¹⁷⁵Stone, *Content-Neutral Restrictions*, *supra* note 168, at 105; see also *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 470 (1997) (“The First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm’s advertising budget. The fact that an economic regulation may indirectly lead to a reduction in a handler’s individual advertising budget does not itself amount to a restriction on speech.”).

¹⁷⁶Dorf, *Incidental Burdens*, *supra* note 165, at 1199.

As a matter of positive law, general laws that create incidental effects on fundamental rights typically will not trigger constitutional scrutiny.¹⁷⁷ For instance, despite incidental effects on speech, no constitutional review is occasioned by application to the press of the antitrust laws, the Fair Labor Standards Act, or the National Labor Relations Act.¹⁷⁸ (Because incidental burdens are most likely to lead to constitutional review when speech is at issue,¹⁷⁹ the analysis that follows focuses on incidental burdens on speech. If IEE is unavailing with regard to incidental effects on speech, as I show below, then *a fortiori* it will not trigger constitutional review for incidental burdens on non-speech fundamental rights.) There is one broad exception to the rule that incidental speech effects do not lead to constitutional scrutiny, and two narrow exceptions. The broad exception is the public forum; content-neutral time, place and manner regulations of traditional public fora are subject to relatively strict constitutional scrutiny.¹⁸⁰ The precise contours of the public forum doctrine need not concern us here, however, because a foreign country patently would not qualify as a public forum.

Outside of a public forum, general regulations that generate incidental burdens on speech will trigger constitutional review under the narrow circumstances that are discussed in the leading case of *Arcara v. Cloud Books, Inc.*¹⁸¹ At issue in *Cloud Books* was a New York statute authorizing closure of buildings found to be a public health nuisance on account of their being places of prostitution or lewdness. This general statute was used to close down a bookstore that sold sexually explicit, non-obscene materials. Such materials are constitutionally protected under the First Amendment, and it was argued that closure of the store burdened the constitutionally protected bookselling activity.¹⁸²

The Court held that constitutional scrutiny was unwarranted.¹⁸³ The Court cited the stopping point concern – the argument that constitutional review is appropriate due to the speech effects “proves too much since every civil and criminal remedy imposes some conceivable burden on First

¹⁷⁷See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (“Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.”).

¹⁷⁸See *id.* (citing to xx).

¹⁷⁹See *Dorf, Incidental Burdens*, *supra* note 165, at xx.

¹⁸⁰Such regulations “must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). Frederick Schauer was one of the first to note that the public forum doctrine is an exception to the general rule regarding incidental burdens to speech. See Schauer, *Cuban Cigars*, *supra* note 173, at 789.

¹⁸¹478 U.S. 697 (1986).

¹⁸²*Id.* at 705.

¹⁸³See *id.* at 707.

Amendment protected activities”¹⁸⁴ – and identified two limited circumstances where general statutes will receive constitutional review. The first is “where a statute has the inevitable effect of singling out those engaged in expressive activity,”¹⁸⁵ such as the tax on the sale of large quantities of newsprint and ink that was struck down in *Minneapolis Star*.¹⁸⁶ The second is “where it was conduct with a significant expressive element that drew the legal remedy in the first place.”¹⁸⁷ The Court explained that this second category refers to statutes that regulate “nonspeech” conduct that is “intimately related to expressive conduct protected under the First Amendment.”¹⁸⁸ For instance, the nonspeech conduct of burning a draft card was inseparable from the defendant’s political speech in *O’Brien*. By contrast, the activities that “drew sanction”¹⁸⁹ in *Cloud Books* – prostitution and lewd behavior – “were not communicative, even from the private actor’s perspective.”¹⁹⁰

The rule “enforce foreign judgments” would not trigger constitutional scrutiny under the test announced in *Cloud Books*. Because such an enforcement rule is generally applicable and content-neutral, “the general presumption” would apply that “that incidental restrictions do not raise a question of first amendment review.”¹⁹¹ This presumption would not be rebutted by either of the exceptions identified in *Cloud Books*. With regard to the first, the rule does not have disproportionate application to expressive activity, but applies to foreign judgments based on foreign laws that govern the full range of behavior that foreign governments regulate. *Cloud Books*’ second exception would not be applicable because, as a procedural judicial rule, the enforcement rule does not regulate any primary conduct whatsoever. As such, the rule cannot, and does not, regulate any expressive activity that is intertwined with nonspeech activity. The enforcement rule only has potential effects on speech, and effects alone are insufficient under *Cloud Books* to trigger constitutional scrutiny.

2. The Doctrine in Practice.² In an influential article, however, Professor Geoffrey Stone argued that the *Cloud Books* formulation does not accurately characterize the case law. Rather, Stone argues, “the Court will undertake first amendment review when an incidental restriction has a *significant effect* on free expression.”¹⁹² Similarly, Professor Michael Dorf argues

¹⁸⁴*Id.* at 706.

¹⁸⁵*Id.*

¹⁸⁶*Id.* (citing to *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575 (1983)).

¹⁸⁷*Id.* at 706.

¹⁸⁸*Id.* at 706 & n. 3.

¹⁸⁹*Id.*

¹⁹⁰Dorf, *Incidental Burdens*, *supra* note 165, at 1206.

¹⁹¹Stone, *Content-Neutral Restrictions*, *supra* note 168, at 114.

¹⁹²Stone, *Content-Neutral Restrictions*, *supra* note 168, at 112 (emphasis supplied).

on both positive and normative grounds that constitutional scrutiny is triggered when an incidental burden is “substantial.”¹⁹³ This subsection takes issue with Stone’s and Dorf’s positive accounts, arguing that *Cloud Books*’ formulation, or at most a more modest refinement than Professors Stone and Dorf proffer, is the best statement of the rule as regards incidental burdens on speech and shows that the rule “enforce foreign judgments” would not trigger constitutional scrutiny on this modified understanding of *Cloud Books*.¹⁹⁴

Professor Stone’s positive claim rests on three cases.¹⁹⁵ Importantly, all were decided before *Cloud Books*. Stone relies on these cases to support the proposition that the *Cloud Books* rule does not accurately describe the doctrine as a purely positive matter.¹⁹⁶ It is puzzling that his analysis, which purports to be positive in nature, does not consider that these cases were limited to the extent they are inconsistent with the rule announced in the later case of *Cloud Books*.

In any event, it seems to me that Professor Stone’s analysis overstates

¹⁹³See Dorf, *Incidental Burdens*, *supra* note 165, at 1180 (“In the course of describing the current doctrine governing incidental burdens in the free speech, free exercise, and rights to privacy contexts, I identify a substantiality threshold in each of these areas.”); *id.* at 1201 (citing to Professor Stone’s article for the proposition that constitutional scrutiny is triggered “whenever the challenged restriction significantly limits the opportunities for free expression”). Professor Dorf argues at length that a substantiality threshold is normatively desirable, *see id.* at 1202-1210, but he does not appear to offer any argument that contemporary doctrine already incorporates a substantiality threshold apart from reliance on Professor Stone’s analysis. *See id.*

¹⁹⁴The refinement I propose is similar to the way Professor Dorf’s understanding of “substantiality.” My conclusion accordingly is consistent with Professor Dorf’s analysis.

¹⁹⁵See Stone, *Content-Neutral Restrictions*, *supra* note 168, at 110-14. The three cases are: *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *NAACP v. Alabama*, 357 U.S. 449 (1958); and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

Professor Stone looked to another pre-*Cloud Books* case, *United States v. Albertini*, 472 U.S. 675 (1985), to support the proposition that either the two exceptions in *Cloud Books* are nonexhaustive or that “in at least some cases ‘expressive’ activity is defined quite broadly.” Stone, *Content-Neutral Restrictions*, *supra* note 168, at 110. In that case, the Court applied constitutional scrutiny to a federal statute that prohibited persons ordered not to enter a military base from doing so as applied to a protester against nuclear proliferation. The majority in *Cloud Books* justified constitutional review in *Albertini* on the ground that there was “governmental regulation of conduct that ha[d] an expressive element.” *Cloud Books*, 478 U.S. at 703-04. Stone asks “was it the expressive leafleting or the nonexpressive reentry that ‘drew the legal remedy?’” and concludes that “*Albertini* suggests either an expansion of the *Cloud Books* exceptions or at least a very broad definition of ‘expressive’ activity.” Stone, *Content-Neutral Restrictions*, *supra* note 168, at 110.

I agree that it is difficult to characterize the activity proscribed in *Albertini* as “expressive,” for the defendant “was prosecuted not for demonstrating . . . but for reentering the base after he had been ordered not to do so,” and the order was due to the defendant’s prior acts of vandalism on the military base. *Albertini*, 472 U.S. at 686. However, *pace* Professor Stone, it seems to me that it is difficult to characterize the pre-*Cloud Books* case of *Albertini* as an “expansion” of *Cloud Books*. It seems to me that the *Cloud Books* majority recast *Albertini* as an expressive conduct case by judicial fiat, perhaps because *Cloud Books* was reluctant to question the *Albertini* case, which had been decided only a year earlier and authored by just-retired Chief Justice Burger. To my mind, *Albertini* was wrong to subject the statute to any constitutional scrutiny whatsoever because the statute did not satisfy the two criteria identified by the Court a year later in *Cloud Books*. Regardless, shoehorning *Albertini* into “expressive conduct” is better understood as a narrowing of *Albertini* rather than an expansion of the category of expressive conduct.

¹⁹⁶See Stone, *Content-Neutral Restrictions*, *supra* note 168, at 110-14.

the inconsistencies. Two cases appear to be fully compatible with the Court's approach in *Cloud Books*. Professor Stone argues that the case of *Roberts v. United States Jaycees*¹⁹⁷ did not “clearly involve a situation in which expressive activity ‘drew the legal remedy’” and hence does not readily fit *Cloud Books*'s second exception.¹⁹⁸ *Roberts* concerned constitutionally protected associational rather than expressive activity, however, and the Court in that case explicitly held that a “regulation that forces the group to accept members it does not desire” directly trenches on the “freedom of association, [which] plainly presupposes a freedom not to associate.”¹⁹⁹ The *Roberts* case accordingly falls within *Cloud Books*'s second exception because the regulated non-expressive activity of whom to accept into the association was “intimately related” to the protected First Amendment right of association.

In the second case relied on by Professor Stone, *Globe Newspaper Co. v. Superior Court*,²⁰⁰ the Court applied constitutional scrutiny to a state law that required judges, at trials for specified sexual offenses involving victims under the age of 18, to exclude the press and general public from the courtroom during the victim's testimony. The Court did not describe the state law as a “general” regulation that imposed incidental effects on constitutional rights but, to the contrary, treated the statute as directly trenching on “the First amendment right of access to criminal trials.”²⁰¹ Accordingly, the state statute directly regulated the constitutionally protected conduct of attending criminal trials. For this reason, *Globe Newspapers* does not even fit the paradigm of a general statute imposing an incidental burden, but is an example of a direct regulation of a protected First Amendment right. This helps explain why the Court applied strict scrutiny,²⁰² not the *O'Brien* intermediate scrutiny that typically applies when incidental burdens trigger constitutional scrutiny.²⁰³

¹⁹⁷468 U.S. 609 (1984).

¹⁹⁸Stone, *Content-Neutral Restrictions*, supra note 168, at 112.

¹⁹⁹Roberts, 468 U.S. at 623.

²⁰⁰457 U.S. 596 (1982).

²⁰¹Id. at 604. Indeed, the opinion is fairly characterized as an extended discourse on the importance of “the First amendment right of access to criminal trials” as a matter of “both logic and experience.” Id. at 606; see generally id. at 604–06 (right of access to criminal trials is a means of “assuring freedom of communication on matters relating to the functioning of government,” “plays a particularly significant role in the functioning of the judicial process and the government as a whole,” “enhances the quality and safeguards the integrity of the factfinding process,” “fosters an appearance of fairness, thereby heightening public respect for the judicial process,” “permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.”). If one wanted to suggest that access to criminal trials itself is not a constitutional right, the factors discussed in *Globe Newspapers* would equally support treating the criminal trial as a special forum that merits constitutional scrutiny even for general regulations, just as is the case with public forums. Indeed, that, in my view, is the best way of understanding the opinion. Relatedly, it seems to me that the state statute should have been subject to less than strict scrutiny.

²⁰²See id. at 607. This is not to suggest that I believe that strict scrutiny was appropriate. See supra note 200.

²⁰³See Dorf, Incidental Burdens, supra note 165, at 1202–04 (noting that *O'Brien* scrutiny applies when general statutes imposing incidental burdens trigger constitutional scrutiny).

The remaining case is best understood as standing for a principle importantly narrower than the proposition that “significant” effects trigger constitutional review. The Court in *NAACP v. Alabama*²⁰⁴ subjected to constitutional scrutiny a general state law, as applied to the NAACP, that required foreign corporations seeking to do business in Alabama to provide the state with the names and addresses of its members. The case thus applied constitutional scrutiny to a general law that does not fit either of the two exceptions identified in *Cloud Books*: the law did not single out expression (indeed, the brunt of its burden falls on non-expressive activity) and the regulated conduct of submitting membership lists was not intimately related to the constitutionally protected conduct of associating.

So how should *NAACP* be understood? There are several possibilities. Because *NAACP v. Alabama* preceded *Cloud Books*, the approach *NAACP* used could be said to have been rejected by *Cloud Books*.²⁰⁵ Those like myself who believe that constitutional review is normatively appropriate in such circumstances will try²⁰⁶ to find a principled basis for permitting constitutional review in *NAACP* but no review in the run-of-the-mill case where general governmental regulations incidentally burden constitutional rights. Professor Stone’s suggestions that the dividing line is whether the regulation imposes “significant” effects is one such effort.²⁰⁷ Such a formulation does not adequately capture what made constitutional review appropriate in *NAACP*, however, and accordingly provides inadequate guidance, risking excessive constitutional review of incidental burdens. The salient factor justifying constitutional review is that the general law threatened not just to impose “significant” effects, but to lead to an absolute deprivation of the underlying right.²⁰⁸ This was the principal rationale that the *NAACP* offered for its holding: the Court specifically found that forced disclosure of membership could be expected to discourage people from joining the

²⁰⁴357 U.S. 449 (1958).

²⁰⁵This approach runs into the difficulty that *NAACP*’s constitutional holding continues to be approvingly referred to by the Court. See, e.g., *University of Pennsylvania v. EEOC*, 493 U.S. 182, 199 (1990).

²⁰⁶Another possibility, of course, is to conclude that rule of law commitments demand no constitutional scrutiny in *NAACP*, notwithstanding a desire to do so, due to an inability to generate a principled and administrable distinction that would keep the floodgates to constitutional review of all incidental burdens closed. I myself believe, however, that a principled and administrable distinction can be located, as discussed below in text.

²⁰⁷Although Professor Stone purports to be engaging in positive analysis when he proposes the significant effects test, see Stone, *Content-Neutral Restrictions*, *supra* note 168, at 114, the discussion above demonstrates, I think, that all cases he relies upon except *NAACP* are better understood differently. Professor Stone’s analysis accordingly is best understood as an effort to generate a principle for explaining why constitutional scrutiny was warranted in *NAACP*.

²⁰⁸*Cf.* *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

organization²⁰⁹ and for that reason concluded that “[i]nviolability of privacy in group association may in many circumstances be *indispensable* to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²¹⁰

This approach works nicely with Professor Dorf’s specification of the conditions that justify constitutional review of where general regulations impose incidental burdens.²¹¹ He argues that “only those incidental burdens that do not leave open adequate alternative channels of communication should be subject to heightened scrutiny.”²¹² Carried over to the context of association, the concern justifying constitutional scrutiny in *NAACP* is that regulations that hinder the joining of associations do not leave open adequate opportunities for association. More so than speech, association is dependent upon quantity. For instance, whereas there were ample alternative communication channels that were open to those who were prevented from sleeping in Lafayette Park to protest governmental policies as regards the homeless,²¹³ membership in a group whose size is depressed due to governmental policies is not an adequate alternative to membership in the larger group that would obtain in the absence of governmental regulation. This is because many of the essential attributes of association – the sociological experience of being part of a group, the group’s ability to advocate and effectuate social and political change,²¹⁴ the group dynamics as regards stability and change over time, and so forth – are a function of the size of the group.

To conclude, what emerges from the pre-*Cloud Books* case law that Professor Stone’s analysis brings to light either is a modest adjustment of the *Cloud Books* rule (via *NAACP*) or *NAACP*’s rejection in *Cloud Books*. I, for one, favor inclusion of the *NAACP* modification, under which a general law will trigger constitutional scrutiny when its incidental effects threaten an

²⁰⁹See *NAACP*, 357 U.S. at 462-63 (“Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility. Under these circumstances, we think it apparent that compelled disclosure of petitioner’s Alabama membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”).

²¹⁰*Id.* at 462 (emphasis supplied).

²¹¹See *supra* note 192 (suggesting that Professor Dorf’s analysis of incidental burdens on speech is best understood in normative rather than positive terms).

²¹²Dorf, *Incidental Burdens*, *supra* note 165, at 1209. I would apply this exception more narrowly than Professor Dorf does with regard to speech. For instance, I do not agree that the Court’s approach in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), “sanctioned severe incidental burdens.” Dorf, *Incidental Burdens*, *supra* note 165, at 1209. It seems to me that those who wished to protest governmental policies with respect to the homeless had ample alternatives apart from sleeping in a public park across from the White House to make their point.

²¹³See *Clark*, 468 U.S. at 294.

²¹⁴See *NAACP*, 357 U.S. at 462-63.

absolute deprivation of the constitutionally protected right. The case law after *Cloud Books*, however, does not clarify which is the correct state of the law. Though the case law is consistent with the *Cloud Books* formulation without the adjustment,²¹⁵ a fact pattern that would test whether the Court would opt for the modification has not been presented.

In any event, the rule “enforce foreign judgments” would not trigger constitutional scrutiny under either the adjusted or unadjusted *Cloud Books* formulation. I demonstrated the latter above.²¹⁶ IEE would not merit constitutional scrutiny under the adjusted *Cloud Books* test, either, for two reasons. First, incidental effects of enforcement, as burdensome as they might be, almost never will threaten an absolute deprivation of the underlying right. *Cloud Books* teaches that the fact that a general rule’s application might mean that a *particular* person or entity will be unable to engage in constitutionally protected speech does not constitute an absolute deprivation for present purposes; the fact that constitutionally protected books were not going to be sold by bookseller Cloud Books, whose shop was ordered closed, did not trigger constitutional scrutiny. As a matter of black letter law, the absolute deprivation exception suggested by *NAACP* is narrow in scope, and the activity that is the subject of the question “Would there be an absolute deprivation?” is not defined molecularly at the level of the individual (*e.g.*, “Will Cloud Books be able to continue selling its constitutionally protected materials?”) but instead is defined in terms of the activity. Thus a general and neutral statute that had the incidental effect of closing down all adult bookshops would appropriately trigger constitutional scrutiny.²¹⁷

²¹⁵The general statutes that have triggered First Amendment review have fallen under *Cloud Books*’ second exception, where the regulated nonspeech conduct is intimately related to constitutionally protected speech. *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 647-48 (2000) (applying constitutional scrutiny to public accommodation law that regulated conduct protected by First Amendment of not associating with those that an expressive association chooses not to associate with; the “right to associate with others . . . plainly presupposes a freedom not to associate” and is directly burdened by a “regulation that forces the group to accept members it does not desire”); *Watchtower Bible and Trace Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 155 (2002) (constitutional scrutiny to ordinance prohibiting “canvassers” from “going in and upon” private residential property for the purpose of promoting any “cause” without first having obtained a permit); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (ordinance banning nudity in public places applied to activity of nude dancing, which Court held to constitute constitutionally protected “expressive conduct”); *cf.* *BE & K Construction Co. v. NLRB*, 536 U.S. 516, 525 (2002) (constitutional scrutiny to question of whether the National Labor Relations Act’s prohibition of employers from restraining, coercing, or interfering with employees’ exercise of rights related to self-organization and collective bargaining could be used to impose liability on employers for filing a lawsuit because “[t]he right of access to the courts is . . . but one aspect of the right to petition”).

²¹⁶*See supra* Part IV.A.1.

²¹⁷I acknowledge that there still remains considerable “play” in determining the level at which the activity is pitched for purposes of determining whether or not an absolute deprivation is threatened. To elaborate on the hypothetical provided above in text, is the relevant activity “selling adult books,” “selling books,” or “speech”? Only the first formulation would trigger constitutional scrutiny of the statute under my reading of *NAACP*. Of course, similar characterization uncertainties are involved in formulating fundamental rights. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (confronting question

As applied to the rule “enforce foreign judgments,” it is difficult to conceive a foreign judgment whose enforcement would threaten absolute deprivation of the underlying right. Even if a particularly publisher were unable to stay in business if it were obligated to either cease distribution abroad or to print a special foreign edition that complied with foreign laws, constitutional scrutiny would not be warranted because the complete loss of one source of speech does not meet the *Cloud Books* criteria; the fact that the book store in that case had to cease operation did not generate constitutional review. *Yahoo!* presents the closest case. Imagine that enforcement of the French judgment literally threatened to close down operation of the Internet. Would enforcement then generate a constitutional question? Yes, it seems to me,²¹⁸ but only under such a circumstance. Technology would thus be a threshold question to determine whether a constitutional issue would be raised by enforcing such a foreign judgment.²¹⁹ Once it were determined that technology permits geographical filtering on the Internet – as it apparently does, such that French users would not have access to sites that would be available to British and American users²²⁰ – the constitutional question would fall away.

Second, a condition precedent of the adjusted rule may be absent. Professor Dorf’s helpful formulation focuses attention on the question of whether there are adequate alternative avenues of communication to the speech that has been incidentally burdened. Implicit in this is that the burdened speech itself must be constitutionally protected. This is sensible, for incidental

whether the privacy right is to be conceptualized as protecting “basic and intimate exercises of personal autonomy” or “the right to die”). My proposal thus shares the doctrinal indeterminacy that characterizes other constitutional doctrines. It seems highly unlikely that there is some principled way of formally fixing the level of generality of the analyzed activity, but that the formulation inevitably is a product of the legal decisionmaker’s good judgment. I do not take this to be a generic argument against the utility of these types of constitutional rules – indeed, indeterminacies with regard to fixing the level of generality is endemic to the task of identifying the scope of a holding, one of the core components of common law reasoning – but, rather, an acknowledgment of the limits of formalism. Particularly in constitutional decisionmaking, discretion is never wholly banished, and judgment almost always plays a role.

²¹⁸Although it could be claimed that even closure of the Internet would not effect a wholesale deprivation insofar as alternative channels of communication would remain, *cf. supra* note 216, the better view, it seems to me, is that the Internet is best understood as a discrete form of communication whose absolute deprivation would raise constitutional concerns.

²¹⁹To say that a constitutional issue is raised is not to indicate how it should be resolved, of course. If there were not effective and affordable filtering technology, the Internet *in its current form* might be maintainable only if Un-American judgments in connection with the Internet were systematically not enforced. Not enforcing a foreign judgment means disregarding the foreign country’s distinctive policy (for instance, England’s pro-plaintiff defamation law). Does the United States Constitution categorically mandate the overriding of foreign country’s interests in this fashion? Does it effectively provide a United States with worldwide immunity from foreign regulations that do not comport with American constitutional requirements? Does the Constitution export its political values in this manner? If the constitutional right were anything less than categorical – as virtually all constitutional rights are – then any of these countervailing considerations conceivably could constitute a compelling governmental interest to justify the enforcement of (at least some) Un-American Judgments, even under a constitutional analysis.

²²⁰See filtering articles.

interference with non-protected speech (such as obscene materials) certainly would not raise any constitutional questions. This raises the following question: is speech outside of the United States constitutionally protected? This is a question that the Supreme Court has not yet answered.²²¹ If the answer is no, however, then the adjusted rule's threshold requirement would not be satisfied such that incidental burdens on such extraterritorial speech could not trigger constitutional scrutiny.²²²

Whether foreign speech is constitutionally protected may partly turn on a hotly disputed jurisprudential question concerning the nature of constitutional rights. The contested issue is whether constitutional rights guarantee that certain privileged conduct can occur²²³ ("rights, *simpliciter*") or whether constitutional rights are "shields against particular [governmental] rules"²²⁴ ("rights against rules"). As a matter of positive law, all participants in the debate agree that some rights are rights, *simpliciter*.²²⁵ For instance, the Constitution's ban on slavery is a "right[] not to have certain states of the world exist rather than [a] right[] not to be judged by certain kinds of rules."²²⁶ As a matter of positive law, all participants likewise agree that some rights are rights against rules.²²⁷ For instance, while the government may not proscribe the "desecrat[ion] [of a] . . . state or national flag,"²²⁸ the identical flag burning activity can be prohibited "pursuant to a rule against arson, assault, the destruction of government property, pollution, or some other such rule that was not targeted at speech."²²⁹ The Constitution thus does not guarantee a state of the world in which a person can burn an American flag, only that the proscription not assume a form that singles out that the expressive activity of flag-burning (right-against-rule). Burning a flag hence is not a right, *simpliciter*.

The disputants in the jurisprudential debate disagree as to whether speech rights (and other fundamental rights) are best characterized as rights

²²¹See Van Houweling, *The Next Yahoo!*, *supra* note 8, at 713 (noting this); see generally *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

²²²This might not be the case if regulation of the American citizen's out-of-country speech threatened to absolutely undermine her domestic speech, as in the *Yahoo!* hypothetical discussed immediately above.

²²³See, e.g., Michael C. Dorf, *The Heterogeneity of Rights*, 6 LEGAL THEORY 77 (2000).

²²⁴Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 13 (1998).

²²⁵Matthew Adler, the strongest proponent of the rights as "rights against rules" thesis, acknowledges this. See Matthew D. Adler, *Rights, Rules, and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371, 1374-75 (2000).

²²⁶Dorf, *Heterogeneity*, *supra* note 222, at xx.

²²⁷See, e.g., Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1325 (2000); Dorf, *Heterogeneity*, *supra* note 222, at (agreeing that "rights as rights against rules is a plausible first-order approximation of much Supreme Court doctrine").

²²⁸See *Johanson v. Texas*, 491 U.S. 397 (1989).

²²⁹Matthew D. Adler, *Personal Rights and Rule-Dependence: Can the Two Coexist?*, 6 LEGAL THEORY 337, 344 (2000).

simpliciter or rights-against-rules.²³⁰ If constitutionally protected speech rights are rights *simpliciter* that guarantee particular “states of the world,” then these rights patently do not apply outside the United States, as a purely descriptive matter. For example, an American citizen’s speech in Saudi Arabia can be proscribed by the Saudi Arabian government, even where the Kingdom cannot show a compelling governmental interest or that there are alternative means by which the American citizen’s communication can be made. Even if the American citizen’s speech in Saudi Arabia would produce benefits in the United States²³¹ – a highly plausible conjecture – this does not translate into a *constitutional* speech right for the American citizen to speak in Saudi Arabia. The alternative would be normatively strange indeed: it would mean that American citizens who travel abroad are immune from foreign country regulations that do not comport with American constitutional requirements. Thus, if speech is a right *simpliciter*, it does not apply abroad and a threshold requirement for the *NAACP* adjustment accordingly cannot be satisfied.

On the other hand, the threshold requirement probably is satisfied if speech is a right-against-rule. Speech as a right-against-rule would mean the following: although Saudi Arabia is not subject to American constitutional limitations and surely can regulate the visiting American citizen as it chooses,²³² Congress’ (or a state’s) regulation of its citizen’s extraterritorial conduct²³³ is subject to constitutional limitations. Even if the precise contours of the constitutional rights vary as between domestic and foreign speech,²³⁴ such a regulatory structure would be consistent with a right-against-rule regime rather than a right *simpliciter* regime: the constitutional right does not guarantee a particular state in the world, but instead places limits on how American polities can regulate.²³⁵ There is no reason to think that a rule that foreign judgments are to be enforced categorically would fall outside the purview of a right-against-rules. Nevertheless, although the threshold requirement thus would be satisfied, an enforcement rule ultimately would not satisfy the *NAACP* exception because, as discussed above, it would not risk the wholesale evisceration of speech rights.

²³⁰Compare Adler, *Response*, *supra* note 224, at 1374 (arguing that free speech doctrine is characterized as fitting the structure of a right-against-rules) with Fallon, *As-Applied Challenges*, *supra* note 226, at 1365 (arguing that constitutional rights, including free speech, “can be violated without a rule being centrally involved” as a positive matter) and Dorf, *Heterogeneity*, *supra* note 222, at xx (xx).

²³¹See Van Houweling, *The Next Yahoo!*, *supra* note 8, at 714-15 (making this argument).

²³²Subject to the limitations imposed by international human rights law, that is.

²³³For discussion of the scope of a country’s extraterritorial prescriptive jurisdiction, see DIETER LANGE AND GARY BORN, *THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS* 35-40(1987); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-04 (1987).

²³⁴See *Reid v. Covert*, 354 U.S. 1 (1957) (concurrences of Frankfurter, Harlan).

²³⁵As a matter of black letter law, this best characterizes the grand jury and jury guarantees that are provided by Article III, §2 and the Fifth and Sixth Amendments. See *id.*

B. *Normative Considerations.* Having just shown that “enforce foreign judgments” would not trigger constitutional scrutiny under either the *Cloud Books* formulation or the adjusted formulation, the question remains whether such an outcome is normatively desirable.

I believe it is. Deciding otherwise – *i.e.*, embracing IEE – would erase the public/private distinction in the same way that *Shelley v. Kraemer*’s attribution rationale did.²³⁶ *Shelley*’s reasoning was problematic insofar as it led to the conclusion that private contractual agreements should be subject to constitutional constraints if one party sought to enforce her contractual right in a court of law. There were two essential parts to the *Shelley*’s rationale, only one of which was problematic: the untroubling conclusion that judicial enforcement of the contract constituted state action and the difficult holding that the content of the contractual right was to be attributed to the state for purposes of the state action doctrine. IEE – applying constitutional scrutiny if judicial enforcement creates effects on speech – disregards the source of the legal right and reproduces the overconstitutionalization that *Shelley* allowed but that the post-*Shelley* case law rejected. A state statute restricting newspaper solicitations, sign posting, or public criticism of a type of psychological therapy would pose serious First Amendment questions, yet recent court decisions have enforced these identical restrictions without constitutional review when they were created contractually because the courts have determined there was no state action.²³⁷ IEE would risk re-constitutionalizing the enforcement of these contracts insofar as enforcing any and all of them clearly has “effects” on speech.

Indeed, IEE either opens the floodgates of constitutional review or demands unprincipled line-drawing to keep the gates in check. If constitutional scrutiny is triggered due to the speech-effects of enforcing foreign judgments, then it would follow that a wide array of matters that do not currently draw constitutional scrutiny ought to. For example, constitutional review also would be appropriate when there are enforcing domestic judgments has effects on speech. Similarly, constitutional review would be necessary in respect of the judicial or administrative enforcement of domestically sourced legal rights that have speech-effects. The rationale of IEE also would suggest that procedural rules that do not directly regulate conduct but that have effects on speech, such as evidentiary rules,²³⁸ ought to be subject to constitutional review.

One who wished to narrow the scope of IEE to avoid such expansive

²³⁶See *supra* Part III.

²³⁷See *supra* Part II.B.2.

²³⁸Evidentiary rules have not been subject to free speech limitations under current law. See Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 696-96 (1997); Christopher J. Peters, *Free Speech and Evidentiary Rules*, (draft on file with author).

constitutional review might suggest that constitutional review is limited to the enforcement of *judgments*, or perhaps to *foreign* claims, but any such line-drawing would be difficult to justify on principled grounds. To be stricter with judgments than legal claims is precisely the converse of ordinary American doctrines, under which courts have a nearly ironclad obligation to enforce foreign judgments but significant leeway to decline to apply foreign law.²³⁹ Nor is it easy to explain on principled grounds why the source of the legal right – foreign or domestic – should be the dividing line between when enforcement does and does not trigger constitutional review. If anything, insofar as American constitutional constraints paradigmatically are limitations on *American* governments and sculptors of the *American* political culture, it would seem that constitutional scrutiny is more readily justified for legal rights whose source is domestic rather than foreign.

In short, a doctrine that conditions constitutional scrutiny on the effects of enforcement is the analog in the doctrine of incidental burdens to *Shelley's* attribution of the substance of the contractual right to the government in the state action context. The two approaches are dissimilar only to the extent constitutional scrutiny is reserved for “substantial” or “significant” effects. The narrower is the scope of “substantial,” the more the public/private distinction is preserved. As shown above, case law in the state action context has rejected *Shelley's* approach of attributing the content of enforced contractual rights to the government.²⁴⁰ Part III showed that although there is nothing *illogical* with *Shelley's* approach, the post-*Shelley* case law suggests that attributing to the State the substance of a contract's rights does not comport with American cultural sensibilities.²⁴¹ Attribution defeats the public/private distinction, and maintaining this dichotomy seems to be important to American political culture. To the extent the normative argument for preserving the public/private dichotomy is sound in the state action context, it would be unwise to trigger constitutional review because enforcement has effects on speech. This suggests that only narrow scope should be given to any substantial effects exception in the incidental burdens context. The *NAACP*-inspired adjustment to the *Cloud Books* formulation accordingly is a promising approach, as a normative matter. By constitutionalizing only those effects that threaten absolute deprivation of the underlying constitutional right, it is a relatively bright line rule²⁴² that preserves the public/private distinction without unacceptably imperiling constitutional rights. Applied to enforcement determinations, it leads to a rejection of the IEE approach, except for those circumstances where enforcement would risks wholly undermining a

²³⁹See *Baker v. General Motors*.

²⁴⁰See *supra* Part III.B.3.

²⁴¹See *supra* Parts III.B.1-2.

²⁴²But see *supra* note 216 (noting such a rule's indeterminacy).

constitutional right in accordance with the *NAACP* adjustment to the *Cloud Books* formulation.

V. THE PROBLEMATICS OF OVER-CONSTITUTIONALIZING

The upshot of the analysis in Part III and IV is this: the Constitution does not determine whether American courts should enforce Un-American Judgments. Court decisions to the contrary are properly described as instances of erroneous over-constitutionalization. This Part V shows that these courts' mistakes are not merely technical in nature, but that they impose several real world costs.

A. *Concealing the Need to Decide.* To conclude that the enforcement of Un-American Judgments is not unconstitutional does not mean that such judgments should be categorically enforced. What it does mean is that whether such foreign judgments should be enforced is not constitutionally predetermined, but is something that must be *decided* as a matter of policy. Obscuring the need to decide with illusions of false constitutional necessity is the first pernicious effect of over-constitutionalization.

B. *Institutional Considerations: Who Should Decide?.* Although there are strong reasons to conclude that governmental officials outside the judiciary are responsible for participating in interpreting the Constitution, the non-judicial branches typically defer to judicial interpretations of the Constitution.²⁴³ The practical effect of constitutionalizing the enforcement of Un-American Judgments accordingly is to make such decisions matters of judicial determination. De-constitutionalizing the question makes clear the role that the other branches properly should play in formulating an enforcement policy.

At the very least, it is clear that the other branches of the federal government have power under the Constitution to regulate the enforcement of foreign judgments. The President has express constitutional authority to negotiate a treaty concerning the enforcement of judgments, to which the Senate could give its advice and consent.²⁴⁴ Both houses of Congress could act in concert with executive action, as happened with NAFTA and other recent international agreements.²⁴⁵ The President could enter into a so-called "executive agreement" with other countries, which would "requir[e] no ratification by the Senate or approval by Congress,"²⁴⁶ establishing an

²⁴³See John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988) (noting and criticizing this).

²⁴⁴PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 64-70 (2002); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) ("the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates").

²⁴⁵See Ackerman & Golove, *Is NAFTA Unconstitutional?*, *supra* note 3, at xx.

²⁴⁶*American Insurance Association v. Garamendi*, 123 S. Ct. 2374, 2386 (2003).

enforcement policy. Though not entirely free from doubt, the President may have the power to issue an executive order enumerating the considerations that should inform the determination of whether foreign judgments should be enforced even without specific congressional authorization.²⁴⁷ Congress could enact legislation that specifies the criteria that courts should consider in deciding whether to enforce such foreign judgments.²⁴⁸ In fact, it is only in the absence of action by either the federal executive or legislative branches that determinations of whether foreign judgments are to be enforced fall – as they have until now for the most part²⁴⁹ – to the judicial branch.²⁵⁰

Pure doctrinal analysis does not fully capture over-constitutionalization's costs of channeling enforcement determinations to the judiciary. A consideration of the criteria relevant to determining whether Un-American Judgments should be enforced suggests that the more political branches of government are better suited to laying down a general policy as regards the enforcement of Un-American Judgments. There are two plausible sets of criteria. The first contains the *sui generis* political considerations that relate to the United States' bilateral relations with a particular country. To provide an analogy, as part of the effort to conclude the Iranian hostage crisis, the United States agreed to suspend American claims against Iran that were pending in American courts without suspending claims that were pending against all other governments.²⁵¹ Under widely held notions of democracy and the allocation of powers effectuated by our Constitution, such *ad hoc*, politically-based determinations are best made by the President, or perhaps

²⁴⁷Such executive action may be upheld even in the absence of federal legislation concerning foreign judgments insofar as it were an exercise of the President's foreign affairs powers. *See generally* *Dames & Moore v. Regan*, 453 U.S. 654 (1981). On the other hand, outside the context of a crisis, such executive action might be deemed to trench on Congress' powers. *See* TRIMBLE, *supra* note 243, at 138-140.

²⁴⁸Congress' power to do this would rest on the Constitution's grant of the power to make any law "necessary and proper" to "carry into execution" the foreign relations power and the commerce clause power. *See id.* at 79-80. Even under the contemporary quasi-Tenth Amendment doctrine of anti-commandeering, which significantly limits the federal government's powers to regulate the States, such federal law emanating from either the executive or legislative branches would bind states courts. The Tenth Amendment's prohibition against the federal government's commandeering state government has been held to apply to the state executive and legislative branches, but not to the state judiciary. *See* *Printz v. United States*, 521 U.S. 898, 928, 935 (1997); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2247-49 (1998) (making this point).

²⁴⁹With the exception of the enforcement statutes discussed *supra* in Part I.A.

²⁵⁰Of course, even if the executive or legislative branches were to act, it is likely that courts still would play an important role in implementing the legislative or executive enactments. Although well-drafted legislation can narrow the political judgments that courts would be required to make, courts in all likelihood still would be responsible for applying the operative rules or principles identified by the executive or legislative in concrete cases. (This is not necessarily the case, of course. It is possible, for instance, that the adjudication of foreign judgments could be statutorily directed to specialized administrative tribunals).

²⁵¹*See* *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

Congress, but most definitely *not* by courts.²⁵²

The second set of criteria contains the considerations that inform a principled approach to govern the enforcement of foreign judgments generally. There are good reasons to think that the more political branches – the federal executive and legislature – also are best situated to making these determinations in respect to Un-American Judgments. As explained in a companion piece,²⁵³ careful thought suggests that there are five distinct sets of interests that are implicated in enforcement determinations: each of the parties, the country that issued the judgment, the country that is being asked to enforce the judgment, and the international system. Deciding which of these interests are deemed legally relevant for purposes of deciding whether to enforce the foreign judgment, and determining what is to be done when the relevant interests point in different directions as regards enforcement such that tradeoffs must be made, involves recourse to extra-legal, value-laden principles that are best characterized as political in nature. As that piece shows, determining whether Un-American Judgments are to be enforced is best performed by the more political branches of government.²⁵⁴

C. *Overlooked Substantive Considerations: The Pattern of Wholly America-Centric Analysis.* In all three cases discussed above in Part II where American courts refused to enforce Un-American Judgments, invocation of the “big gun” of the First Amendment led the courts to undertake a wholly United States-centric analysis. Absent from the legal analysis was any serious consideration of the nature of the foreign country’s or foreign plaintiff’s interests, or the possible effect that non-enforcement might have on international law. The courts thus ignored factors that would appear to be relevant to determining fair outcomes.

Consider first the *Matesvitch* case. It was legally irrelevant to the court’s analysis that both parties had been residents of England at the time Matusевич wrote and published his letter, that the letter appeared only in an English newspaper, and that the subject of their dispute (the BBC’s hiring policies) had little palpable connection to the United States and can best be described as a matter of virtually sole interest to England (and, perhaps, the then Soviet Union).²⁵⁵ While public figures have little protection from defamation in the American press under American law, England has elected a

²⁵²See *Baker v. Carr*, 369 U.S. 186, 211 (1962) (noting that foreign relations issues that “turn on standards that defy judicial application,” “involve the exercise of a discretion demonstrably committed to the executive or legislature,” and that “uniquely demand single-voiced statement of the Government’s views” properly fall to the executive and legislative branches, not to courts).

²⁵³See Rosen, *Un-American Foreign Judgments*, *supra* note 2, at xx.

²⁵⁴See *id.*

²⁵⁵The dissenting Maryland justice noted that these facts were irrelevant to the majority’s analysis. See *Telnikoff*, 702 A.2d at 256 (Chasanow, J., dissenting).

libel regime under which the honor of public figures is protected no less than that of private citizens.²⁵⁶ What precisely were the American interests at stake that justified overriding these countervailing British interests? The court did not provide an answer, presumably because it believed that the First Amendment trumped any such inquiry. If the First Amendment was not applicable, then there is no reason to conclusively presume that these considerations are irrelevant.

A similar pattern can be seen in the *Bachchan* decision: The court gave absolutely no consideration to the interests of England and the non-American plaintiff in having the judgment enforced.²⁵⁷ India Abroad was not sued for what it published in its United States newspaper, but for its English publication and for the Indian newspaper story that was based on information that India Abroad had wired to India. Both India and England have defamation law that is more pro-plaintiff than that of the United States. Which substantive law should apply when false information is published outside of the United States about a non-American? How important are Mr. Bachchan's interest and England's interest in the matter? How does the fact that India Abroad voluntarily elected to do business in England, and to wire information outside of the United States, affect the determination of the enforcement question? The court addressed none of these factors, however, presumably because it believed that the First Amendment categorically precluded enforcement.

Similar United States-centric analysis is found in the district court's decision in the *Yahoo!* case. To its credit, the district court opinion did not wholly entirely ignore France's interest.²⁵⁸ In its haste to advance to its First Amendment analysis, however, the court erected a straw man. The court concluded that France did not have an interest in the enforcement decision because refusing to enforce the foreign judgment did not affect the "the right of France or any other nation to determine its own law and social policies."²⁵⁹ This is true but beside the point. If Country B allows people within its territory to aid and abet persons in Country A from breaking Country A's laws, Country B undercuts Country A's ability to make *efficacious* laws that advance its social policies. This was the gravamen of the plaintiff's claim: that the ready access to Nazi auction sites that Yahoo! provided undermined France's ability to enforce its law and vindicate its chosen social policy.²⁶⁰ It follows that France had an interest in the U.S. district court's enforcement decision, notwithstanding the federal judge's determination to the contrary.

²⁵⁶See *Anglicizing Defamation*, *supra* note ?, at 933.

²⁵⁷See *Bachchan*, 585 N.Y.S. 2d at 661-65.

²⁵⁸See *Yahoo!*, 169 F. Supp. 2d at 1186 ("France clearly has the right to enact and enforce such laws as those relied upon by the French Court here.").

²⁵⁹*Id.*

²⁶⁰See *infra* note ? and accompanying text.

Overlooking France's interest led the *Yahoo!* court to label as legally irrelevant the most pertinent fact to the enforcement decision. Yahoo! argued that the Internet is a borderless medium, such that any action that Yahoo! might undertake to restrict access to Nazi sites would affect people outside of France.²⁶¹ The plaintiffs argued, however, that Yahoo! already had the technology to identify users' geographical locations and hence to screen out only computer users in France. The High Court in France made a factual finding that Yahoo! had this capability.²⁶² The U.S. district court, however, concluded that this factual question was legally irrelevant.²⁶³ Why? Due to the First Amendment, of course.²⁶⁴ This is a double mistake. As shown above, the First Amendment doesn't resolve the question. Good sense suggests, and in a companion piece I will show, that whether Yahoo!'s compliance with French law would result in censorship of Nazi auction sites in the countries in the world where such sites are not prohibited is legally relevant to determining whether France should be able to keep Yahoo! from acting in ways that undermine the efficacy of French law.

CONCLUSION

Laws created by foreign governments that could not have been enacted by governments in the United States due to the Constitution surely are "Un-American." Not only do they emerge from non-American polities, but they incorporate values that diverge from core American constitutional commitments. Such foreign laws are not, however, unconstitutional, for they are not products of the United States political community. Nor is it unconstitutional for an American court to enforce a foreign judgment based on such a law. The substance of the laws are not properly attributed to the United States under contemporary state action doctrine, and wisely so. Likewise, the effects of enforcing foreign judgments should not trigger constitutional scrutiny under the doctrine of incidental burdens. The recent courts that have concluded that enforcing Un-American judgments itself would be unconstitutional have misanalyzed the issue. In so doing, they have utilized a wholly United States-centered analysis that omits many considerations that are crucial to arriving at just outcomes.

The categorical refusal to enforce such judgments harms plaintiffs that have prevailed abroad, undermines the ability of foreign countries to advance

²⁶¹*Yahoo!*, 169 F. Supp. 2d at 1185; *see also* Post and Johnson.

²⁶²*See supra* note 58.

²⁶³*See Yahoo!*, 169 F. Supp. 2d at 1191 & n. 10 ("the Court concludes that Yahoo!'s ability to comply with the order is immaterial to the question of whether enforcement of the order in the United States would be constitutional."); *id.* at 1194 (finding that the French parties "have failed to show the existence of a genuine issue of material fact or to identify any such issue the existence of which could be shown through further discovery.").

²⁶⁴*Id.*

political commitments that diverge from American constitutional values, and creates needless costs and uncertainty for the international community. The illusion that the Constitution answers the enforceability question obscures the value-laden political judgments that inevitably inform the determination of whether Un-American Judgments should be enforced. Disguising such political judgments in the garb of constitutional necessity channels enforcement determinations from the more political branches to the courts and erroneously narrows the scope of the President's and Congress's powers in respect to foreign affairs. This is particularly unfortunate. There are good reasons to think that foreign relations generally, including the deeply political considerations that are involved in formulating a policy as regards enforcement, is a domain best suited to the more political branches. 1