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Article

Should “Un-American” Foreign Judgments Be Enforced?

Mark D. Rosen†

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INTRODUCTION

Plaintiffs frequently prevail only to find postjudgment 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 are frequently absent—the plaintiff can achieve a meaningful victory only if it can enforce the judgment in the court of a country where the losing party or its assets can be found. The courts of most countries, including the United States, enforce virtually all such so-called foreign judgments under the doctrine of comity.

What if the foreign judgment, however, is based on a foreign law that the Constitution precludes an American polity from enacting? Consider, for instance, a French judgment founded on a French hate speech law that First Amendment jurisprudence would not allow the Congress to
Similarly, what should a U.S. court do with an English defamation judgment based on British libel law, which is more pro-plaintiff than current constitutional doctrine allows American law to be?

All American courts to date that have confronted this question have concluded that it would be unconstitutional to enforce such foreign judgments. I argued in an earlier article that this conclusion 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. Having shown in that article that the Constitution does not answer the question of whether American courts can enforce “un-American” judgments, this Article generates a framework for identifying and analyzing the policy considerations that properly inform the determination of whether such judgments should be enforced. The framework also sheds considerable light on the enforcement of the usual run of foreign judgments by identifying some unspoken yet nonaxiomatic assumptions that underlie the comity case law.

In addition to providing guidance as to how as a substantive matter enforcement decisions ought to be made, this Article’s analysis has institutional implications. Drawing on game theory and Rawlsian political theory, the Article shows why deciding whether “un-American” foreign judgments are to be enforced almost always implicates deeply political questions that are best decided by the more political branches under conventional theories of democracy. Moreover, even after the difficult value judgments have been made, much of the decision making turns on information that is difficult for a court not only to access but also to process. Treaties and executive agreements, both of which typically involve ex ante negotiations among countries, may be the most promising mecha-

1. This precise question was presented in Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). The facts of the case are discussed infra Part I. The court’s legal reasoning is critiqued in Mark D. Rosen, Exporting the Constitution, 53 EMORY L.J. (forthcoming Spring 2004) (manuscript at Part II.C).

2. This question was presented in Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992), and in Telnikoff v. Mateusvitch, 702 A.2d 230 (Md. 1997). The facts of both cases are discussed infra Part I. The courts’ legal analyses are discussed and critiqued in Rosen, supra note 1 (manuscript at Part II.A–B).

3. See Rosen, supra note 1 (manuscript at Part II.A–B).

4. See id. Part III.

5. See id. Part III (manuscript at 14–32).

nisms for generating a policy as regards un-American judgments. This insight is particularly timely, for the United States is currently participating in a multilateral attempt to draft an international treaty concerning the enforcement of foreign judgments under the auspices of the Hague Conference on Private International Law.

If the executive and legislative branches do not ultimately produce a policy with respect to un-American judgments, it will be left to the courts to decide whether such judgments are to be enforced. In the main, this is how things currently are. This Article’s analytical framework offers useful guidance to courts in the event the status quo does not change, though several crucial determinations that must be made admittedly push the limits of judicial competency. (Indeed, this is one reason why formulating an enforcement policy is best left to the more political branches of government.)

To be clear, the Article does not in the end endorse a game theoretic, Rawlsian, or any other particular approach to foreign relations. The unwillingness to champion any single normative framework is a reflection of the Article’s conclusion that deciding which approach to adopt is an intensely subjective, political process. The Article does, though, elaborate some of the implications of each normative rubric so that the decision maker understands what is entailed by a commitment to either game theory or Rawlsianism. Moreover, the Article shows that, under both game theoretic and Rawlsian approaches, many of the standard objections to enforcing un-American judgments fall away upon careful analysis. Most of the time, nonetheless, the ultimate decision as to whether an un-American judgment should be enforced requires a trade-off among competing interests that invariably calls upon the decision maker’s antilegal commitments.

Finally, this Article’s analysis underscores the practical costs of the contemporary case law’s erroneous analysis. To date, courts have categorically refused to enforce un-American judgments on the view that do-

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7. For an important caveat, see infra note 180.


9. Federal courts could throw the question back to other branches of government by finding enforceability to be a nonjusticiable political question, but this seems unlikely. The political question doctrine is seldom successfully invoked, it never has been relied on in this context, and, in any event, it would limit only federal courts, not state courts. See generally Rachel E. Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 COLUM. L. REV. 237, 298 n.368, 300–19 (2002).
This Article shows that a broad range of approaches to international relations gives rise to the conclusion that such a categorical refusal to enforce un-American judgments is unwise. Rather, un-American judgments should be enforced at least some of the time.

The Article is divided into five Parts. To illustrate concretely what is at stake, the first Part briefly surveys the cases in which American courts have been asked to enforce un-American judgments. Part II identifies the lessons that can be drawn from the extensive case law concerning the enforceability of simple foreign judgments—those where the underlying legal right could have been created by an American polity. The case law is a helpful first step, but it is insufficiently robust to provide much guidance with regard to un-American judgments beyond identifying the various parties and institutions whose interests are affected by enforceability determinations.

Part III argues that trading off among the parties and institutions when their preferences conflict with respect to the enforcement of foreign judgments frequently requires recourse to ante-legal political commitments. Part III illustrates this by drawing on two very different normative approaches to foreign relations, game theory and Rawls’s international political theory. Although there are other approaches to international relations, Part III explains why analyzing foreign judgments from the vantage point of these two perspectives is particularly instructive. Part III then develops the basic analytics of game theory and Rawlsian theory and applies each to the case of simple foreign judgments. Interestingly, although the doctrines each theory prescribes are importantly different in several fundamental respects, both game theory and Rawlsian theory lead to the common conclusion that most simple foreign judgments should be enforced.

Part IV extends the game theoretic and Rawlsian approaches to the more complex case of un-American judgments. The analysis demonstrates why, far more than in the case of simple foreign judgments, determining whether un-American judgments should be enforced is best handled by the more political branches of government. Though both game theory and Rawlsian theory reject the view that American courts categorically should not enforce un-American judgments, the two approaches lead to different enforcement determinations much of the time. Part V synthesizes the previous Part’s conclusions into a workable framework, which is then applied to the cases surveyed in Part I in which courts have been confronted with un-American judgments. A short conclusion follows.

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10. See Rosen, supra note 1 (manuscript at Part II).
I. WHAT IS AT STAKE

Our analysis of un-American judgments will be aided by understanding some concrete scenarios where the issue of enforcing such foreign judgments has arisen. This Part briefly surveys three cases. The reasoning used by each court will not concern us now, for all three utilized defective constitutional analysis that led the courts to decline to enforce the foreign judgments. What is important is to get a sense of the issues that arise when such foreign judgments are presented to American courts.

The prevailing plaintiff in Telnikoff v. Matusevitch had been a leading activist for human rights in the Soviet Union since the 1950s. Telnikoff was a resident of England at the time that defendant Matusevitch wrongly accused him of being anti-Semitic and racist in a letter published in the Daily Telegraph, an English newspaper. The letter concerned the British Broadcasting Company’s recruitment policies for their Russian service. Telnikoff sued for defamation in English court. Under English law, defendant Matusevitch had the burden of proving that the allegedly defamatory remarks were true, whereas under American law, the plaintiff would have had to show that the defendant had asserted falsehoods with malice since plaintiff Telnikoff was a limited public figure. Telnikoff was awarded £240,000 in damages, but Matusevitch relocated himself and his assets to the United States before Telnikoff could collect. Telnikoff accordingly sued in courts in the United States to enforce his English judgment.

The prevailing plaintiff in Bachchan v. India Abroad Publications, Inc. was a non-American living outside of the United States who had been libeled by a false news report that had appeared in an English news-
The defendant, India Abroad, was a New York news service with a subsidiary in England. India Abroad transmitted reports internationally and printed newspapers in the United States and England. The story in question, which had been written by a reporter in London, falsely 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 news service’s English subsidiary printed and distributed a copy of India Abroad in England. The story also was reported in an issue of the defendant’s New York newspaper.

Mr. Bachchan sued for defamation in England for the story that had appeared in the English newspaper, but not in India Abroad’s New York paper. The English court applied English defamation law. In contrast to what would have been necessary under U.S. defamation law, Mr. Bachchan was not required under English law to show that the press defendant acted with malice. The English court 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.

In Yahoo!, Inc. v. La Ligue Contre le Racisme et L’Antisemitisme, two French nonprofits dedicated to eliminating anti-Semitism faced off against Yahoo!, a California-based Internet service provider. French law prohibits the exhibition of Nazi propaganda and artifacts for sale—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.

22. Id. at 661–62.
23. Id. at 661.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 662.
30. See Rosen, supra note 1 (manuscript at Part II.A).
32. Id.; see 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, 246 n.85 (1994) (noting that Mr. Bachchan’s attorney argued that “assets were unavailable in Britain”). See generally id. at 256–62 (praising the Bachchan decision).
34. Id. at 1183.
35. Id. at 1184.
36. Id. at 1189.
Plaintiffs sued Yahoo! in a French court for violating French 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) by only those computers that were sitting in France. It ordered Yahoo! to do so, and imposed a penalty of 100,000 Francs (approximately U.S. $13,300) for each day of noncompliance.

The Yahoo! computers that were ordered to be reconfigured and Yahoo!’s assets, however, were located in the United States. Yahoo! did not voluntarily comply with the French court’s order. The plaintiffs would have had to sue in a U.S. court to enforce the French order. Yahoo! acted first, however, seeking a declaratory judgment that enforcing the French order would violate the First Amendment. The U.S. district court refused to enforce the foreign un-American judgment, just as the Bachchan and Matesuvitch courts did.

II. LESSONS AND LIMITS OF THE COMITY CASE LAW

Though American courts only recently have grappled with un-American judgments, they long have confronted judgments from foreign countries. Many such foreign judgments have been predicated on foreign laws with no analogues in American law, and still others on foreign laws that reflected policies that differed from domestic policies unrelated to constitutional issues. This Part surveys the American doctrines that have been developed in respect of such “simple” foreign judgments for the purpose of drawing guidance vis-à-vis un-American judgments. The comity case law provides a helpful first step, though it is insufficiently developed to resolve the enforcement questions that are presented by un-American judgments. In fact, the analysis that follows identifies some deficiencies that equally apply to the doctrine governing the enforcement of simple foreign judgments.

37. Id. at 1184.
38. Id.
39. Id. at 1191 n.10 (noting the “French Court’s factual determination that Yahoo! does possess the technology to comply with the French order”).
40. Id. at 1185.
41. The 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.
42. See id. at 1186.
43. Id.
44. See id. (manuscript at Parts I-II) (discussing three recent decisions and noting that the United States “has been at the vanguard of enforcing foreign judgments” since the Supreme Court’s 1895 decision in Hilton v. Guyot, 150 U.S. 113 (1895)).
45. See id. (manuscript at Part II) (discussing the enforcements of judgments that were contrary to American public policy).
A. THE NORM OF ENFORCEMENT

As a matter of positive law, American courts almost always enforce foreign judgments under a comity analysis. 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.” Because the Constitution almost categorically requires one State to enforce sister State judgments, 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 utilized procedures that were not fundamentally unfair. If these conditions are met, the Restatement instructs that 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.” This last caveat is what is referred to as the public policy exception. The norm of enforcement is so strong that virtually all jurisdictions have rejected the so-called reciprocity doctrine, adopted by the United States Supreme Court in the nineteenth century, which conditioned American enforcement on the foreign country’s past enforcement of American judgments.

The handful of statutes and treaties that address the enforcement of specific types of judgments or their analogues—such as the Uniform Foreign Money-Judgments Recognition Act and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral

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46. See id. (manuscript at Part I).

47. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971); see also id. § 98 (stating that 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.

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

49. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92, 98 cmt. a (1971).

50. Id. § 117 cmt. c.

51. See id. This 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, 522 U.S. at 233 (stating that “[the Court’s] decisions support no roving ‘public policy exception’ to the full faith and credit due judgments”).

52. The Supreme Court introduced the doctrine of reciprocity in Hilton v. Guyot, 159 U.S. 113 (1895). Most jurisdictions have rejected it. See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1191 (3d ed. 2000). For a good discussion of why the doctrine of reciprocity does not bind state courts, and probably does not bind federal courts sitting in diversity jurisdiction, see id.

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. There is no reciprocity requirement.

As I have shown elsewhere, both caveats to the general rule of enforcement have been construed narrowly. Most pertinent for present purposes, the vast majority of American courts have interpreted the public policy exception narrowly. Enforcement is deemed to violate public policy only if the judgment is “repugnant”; a common formulation is that “the 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...’” Courts refer to the public policy exception as a “high standard” that is “narrow in scope,” and as a doctrine that is available only in “exceptional cases” or the “rare case.” As one court has stated:

[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.”

Indeed, the Restatement (Second) of Conflict of Laws provides that foreign judgments should be enforced even if “the original claim could not have been maintained in a State of the United States.” Case hold-
B. POLICIES IDENTIFIED IN THE COMITY CASE LAW

The late nineteenth century United States Supreme Court case of Hilton v. Guyot provided what has become the canonical explanation of comity as it relates to the enforcement of foreign judgments:

“Comity,” in the legal sense, is neither a matter of absolute obligation . . . nor of mere courtesy and good will . . . . But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton thus alludes to three sets of interests: the international system, the persons who are under the protection of American law, and the country that has issued the judgment.

Subsequent courts that have confronted requests to enforce foreign judgments have echoed these interests and provided guidance in understanding their content (as will be described in the immediately following paragraphs). With regard to the interests of the international system, courts have noted that enforcement “produce[s] a friendly intercourse between the sovereignties.” Among other things, this facilitates the smooth functioning of international business and the international system. As one court has observed, “the increasing internationalization of commerce requires that United States courts recognize and respect the judgments entered by foreign courts to the greatest extent consistent with our own ideals of justice. ‘Unfettered trade, good will among nations, and a vigorous and stable international—and national—economy demand no less.”

Hilton’s second set of interests—the interests of the persons under protection of American law—have been shoe-horned by recent courts into a res judicata style analysis. Foreign judgments are enforced to protect the party who has prevailed in the earlier litigation from having to relitigate and to keep one party from harassing another by filing endless lawsuits in different countries based on the identical transaction or occur-

63. See Rosen, supra note 1 (manuscript at Part I).
64. 159 U.S. 113 (1895).
65. Id. at 163–64. The Hilton Court did not ultimately enforce the judgment before it on the ground that France would not have enforced the United States’ judgment. See id. at 228–29.
66. Id. at 165.
68. Id. (quoting Tahan v. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981)).
69. See, e.g., Ackermann v. Levine, 788 F.2d 830, 841–42 (2d Cir. 1986).
Courts also have concluded that it is fair that the losing party be bound to the foreign judgment if the court that issued the judgment indeed had personal jurisdiction over the parties. These courts also have noted that enforcement can eliminate duplicative proceedings and thereby conserve scarce judicial resources, a res judicata benefit that does not inure to the direct benefit of the litigating parties.

With regard to Hilton’s third set of interests, contemporary courts have understood comity as reflecting the appropriate respect that one sovereign should accord the official acts of another sovereign. Such language and style of reasoning draw on a similar conception of sovereignty that is found in the act of state doctrine. The seminal early cases articulating this understanding utilized reasoning that reflected the view that sovereignty carried with it some inevitable content. For example, the Supreme Court stated such things as “[e]very sovereign State is bound to respect the independence of every other sovereign State” and “[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute . . . . Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty . . . .” This form of reasoning presumes that legal categories (such as “sovereignty”) have some innate, predetermined content. Such a jurisprudential assumption is open to question. At the very least, there are strong reasons to doubt the notion that sovereignty necessarily implies some set of powers and immunities; the rise of human rights law and international institutions such as the United Nations certainly has undermined the earlier, widely held view that sovereigns ipso facto can do whatever they wish within their borders. Arguments invoking the concept that sovereigns

71. See infra Part IV.A (explaining why this is so even if the losing party is an American and the judgment is based on law that an American polity could not have enacted).
72. See Panama Processes, 796 P.2d at 282.
73. See, e.g., In re Will of Brown, 505 N.Y.S.2d 334, 337 (Sur. Ct. 1986) (noting that comity reflects that “respect is due to the judicial act of another sovereign”); cf. Turner Entm’t Co. v. Degeto Film GmbH, 25 F.3d 1512, 1518 (11th Cir. 1994) (speaking of the “proper level of respect for the acts of our fellow sovereign nations” in the analogous context of “international abstention”).
78. See id. at 5–8.
79. See JOHN RAWLS, THE LAW OF PEOPLES 27 (1999) (referring approvingly to the proposition that “changes in the powers of sovereignty from one period to another arise
are owed certain respect accordingly are best understood not as assertions that sovereigns enjoy certain powers as an a priori matter, but as claims that comity is consistent with a widely held contemporary understanding that sovereigns enjoy a particular power.\textsuperscript{80}

Modern courts have introduced an additional argument in favor of enforcing foreign judgments.\textsuperscript{81} Enforcement under comity is said to promote the separation of powers interest of limiting judicial interference with the legislative and executive branches’ conduct of foreign policy.\textsuperscript{82} Behind this goal is the belief that the other two branches are more institutionally competent to construct a wise and coherent policy.\textsuperscript{83} This same understanding concerning the institutional competencies of the various branches is a cornerstone of the act of state and political question doctrines.
C. LIMITS OF THE COMITY CASE LAW

Courts invoking comity almost always draw on one or more of these policy considerations.\(^85\) The analysis tends to be *ipse dixit* in character, however, with courts merely reciting these considerations and then asserting the conclusion that the simple foreign judgment should be enforced.\(^86\) Perhaps this is because the courts are of the view that all considerations point to the conclusion that the foreign judgment should be enforced.\(^87\) This is incorrect, however. For instance, enforcing even simple foreign judgments imposes costs on the international system.\(^88\) Disregard of the countervailing considerations is particularly problematic when analyzing un-American judgments, for some of these drawbacks to enforcement are more acute than is the case with simple foreign judgments. For example, while it ordinarily might be fair to enforce a foreign judgment against a losing party, considerations might be different if the losing party is a U.S. citizen and the underlying legal right is premised on a foreign law that an American jurisdiction could not constitutionally enact.\(^89\)

Moreover, the canonical *Hilton* formulation omits mention of a prominent interested entity: the enforcing jurisdiction. To be sure, American interests are not wholly ignored under comity. If a foreign judgment violates “public policy,” then the public policy exception instructs that the judgment is not to be enforced.\(^90\) The public policy exception, however, is problematically undertheorized. Structurally, public policy is a “unilateralist” doctrine that considers only the interests of one jurisdiction and does not take account of the effects that follow in other jurisdictions.\(^91\) Why should public policy be unilateralist? Similarly, why is it the case that nonenforcement owing to the public policy exception is legislative branches’ administration of foreign policy. For this reason, the separation-of-powers norm of judicial noninterference, as a practical matter, is reflected in a comity doctrine that generously enforces foreign judgments and that does not apply a strict public policy exception.


\(^87\) See, e.g., Van Den Biggelaar, 978 F. Supp. at 858 (noting that U.S. courts “normally will give effect to . . . judicial acts of a foreign nation”); Panama Processes, 796 P.2d at 282 (observing that the present judicial trend is to acknowledge foreign judgments).

\(^88\) See infra Part IV.D.

\(^89\) See infra Part IV.A.2.

\(^90\) See supra Part II.A.

so rare? Comity and the public policy exception lack sufficient theoretical robustness to answer these questions. This inadequacy is particularly troublesome with regard to un-American judgments, for such judgments always implicate public policy concerns. 

D. LESSONS OF THE COMITY CASE LAW

The comity case law helpfully identifies the parties and entities whose interests are affected by enforcement determinations: the litigants, the country that has issued the judgment, the country that is being asked to enforce the foreign judgment, and the international system as a whole. Some recent cases have spoken of the relevant considerations in different terms, invoking res judicata and separation of powers considerations.

It seems to me that analysis of enforcement questions is facilitated if the inquiry instead focuses on the affected parties and entities. This suggestion to a large extent is a disagreement only with the organizational scheme recent courts have used; I do not suggest that the concerns captured by res judicata and separation of powers are irrelevant, only that they should be differently grouped.

There are very real benefits to reframing the inquiry with the “entity-by-entity” analysis I suggest. Fixing attention on the affected parties and entities reduces the likelihood that relevant considerations will be overlooked. It also clarifies the competing interests at stake when not all factors point to the same conclusion. Moreover, although the interests of the various parties and entities are not reducible to a common metric, it is easier to appreciate the tradeoffs involved when focusing on the parties and entities than when evoking such disparate conceptions as res judicata and separation of powers.

III. TWO ANALYTICAL FRAMEWORKS

A. OVERVIEW: NORMATIVITY’S INEVITABILITY

As shown above, the comity and public policy case law collectively recognize 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 interna-

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92. See Rosen, supra note 1 (manuscript at Part II) (discussing three recent un-American judgment cases that implicated public policy issues surrounding the First Amendment).

93. See supra Part II.B.

tional system. Although the comity case law suggests that all considerations point in favor of enforcement, this Part III shows that value-laden judgments inhere in this to-many-eyes neutral analysis.

To see this, consider the following two questions. First, although the stability of the international economic system surely is implicated by the enforcement of foreign judgments, why should that matter to an American governmental official who is deciding whether a foreign judgment should be enforced? Second, why should any weight at all be accorded to the sovereign interests of the country that has issued the judgment? Although traditional comity doctrine accords importance to these two factors, their significance is not self-evident. For example, game theory postulates that U.S. conduct of foreign relations, of which enforcement of foreign judgments is a part, should be strictly determined by what is in U.S. interests. At the same time, it cannot be assumed that game theory’s approach is some natural baseline for analyzing foreign relations. I illustrate this by fleshing out a competing “fairness” approach that is found in John Rawls’s The Law of Peoples, for which the interests of other countries and the international system are relevant.

Analyzing the enforceability of foreign judgments from game theoretic and Rawlsian perspectives, as the rest of this Part does, is valuable for several reasons. Although game theory and Rawlsian analysis do not exhaust the possible normative approaches that can be taken to international relations, the two methodologies reflect important competing

95. See supra Part II.B.
96. This Article is concerned with identifying a principled, generally applicable policy regarding foreign judgments. It is always possible that a country can formulate an enforcement policy that is specific to its bilateral relations with a single country. For example, 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 pending against other countries. See Dames & Moore v. Regan, 453 U.S. 654, 662–63 (1981). This Article will not address such sui generis matters.
97. See supra Part II.B.
98. For an excellent exposition of this approach, see Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. Chi. L. Rev. 1113 (1999). Although Goldsmith and Posner state that their analysis is positive rather than normative, see id. at 1115, it is hard to escape the conclusion that the two analyses merge together in their scholarship. At any rate, many other game theorists have advanced their approach in normative terms. See, e.g., Thomas C. Schelling, The Strategy of Conflict (1960).
99. Rawls, supra note 79.
impulses found in both the academy and government. This is not surprising, for game theory and Rawlsian analysis are polar opposites on a spectrum that runs the gamut of possible approaches to international relations: wholly self-interested analysis (game theory) versus what is “fair” from the vantage point of a disinterested third party (Rawls). Furthermore, the game theoretic and Rawlsian analyses provided below cut across many of the approaches to international relations identified by legal theorists and political scientists. Realism, liberal theory, constructivism, institutionalism, the managerial model, and the transnational legal process school for the most part aim to explain the way that international law and institutions operate, not to identify substan-


102. This is not to suggest that the Rawlsian approach discussed infra Part IV.C.3 is the only possible fairness-based rubric that could be taken to foreign relations. Surely it is not. Moreover, many have argued that the principles of international relations that properly follow from Rawls’ premises are very different from the principles that Rawls himself derives. See, e.g., Eric Cavallero, Popular Sovereignty and the Law of Peoples, 9 Legal Theory 181, 183 n.6 (2003) (collecting and discussing such sources). For example, whereas Rawls derives principles of noninterference and nonaggression, Allen Buchanan argues that Rawlsian premises also would give rise to principles of global equality of opportunity and democratic participation in important global institutions. See Allen Buchanan, Rawls’s Law of Peoples: Rules for a Vanished Westphalian World, 110 Ethics 697, 701, 718 (2000). Such important differences in designing a fairness-based rubric only underscore this Article’s claim that choosing among the competing approaches to foreign relations is an inherently subjective, ante-legal process inasmuch as subjectivity extends beyond the choice between game theory and fairness to how a fairness approach is elaborated. That is to say, although the theorists write as if their conclusions are a matter of cold logic, the conclusions to which they come are more likely a function of the different subjective sensibilities that they bring to their analyses. While space limitations preclude further exploration here into the competing fairness-based approaches, it is important to emphasize that this Article’s conclusions regarding the inherently political character of the choices regarding foreign relations are unaffected by the Article’s exclusive focus on Rawls’s fairness approach. It is also important not to treat Rawls’s account as metonymic with the fairness-based account of foreign relations. Rather, Rawls presents one plausible fairness approach. Given Rawls’ stature in contemporary political theory, though, his account is an influential starting point.

103. See, e.g., Krasner, supra note 101, at 237–38.


106. See, e.g., International Regimes (Steven D. Krasner ed., 1983); Guzman, supra note 100, at 1839–40.


tively preferable rules. Both game theoretic and Rawlsian analyses of the substantive question of whether foreign judgments should be enforced are relevant to more than one of these approaches to international relations.

Moreover, simultaneously analyzing enforceability in terms of both game theory and Rawlsian theory generates insights into each that easily could be overlooked if either were studied in isolation. Awareness of these two possible approaches makes clear that neither is axiomatic. Furthermore, each recommends a different legal test for analyzing enforceability and, particularly as regards un-American judgments, different ultimate conclusions. This suggests that whether to enforce foreign judgments much of the time requires recourse to thick theory, even if it is unstated in the analysis. Selecting which thick theory to use involves a value-laden, ante-legal choice. This is why formulating our country’s enforcement policy, particularly with regard to un-American judgments, is best undertaken by the more political branches.

The rest of Part III introduces the basics of game theoretic and Rawlsian analytics and applies them to simple foreign judgments. Part IV applies each approach to un-American judgments.

B. GAME THEORY

Under a game theoretical approach to international relations, countries are assumed to act in such a manner as to maximize their own parochial interests, where each country’s interests are independent of the well-being of other countries. The analysis that follows suggests two

109. See Abbott, International Relations Theory, supra note 100, at 362 (noting that “as a social science, IR [international relations] does not purport to be . . . a true ‘legal method’ capable of answering doctrinal questions”).

110. For instance, game theory could have relevance to all approaches, with the exception perhaps of liberal political theory and constructivism. A Rawlsian analysis would be amenable to all but a realist approach.

111. See infra Part IV.

112. While this Article’s game theoretic and Rawlsian analysis does not definitively establish the impossibility of locating an alternative approach to foreign relations that all persons could agree upon, none has been propounded in the scholarly literature. Moreover, recognition of the very different expectations that underwrite game theory and Rawlsian analysis casts doubt on the possibility of finding an approach that could generate consensus. For the classic locus of the effort to find a common denominator among persons bearing different foundational convictions, see Cass R. Sunstein, Legal Reasoning and Political Conflict (1996).

113. Game theory analyzes a player’s “payoff” for taking a given strategy by looking only at the costs incurred or benefits attained by that player. See Douglas G. Baird et al., Game Theory and the Law 9–14 (1994). It is not structurally incompatible with game theory’s assumptions to analyze payoff as if the player is at least somewhat “other regarding” and even to go so far as to count altruism as generating a benefit for the altruistic player, such that the value of its payoff turns in part on the welfare of other players.
important things. First, it is in the best interests of the United States that American courts enforce simple foreign judgments under most circumstances. Second, enforcement might not reliably come about if left to the courts to decide; bilateral agreements or a multilateral treaty may be necessary to ensure the enforcement of foreign judgments.

1. Foreign Judgments and the Prisoner’s Dilemma

A crucial step in game theory is identifying the costs and benefits that attend each combination of strategies. Whether or not the enforceability of foreign judgments can be usefully represented by one of game theory’s paradigmatic games depends on the values that are attached to the assorted costs and benefits of enforcement. The precise numbers are difficult to ascertain when the player is a country, rather than a company, and the relevant payoff is the country’s interest, rather than profit. This is because a country’s interest comprises a multitude of considerations, many of which are not readily measured. Even when they can be measured, moreover, many of the costs cannot be translated into a common metric. Below are two plausible characterizations of the relevant costs and benefits. While each characterization suggests that enforceability fits a different strategic game—the “prisoner’s dilemma” and the “stag hunt”—the difficulty of establishing which set of values better reflects reality is not problematic for present purposes because both games lead to the conclusion that it is in the parochial interests of the United States to enforce simple foreign judgments.

First, consider the costs of enforcing foreign judgments from the perspective of the United States. There are administrative costs of using judicial resources for purposes of enforcement. There might be additional costs if the law underlying the foreign judgment reflects policy considerations not shared by the United States, though such costs would be difficult to quantify. If the party against which enforcement is sought is a U.S. citizen, as frequently is the case, enforcement will result in a diminution of the citizen’s wealth, which will have some negative trickle-down effects on the U.S. economy. Other potential costs are subtle.

Game theorists, however, typically do not analyze payoffs in this way. See, e.g., ROBERT AXELROD, THE EVOLUTION OF COOPERATION 3 (1984) (studying behavior among “egoists” who consider only their parochial interests); SCHELLING, supra note 98, at CITATION (assuming that players’ interests are wholly parochial).

114. Different conclusions emerge with regard to un-American judgments. See supra Part I.

115. This is because game theory proceeds by identifying the “payoffs” that are enjoyed by the players when they elect different strategies, where each player’s payoff is a function of both her and the other party’s strategy.

116. See infra Part IV.D (discussing these potential costs which for the most part have been ignored by commentators).
Enforcing a foreign judgment makes foreign regulations more efficacious by eliminating the regulation-evading tactic of strategically keeping assets out of the regulating jurisdiction and ignoring its laws in reliance on the regulating country’s inability to enforce its judgments. Making foreign laws efficacious means that American companies will have to absorb the transaction costs of conforming their behavior to different countries’ laws, and such costs reduce net American wealth. Moreover, multiple countries’ different rules sometimes might impose inconsistent obligations on American companies, creating legal uncertainty.

Next, consider the benefits the United States receives from having U.S. judgments enforced by foreign countries. Enforcement closes off the strategy of evasion mentioned above, increasing the efficacy of U.S. law. Enforcement also means that wronged U.S. citizens can collect judgments awarded against parties with assets outside the United States. Finally, and probably most importantly, a legal regime in which countries enforce each other’s foreign judgments facilitates the conduct of international business, which benefits the United States. If countries did not enforce other countries’ foreign judgments, companies would be more reluctant to enter into international dealings on account of the fact that efficacious legal recourse would be more uncertain and costly. Companies might have to fully litigate matters in more than one jurisdiction, and may never successfully recover if the sued defendant shuffles its assets from country to country to avoid paying judgments.

The values that are attached to these various costs and benefits determine the type of strategic game that is presented by the question of whether foreign judgments should be enforced. It seems plausible to conclude that the benefits of enforcement are greater than the costs. Administrative costs are relatively small, and the income loss suffered by American interests likely is much smaller than the benefits of international business transactions that would be jeopardized under a regime of mutual nonenforcement, given the importance of foreign business transactions to the U.S. economy. The transaction costs of having to comply with foreign laws may be substantial, to be sure, but it once again is hard to believe that they would exceed the benefits of international business. Similarly, although the “costs” of enforcing a foreign judgment that runs against the grain of American sensibilities cannot readily be translated to a monetary metric and hence are technically incommensurable, it seems unlikely that most Americans, if asked to

117. To note that a decision involves a choice between or among incommensurables is not to say that a decision is not possible. Indeed, though most difficult choices involve incommensurability—should I work more hours or play the piano?—people make decisions under such circumstances all the time. Experience seems to bear out the hypothesis in the text above regarding the preference for the benefits of foreign trade over the costs of en-
choose between them, would select the benefits of not enforcing distasteful foreign judgments over the benefits of foreign trade.\textsuperscript{118}

To attach some rough but indicative sample values, assume that the net benefit to one country of having its judgment enforced is positive twelve (+12) and that the cost of enforcing a foreign judgment is negative two (-2).\textsuperscript{119} For present purposes, let us assume that the foreign country is faced with the same set of incentives.\textsuperscript{120} The resulting pattern of costs and benefits can be graphed using standard game theoretic conven-


\textsuperscript{118} Moreover, American law governing the enforcement of foreign judgments has long rejected a “reciprocity” requirement, i.e., a rule conditioning Country A’s enforcement of Country B’s judgments on Country B having enforced Country A’s judgments. \textit{See} \textit{Scoles et al., supra} note 52, at 1191 & nn.6–8. The absence of such a “stick” to bring about cooperation that maximizes joint utility at first might seem puzzling under a game theoretic perspective. On further consideration, it might reflect American concern that American refusal to enforce foreign judgments risks broadening the circumstances when foreign countries will refuse to enforce American foreign judgments, imperiling U.S. international business interests. Alternatively, it is possible to understand the absence of a reciprocity requirement as a deviation from game theory’s predictions. In any event, such deviation would not be relevant to this Article’s analysis, which considers possible normative approaches to international relations for the purpose of highlighting the trade-offs among incommensurable considerations that any rule governing the enforceability of un-American judgments necessarily will reflect. Trading-off is an inherently subjective process that accordingly is “political” in nature.

\textsuperscript{119} The analysis that follows later in the text is unchanged if the benefit to a country of having its judgment enforced is deemed to be much greater than the relative cost of enforcing the foreign country’s judgment. \textit{See infra} note 122.

\textsuperscript{120} This assumption will not always hold. Some countries may value each of the aforementioned benefits and costs differently than does the United States. Indeed, it is plausible that the actual costs and benefits experienced by a country are a result of factors that are specific to the country. Two countries do not have to value the costs and benefits in the same absolute terms, however, for an interaction to be modeled as a prisoner’s dilemma; what matters is the relationship between costs and benefits from the perspective of each country. As long as they bear the relationship identified below, \textit{see infra} note 122, the interactions of the two countries can be modeled as a prisoner’s dilemma.

Countries akin to the United States, such as other liberal democracies like England and France, are more likely to experience the costs and benefits of enforcing foreign judgments in roughly the same proportion as does the United States. The conclusions in the text above do not hold, however, with respect to countries that experience the benefits and costs of enforcing foreign judgments in proportions that do not satisfy the criteria that establish a prisoner’s dilemma. Such asymmetric costs and benefits across players complicate game theory generally, not only in the enforcement of foreign judgments context. Interactions under conditions of such asymmetric costs and benefits can be modeled, though they may not fit the standard games. Whether such asymmetric costs are the rule or the exception in the context of enforcing foreign judgments ultimately is an empirical question that is beyond this Article’s scope.
As shown in Figure 1, the result is a standard prisoner’s dilemma, where the payoffs in each cell correspond respectively to the United States and then to the Foreign Country.

Figure 1: Prisoner’s Dilemma

<table>
<thead>
<tr>
<th></th>
<th>Foreign Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforce U.S. judgment</td>
<td></td>
</tr>
<tr>
<td>Enforce foreign judgment</td>
<td>10, 10,</td>
</tr>
<tr>
<td>Don’t enforce foreign judgment</td>
<td>-2, 12</td>
</tr>
<tr>
<td>Don’t enforce foreign judgment</td>
<td>12, -2,</td>
</tr>
</tbody>
</table>

Payoffs: United States, Foreign Country

If this game were played only once, game theory predicts that both players would “defect” and choose not to enforce the other country’s judgment. This outcome would not be Pareto-optimal because there is...

121. Enforcing foreign judgments is appropriately modeled as a bilateral, rather than a multilateral, game. The strategy incentives can be analyzed by reference to pair-wise interactions between states, rather than multilateral interactions in which the way Country A acts towards Country B affects Country A’s relations to all other countries, because both the benefits of cooperation and the threat of retaliation are divisible. Cf. Goldsmith & Posner, supra note 98, at 1154–55 (noting the bilateral/multilateral distinction). This bilateral character is what makes it possible for a country to have a general approach to the enforcement of foreign judgments. This could change, however, if, for example, a treaty conditioned its members’ enforcement of a country’s foreign judgments on that country’s enforcement of the foreign judgments of all members.

122. Axelrod defines a prisoner’s dilemma as a game that satisfies the following conditions: (1) if both players cooperate they get the reward, R; (2) if they both defect they get the punishment, P; (3) if one cooperates and the other defects, the first gets sucker’s payoff, S, and the other gets the temptation, T; and (4) T>R>P>S and R>(T+S)/2. AXELROD, supra note 113, at 206. Thus, even if a significantly greater payoff value were assigned to the benefit of enforcement, for example 100, the result would still be a prisoner’s dilemma, for example 102>100>0>(–2) and 100>50.

123. Reciprocal defection is both a dominant strategy and a Nash equilibrium. See BAIRD ET AL., supra note 113, at 11 (defining strictly dominant strategies); id. at 33–34 (explaining why each player in a prisoner’s dilemma has a strictly dominant strategy that leads to suboptimal outcomes); id. at 21 (defining Nash equilibrium as a situation where each player selects a strategy that is the best response to all of the possible strategies available to the other player).

The analysis in the above text, which takes the form of a “normal form game,” might be thought to problematically simplify the decision-making process with respect to the enforcement of foreign judgments. After all, the players typically do not make simultaneous decisions, but rather sequentially decide whether to enforce the other country’s judgment. As such, one might think that enforcement of foreign judgments is more properly
an alternative set of strategies—mutual enforcement—that could make both players better off.\textsuperscript{124} Whereas each player gets a payoff of zero (0) under mutual nonenforcement, each would enjoy a payoff of ten (10) under mutual enforcement.\textsuperscript{125} In other words, this model suggests that it is in the United States's parochial interests to enforce foreign judgments, assuming that this would create a situation in which the foreign country also enforced U.S. judgments. Stated differently, from the vantage point of pure self-interest, cooperation is superior to the noncooperative outcome of mutual nonenforcement.

The question of whether to enforce a foreign judgment, however, is better modeled as a repeat game, rather than a single-play game, because the decision whether or not to enforce a foreign judgment is presented to a country not just one time, but recurrently.\textsuperscript{126} Unlike a single-play prisoner’s dilemma, cooperation may naturally emerge in a repeat game.\textsuperscript{127} Even under circumstances of repetition, however, cooperative outcomes leading to a Pareto-optimal result often will not arise on their own.\textsuperscript{128}

modeled as an “extensive form game” rather than a “normal form game.” See id. at 50 (noting that normal form games model simultaneous decision making whereas extensive form games model sequential decision making). Simplifying the analysis by using a normal form game is not problematic, however, because enforcement questions are best modeled as a “supergame”—that is, a game that is either repeated infinitely or repeated such that the players do not know when it will end—and the sequence in which the players move is not important in a supergame since the expected payoff value is the sum of a large number of interactions. See id. at 167. Additionally, sequencing is not important because numerous cases concerning the enforcement of foreign judgments are likely pending simultaneously. For these reasons, the enforcement of foreign judgments can be modeled as a normal form game, as is done above in the text.

\textsuperscript{124} See id. at 311 (“A solution to a game is Pareto-optimal if there is no other combination of strategies in which one of the players is better off and the other players are no worse off.”).

\textsuperscript{125} See id.

\textsuperscript{126} A game that is repeated an infinite number of times is known as a “supergame.” Id. at 167. Although most repeat games are not of infinite length, “a game of infinite length and a game of uncertain length with a fixed probability of ending after each period have the same structure.” Id. The enforcement of foreign judgments is fairly characterized as a game in which there is no end point that is known to the players.

\textsuperscript{127} Cooperation may occur if several conditions are met: if the players care about the future relative to the present and if the costs of enforcing the foreign judgment are not too high relative to the benefits of cooperation. See Goldsmith & Posner, supra note 98, at 1126. Over time, each country may elect to enforce the other’s judgments. Even under such conditions, however, cooperation is not assured. See infra note 128.

\textsuperscript{128} See Baird Et Al., supra note 113, at 172–73. This is the conclusion of so-called “folk theorems.” See id. at 172. Although “repetition itself creates the possibility of cooperative behavior,” id. at 174, mutually beneficial results are not guaranteed. See id. at 169–74. For a full discussion of folk theorems, see Drew Fudenberg & Jean Tirole, GAME THEORY 150 (1991) (“The ‘folk theorems’ for repeated games assert that if the players are sufficiently patient then any feasible, individually rational payoffs can be enforced by an equilibrium. Thus, in the limit of extreme patience, repeated play allows virtually any payoff to be an equilibrium outcome.”). See also id. at 160 (stating that folk theorems under-
“[R]epeated play allows virtually any payoff to be an equilibrium outcome,” even a suboptimal one.

Interventions such as pre-play communication for the purpose of making mutual cooperation a focal point, however, can bring about the cooperative solution in repeat prisoner’s dilemmas. Formal agreements between countries and multilateral treaties are two possible interventions. It is more difficult to imagine effective interventions that could be generated by courts, though an international analogue of a restatement of the law might suffice. To the extent that judicial tools are less efficacious than those generated by the executive and legislative branches, game theory accordingly provides an argument in favor of executive and legislative involvement in setting enforcement policies.

2. Foreign Judgments and the Stag Hunt

The analysis above assumed that the full measure of benefit would be enjoyed even if one of the parties did not enforce a foreign judgment. A more realistic model, however, might disaggregate the benefits of en-

mine the conclusion that players in repeat games can be expected to “coordinate on efficient equilibria” and that “cooperation is particularly likely in repeated games”).

FUDENBERG & TIROLE, supra note 128, at 150.

See id. at 150, 160.

BAIRD ET AL., supra note 113, at 39–41. Both parties still would have an incentive to defect, however, in a single-play prisoner’s dilemma. Although payoffs can be altered by enforceable contractual obligations, enforcement of international obligations is notoriously difficult.

There are two reasons why the international legal system’s weak enforcement system does not undermine the conclusion that treaties and agreements can be useful for this purpose. First, even absent any sense of obligation, the process of negotiation can be the equivalent of “cheap talk” that, while not formally binding, provides both parties with information as to how the other is likely to act, i.e., cooperatively, and hence makes each party’s decision to cooperate more likely. See Joseph Farrell & Matthew Rabin, Cheap Talk, 10 J. ECON. PERSP. 103, 112–17 (1996) (providing a formal model to explain why cheap talk can bring about Pareto-optimal outcomes, but noting that cheap talk will not necessarily have this effect); Richard H. McAdams, A Focal Point Theory of Expressive Law, 86 VA. L. REV. 1649, 1658 (2000) (noting social experiments that show that cheap talk can facilitate coordination). Second, agreements and treaties may indeed affect behavior. Although it might be difficult to obtain formal sanctions for breaches of international obligations, the reputational costs of violating international obligations may induce a country to “comply with its international obligation even when it would not have done so in the absence of that obligation.” Guzman, supra note 100, at 1848. See generally id. at 1844–48 (providing a game theoretical analysis that suggests how reputation costs can influence country behavior).

Though not even technically binding (in contrast with public international law, which simply has a weak enforcement mechanism), a restatement could function as “cheap talk.” See supra note 132.

On the other hand, the pattern of mutual enforcement of foreign judgments that has developed under international law might be said to be an instance where the Pareto-optimal solution has arisen naturally on its own.
forcement. While some benefits likely would accrue to the United States if the Foreign Country enforced a U.S. judgment while the United States did not enforce the foreign judgments, other benefits—most notably the facilitation of international business—might be present only if both countries typically enforce judgments over time. Therefore, assume the following: the cost of enforcing a foreign judgment remains negative two (-2); the benefit accruing to the United States even if the United States does not enforce the foreign judgment, B1, is positive five (+5); and the benefit representing additional incremental benefit enjoyed by the United States only if it also enforces the other country’s foreign judgment, B2, is positive seven (+7).

Assume as well that the other country has symmetrical payoffs. The results can be graphically depicted as follows:

<table>
<thead>
<tr>
<th></th>
<th>United States</th>
<th>Foreign Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enforce U.S. judgment</td>
<td>10, 10</td>
<td>-2, 5</td>
</tr>
<tr>
<td>Don’t enforce foreign judgment</td>
<td>5, -2</td>
<td>0, 0</td>
</tr>
</tbody>
</table>

**Figure 2: Stag Hunt**

This method of modeling the costs and benefits generates the so-called stag hunt paradigm. Whereas Country A’s interests are maximized in the prisoner’s dilemma when Country B enforces Country A’s
foreign judgments but Country A does not enforce Country B’s judgments, Country A’s interests in a stag hunt are maximized when both countries enforce the other’s foreign judgments. If Country B does not enforce Country A’s judgments, however, Country A is better off if it does not enforce Country B’s judgments, either.

The stag hunt, like the prisoner’s dilemma, suggests that mutual enforcement of the other’s foreign judgments is in each country’s parochial interests. The single-play stag hunt has two Nash equilibria, however, and will not reliably yield the Pareto-optimal result of mutual enforcement.\(^{139}\) Furthermore, as with the prisoner’s dilemma, it can be shown that a repeat stag hunt does not ensure a cooperative solution.\(^{140}\) As is true with repeat prisoner’s dilemmas, however, external interventions such as treaties and bilateral agreements can provide the necessary push to secure the mutually beneficial cooperative outcome of reciprocal enforcement. As we will see below in Part IV, however, game theory yields a different analysis as regards the enforcement of un-American judgments.

C. RAWLS’S \textit{THE LAW OF PEOPLES}\(^{141}\)

Rawlsian political theory yields a very different approach to foreign relations generally, as well as to the enforcement of foreign judgments, than does game theory. What follows in this section is an explication of Rawls’s general approach and its application to the enforcement of simple foreign judgments.

1. Rawls’s General Approach

In the essay \textit{The Law of Peoples}, John Rawls seeks to identify fair terms of international relations, which he dubs the “Law of Peoples.”\(^{142}\) As he did in his domestic account of justice, Rawls uses a social contract

\(^{139}\) The stag hunt’s two Nash equilibria are: (1) both hunt stag (here, enforce the other country’s judgments) and (2) both hunt hare (here, do not enforce the other country’s judgments). See \textit{id.} at 36. If Player A hunts stag, Player B’s best strategy is to hunt stag, meaning that both players hunting stag is one Nash equilibrium. See \textit{id.} Similarly, if Player A hunts hare then Player B’s best strategy is also to hunt hare, meaning that hunting hare also is a Nash equilibrium. See \textit{id.} For a discussion of Nash equilibria, see \textit{id.} at 21. See \textit{also supra} note 123.

\(^{140}\) See \textit{supra} note 128. The Pareto-optimal solution is not assured because there are multiple Nash equilibria, and Pareto-optimality relies on a strict punishment strategy that may not be credible. See \textit{BAIRD ET AL.}, \textit{supra} note 113, at 173 (noting that “[t]he threat of the severe punishment needed to support the Pareto-optimal equilibria may not be credible. Parties may not find it in their self-interest to carry out severe punishments after there has been a deviation.”).

\(^{141}\) \textit{RAWLS, supra} note 79.

\(^{142}\) See \textit{id.} at 3.
methodology based on an “original position” to determine the fair terms of international relations. In the domestic case, parties in the original position represent an individual citizen, and they “do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent.” In the international case, parties in the “second original position” represent not citizens but peoples, and they do not know “the size of the territory, or the population, or the relative strength of the people whose fundamental interests they represent.” In both the domestic and international cases, the original position’s veil of ignorance is the key to enabling people to conceptually transcend their self-interest so as to identify just institutions. A person in an original position will treat every citizen in the domestic case (or every “peoples” in the international case) fairly because she does not know whom she represents and accordingly will not choose political institutions that unfairly treat whomever she might represent.

To understand fully the principles of international intercourse that Rawls derives via the second original position, it is necessary to be clear about the entities that are represented in the second original position: “peoples.” “Peoples,” for Rawls, refers to groups of individuals who are (1) united by “common sympathies” and (2) who act through their government. By “common sympathies,” Rawls appears to be referring to common language, history, race, religion, or shared territory that unites a group of persons so that they feel greater kinship toward one another than in respect to others. In short, “peoples” refers to cultures

143. See id. at 30 (noting the social contractarian nature of his analysis).
144. JOHN RAWLSS, POLITICAL LIBERALISM 305 (1993).
145. See RAWLSS, supra note 79, at 32. Rawls evidently dubs this the “second” original position only because he first utilized the original position to deduce domestic principles of justice. See id.
146. Id.
147. See id. at 30–33. To treat an individual (or peoples) fairly does not mean that every individual (or peoples) will be allowed to do whatever she wishes. Any allowable constraints, however, will be fair insofar as a person in the original (or second original) position would think it fair to impose such limitations. Furthermore, the mere fact that an individual (or peoples) is excluded from the original (or second original) position does not mean that her interests will be wholly disregarded. Rawls concludes, for example, that people in the original position would take account of those societies not represented in the second original position, i.e., burdened societies, outlaw states, and benevolent absolutisms. See, e.g., id. at 89–91.
148. Id. at 23.
149. Id.
150. See id. To be sure, Rawls does not say much directly about what he means by “common sympathies.” He cites to John Stuart Mill’s Considerations on Representative Government, which uses the phrase “common sympathies,” but this reference to Mill is only tentative. Rawls states that “[a]t this initial stage, I use the first sentences of [Mill’s]
that are politically organized.

Rawls’s account explicitly assumes both that culture is very important for persons and that it is important that different groups retain their different cultures. Rawls rejects the goal of creating a single world culture and world government, explicitly stating that protecting different peoples’ cultures is important.  According to Rawls, “It is surely, ceteris paribus, a good for individuals and associations to be attached to their particular culture and to take part in its common public and civic life. In this way political society is expressed and fulfilled.”

Rawls does not explain why the preservation of diverse cultures is important, though he approvingly refers to several noted political philosophers who do. The notion is that a person’s culture is an important aspect of her personal identity. Culture provides the “set of values that serve as criteria for evaluation” that are a prerequisite to moral reflection and the making of meaningful choices. This is not to say that people are wholly culturally determined, or that people are without the power to

151. See id. at 61; see also id. at 40 (“If a reasonable pluralism of comprehensive doctrines is a basic feature of a constitutional democracy with its free institutions, we may assume that there is an even greater diversity in the comprehensive doctrines affirmed among the members of the Society of Peoples with its many different cultures and traditions.”).

152. See id. at 61. Though I do not intend to pursue the point here, there appears to be a tension between the understandings of human needs that Rawls utilizes in the domestic and international cases. More specifically, Rawls’s approach in The Law of Peoples appears to reflect a thicker understanding of personhood.

153. The closest he seems to come is with his assertion that not accommodating other cultures is to deny respect to members of the culture, and that undermining the cultures of “decent nonliberal peoples” is to deny the “due measure of respect” that they are owed by liberal people. Id. at 61.

154. See id. at 65–78.

155. YAEEL TAMIR, LIBERAL NATIONALISM 7 (1993) (stating that “[b]eing situated” in a culture is one of the “preconditions of personal [identity]” for individuals).

156. Id. at 22 (“Reflecting on issues concerning moral identity is dependent on the presence of a cultural context.”). For a similar account, see WILL KYMMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 83–84 (1995) (arguing that “freedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us”). See also id. at 83 (“People make choices about the social practices around them, based on their beliefs about the values of these practices . . . . And to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.”); Mark D. Rosen, “Illicit” Societal Cultures, Liberalism, and American Constitutionalism, 12 J. CONTEMP. LEGAL ISSUES 803 (2002).
critically analyze, and to even reject, their culture. 157 A person’s particular culture, however, provides the starting point for such critical analysis. 158 For that reason, preserving the individual’s distinctive culture is deeply important.

To be clear, Rawls’s analysis does not lead to the conclusion that the Law of Peoples requires that all cultures should be allowed to flourish. As in the domestic context, Rawls limits the universe of potential participants in the second original position; only “reasonable” persons may participate in the first original position, 159 and only “liberal” and “decent hierarchical peoples” may participate in the second original position. 160 Determining the potential participants is crucial to determining the content of the Law of Peoples, for persons in the second original position will not protect the interests of those whom there is no possibility they might represent as carefully as they will protect their own.

We now are in a position to appreciate the principles of international intercourse that, according to Rawls, people in the second original position would select. 161 The first principle is that “[p]eoples are free and independent, and their freedom and independence are to be respected by other peoples.” 162 This is because “no people organized by its government is prepared to count, as a first principle, the benefits for another people as outweighing the hardships imposed on itself. Well-ordered peoples insist on an equality among themselves as peoples . . . .” 163 Given

157. See TAMIR, supra note 155, at 25. The view that persons steeped in their particular cultures nonetheless are capable of undergoing radical personal transformations that remake their moral or national identities is what makes Tamir’s account firmly liberal. See id. at 23. Other thinkers disagree, arguing that not all aspects of a person are subject to critical revision. See, e.g., 1 CHARLES TAYLOR, PHILOSOPHICAL PAPERS: HUMAN AGENCY AND LANGUAGE 34–35 (1985) (arguing that certain evaluations are “inseparable from ourselves as agents”); see also Michael J. Sandel, Book Review, 107 HARV. L. REV. 1765, 1768 (1994) (arguing that people can “sometimes be obligated to fulfill certain ends we have not chosen—ends given . . . by our identities as members of families, peoples, cultures, or traditions”).

158. TAMIR, supra note 155, at 22–25.

159. RAWLS, supra note 144, at 29–30; see also 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, 1120 (1998).

160. RAWLS, supra note 79, at 32–34 (liberal peoples); id. at 63 (decent hierarchical peoples). Rawls explicitly notes this relation between reasonableness (in the domestic case) and liberal and decent hierarchical peoples (in the international case). See id. For a formal definition of “decent hierarchical peoples,” see id. at 64–67. For Rawls, decent hierarchical peoples respect basic human rights and are willing to live peacefully with other peoples, but they treat citizens within their polity not as individuals but as members of groups and do not give equal treatment to all groups. Id. at 64–66, 68–71.

161. See id. at 37–41.

162. Id. at 37.

163. Id. at 40.
Rawls’s view of the importance of culture, this equality principle is sensible. Not knowing which peoples they in fact represent, and aware of culture’s importance, “the representatives of peoples will want to preserve the equality and independence of their own society.” 164 For these same reasons, persons in the second original position also would select a strong (but not categorical) principle of nonintervention. 165

2. Application to Foreign Judgments

The principles of equality and nonintervention provide guidance to analyzing the question of whether foreign judgments should be enforced. 166 Imagine that a judgment issued from a court in Country I (the Issuing jurisdiction) and that a court in Country E (the Enforcing jurisdiction) has been asked to enforce the judgment. The principle of equality suggests the following: if nonenforcement would threaten Country I’s culture, and enforcement does not pose a risk to Country E’s culture, then Country E should enforce Country I’s foreign judgment. To conclude otherwise would be to say that persons in the second original position would select a Law of Peoples that unnecessarily threatened the culture of a people they might represent. Given the importance of culture, persons in the second original position would not make such a decision. Instead, the principle of equality suggests that they would select what might be termed a “culture-preserving” rule with regard to the enforcement of foreign judgments. 167

164. Id. at 41.
165. Id. at 37.
166. See id. at 86 (stating that the “Law of Peoples is thus reasonably complete,” meaning that “it can be extended to give principles for all politically relevant subjects . . . . There is no relevant subject, politically speaking, for which we lack principles and standards to judge.”). To be sure, Rawls’s short essay does not explicitly deal with the issue of foreign judgments, or for that matter, most other specific issues. See id. Indeed, Rawls acknowledges that the principles he identifies “require much explanation and interpretation.” Id. The principles are to be elaborated from the vantage point of the second original position. Id. at 37. This is sensible; if the hermeneutic device of the second original position is a fair and illuminating method for identifying the broad principles of inter-peoples interaction, it follows that it also is suitable for specifying the principles’ detailed applications.
167. The term “culture-preserving” is my own. It is not intended to suggest that cultures are stagnant, but only to suggest that people in the second original position would not select international rules under which cultural change of one peoples was the result of the actions of other peoples. To be sure, significant aspects of many of today’s cultures can be said to be the result of persecutions and other such forces whose origins are outside the given culture. Because many persecuted cultures have disappeared over time, it seems reasonable to posit that persons in the second original position, knowing this, would not wish to put their own cultures at risk. Furthermore, even with regard to those cultures (such as Jewish, Armenian, and gypsy cultures) that have survived, such persecutions are not typically conceptualized by the resulting culture as having been beneficial, notwithstanding the fact that they importantly shaped that culture. For an informative account of the dynamics of cultural development, see SELYA BENHABIB, THE CLAIMS OF CULTURE.
A further implication of the principle of equality is that there should not be a “reciprocity” requirement that conditions Country A’s enforcement of Country B’s judgments on Country B’s enforcement of Country A’s judgments. The risks of enforcing another country’s judgments are undoubtedly culture specific, turning on such variables as the fragility of the enforcing country’s culture and the way that judicial acts are conceptualized by the enforcing country’s citizens. The Law of Peoples accordingly suggests that Country E should enforce Country I’s judgment whereas Country C should not enforce the identical judgment from Country I if enforcing the judgment would not damage Country E’s culture but would devastate Country C’s culture. The Law of Peoples would not include a reciprocity requirement because a person in the second original position, not knowing what people she represented, would choose a legal regime that was maximally protective of different liberal and decent hierarchical cultures, for she would not risk selecting a rule that unnecessarily threatened the people she might represent.

The analysis so far has assumed zero cultural costs for Country E if the judgment is enforced and some cultural costs for Country I if the judgment is not enforced. Most of the time, however, deciding whether to enforce a foreign judgment presents a more difficult choice. Very often, there will be some cultural costs to Country E of enforcing Country I’s judgment. A Rawlsian analysis suggests there should be an accounting of how the enforcing court’s decision would impact the cultures of both the enforcing country, Country E, and the issuing country, Country I—what choice of law scholars call a “multilateralist” approach. (By contrast, the public policy exception, as currently understood, is an example of a unilateralist approach, insofar as it asks only whether enforcement of a foreign judgment would be contrary to American policy without considering the impact on the foreign country.)
contrast, a “unilateralist” approach analyzes solely from the perspective of the jurisdiction that is making the juridical determination.\textsuperscript{172} The person in the second original position, who by definition does not know the people she represents, would select a regime under which the enforcing court would be required to assess the cultural costs to the enforcing country and the costs to the issuing country of not enforcing the judgment, and to choose the outcome that minimizes the cultural cost. This would protect cultures in a manner that would not systematically disadvantage any particular culture. Persons in the second original position would choose this culture-preserving rule because they would be averse to selecting a rule that unnecessarily put either a liberal or decent hierarchical culture at risk, lest they end up representing a people from that culture.\textsuperscript{173} As will be explained below, the fact that only liberal and decent hierarchical cultures need to be protected is the source of important substantive limitations on what foreign judgments can be enforced.\textsuperscript{174}

The analysis to be made under a Rawlsian approach is similar to that found in the domestic choice of law doctrine known as “comparative impairment.”\textsuperscript{175} Under comparative impairment, courts apply the law of the jurisdiction whose interests would be most adversely affected if its law is not applied.\textsuperscript{176} I will refer to its international cousin, which focuses on the enforcement of judgments rather than choice of law, as “international comparative impairment.”\textsuperscript{177}

Comparative impairment has been subject to numerous critiques that it is unworkable.\textsuperscript{178} The same challenges could be carried over \textit{mutatis


\textsuperscript{172} D\textsuperscript{o}d\textsuperscript{e}, \textit{supra} note 91, at 107.
\textsuperscript{173} See \textit{supra} note 160 and accompanying text. In one important sense, Rawlsian analysis calls for an approach completely at odds with traditional public policy analysis. Public policy justifies refusing enforcement of judgments based on laws that run up against our most important public policies, while Rawlsian analysis would not—insofar as such fundamental policies are robust and not at risk.
\textsuperscript{174} See \textit{infra} Part IV.C.3.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} For an example of a court taking this approach outside the enforcement context, see \textit{Turner Entertainment Co. v. Degeto Film GmbH}, 25 F.3d 1512, 1521 (11th Cir. 1994), where the Eleventh Circuit, deciding to abstain pending the conclusion of German litigation, assessed “the relative strengths of the American and German interests” and noted that “the public interest in the litigation is more conspicuous” in Germany than in the United States.
mutandis to international comparative impairment. There are two major concerns: (1) whether the enforcing country can ascertain the potential cultural costs to the issuing country of not enforcing; and (2) even if the enforcing country can ascertain those costs, what should be done when, as usually will be the case, the domestic and foreign costs are incommensurable. In other words, how can it be determined which cultural cost is “greater” if the cultural interests are not capable of being measured by a common metric that captures everything that matters about the two options?  

At this point it is crucial to differentiate among the different branches of government. The above challenges primarily address judicial competency. The legislative and executive branches, by contrast, have tools and competencies that permit them to undertake such analysis. One of the foremost tools is negotiation with other countries, particularly during the process of negotiating treaties or executive agreements. The negotiation context is well suited both for enabling the federal executive to ascertain the interests of the other country and for creating compromises that reflect the negotiating parties’ shared sense of what constitutes fair outcomes on an ex ante basis.

179. See Kramer, supra note 178, at 316–18 (distilling the various critiques of comparative impairment to these two principles). Kanowitz criticizes comparative impairment for asking courts to make essentially political judgments. See Kanowitz, supra note 178, at 257–59. This is best understood as an undifferentiated argument that courts are unable to successfully accomplish the two analytical tasks described above in the text. Kay’s argument, as well as that of Allen and O’Hara, is that comparative analysis is too complex for courts to successfully undertake. See Allen & O’Hara, supra note 178, at 1031–33; Kay, supra note 178, at 586. Allen and O’Hara advance the analysis by providing a new theoretical reason—the interaction of bundling and depeçage—as to why comparative impairment might be too complex. See Allen & O’Hara, supra note 178, at 1033–37. They argue that “[s]tates can use differing bundles of mechanisms to produce a given ex ante behavioral incentive.” Id. at 1036. Accordingly, one can misunderstand the state’s true policy if one analyzes only one strand of the bundle of incentives. Id. This is best understood as an argument concerning the difficulties of assessing state policy, and it holds in the purely domestic situation as well. Furthermore, while it identifies a common trap, it does not establish that courts are a priori incapable of ascertaining state policy. Accordingly, this interesting argument of Allen and O’Hara is best understood as an aspect of the first challenge to comparative impairment concerning courts’ abilities to ascertain the policy behind laws. Their argument strikes a useful cautionary note, but does not establish that comparative impairment is presumptively unworkable.

180. This Article provides several considerations that suggest the wisdom of resolving enforcement questions through treaty making or executive agreements. See Am. Ins. Ass’n v. Garamendi, 123 S. Ct. 2374, 2386–87 (2003) (explaining the president’s power to make “executive agreements”). This Article does not, however, provide a comprehensive analy-
The executive and legislative branches are better suited to making the determinations called for by international comparative impairment outside the negotiation context as well. To understand why, it first is necessary to refine the concept of incommensurability. When goods are commensurable, there are clear-cut choices among them that all rational actors would agree upon; a single five-dollar bill readily can be evaluated in relation to three one-dollar bills, and everyone would agree that, in the ordinary case, the former is more valuable than the latter. Incommensurability, by contrast, concerns the choice between (or among) options that cannot be reduced to a single metric that captures everything that matters about the options and that thereby permits comparisons with which all rational actors would agree. Incommensurability generally describes the arena of choice in which subjective evaluations must be made. The choice among incommensurables is a process of prioritizing the strengths and weaknesses of each of the potential law-making institutions, i.e., the judiciary, the executive, and the legislature, vis-à-vis the likelihood of generating a good solution with respect to the enforcement of foreign judgments. Neil Komesar has argued that such “comparative institutional analysis” is a necessary prerequisite to determining which institution should be entrusted with law-making responsibility, see Neil K. Komesar, Law’s Limits: The Rule of Law and the Supply and Demand of Rights (2001), and this strikes me as indisputably correct. While space limitations preclude me from undertaking a full-blown analysis of the desirability of treaties or executive agreements in this context, this Article does at least identify some important considerations that is in their favor.

Parenthetically, it is not the case that such “comparative institutional analysis” with regard to the enforcement of foreign judgments would run afoul of the Constitution, for there is no constitutional requirement that the political branches negotiate a treaty or create an executive agreement concerning foreign judgments. In the absence of a treaty or executive agreement, enforcement determinations typically fall to the courts. Accordingly, a comparative institutional analysis is fully relevant to asking whether it makes sense, as a policy matter, to embark on a treaty or executive agreement, or to leave things as they are now.

181. This excludes, for instance, a dollar bill that has been signed by a celebrity.

182. Cf. Brett G. Scharffs, Adjudication and the Problems of Incommensurability, 42 WM. & MARY L. REV. 1367, 1412–15 (2001) (speaking of the incontestable goal of “maximizing” when deciding among commensurable matters); id. at 1428–29 (if “there is only one value that ultimately matters, then rationality will compel a practical decision maker to seek and choose the option that will realize the most of that value. From this view, practical reason is entirely a matter of calculation.”).

183. See, e.g., Joseph Raz, Incommensurability and Agency, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110 (Ruth Chang ed., 1997) (“Incommensurability is the absence of a common measure.”); Scharffs, supra note 182, at 1390 (stating that incommensurability arises when “everything that matters about two competing options” cannot “be expressed in terms of a common values”). So me commentators have used the term “incomparability” for the absence of a common metric. See Chang, Introduction, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra, at 1–4. Other commentators have argued that “incommensurability” and “comparability” appropriately have two very different meanings. See, e.g., Scharffs, supra note 182, at 1390–94.
competing commitments. As such, it can well be understood as defining the very character of the person or polity that is making the decision.\textsuperscript{183} These are the sort of value judgments that form the core of political decision making, and they accordingly most properly fall within the domain of the legislative and executive branches.\textsuperscript{185} For this reason, the presence of technically incommensurable considerations is not a challenge to legislative or executive utilization of the method of international comparative impairment. Just the opposite: the inevitable presence of incommensurability problems in the arena of enforceability is a strong argument that the decision of whether to enforce foreign judgments is most appropriately made by the more political branches of government rather than courts.

Even with respect to courts, however, the above challenges to international comparative impairment may not be devastating. Virtually identical analytical difficulties attend domestic legal analysis, and courts nevertheless render judgments. Consider the first challenge. Courts very frequently engage in purposive interpretation that requires that they ascertain the interests served by various laws.\textsuperscript{186} Asking a court to ascertain the cultural costs of not enforcing a judgment is akin to this determination; it involves assessing the value served by the law and the likely consequences of nonenforcement of the law. Surely, it may be more difficult to ascertain the interests that are served by a foreign law, but the difference is one of degree rather than kind.\textsuperscript{187} Moreover, sometimes it may not be difficult at all to determine the foreign interests that are served by a particular foreign law.

Consider next the issue of incommensurability. American courts are

\textsuperscript{184} For similar accounts of incommensurability, see Elijah Millgram, Incommensurability and Practical Reasoning, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra note 183, at 151–69 (focusing on individual decision making under circumstances of incommensurability); Raz, supra note 183, at 110–28 (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, Leading a Life, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, supra note 183, at 170–83 (stating that justified choice among incommensurables can be made by analyzing how the competing goods fit within the “shape” of a person’s life). For an instructive general account of incommensurability, see Richard Warner, Does Incommensurability Matter? Incommensurability and Public Policy, 146 U. PA. L. REV. 1287 (1998).

\textsuperscript{185} This is not to suggest that the legislative and executive branches are identically situated with regard to making political decisions as far as democratic theory and American constitutionalism are concerned, only that they are more institutionally suited to such decision making than courts.

\textsuperscript{186} See Kramer, supra note 178, at 292–94.

\textsuperscript{187} Furthermore, the difficulty of ascertaining effects on foreign cultures likely diminishes to the extent that judges from different countries interact with one another. See Anne-Marie Slaughter, Judicial Globalization, 40 VA. J. INT’L L. 1103 (2000) (describing this phenomenon).
asked all the time to “balance” interests that are not analytically commensurable. What does it mean, for example, for a court under the doctrine of procedural due process to balance the potential deprivation suffered by a citizen against the government’s interests in administrative ease and fiscal savings? These considerations are not reducible to a common metric and hence are incapable of being technically commensurated. If and how such incommensurables can be “weighed” against one another, “balanced” against each other and the like are hotly contested jurisprudential questions that I cannot hope to definitively answer here. Nonetheless, regardless of whether we can clearly explain how courts solve incommensurability problems, it is clear that they do it all the time in the domestic context. That being so, it might be argued that it is not unreasonable to believe that they can make decisions in the international context, as well.


190. See Scharffs, supra note 183, at 1374 (noting that “[j]udges routinely seek to accomplish the impossible—to commensurate incommensurable values. That they attempt to do so with regularity says something important about the problems of incommensurability, namely that such problems do not foreclose reasoned deliberation and choice.”).

191. The process of commensurating incommensurables in the domestic context, however, is different than in the international context. As mentioned above, commensurating incommensurables can be usefully understood as prioritizing competing interests and, in the process, creating culture. When American courts resolve purely domestic cases, they can be understood as helping to construct the American culture as they harmonize incommensurable commitments. That they are engaging in such a subjective process is not problematic insofar as they are working to define the culture of which all parties to the litigation acknowledge being a part. In the context of determining whether foreign judgments should be enforced, however, matters are importantly different. There are multiple cultures—the American and the foreign culture—and an American court’s commensurating incommensurables in a manner that reflects American values when deciding whether to enforce a foreign judgment could well be labeled an act of cultural hegemony.

When a court harmonizes competing incommensurable commitments, it inevitably helps create a particular culture. Importantly, when courts confront the question of whether to enforce a foreign judgment, the resolution they provide shapes not only domestic culture, but the international legal culture as well. Accordingly, when courts harmonize incommensurable values in the process of deciding whether to enforce a foreign judgment, they should keep in mind that they are making a decision that will help construct the character of two cultures: domestic and international. See Graeme B. Dinwoodie, A New Copyright Order: Why National Courts Should Create Global Norms, 149 U. Pa. L. Rev. 469, 570 n.319 (2000) (making a similar point). The obvious complexity of this process is yet
D. RAWLS VERSUS GAME THEORY: A DIFFERENCE IN BASIC VALUES

We now are in a position to appreciate the major respect in which Rawlsian political theory differs from game theory. Rather than operating under a veil of ignorance, the players under game theory are assumed to know whom they represent and what their interests are. These different starting vantage points mean that Rawlsian theory is structured to generate rules of interaction that all countries might deem to be fair, whereas game theory aims to maximize the interests of parties who know their identity. The touchstone of a game theoretic analysis accordingly becomes U.S. parochial interests; any interest in supporting other countries’ laws is purely derivative of U.S. interests. Under a Rawlsian approach, by contrast, the goal is to create a law of international relations that disinterested third parties would think is fair.

Ultimately, the choice between a game theoretic approach and a Rawlsian analysis boils down to this question: Should foreign relations be determined solely on the basis of what is in the interest of the United States, or in view of what is fairest from the perspective of all countries? It seems unlikely that the choice between the two is governed by logic. The choice instead would seem to reflect value judgments about which people of good will can disagree.

To be clear, this Article does not take a position on which approach is preferable. Rather, it aims to show that resolving enforceability determinations frequently requires recourse to ante-legal, value-laden judgments.

IV. APPLYING THE TWO FRAMEWORKS TO UN-AMERICAN JUDGMENTS

Taking account of all potentially affected entities, this Part analyzes the enforceability of un-American judgments from three perspectives: comity analysis, game theory, and Rawlsian political theory. The relevance of game theory and Rawlsian political theory were explained above.

Comity is worth considering because it is the likely doctrine courts would turn to once they understand that the Constitution is not a bar to the enforcement of un-American judgments, unless and until either the executive or legislative branch steps in to formulate a policy as

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193. Neither is readily reducible to the other. Though it may be argued that pursuing fairness is in the self-interest of powerful countries, and that failing to do so accounts for terrorism and political instability, such a claim is factually contingent. In an effort to avoid unnecessary assumptions, this Article will treat game theory and Rawlsian theory as distinct approaches.
194. See supra Part III.A.
195. See Rosen, supra note 1 (manuscript at Part III).
regards the enforcement of un-American judgments. Some parts of the
comity analysis are unaffected by the analyst’s ante-legal political com-
mitments. At many points, however, comity is undertheorized and a-
cordingly incapable of providing principled guidance. At these junctures,
recourse must be had to political commitments, and these ante-legal
commitments are outcome determinative.

Two findings are worth highlighting from the outset. First, game
theory and Rawlsian analysis converge on a conclusion that is at variance
with American court holdings to date: both methodologies reject the view
that un-American judgments categorically should not be enforced. Sec-
ond, even under a Rawlsian analysis, which is quite sympathetic to for-
mie judgments, not all un-American judgments should be enforced by
American courts.

A. FAIRNESS TO THE PARTIES

First consider the question of fairness to the litigating parties.
Though this consideration already is part of ordinary comity analysis, no
courts to date have undertaken the analysis that follows due to their mis-
taken constitutional analysis, which pretermitted such considerations of
fairness. Fairness to the parties also is relevant under a Rawlsian analysis,
for people in the second original position would not select a regime of
enforcement that treated individual litigants unfairly. 196 Under the stan-
dard game theoretic approach, however, fairness to the parties is not a
relevant consideration. 197 The fairness analysis that follows thus is rel-
vant to comity and Rawlsian analysis, but not to game theory. The fair-
ness analysis shows that it is almost always fair to both the winning and
losing parties for an American court to enforce un-American judgments,
even if a U.S. citizen is the losing party.

  196. It might be objected that fairness to individuals would be irrele-
vent under Rawls’s account insofar as the focus of his analysis is “peoples,” not indi-
viduals. As explained above, however, “peoples” and cultures are valuable only because they are impor-
tant to, and bring benefits to, individuals. See supra Part III.C. Accordingly, while people in
the second original position (international) would not insist on the same thick set of pro-
tections that persons in the original position (domestic) would, they would not choose a
regime of enforcement that treated individual litigants unfairly. For discussion of the
distinction between “peoples” and individuals, see supra note 147.

  197. Although it is possible to include fairness as a benefit when undertak-
ing the cost-benefit analysis called for by game theory, this typically is not done. See supra note 113.
Under game theory, the effects of enforcement on the parties are relevant only insofar as
they affect the country. If the party seeking enforcement is a U.S. citizen, then enfor-
cement generates a benefit insofar as it aids a U.S. citizen. If the party against whom en-
forcement is sought is a U.S. citizen, then enforcement generates a cost to the extent en-
forcement may have negative trickle-down effects on the U.S. economy. If neither party is
a U.S. citizen, then the parties’ perspectives are of absolutely no import to a game theo-
retic analysis.
1. The Victorious Party

If the foreign jurisdiction properly exercised adjudicatory jurisdiction and the trial procedures were basically fair, then the same considerations that inform domestic res judicata doctrine suggest it is fair to enforce the judgment from the perspective of the party who was victorious in the foreign court. Comity doctrine and the recognition statutes specifically provide that a foreign judgment will not be enforced if the litigating court lacked adjudicatory jurisdiction or if the procedures were not fundamentally fair. 198

While contemporary doctrine thus goes far to ensuring that foreign judgments are enforced only when doing so would be fair from the vantage point of the victorious party, the doctrine omits one relevant consideration: whether the issuing jurisdiction properly had legislative jurisdiction. 199 If the issuing jurisdiction did not have the power to appropriately regulate the matter at hand, fairness to the “victorious” party does not demand that the judgment be enforced. The careful entity-by-entity analysis suggested here thus already has unearthed a relevant consideration overlooked by contemporary doctrine.

2. The Losing Party

From the perspective of the party who lost in the foreign court, it similarly is not unfair to respect the foreign judgment if the foreign country both had proper adjudicatory and legislative jurisdiction and also utilized fair procedures. The policies behind res judicata are applicable here, as well: the losing party had her day in court, and she accordingly should not be permitted a second bite at the litigation apple. This conclusion is most clear if the losing party herself is a citizen of the foreign country from which the judgment issued, for there is a broad consensus that countries are entitled to regulate their citizens and to adjudicate their disputes. 200 In the ordinary case—that is, unless her home country’s laws are

198. See supra Part II.A.

199. Legislative jurisdiction refers to a country’s power to regulate, whereas adjudicatory jurisdiction is the power to hale a party before its courts. Hartford First Ins. Co. v. California, 509 U.S. 764, 813–14 (1993) (Scalia, J., dissenting) (explaining the difference between legislative and adjudicatory jurisdiction). A state may have personal jurisdiction but not legislative jurisdiction. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985). Conversely, a state may lack personal jurisdiction but have legislative jurisdiction. See, e.g., Kulko v. Superior Court, 436 U.S. 84, 101 (1978). Although the Restatement (Second) of Conflict of Laws is well aware of legislative jurisdiction, see, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 (1971), its definition of a valid judgment (which under section 98 is entitled to recognition) focuses only on judicial jurisdiction. See id. § 92 & cmt. a. Good sense suggests that prescriptive jurisdiction also is relevant to determining whether the issuing country’s interest is valid.

200. Though there is broad consensus, there are dissenting views. For an informative
absolutely repugnant or unless she was wrongly prevented from leaving her country—it accordingly is fair to apply the judgment against her.

The conclusion that it is fair to hold the losing party to the foreign judgment persists even if (1) the losing party is a citizen of the United States and (2a) the foreign court utilized procedures that differ from constitutionally required American procedures and/or (2b) the underlying law giving rise to the right could not have been enacted by an American government due to the Constitution. The enforcement of such judgments is not unfair from the perspective of the losing party if the party can be said to have consented to being governed by the foreign law. Three questions arise: (1) Why should consent matter to determining whether it is fair to subject the losing party to the foreign judgment? (2) What are the conditions for finding consent? (3) Are there substantive limits to the type of regulations to which a U.S. citizen can fairly be permitted to consent? There is no case law directly on point to answer these questions. Instead, this section considers these issues from the vantage point of political theory and analogous areas of the law.

a. Why Consent Matters

It is not unfair to hold persons to the laws of a foreign country if they indeed have consented to abide by such laws because it is fair to hold persons to what they have agreed. Western political tradition long has sought to justify the duty to obey laws on citizens’ consent to abide by laws. According to Plato, for example, consent was the justification Socrates gave for submitting to the death sentence that Athens issued against him. John Locke famously argued that nothing can place a person under the power of a governmental authority unless that person has consented to be so governed. An overview of arguments against inferring such regulatory power, see Seth F. Kreimer, “But Whoever Treasures Freedom . . .”: The Right to Travel and Extraterritorial Abortions, 91 Mich. L. Rev. 907 (1993). There also is enduring dispute over the appropriate scope of government’s regulatory power. For recent sophisticated arguments concluding that only minimal regulatory power is justifiable, see Robert Nozick, Anarchy, State, and Utopia 312 (1974) and Randy E. Barnett, Constitutional Legitimacy, 103 Colum. L. Rev. 111, 128 (2003). I do not intend to enter into this fray here.


203. Plato, Crito, in Plato & Aristophanes: Four Texts on Socrates 99, 110–11 (Thomas G. West & Grace Starry West trans., 1984) (speaking in the name of the laws of Athens, Socrates argues that “to whoever of you stays here and sees the way that we reach judgments and otherwise manage the city, we say that he has already agreed with us in deed to do whatever we bid. And when he does not obey, we say that he does injus-
son “into subjection to any earthly power but only his own consent.”

This is the cornerstone of social contractarian theories, which seek to justify and delimit governmental power on the basis of citizens’ consent to being governed. The strength of the notion of consent is demonstrated by the fact that many of the most influential political theorists in our culture—not only Locke but also Rousseau, Kant, and Rawls—are social contractarians. To be sure, each of these thinkers has a different understanding of the proper metes and bounds of governmental power; all, however, share the view that consent is a fair basis for creating obligation.

There are well-known difficulties that confront the effort to justify the coercive power of the state on the basis of consent. However, I shall argue below that these obstacles apply to exercises of power by the country where one lives, but not to a foreign country’s regulation of visitors. In the end, consent is a fair basis for subjecting American citizens to other countries’ laws, even laws that could not constitutionally have been enacted by an American polity.

b. What Constitutes Consent

The first difficulty faced by social contractarians is that citizens virtually never explicitly consent to laws. Apart from immigrants, citizens are never asked whether their remaining in the country in which they have been born means that they have consented to abide by the country’s laws.

The first difficulty leads to the second one. The “paucity of express consentors” means that consent must be implied. Yet circumstances make it unlikely that one can meaningfully imply consent from the mere fact that a person remains in her country of birth. To begin, consent must be inferred from a non-action, i.e., remaining. This always is dangerous, for inaction could easily be explained by inertia rather than a proactive decision to remain that is accompanied by consent. Most importantly, expatriates bear extremely high exit costs: leaving friends, family, job,
and the culture into which one has been born. Accordingly, remaining may not reflect an affirmative choice to remain and consent to abide by the laws of one’s home country, but instead may reflect a reluctance to incur steep costs. In fact, the social and cultural costs of living the life of an expatriate may mean that leaving one’s home country is not a realistic option for many or most people (outside of exigent circumstances such as famine or prosecution). If so, then it is not meaningful to describe the act of remaining where one was born as a decision to remain, and it accordingly is problematic to understand the act of remaining as including consent to abide by the home country’s laws.

A third difficulty with justifying the state’s exercise of power on the basis of consent concerns notice. Citizens typically are not terribly knowledgeable about the vast majority of their country’s laws. Such ignorance may render consent to abide by the country’s laws suspect.

None of these three objections to consent, however, has force in respect to consent-based justifications for subjecting citizens of Country A to the laws of Country B when that citizen directs activity to Country B. Across all three dimensions that cast doubt on the plausibility of identifying meaningful consent, there are crucial differences between finding consent to the laws of one’s home country (the “domestic context”) and finding consent to the laws of a foreign country (the “foreign context”).

Consider first the nature of the consent in the foreign context: it frequently is explicit rather than implied. Companies typically must explicitly consent to abide by the foreign country’s laws in order to acquire the licenses necessary to do business.

With regard to the second difficulty, even where there is no explicit consent it is far more plausible to identify meaningful implied consent in the foreign context than in the domestic context. First, in the foreign context there is affirmative action; the person has not just passively remained, but has either traveled abroad or otherwise directed actions to the foreign country. It accordingly is more plausible to infer a mental

211. Kreimer, supra note 200, at 928 & n.75.
212. Id.
213. Whether this is so turns on the specifics of one’s theory of consent. A person’s lack of knowledge presumably would undermine the legitimacy of consent for Plato, who argues that not obeying law is unjust insofar as residents have two options: to do or to persuade. See Plato, supra note 203, at 111. Lack of knowledge eliminates the second option. See Kreimer, supra note 200, at 927 (plausibly asserting that “the nature of the obligations consented to must be understood by the party who consents”). A plausible retort is that citizens consent to being bound by the products of a political process, and that they accordingly need not be familiar with the particulars of any laws for consent to be meaningful. For present purposes I need not determine the force of the original objection because it simply does not carry over to the international context, as is explained below in the text.
state. Second, the different opportunity costs present in the foreign context eliminate the risk of nonvoluntariness that sheds doubt on implied consent domestically. As seen above, the difficulty of changing citizenship makes it seem that people who continue living where they were born may not have made a meaningful decision to do so, thereby undermining the claim that remaining includes an implied consent to abide by the home country’s laws. There are no such analogous costs in the foreign context. The opportunity costs in the foreign context, e.g., not doing business in the foreign country or not visiting the foreign country, are far lower than the opportunity cost in the domestic context, e.g., becoming an expatriate. The lower opportunity cost in the foreign context makes it more plausible to construe the decision to engage with a foreign country as voluntary. The voluntary nature of the company’s or person’s interaction with the foreign country means that there is no reason to question the intuition discussed above that a visitor meaningfully consents to abide by a foreign country’s laws when interacting with that country. Indeed, for all these reasons, most people would probably agree it is intuitively reasonable to conclude that those who visit or do business in another country impliedly (if not explicitly) take upon themselves the duty to abide by that country’s laws, as a general matter.

The third difficulty, lack of notice, also is far less vexing in the foreign context. To begin, licensing requirements often specify the laws with which the licensee is expected to comply. Moreover, there are good reasons to conclude that notice is not an issue even where a license does not so specify, or when there is no license requirement. Businesses, particularly sophisticated businesses, typically are knowledgeable about the laws of foreign countries in which they do business. Indeed, such knowledge likely is a prerequisite to the responsible conduct of business. For these reasons, lack of knowledge to what one is consenting typically is not an issue for businesses that transact business internationally (though it might be relevant for some small businesses).

214. This cost is heightened with respect to online businesses. I shall not dedicate further attention to this subject in this Article, however.

215. Correspondingly, the plausibility of implied consent in the foreign context is diminished to the extent that voluntariness of the interaction is diminished; it is less plausible to find implied consent on the part of a refugee fleeing persecution, for instance.

216. This is not to suggest that the visitor’s home jurisdiction loses interest in its citizen when she goes abroad. The visitor’s out-of-country activities may well affect the interests of her home country such that the home country also has regulatory jurisdiction, resulting in concurrent regulatory jurisdiction. Cf. Mark D. Rosen, Extraterritoriality and Political Heterogeneity in American Federalism, 150 U. PA. L. Rev. 855, 882–91, 914–16 (2002) (noting a parallel phenomenon with regard to states within the United States). Indeed, there may be circumstances where a host country does not have legitimate regulatory jurisdiction over a visitor. The point above in the text simply is that visiting a foreign country typically entails meaningful consent to abide by its laws.
The same cannot be said, however, for the average individual tourist. If anything, tourists are likely to be less knowledgeable about a foreign country’s laws than are the foreign country’s citizens. The knowledge that reasonably can be imputed to a tourist is highly context sensitive, however, turning on such considerations as the substantive law in question and the reasons for the individual’s visit. For instance, visitors who go to Kenya to hunt plausibly can be expected to know the regulations governing which and how many game may be bagged. A visitor might not properly be deemed to have consented to less well known laws that do not affect the average tourist but that his activities just happened to touch upon.

Notably, contemporary enforcement doctrine (both in its common law form of comity and in the statutes and treaties that address discrete aspects of the enforcement of foreign judgments) provides a check to ensure that the party subject to the foreign law has meaningfully consented to that law. A threshold prerequisite to the enforcement of a foreign judgment is that the foreign court’s exercise of power was consistent with the requirements of personal jurisdiction. Under the American approach, personal jurisdiction can be established by means of either “general” jurisdiction or “specific” jurisdiction. General jurisdiction is established where a party has had continuous and systematic contacts with a forum. Specific jurisdiction requires a showing that the party has “purposefully directed” its activities to the forum and that the litigation “arise[s] out of or relate[s] to” that purposeful availment. The cor-

217. See supra Part II.A.

An important question is whether this means that the foreign court should be held to the same requirements as American courts. American courts typically apply American constitutional doctrines in making this determination. See, e.g., Bank of Montreal v. Kough, 430 F. Supp. 1243, 1247 (N.D. Cal. 1977), aff’d, 612 F.2d 467 (9th Cir. 1980). Though beyond the scope of this Article, the better view is that the foreign court’s exercise of jurisdiction only need be consistent with the broad policies of personal jurisdiction, though not necessarily all the doctrinal details of American due process. The same policy considerations underlying comity—particularly facilitating operation of the international legal system and supporting political heterogeneity across countries—suggest that it would be inappropriate to hold foreign courts to the identical requirements that due process imposes on domestic courts. The Draft Hague Convention on Jurisdiction and Foreign Judgments takes this approach. See supra note 8 and accompanying text.

221. See Burger King, 471 U.S. at 472; Hanson v. Denckla, 357 U.S. 235, 253 (1958) (“It is essential in each case that there be some act by which the defendant purposefully
nerstones of personal jurisdiction thus are concepts that are intimately related to meaningful consent: foreseeability and purposeful availment. More specifically, “the foreseeability that is critical [is] . . . that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.”

Although personal jurisdiction is directed to establishing adjudicatory jurisdiction rather than legislative jurisdiction, personal jurisdiction’s requirements of foreseeability and purposeful availment go a long way toward ensuring that there has been meaningful consent to the forum’s substantive law, as well. To the extent that foreseeability and purposeful availment do not provide such assurance, enforcement analysis ought to reflect the understanding that fairness to the losing party mandates that she could be said to have objectively consented to the issuing country’s substantive laws.

c. The Limits of Consent

Even where there has been meaningful consent to abide by a foreign law, should an American court respect it? American law sometimes refuses to respect the informed choices made by its citizens. Should an American citizen’s or corporation’s consent to abide by foreign laws that an American polity could not constitutionally have enacted be considered per se unfair to that citizen or corporation?

No. To begin, holding otherwise would treat foreign countries more strictly than American polities, for American citizens may waive many constitutional rights they hold vis-à-vis American polities. For example, American citizens may incriminate themselves, refuse to be represented by counsel, consent to being searched absent probable cause, or plead guilty and thereby waive all procedural rights. Although the unconstitutional conditions doctrine is notoriously unsusceptible to a

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223. See supra note 199 (explaining the difference between legislative and adjudicatory jurisdiction).


225. American courts will not enforce certain substantive provisions under substantive unconscionability or under contract law’s public policy exception. For more on this, see infra text accompanying notes 244–247.


227. See Perez v. United States, 501 U.S. 923, 936–37 (1991) (enumerating a sample of constitutional rights that can be waived). Indeed, many constitutional rights can be waived under circumstances not only where there is no explicit waiver, but also where one is hard pressed to find even meaningful implied waiver. See id.

228. For an informative discussion of the relationship between the doctrines of waiver
principled doctrinal description, one unquestionable thing that can be said is that virtually all constitutional rights can be waived under some circumstances. Here are some examples: the federal government can “condition[] receipt [of assistance] under Aid to Families with Dependent Children . . . on the recipient’s submission to warrantless searches of her home”; the receipt of federal funds under the Public Health Services Act can be conditioned on family planning clinics’ agreement to not recommend or counsel abortion as a method of family planning; Congress can bar federal food stamps from otherwise eligible households that become needy because a household member is on strike. In short, the notion that constitutional rights are inalienable and accordingly may not be waived has not been accepted by courts. It would be strange if the law that permits American citizens to waive constitutional rights did not allow them to waive nonconstitutional analogues of those rights in respect of foreign countries.

and unconstitutional conditions, see Mazzone, supra note 226.

229. See, e.g., Lynn A. Baker, The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions, 75 CORNELL L. REV. 1185, 1195 (1990) (noting that the “principal recent commentators on the unconstitutional conditions doctrine have all agreed that the Court has yet to arrive, explicitly or implicitly, at a clear limiting principle for deciding challenges to conditions on government benefits”); Frederick Schauer, Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency, 72 DENN. U. L. REV. 989 (1995) (trying to explain why it is not to be expected that a consistency doctrine of unconstitutional conditions can be generated); Kathleen M. Sullivan, Unconstitutional Conditions, 102 HARV. L. REV. 1413, 1416 (1989) (“As applied . . . the doctrine of unconstitutional conditions is riven with inconsistencies.”).

230. A notable exception is the Thirteenth Amendment’s ban on slavery. U.S. CONST. amend. XIII.


232. Sullivan, supra note 229, at 1437 (describing Wyman v. James, 400 U.S. 309 (1971)).


234. See Lyng v. Int’l Union, UAW, 485 U.S. 360, 362–64 (1988). Although the Court has not held labor strikes themselves to be constitutionally protected speech or association, it is not far-fetched to assume that “union membership implicates at least some protected freedoms of speech and association.” Sullivan, supra note 229, at 1438.


236. See Baker, supra note 229, at 1215 & n.113; Sullivan, supra note 229, at 1477 & n.285.

237. I say “analogues” for the following reason: because the First Amendment does not bind France, agreeing to abide by France’s hate speech law cannot be said to waive an actual First Amendment right.

238. Black letter unconstitutional conditions doctrine permits constitutional rights to be waived so long as the government has not coerced it. See Baker, supra note 229, at 1194–95 (noting that “the rhetoric of individual ‘choice’ versus ‘coercion’ permeates” the Court’s discussions of the unconstitutional conditions doctrine); Sullivan, supra note 229, at 1428–43 (collecting cases where the Court analyzed conditions in terms of coercion).
Furthermore, to conclude that it is per se unfair to permit an American citizen to consent to un-American laws is to decide that traveling American citizens properly are immune to those laws of their host country that an American polity could not have enacted. What notion of fairness suggests that American citizens are entitled to such immunity? Immunizing traveling Americans from such foreign laws may well interfere with the foreign country’s ability to ensure compliance with its policies. Though comity is not theoretically rich enough to provide a principled answer as to why this would be problematic, Rawlsian theory is. Such interference with the foreign culture would be per se problematic from the vantage point of the second original position; the culture-preserving orientation that is derived from a Rawlsian approach leads to the conclusion that visitors who are unwilling to abide by a host country’s norms should not come, not that host countries should be required to treat visitors in accordance with their home countries’ constitutional norms regardless of the effects this might have on the host country’s cultural norms. Indeed, immunizing traveling Americans sometimes might jeopardize political stability in the host country; it is entirely possible that an act of plainly speaking one’s mind in public, which in the United States would be constitutionally permissible and harmless, might have devastating consequences in another country. More generally, the meaning and possible consequences of a particular action might radically change depending on where it, or its consequences, occur. Accordingly, fairness does not demand that an activity allowed in place A also be permissible in place B.

239. See supra Part II.C (discussing limits to comity case law).
240. See supra note 229, at 1192–93; Schauer, supra note 229, at 995–96; Sullivan, supra note 229, at 1433, 1450–56. Nonetheless it is notable that a foreign government’s conditioning travel to its country or doing business with its country on the traveler/business’s agreement to abide by its laws is almost certain to be less “coercive” than almost any condition that an American government might attach to its own citizen’s receipt of governmental benefits. This is true for the same reasons discussed above as to why it is more plausible to infer consent on the part of foreign travelers than on the part of domestic citizens. See supra Part IV.A.2.b.
241. Though it is simplest to make this point by reference to physical location, the proposition is not tied to physical geography. That is to say, legitimate state interests that justify governmental regulation are not determined exclusively by physical location. See generally Rosen, supra note 216, at 882–91, 914–16 (describing the normative argument for extraterritoriality and discussing the right to travel as a limit on states’ power).
242. The reasonableness of this proposition is strongly suggested by the fact that the locus of an activity sometimes is highly relevant to the activity’s constitutionality under American constitutional law. To take an example from the First Amendment, there are lo-
This is not to suggest that there should be no limits on that to which a person can consent. The most important of these limits will be discussed later under the rubric of the interests of the enforcing country. Limitations derived from paternalism, however, merit mention in the present section, which considers fairness vis-à-vis the individual parties. Consider the substantive provisions in domestic contract law that courts will not enforce. Although American contract law “confers upon contracting parties wide power to shape their relationships,” courts occasionally refuse to enforce a substantive provision on the ground that it would violate public policy. For instance, contracts creating slavery are void in all jurisdictions, and gaming contracts are unenforceable in many states.

Contractual limitations that interfere with speech and related First Amendment rights, however, have been upheld consistently in American courts. For example, courts have enforced settlement agreements in which a party agreed not to publicly criticize a certain type of psychological therapy and restrictive covenants in condominium bylaws that barred the posting of signs. If American citizens can consent to limitations in the United States where a citizen is not permitted to speak or do what she may in Los Angeles. For example, government officials in some places in the United States (namely, army bases) may prohibit speech that is merely “intemperate, . . . disloyal, contemptuous and disrespectful,” Parker v. Levy, 417 U.S. 733, 739, 758–59 (1974), may enact prior restraints, Brown v. Glines, 444 U.S. 348, 349, 358 (1980) (upholding Air Force regulation requiring “members of the service to obtain approval from their commanders before circulating petitions on Air Force bases”), and may ban private citizens’ political speech, Greer v. Spock, 424 U.S. 828, 837–38 (1976). Such regulations would be impermissible virtually anywhere else in the United States. In short, the content of people’s rights may be tied to geography: either where they are physically located or where their actions have effects. See generally Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77 Tex. L. Rev. 1129, 1152–56 (1999) (discussing nonuniformity in constitutional requirements in connection with the military community). As such, there is no reason to believe that fairness to the individual demands that she be permitted to speak or do in Country B what she may speak or do in Los Angeles.

243. See infra Part IV.C.
244. E. Allan Farnsworth, Contracts 426 (3d ed. 1999).
245. Id. at 321.
246. This is due to the Thirteenth Amendment’s ban on slavery, which is directly applicable to private individuals. U.S. Const. amend. XIII; see Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991) (noting that the Thirteenth Amendment applies to individuals).
248. See Rosen, supra note 1 (manuscript at Part III.B.2.a).
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ing their speech by entering into a contract with another American citizen—and they can—should they be more constrained in limiting their autonomy when they enter into a relationship with a foreign country? Does it make sense, in other words, to say that American citizens should be permitted to consensually limit the scope of their freedom less with foreign entities than with fellow citizens? From the standpoint of fairness to the American citizen, the party with whom she contracts would not seem to be relevant.

If anything, there are reasons to think that the limitations with regard to enforcing foreign judgments should be less strict than the public policy limitations that void domestic contracts. First, foreign judgments based on foreign laws are—as their name indicates—judgments. The American law of full faith and credit long has treated judgments more “exacting[ly]” than laws, requiring courts from State A to enforce judgments from State B even though A’s courts would not have been required to apply B’s law had the litigation occurred in A’s courts. For example, though Mississippi refused to enforce certain futures contracts on the ground that they were gambling contracts that were contrary to public policy, Mississippi was required to enforce a Missouri court’s judgment that was based on such a contract which a Mississippi could have refused to enforce. Although full faith and credit does not apply to the judgments of foreign countries, the core policy considerations justifying the different treatment accorded to judgments apply equally to foreign judgments: the desire for finality and the greater potential for interpolity friction owing to the fact that a judgment is a more focused declaration of state policy than is a general law. An American court accordingly might be justified in enforcing a foreign judgment premised on a substantive contract right that it would not have enforced, on grounds of public policy, if it had appeared in a domestic contract.

Second, the policy behind not upholding a domestic contractual provision might be absent when the consent runs from an American citizen to a foreign government or foreign national. This would be true, for example, if the refusal to enforce the domestic contract provision aimed not to protect the promisor, but to penalize promisees who exact overly strict concessions. It is plausible that a substantive provision in a con-

254. Cf. Farnsworth, supra note 244, at 322 (noting that many of the considerations that may move a court to refuse to enforce an agreement on grounds of public policy “turn on reluctance to aid the promisee rather than on solicitude for the promisor”).
tract between two Americans deemed to violate public policy would be
acceptable if it had been negotiated between an American and a foreign
national (or if it had been imposed as a regulation by a foreign country).
In the former case, a fellow member of one’s political community is
seeking to impose restrictions on a fellow citizen that are at variance with
their shared culture. In the latter case, a foreign national or country may
be seeking to protect its particular values, and there is no reasonable ex-
pectation that the foreigner need share American values.

Doctrinally, such interests of the foreign country’s political commu-
nity should be legally relevant under the balancing test typically used to
determine whether to refuse enforcement on grounds of public policy.\textsuperscript{255}
Indeed, the interests of protecting a foreign political community are more
weighty than a private party promisee’s interest in exacting concessions
from a fellow member of her political community that run against the
shared values of the political community to which they both belong. This
do not mean that the foreign country’s political interests are disposi-
tive, but simply that the foreign and domestic promisee are differently
situated for purposes of a public policy analysis.

B. INTERESTS OF THE ISSUING COUNTRY

The next set of interests that are implicated by enforcement deter-
minations is that of the foreign country that has issued the foreign judg-
ment (the “Issuing Country”). The weight accorded to the Issuing Coun-
try’s interests varies depending upon one’s ante-legal commitments. The
Issuing Country’s interests are relevant to comity, but comity has an in-
adequately theorized concept of “sovereignty” to assess the nature of that
interest.\textsuperscript{256} Under Rawlsian theory, protecting the Issuing Country’s cul-
ture is a core value, as long as the Issuing Country fits the paradigm of
either a liberal or decent hierarchical society.\textsuperscript{257} After all, the person in
the second original position does not know which peoples she represents
and accordingly adopts a principle of equality that seeks to protect all
liberal and decent hierarchical peoples in the same ways.\textsuperscript{258} Under game
theory, however, the Issuing Country’s interests are relevant only if re-
specting them advances the enforcing jurisdiction’s parochial interests.\textsuperscript{259}
For instance, game theory counsels enforcement if the Issuing Country’s
political stability is in the U.S.’s interest and enforcing the foreign judg-
ment will advance stability.\textsuperscript{260}

\begin{footnotes}
\item[255] See \textit{id.} at 324.
\item[256] See \textit{supra} Part II.B.
\item[257] See \textit{supra} Part III.C.
\item[258] See \textit{supra} Part III.C.
\item[259] See \textit{supra} Part III.B.
\item[260] See \textit{supra} Part III.B.
\end{footnotes}
The analysis that follows applies to a Rawlsian approach. It also can be applied to comity; comity already takes account of the Issuing Country’s interests, and the following analysis can enrich this aspect of a comity inquiry. The analysis does not, however, apply to a game theoretical approach, under which the Issuing Country’s interests are wholly derivative of U.S. interests, for such analysis inevitably is country specific and situation specific.

The Issuing Country typically has two main interests in the enforcement of its judgment. The first reflects the policy concerns that underlie the act of state doctrine: that the official acts of a foreign government be respected by other countries. Refusing to respect a duly issued foreign judgment violates this interest of the foreign country. This is the interest that has been recognized in the comity case law.

Second, the foreign country has an interest in seeing that other countries do not interfere with its policies. Failing to enforce a foreign judgment can frustrate the ability of the foreign country’s citizens to obtain compensation in accordance with the country’s public policy. Non-enforcement also can hinder the foreign country’s ability to ensure compliance with its noncompensatory policies. When American courts decline to enforce judgments based on foreign laws that American policies could not have enacted, they impede foreign countries from governing themselves simply because their legal norms are at variance with American constitutional doctrines. For example, although France has a commitment to free speech, French doctrine permits more extensive regulation of hate speech than U.S. law allows.

The U.S. district court’s refusal to enforce a French judgment in the Yahoo! case frustrated France’s ability to enforce its law, and thereby to ensure its efficacy, simply because the French law did not conform to U.S. First Amendment doctrine.

The Issuing Country’s interest in this second sense accordingly is a function of the legitimacy of its regulatory efforts. Several caveats follow from this. First, the regulation must be authorized under the Issuing

261. See supra Part II.B.
262. See supra Part III.B.
264. See supra Part II.
267. One also could argue that the legitimacy of the issuing country’s interest turns on the substantive content of its regulation. I prefer, however, to treat this issue of appropriate limitations on the foreign country’s law under the rubric of the interests of the enforcing country, and I accordingly discuss it in the next subsection.

Two other considerations plausibly bear on the legitimacy of the issuing country’s in-
Country’s internal law, for there can be no legitimate interest on the part of the Issuing Country if the regulation at issue is not legal under its own laws. Second, the Issuing Country’s effort to regulate must be consistent with the customary international law principles governing the scope of extraterritorial prescriptive jurisdiction, and the application of its law in the judgment at hand must have been consistent with generally accepted principles of international choice of law. If the foreign country’s regulatory effort does not satisfy these tests, then the foreign judgment should not be enforced. For example, a hypothetical Iranian judgment enjoining publication in the United States of Rushdie’s *Satanic*...
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Verses should not be enforced by an American court because such a judgment would exceed the scope of legitimate prescriptive jurisdiction under customary international law.

C. INTERESTS OF THE ENFORCING JURISDICTION
(HERE, THE UNITED STATES)

Analyzing the interests of the enforcing jurisdiction is complex. Contemporary comity doctrine takes account of U.S. interests via the public policy exception in a problematically undertheorized fashion that fails to explain why the exception is unilateralist and why its threshold is high. In respect of the interests of the enforcing jurisdiction, the policy prescriptions of game theory and Rawlsian political theory diverge starkly. Moreover, each approach’s relationship to comity is complex. A game theoretic approach calls for a unilateralist approach akin to the public policy exception in formal structure, but would advocate broadening the scope of the exception. Rawlsian analysis requires a multilateralist approach, but the standard it uses for determining what foreign judgments should not be enforced likely would not look much different from what is found under the public policy exception.

1. Comity and the Public Policy Exception

Understanding that it is not unconstitutional for an American court to enforce an un-American judgment, a court confronted with such a judgment would ask whether it was “repugnant to fundamental notions of what is decent and just.”

270. An important institutional question arises as to which branch of government ought make this type of determination. In the classic statement of the act of state doctrine, the Court held on separation-of-powers grounds that determinations of the validity of another country’s laws should not be made by American courts. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). This is yet another reason for concluding that U.S. policy regarding the enforcement of foreign judgments ought to be laid down in the first instance by the more political branches. At the same time, increasing globalization and judicial involvement with foreign matters might suggest that American courts inevitably will have to play a larger role in matters that touch upon foreign relations than they did in 1964, when Sabbatino was decided. I do not intend to resolve this important question in this Article.

271. The only plausibly applicable category of prescriptive jurisdiction would be the effects doctrine. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. d (1986). Though countries are divided as to the scope of effects jurisdiction, see THE INT’L CHAMBER OF COMMERCE, supra note 268, at 36–37, it is inconceivable that “effects” would be given so broad a scope as to encompass the Iranian regulation discussed above in the text.

272. See supra Part II.C.

273. In re Will of Brown, 505 N.Y.S.2d 334, 341 (N.Y. Sur. Ct. 1986). Courts would resort to a comity analysis where a treaty or statute did not govern the enforcement decision, as is the case most of the time.
unilateralist in structure because it considers only the U.S.’s interest and does not invite consideration of the Issuing Country’s interest. It also is important to note that the public policy exception does not provide a principled basis for determining the contours of these standards. Would France’s hate speech law trigger the exception? England’s pro-plaintiff defamation law? The analyst applying the public policy exception would have to utilize some theory, whether explicit or implicit, to answer these questions. Here is how game theory and Rawlsian political theory would resolve them.

2. Game Theory

As seen above, analysts adopting a game theoretic approach analyze enforcement strictly from the perspective of maximizing U.S. parochial interests. Game theory thus calls for a unilateralist analysis. Though game theory suggests that it generally is in U.S. interests to enforce foreign judgments, the conclusion is different as regards un-American judgments. Game theory suggests that un-American judgments should not be enforced when such judgments come from countries that do not enforce a broad range of American judgments that are deemed to be violative of their public policy, unless enforcing such an un-American judgment is peculiarly in the interest of the United States (for example, for the purpose of securing political stability). If and when a particular foreign country enforces a wide range of U.S. judgments, however, game theory suggests that American courts should enforce un-American judgments. In short, a game theoretic analysis does not counsel against American enforcement of un-American judgments as a categorical matter.

The game theoretic analysis of un-American judgments runs as follows. The United States already enforces foreign judgments more fre-

274. See supra Part III.B.
275. See supra Part III.B.
276. See supra Part III.B.
277. See supra Part III.B.
278. One might think that occasional U.S. nonenforcement would not be problematic under a game theoretic analysis because enforcement issues are best understood as bilateral games and a decision not to enforce accordingly would jeopardize, at most, a bilateral relationship between the United States and the country whose judgment it refused to enforce, not the entire international regime. A policy of not enforcing un-American judgments, however, would affect U.S. relations vis-à-vis foreign judgments with a large number of countries. Consider things just from the perspective of the First Amendment. U.S. First Amendment jurisprudence is anomalous with regard to the protection it affords speech. Virtually every other country with constitutional commitments to free speech tolerates greater intrusions into speech to protect the public good (through such things as hate speech legislation). See Sionaidh Douglas-Scott, The Hatefulness of Protected Speech: A Comparison of the American and European Approaches, 7 WM. & MARY BILL RTS. J.
Intuition alone suggests that cutting back U.S. enforcement of foreign judgments so that U.S. practice moved in the direction of these other countries’ practices would not necessarily jeopardize the regime of cooperation vis-à-vis foreign judgments that has developed. The game theoretic refinement280 known as the perfect Bayesian equilibrium solution281 supports the conclusion that the United States should not enforce all foreign judgments from Country X if that country doesn’t enforce all U.S. judgments. This refinement assumes that players in a repeat game (such as the enforcement of foreign judgments) start out with certain beliefs as to how the other players will act and then update their beliefs when they observe how the other players actually act.282 Each player will then act in accordance with the revised belief in a manner that will maximize her pay-off.283

Applied to the enforcement of foreign judgments, the perfect Bayesian equilibrium solution analysis would be as follows. Although the enforcement of foreign judgments is properly modeled as either a prisoner’s dilemma or a stag hunt, meaning that enforcement of the other’s foreign judgments is mutually beneficial,284 the United States would learn over time that a particular foreign country does not enforce U.S. judgments under certain predictable circumstances (i.e., when the judgment is contrary to the foreign country’s public policy). The United States then would not have to enforce all of that foreign country’s judgments in order

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279. See Scoles et al., supra note 52, at 1194–98. For example, England has a statute that not only denies recognition to U.S. antitrust judgments, but also allows the defendant in the foreign proceeding to recover treble damages he had to pay from the plaintiff’s British assets. Id. at 1195.

280. Games frequently have multiple equilibria. See Baird et al., supra note 113, at 313. Refinements eliminate equilibria that players are unlikely to adopt. Id.

281. See id. at 80–89. “Perfect” refers to the notion that players will act in conformity with their beliefs. Id. at 84. “Bayesian” refers to the idea that players put probabilities on different events occurring and then update their beliefs as they acquire new information. Id. at 83.

282. See id. at 84.

283. See id. According to Baird. [a] proposed solution to a game is suspect if it depends on one of the players having beliefs that are inconsistent with the actions that the players take in equilibrium... We can test whether a proposed equilibrium is a perfect Bayesian equilibrium... [by asking] whether, in the proposed equilibrium, a player’s actions are a best response, given that player’s beliefs and the actions and beliefs of the other players.

284. See supra Part III.B.
to induce the foreign country to enforce the U.S. judgments it enforces.

The result would be the reciprocal enforcement of foreign judgments not contrary to public policy coupled with the reciprocal nonenforcement of judgments that are deemed to be contrary to public policy. To posit that the United States would enforce all the foreign country’s judgments where the foreign country enforces most but not all U.S. judgments would run contrary to the perfect Bayesian equilibrium solution because it would assume that the United States would select a suboptimal strategy, given a rational belief by the United States as revised over time as to how the foreign country will act. Such a strategy would be suboptimal from the U.S. perspective because if the foreign country does not enforce U.S. judgments contrary to its public policy, then the United States similarly would prefer not to enforce judgments based on the foreign country’s laws that are contrary to U.S. public policy, in light of the fact that enforcing such judgments invariably imposes some costs on the enforcing country.285

I will call the approach implied by the perfect Bayesian equilibrium solution a rule of “tailored reciprocity,” for the following reasons. “Reciprocity” in the enforcement context refers to the Enforcing Country conditioning enforcement on the Issuing Country’s having enforced the Enforcing Country’s judgments in the past. Under a reciprocity regime of the untailed variety, the Issuing Country’s failure to enforce U.S. judgments that are contrary to the foreign country’s public policy would mean that the U.S. should not enforce any of the Issuing Country’s judgments. Early U.S. enforcement doctrine contained such a reciprocity requirement,286 but this has been discarded by most American jurisdictions.287 “Tailored reciprocity” is a more refined tit-for-tat strategy than the old reciprocity doctrine: rather than asking generally whether the other country enforces its foreign judgments, a country would ask whether the other country enforces the type of judgment that is before it. To be clear, “tailored reciprocity” is not currently found in the law, but it is the method that is suggested by a game theoretic approach.

It is important to note that even under current conditions, where many foreign countries do not enforce many U.S. judgments, game the-

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285. This analysis presumes, however, that each country can readily ascertain the scope of the other’s public policy exception. If not, then Player 1’s nonenforcement on public policy grounds might be construed by Player 2 as a decision not to enforce foreign judgments more generally, regardless of the rhetoric deployed by courts of Player 1, leading Player 2 not to enforce Player 1’s judgments, which in turn would lead Player 1 not to enforce Player 2’s judgments more generally, and so on. Though there undoubtedly could be hard cases, un-American judgments, in the main, presumably would be readily identifiable as being contrary to public policy.


287. See Coles et al., supra note 52, at 1195–98.
ory leads to the conclusion that sometimes un-American judgments should be enforced. Some countries generally enforce U.S. judgments, and their foreign judgments—even un-American judgments hailing from those countries—accordingly should be enforced. Moreover, it might be beneficial to the United States to enforce an un-American judgment if nonenforcement threatened the foreign country’s political stability. To provide an analogy, notwithstanding American commitments to free political association, after World War II the United States approved a constitution for Germany that subjected the freedom of association to a content-based restriction that “explicitly forbid[ade] the formation of antidemocratic and other antithetical groups.”

3. Rawlsian Theory

As shown above, Rawlsian analysis calls for a multilateralist approach that takes account of enforcement’s costs to the Enforcing Country as well as nonenforcement’s costs to the Issuing Country. Furthermore, a Rawlsian analysis suggests that the only cultures that ought to be protected are those belonging to liberal and decent hierarchical societies. Judgments based on those laws of outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms that would not be enacted by liberal or decent hierarchical societies should not be enforced.

It follows that it is not necessary under a Rawlsian approach that the foreign law be conterminous with American constitutional requirements. Indeed, even some foreign judgments based on nonliberal laws would be eligible for enforcement under Rawls’s account. England and France readily qualify as liberal democratic societies under Rawls’s criteria. The mere fact that Britain’s libel laws and France’s hate speech legisla-
295. *Id.* at 11–12. According to Rawls, even when two or more peoples have liberal constitutional regimes, their conceptions of constitutionalism may diverge and express different variations of liberalism. A (reasonable) Law of Peoples must be acceptable to reasonable peoples who are thus diverse; and it must be fair between them and effective in shaping the larger schemes of their cooperation.

296. *Id.*

297. *See supra* notes 175–176 and accompanying text (explaining the comparative impairment approach).
courts do by virtue of their being courts. Indeed, there are reasons to think that the American public in fact draws a distinction between judicial enforcement of legal rights and governmental support of the underlying substantive legal rights. Popular understanding of the judiciary may encompass the distinction between enforcement of foreign judgments and governmental endorsement of the laws underlying such judgments.

Third, the robustness of the constitutional norm at issue likely affects the actual costs of enforcing a foreign judgment. The stronger the norm, the less is the cost of enforcing a foreign country’s judgment insofar as the strong norm is unlikely to be disturbed.

D. INTERESTS OF THE INTERNATIONAL SYSTEM

The final entity affected by enforcement determinations is the international system. Comity case law long has assumed that enforcing foreign judgments unqualifiedly advances the interests of the international system by increasing legal predictability and eliminating duplicative proceedings. This is yet another example of comity’s undertheorization, for careful thought suggests that there are potential downsides from the perspective of the international system to enforcing even simple foreign

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298. Consider, for example, the durability of the rule of Testa v. Katt, 330 U.S. 386 (1947), which states that state courts are required to apply even those parts of federal law with which they disagree. State courts thus are treated differently than state executives and legislatures, for under the quasi-Tenth Amendment doctrine of anti-commandeering, the federal government is disabled from requiring state executives to enforce federal law, see Printz v. United States, 521 U.S. 898, 935 (1997), or requiring that state legislatures enact a law, see New York v. United States, 505 U.S. 144, 188 (1992). The primary justification is that commandeering undermines political accountability; citizens would erroneously blame state legislatures for enacting a law that Congress required them to enact.

Testa’s rule has survived contemporary anti-commandeering doctrine. See Printz, 521 U.S. at 907. Requiring state courts to apply federal law is not deemed to constitute federal commandeering of state courts because, the Supreme Court has explained, courts apply the law of other sovereigns all the time. Id. Because courts frequently apply other sovereigns’ laws by virtue of their being courts, U.S. citizens do not assume that a state court’s application of a given law indicates state endorsement of that law.

The same rationale may apply here: Citizens may appreciate that an American court’s enforcement of a foreign judgment based on a law that an American polity could not have enacted is simply another example of a court being asked to apply another sovereign’s laws. Accordingly, the enforcement of a foreign judgment would not be understood as an American polity’s support for the substantive law underlying the judgment, but as an instance of an American court doing its job of being a court—a job that sometimes requires it to apply another sovereign’s laws. However, the social meaning of enforcement may well be a function of whether the court is enforcing a judgment for damages or injunctive relief. The latter could well be construed as constituting more active participation on the part of an American polity. To the extent this were true, the domestic interest in not enforcing the foreign judgment would increase under a game theoretic approach.

299. See supra Part II.B.
judgments. Ultimately, the significance of these costs is a function of the analyst’s prior political commitments. While these objections fall away under a Rawlsian perspective, several survive under a game theoretic approach and are appropriately taken into account when analyzing the costs and benefits of enforcing un-American judgments under a game theoretic rubric.

Enforcing foreign judgments increases transaction costs by making it necessary for companies that engage in international activities to tailor their behaviors to different jurisdictions. Such “compliance” costs are necessary because enforcing foreign judgments makes the foreign law more efficacious by making it less easily evaded. The comity case law has not recognized these compliance costs.

How ought these costs influence enforcement determinations? Whether and to what extent they are legally relevant turns on the analyst’s prior political commitments. To illustrate, such costs are understood differently under the game theoretic and Rawlsian approaches. To the extent that such business costs ultimately are absorbed by the United States, they are properly included in the cost-benefit analysis that drives a game theoretical analysis and they accordingly counsel against enforcement (though they do not on their own lead to the conclusion of nonenforcement insofar as there may be countervailing benefits to enforcing the judgment). Under a Rawlsian approach, on the other hand, such costs are inevitable byproducts of doing business in a world in which there are many countries. The only way to limit such costs would be to identify a single governing law, and persons in the second original position would prefer a legal regime that created such transaction costs to the alternative of a single regulatory regime that put their culture at risk.

Relatedly, it might be thought that enforcing foreign judgments could lead to a race to the bottom (where the “bottom” refers to the most restrictive legal regime). The efficacy that enforcement provides to foreign law may lead international actors to conform their actions to the most restrictive legal regimes to save the transaction costs associated with tailoring their actions to each and every jurisdiction in which they act. Further consideration, however, suggests that this concern of a race to the bottom is exaggerated. The concern rests on the assumption that transaction costs outweigh the costs of voluntarily accepting the strictest

300. One might ask why an article focusing on un-American judgments should address such generic costs of enforcement. The answer is that a full analysis demands an accounting of even such heretofore overlooked generic costs since the costs of enforcing un-American judgments are a function of the costs of enforcing general foreign judgments plus the *sui generis* costs that attend enforcing foreign judgments that are antithetical to American constitutional values.

301. The same is true with regard to simple foreign judgments.
regulations. Whether this is true is an empirical matter. There are strong reasons to doubt that this is so as an across-the-board matter. Consider the extensive U.S. employment regulations, which require that employers make reasonable accommodations for disabled persons, pregnant women, and older people. These requirements can be expensive. It is doubtful that an American company with manufacturing operations in South America would voluntarily choose to apply U.S. employment regulations to its Ecuadorian workforce to save transaction costs.

Even where international actors would opt to conform their activities to the strictest rule, it must be explained why this is properly deemed to be a “cost.” If a country feels strongly that parties appropriately subject to its prescriptive jurisdiction should not conform to a restrictive standard, the country can so require. Any costs associated with a race to the bottom accordingly turn out to be the compliance costs discussed above. If the enforcing country is indifferent, on the other hand, it is hard to see why a private actor’s decision to conform its behavior to a stricter law should matter from the perspective of the international system. The private sector frequently goes beyond what the law requires, and doing so typically is not deemed to be problematic.

Finally, it is important to consider a possible cost that recently has been discussed outside the comity context: the risk of subjecting international actors to inconsistent and conflicting regulations. After explaining what this cost is, this Article will show why it is not properly deemed a cost of enforcing foreign judgments, making it irrelevant to a Rawlsian analysis. The risk of inconsistent and conflicting obligations nonetheless would be relevant under a game theoretic analysis, and would counsel against enforcement.

Enforcing foreign judgments increases the efficacy of foreign laws, and an international actor will be subject to conflicting obligations if an efficacious foreign law and the domestic law purport to regulate the identical transaction or occurrence in ways that cannot be simultaneously satisfied. 302 The potential for conflicting obligations is eliminated if one country’s law is effectively disabled, leaving only one country to regulate a given transaction or occurrence. It is here that the enforcement of judgments becomes relevant: refusing to enforce a foreign judgment re-

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302 While there are several patterns such inconsistent obligations can take, two merit attention here. First, if Country A’s law is permissive and Country B’s law is mandatory, then the inconsistent laws will mean that party C must conform to Country B’s mandatory law to avoid liability. Under this circumstance, party C can comply with both countries’ laws, but Country A’s policy of permitting choice is undercut. Second, if both Country A’s and Country B’s laws are mandatory, and they each require different behaviors, then party C could be placed in a situation where it is literally impossible to comply with both countries’ laws.
roduces its efficacy.\textsuperscript{303}

It is important not to overstate the problem of inconsistent obligations. It occurs only infrequently for two reasons. First, countries’ laws typically do not \textit{require} activities that are \textit{prohibited} elsewhere. Most frequently, Country A’s prohibition that regulates the activities of a citizen of Country B in Country B disallows the citizen from undertaking an activity that is permitted, but not required, in Country B.\textsuperscript{304} While such a restriction might be said to undermine Country B’s policy insofar as it limits options that Country B is willing to grant its citizens,\textsuperscript{305} the conflict between the laws of Country A and Country B is less severe than a situation in which two countries’ laws impose obligations that cannot be simultaneously obeyed. Second, the problem of inconsistent obligations only seldom arises because international actors’ activities frequently are divisible so that both countries’ laws simultaneously \textit{can} be obeyed. International editions of publications are an example of this: a party can effectively act one way in Country A and differently in Country B. Similarly, a manufacturer can produce different lines of goods that meet the standards of different countries’ tort regimes.

Importantly, where conflicting obligations do arise, the law governing the enforcement of foreign judgments is not the proper doctrinal vehicle for addressing them.\textsuperscript{306} This is because enforcement is conceptually inadequate to resolve fairly the problem of inconsistent regulations under any normative approach aside from game theory. To illustrate, although enforcement is virtually guaranteed if judgment is obtained in a jurisdiction in which the defendant has assets, the presence of assets is normatively irrelevant under anything but a game theoretic approach to the propriety of a country’s regulation of a transaction or occurrence. This shows that the prerequisites for enforcement simply do not coincide with

\begin{itemize}
\item \textsuperscript{303} Professor Jack Goldsmith has argued against the enforceability of foreign judgments for this very reason. \textit{See} Jack L. Goldsmith, \textit{Against Cyberanarchy}, 65 U. Chi. L. Rev. 1199, 1216 (1998). Writing in the context of Internet regulation, Goldsmith has argued that the problem of multiple countries’ conflicting regulations is largely a nonissue because countries in which an actor does not have assets will be unable to enforce their judgments and accordingly do not have the power to regulate efficaciously. \textit{See id.} Goldsmith’s argument that conflicting regulations are a nonissue thus rests on the conclusion that countries in which a defendant’s assets are located should not enforce foreign judgments that issue from countries in which the defendant does not have assets.
\item \textsuperscript{305} \textit{See id.} at 820–21 (Scalia, J., dissenting).
\item \textsuperscript{306} As discussed above, courts confronting a foreign judgment legitimately can check that the issuing jurisdiction’s court properly applied the doctrines of prescriptive jurisdiction and international choice of law. \textit{See supra} Part II. Beyond this, however, it is best not to address the problem of inconsistent obligations through the rubric of enforcement, for the reasons discussed above in the text.
\end{itemize}
the considerations for determining which country’s regulations appropriately apply under any normative theory apart from game theory, under which the enforcing jurisdiction’s interests are all that matter.

More generally, enforcement is not the appropriate doctrine to address the problem of inconsistent regulations because inconsistent regulations arise from unsolved problems in two other legal doctrines. The first is prescriptive jurisdiction—the scope of a country’s powers to regulate. The law governing prescriptive jurisdiction includes the principles that govern the extent to which one country can regulate extraterritorially. It is well accepted that countries have some powers to regulate outside their physical borders, but to what extent? Lack of clarity as to the metes and bounds of these powers is what is largely responsible for creating inconsistent obligations in the first place. The second doctrine responsible for creating inconsistent obligations is international choice of law—the law that determines which country’s law should be applied when two or more countries have the power to regulate. Solving conflicting obligations through enforcement doctrines is troublesome because it is the doctrines of prescriptive jurisdiction and international choice of law that are the source of the problem and that accordingly are the appropriate ways of addressing the predicament of inconsistent obligations.

Furthermore, utilizing the doctrine of enforcement to solve the problem of inconsistent obligations would systematically benefit countries with large economies. The opportunity costs of an international actor keeping assets out of a country with a large economy may be great, for doing so typically limits access to the country’s market. Since foreigners’ assets are likely to be present, economically important countries typically will be able to enforce their judgments and hence effectively regulate. Small countries in which defendants are less likely to have assets, however, would be unable to enforce their judgments. The size of a country’s economy—and the extent to which potential defendants can afford to keep their assets outside a country’s economy—is normatively irrelevant to resolving which country should be able to efficaciously regulate under anything apart from a game theoretic perspective. For example, a company without assets in Country A might undertake activities outside

307. This is not the only source of inconsistent obligations. Many transactions or occurrences involve steps that occur in different countries. Under such circumstances, inconsistent obligations can arise even if no regulating country is regulating extraterritorially. Furthermore, it is conceivable that the most normatively attractive account of prescriptive jurisdiction would lead to a system in which more than one country legitimately had the power to regulate particular transactions or occurrences. Inconsistent obligations could arise under such a system of concurrent prescriptive jurisdiction. Sorting out which obligations should prevail when both jurisdictions’ regulations comport with the rules governing extraterritorial prescriptive jurisdiction would fall to other doctrines in such circumstances, such as international choice of law, as is discussed above in the text.
Country A that affect that country to such an extent that it has the right to regulate the company under virtually any normative theory of prescriptive jurisdiction. Solving conflicts of obligation by relying on enforcement thus amounts to a bald power grab, with smaller countries being unable to effectively regulate simply by virtue of their size.

The upshot is this. To the extent that legislative jurisdiction and international choice of law are the appropriate doctrines to manage conflicting obligations from multiple countries, the risk of inconsistent obligations does not constitute a reason for not enforcing foreign judgments under a Rawlsian fairness approach. From a game theoretic perspective, however, nonenforcement can provide a quick fix that systematically benefits U.S. interests whenever problems of conflicting obligations arise.

To quickly review, the possible costs to the international system of enforcing foreign judgments dissolve upon closer inspection under a Rawlsian analysis. Under such an approach, considerations from the vantage point of the international system all counsel in favor of the enforcement of foreign judgments. On the other hand, costs to the international system that are then borne by individual states—such as increased transaction costs and the risk of inconsistent obligations—counsel against enforcement under a game theoretic approach. As with so many other issues concerning the enforcement of foreign judgments, determining the relevance of enforcement’s consequences vis-à-vis the international system turns on the analyst’s ante-legal political preferences.

V. SYNTHESIS AND APPLICATIONS

This final Part V synthesizes the aforementioned considerations into a workable framework for determining whether un-American judgments should be enforced and then applies the framework to the cases examined in Part I where American courts categorically refused to enforce un-American judgments on the mistaken belief that it would be unconstitutional for them to do so.

A. THE PROPOSED ANALYTICAL FRAMEWORK: A SYNTHESIS

The table on the following page summarizes how each approach—comity, game theory, and Rawlsian political theory—analyzes the consequences of enforcement decisions that are visited upon each affected entity. The salience of these considerations is not dependent upon which branch of government ultimately generates an enforcement policy.
<table>
<thead>
<tr>
<th></th>
<th>Comity (A)</th>
<th>Game Theory (B)</th>
<th>Rawls (C)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Plaintiff</strong> (1)</td>
<td>Enforce (principles of res judicata).</td>
<td>Irrelevant.</td>
<td>Same as 1A, with one additional check: did Issuing Country have prescriptive jurisdiction?</td>
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<td><strong>Defendant</strong> (2)</td>
<td>If Issuing Country properly had personal jurisdiction, then it is fair to subject even a U.S. citizen to un-American judgments if there has been meaningful consent.</td>
<td>Irrelevant.</td>
<td>Same as 2A.</td>
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<td><strong>Issuing Country</strong> (foreign country) (3)</td>
<td>Enforce due to the respect due a sovereign—undertheorized.</td>
<td>Irrelevant, unless advantageous from U.S. perspective (e.g., promotes political stability).</td>
<td>No “reciprocity requirement.” If the foreign judgment is consistent with the international limits on legislative jurisdiction and choice of law, and if the law is consistent with a liberal or decent hierarchical society, then enforce if not enforcing would harm the Issuing Country’s culture more than enforcing would harm U.S. culture (i.e., international comparative impairment).</td>
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<tr>
<td><strong>Enforcing Country</strong> (United States) (4)</td>
<td>No “reciprocity requirement.” Enforce to advance separation of powers ideal of not interfering with foreign policy, but do not enforce if foreign judgment is “repugnant” to American public policy. This “public policy” exception is undertheorized.</td>
<td>The sole consideration is “tailed reciprocity”—do not enforce un-American judgments under current conditions, unless the country broadly enforces U.S. judgments or it is otherwise in U.S. interests to enforce.</td>
<td>The sole consideration is “tailed reciprocity”—do not enforce un-American judgments under current conditions, unless the country broadly enforces U.S. judgments or it is otherwise in U.S. interests to enforce.</td>
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<tr>
<td><strong>International System</strong> (5)</td>
<td>Enforce, because it facilitates international transactions.</td>
<td>Irrelevant, unless advantageous from U.S. perspective.</td>
<td>Same as 5A.</td>
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<tr>
<td><strong>Transaction Costs</strong> (5.1)</td>
<td>Overlooked to date.</td>
<td>A cost counseling against enforcement.</td>
<td>Worthwhile cost.</td>
</tr>
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<tr>
<td><strong>Inconsistent Obligations</strong> (5.2)</td>
<td>Overlooked to date.</td>
<td>A cost counseling against enforcement.</td>
<td>Solve at source of problem to avoid systematic unfairness to smaller economies.</td>
</tr>
</tbody>
</table>
1. Overview: A Comparison

The analysis is most streamlined under a game theoretic approach. If an American court is asked to enforce an un-American judgment from a foreign country that does not enforce many U.S. judgments due to the foreign country’s public policy exception (or its doctrinal analogue), then game theory counsels against enforcement unless there are overriding U.S. interests to do otherwise. Such interests could include the aim of promoting political stability in the foreign country or ensuring that a prevailing U.S. plaintiff is able to collect against a foreign citizen’s assets that happen to be situated in the United States. Generally speaking, however, game theory would counsel against enforcing un-American judgments until such time as the foreign country enforces U.S. judgments without invoking the public policy exception. This is “tailored reciprocity.”

Comity and Rawlsian analysis diverge significantly from game theory but themselves share much in common. As shown in the chart on the previous page, the analysis is identical, or virtually identical, at several junctures: 1A =1C, 2A=2C, and 5A=5C. Furthermore, both doctrines reject any reciprocity requirement.

Though the comity case law has identified most of the potentially affected entities, its theoretical underpinnings are not sufficiently developed to explain current black letter doctrine. Nor is comity a sufficiently robust concept to weigh each entity’s interests when enforcement benefits some but harms others. Rawlsian analysis is one plausible theoretical framework that can answer these questions. The Rawlsian approach explains why fairness to the parties is important, why a party can meaningfully consent to be bound by an un-American law, and why there rightfully is no reciprocity requirement.

Rawlsian analysis, however, counsels for the reworking of certain aspects of contemporary comity doctrine. Under a Rawlsian analysis, the distinction between the issuing and enforcing countries’ interests dissolves (hence the erasure of the line between rows three and four in column C), and the goal is to minimize cultural costs among liberal and decent hierarchical societies. Procedurally, this means that the Issuing Country’s judgment must be consistent with international limitations on the exercise of legislative jurisdiction and choice of law. Substantively, this means that rather than utilizing a unilateralist public policy exception that only asks whether a foreign judgment is “repugnant” to American culture, the law should utilize an international comparative impairment approach and refuse to enforce only those foreign judgments that reflect

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308. These requirements also ensure that enforcement is fair from the perspective of the victorious party that is seeking enforcement.
the problematic laws of outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms.

2. Synthesis

There is no need to reiterate the very simple doctrinal test described above that follows from a game theoretic approach. The analysis under either comity or a Rawlsian approach, however, is more complex. Under both comity and a Rawlsian approach, the threshold inquiry should fix on whether enforcement is fair from the perspective of the defendant. Did the issuing country properly exercise personal and legislative jurisdiction? If not, the foreign judgment should not be enforced as a categorical matter. If so, did the party against whom enforcement is sought meaningfully consent to being bound by the un-American law? The question is readily resolved in the affirmative when the party is a citizen of the foreign country from whose court the judgment issued. Furthermore, American citizens can meaningfully consent to be bound by foreign laws that American polities could not have enacted due to constitutional constraints.

The next set of questions concerns the relative interests of the issuing and enforcing countries. Comity and Rawlsian political theory answer the question differently. As a threshold matter, comity invokes the undertheorized public policy exception and asks whether the foreign law embodied in the judgment is “repugnant” to American policy. Under a Rawlsian approach the threshold question, by contrast, is whether the foreign law embodied in the judgment reflects values consistent with liberal...
eral or decent hierarchical societies. If not, the judgment categorically should not be enforced.311

If the threshold requirement is met, comity almost automatically finds that the issuing country has a sovereign interest in having its judgment enforced. A Rawlsian approach, by contrast, invites comparative impairment analysis that is difficult for courts to make, and for that reason is best left to the political branches. In fact, it is very difficult for even the executive and legislative branches to make such cross-country determinations. The best way to answer such questions likely is through *ex ante* negotiations via treaties or executive agreements. Absent executive or legislative involvement, courts nonetheless can muddle through, much as they do when they assess the policies behind statutes and engage in balancing incommensurables in litigations that concern purely domestic matters.312

The final set of considerations concerns the international system. To date, the comity case law has assumed that enforcement is beneficial to the international system. The case law, however, has not taken account of several costs to the system that enforcement imposes: transaction costs of compliance with multiple countries’ laws and the possibility of inconsistent and conflicting obligations. These costs do not counsel against enforcement under a Rawlsian framework. It is unclear how they would be treated under comity’s undertheorized approach.

In short, how the enforcement of un-American judgments is analyzed ultimately turns on the analyst’s ante-legal political commitments. Two plausible approaches to international relations—game theory and Rawlsian political theory—generate very different frameworks for answering enforcement questions. Involving competing value judgments, as well as matters of foreign affairs, enforcement determinations are best made by the more political branches of government, not by courts.

**B. SOME APPLICATIONS**

This final section revisits the cases analyzed earlier in which American courts refused to enforce un-American judgments on the view that the First Amendment precluded enforcement of such judgments.313 Analysis from a game theoretic perspective is simple: none of the foreign judgments should have been enforced because both England and France have refused to enforce many American judgments based on their domestic equivalents of public policy exceptions.314 What follows is the more

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311. *See supra* notes 290–292 and accompanying text.
313. *See supra* Part I.
314. *For example,* England’s Protection and Trading Interests Act of 1980 “denies
complex analysis entailed by either a comity or a Rawlsian approach. All that follows is unaffected by which branch of government ultimately formulates enforcement policy.\textsuperscript{315}

1. \textit{Telnikoff}\textsuperscript{316}

This is the easiest case to resolve. Had the court engaged in an ordinary comity analysis rather than its misplaced constitutional frolic, it probably would have decided to enforce the foreign judgment. A Rawlsian analysis clearly concludes that enforcement would have been proper.

a. The Parties

Comity and Rawlsian analysis are identical as regards the determination of whether enforcing an un-American judgment is fair to the parties, and both would conclude that enforcement would have been fair to the parties in the \textit{Telnikoff} case.\textsuperscript{317} First consider the victorious plaintiff, Mr. Telnikoff. He obtained judgment after having fully litigated the matter in England, and English trial procedures were not alleged to have been unfair. For these reasons, enforcement would have been fair from the perspective of the plaintiff.\textsuperscript{318}

Next, consider matters from the vantage point of the losing party, Mr. Matusevitch. At the time he published his letter in an English newspaper, Matusevitch was a long-term resident of England.\textsuperscript{319} For this reason, Matusevitch meaningfully consented to being governed by English libel law, and England properly exercised adjudicatory and legislative jurisdiction. Furthermore, the substantive provisions of English law do not exceed the limits to which American courts should permit a person to consent.\textsuperscript{320} English libel law is no more restrictive than domestic contractual limits on speech that American courts regularly have upheld.\textsuperscript{321} For

\textsuperscript{315} The sole exception is the separation of powers consideration pointed to under comity that favors enforcement to avoid judicial interference with executive branch formulation of foreign policy. See supra notes 82–83 and accompanying text.

\textsuperscript{316} Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997).

\textsuperscript{317} See supra Parts II.A, III.C.1.

\textsuperscript{318} See supra Part IV.A.1.

\textsuperscript{319} See Telnikoff, 702 A.2d at 232.

\textsuperscript{320} See, e.g., State v. Noah, 9 P.3d 858, 871 (Wash. Ct. App. 2000) (upholding settlement agreement under which an American citizen agreed not to publicly criticize a controversial psychotherapy technique); see also Rosen, supra note 1 (manuscript at Part II.B.2.c).

\textsuperscript{321} See Noah, 9 P.3d at 871.
these reasons, it would not be unfair from the perspective of Mr. Matusevitch for an American court to enforce the English judgment, even though an American polity could not have enacted the type of libel law on which the judgment was based.\footnote{322. See supra Part IV.A.2 (detailing the analysis relevant to a “losing party”).}

\textit{b. The Countries}

Both comity and Rawlsian analysis first would inquire whether, as a threshold matter, the English law on which the judgment was based is a type of law that an American court categorically should not enforce. Under comity, the question is whether English libel standards are so “repugnant” to American standards as to require nonenforcement.\footnote{323. See supra Part II.A.} Comity’s undertheorized character does not permit a definitive answer,\footnote{324. See supra Part II.C.} but I would suggest that once the canard of unconstitutionality has been discarded, it is reasonable to conclude that the English rule at issue here, that false published statements that adversely affect reputation are prima facie defamatory, simply does not qualify as sufficiently “repugnant” to merit nonenforcement. Indeed, prior to the 1960s there were jurisdictions in the United States that had such laws; such laws in fact were the predicate for rulings in cases such as \textit{New York Times v. Sullivan}.\footnote{325. 376 U.S. 254, 279–80 (1964).} England’s defamation law incontrovertibly differs from what is required by today’s First Amendment jurisprudence, but that alone hardly makes the English law “repugnant.” On the other hand, the public policy exception does not have sufficient theoretical resources to contradict a claim to the contrary. In the end, what constitutes “repugnance” for purposes of comity accordingly is indeterminate.\footnote{326. See supra Part II.C.}

A Rawlsian analysis provides a more definitive answer.\footnote{327. See supra Part III.C.} Although U.S. and English judgments differ as regards the scope accorded to free expression, the English law is the product of a liberal democracy. Because England is neither an outlaw state nor a benevolent absolutism, the principles of equality and nonintervention ought to govern U.S. interactions with her. Accomplishing this goal entails respecting the political choice made by English culture, not categorically refusing to enforce a foreign judgment based on the English law simply because the foreign law does not coincide with American First Amendment doctrine.

Assuming that the comity analysis concluded that the English judgment survived the threshold question, comity next would ask whether England had a legitimate sovereign interest in the judgment’s enforce-
The conclusion would be in the affirmative because an English court had issued a final judgment following lengthy adjudication that included two jury trials and an appeal. Apart from the public policy analysis mentioned above, standard comity analysis does not consider other potential costs to the Enforcing Country that enforcement might entail.

Rawlsian analysis would evaluate the interests of England and the United States by considering the cultural costs of enforcement and nonenforcement rather than by invoking the concept of sovereignty. The English libel law reflected an important English public policy: the honor of persons should be protected against defamation, and public figures should have the same protections against libel that are enjoyed by private citizens. A U.S. policy of nonenforcement could invite large-scale evasion of English libel law over time.

The United States, on the other hand, had virtually no interest in not enforcing the English judgment because domestic costs of enforcement would have been negligible. Though the First Amendment precludes an American polity from enacting the English libel law, enforcing the judgment would not have endangered this country’s cultural commitment to First Amendment values. Those values are quite robust. Moreover, a strong argument can be made that enforcing the foreign judgment would not constitute a public expression of governmental support for the substantive law underlying the judgment. American courts apply the laws of other sovereigns all the time, and when they do so it is popularly understood that they are merely doing their job as courts, not that they are giving public support to the substantive provisions they happen to be applying. Enforcing the British judgment accordingly would not have had a social meaning in the United States that would have imperiled American culture. For these reasons, an international comparative impairment analysis suggests that nonenforcement was more damaging to English culture than enforcement would have been to American culture.

c. International System

Both comity and Rawlsian analysis lead to the conclusion that enforcing the judgment in Telnikoff would have been beneficial to the international system. A strong pattern of enforcement of foreign judgments increases predictability and eliminates duplicative proceedings, thereby encouraging international business. Though the comity case law to date has not considered the possibility that enforcement could impose transaction costs and aggravate the problem of inconsistent and conflicting obligations, the Telnikoff scenario does not threaten to create any such costs since the English regulation in that case applied to an English citizen’s

328. See supra note 298.
activities in England. In any event, any such costs would not be relevant to a Rawlsian analysis, as explained above, for people in the second original position would decide that protecting culture trumps financial costs. 329

2. Bachchan 330

The Bachchan case is harder than Telnikoff because enforcing the foreign judgment would have imposed some domestic costs, possibly including some deleterious effects on American culture. Balancing these costs against the interests of England, the parties, and the international system is an act of commensurating incommensurables that is political in character. This Article’s framework elucidates the array of relevant considerations and in so doing makes it clear that additional information was needed to make an informed enforcement determination. Under a plausible set of factual assumptions, however, the British judgment should have been enforced under either a comity or Rawlsian approach. The judgment would not be enforced under a game theoretic approach, however, for the reasons elucidated above.

a. The Parties

In an analysis that is common to both comity and Rawlsian political theory, it can be shown that enforcing the judgment would have been fair from the perspective of the parties. 331 The victorious plaintiff resided in England and was libeled by a report that appeared in a newspaper there. 332 There were no suggestions that the English trial was procedurally unfair. Enforcement accordingly would have been fair from the perspective of the plaintiff.

It also would have been fair from the perspective of the losing defendant, India Abroad, to enforce the judgment. Although India Abroad was a New York news service, it had a subsidiary in England that had printed and distributed the offending publication in England. 333 By setting up a subsidiary in England, it is fair to say that India Abroad meaningfully consented to being governed by English law with regard to activities that the company undertook in England and had effects in England. As discussed in relation to Telnikoff, 334 it cannot plausibly be said that the libel law in question is a substantive limitation to which

329. See supra Part III.C.
331. See supra Part IV.A.
334. See supra Part V.B.1.a.
American citizens ought not be permitted to consent. For these reasons, it would not have been unfair to enforce the British judgment against the American corporation, even though the judgment was based on a law that the Constitution would have prevented an American polity from enacting.

b. The Countries

Insofar as the law in Bachchan is the same as what was at issue in Telnikoff, the analysis above with regard to the threshold determination and England’s interests is identical to what was elucidated above. The impact on the United States of enforcing the judgment in Bachchan, however, is more complex. The relevance of the effects is a function of the analyst’s ante-legal commitments.

Enforcing the judgment in Bachchan would have imposed going-forward business costs on American corporations. Because India Abroad’s New York headquarters both transmitted news reports abroad and printed newspapers in the United States and England, an enforceable judgment would have meant that India Abroad would have had to treat its domestic and foreign publications differently in the future. Some information that was legally published in its New York newspaper would run afoul of English legal requirements. India Abroad would then have had four options: it could have (1) published an international edition that was tailored to foreign legal requirements; (2) stopped publishing in England; (3) created only a single publication that complied with the most restrictive legal requirements, thereby watering down the information provided to American citizens; or (4) gone out of business.

The four possible options entail varying proportions of two types of costs: financial costs that would be absorbed by the company and information costs that might be imposed on the American public. Though the comity case law to date has not taken account of financial costs in determining whether a foreign law triggers the public policy exception, comity’s undertheorized character provides no certainty that such costs will remain outside of the exception’s purview. It is clear that financial costs are irrelevant under a Rawlsian analysis. Under both comity and Rawlsian approaches, however, information costs are relevant. Information

336. A fine student note provides a similar breakdown of the options faced by India Abroad. See Jeremy Maltby, Note, Juggling Comity and Self-Government: The Enforcement of Foreign Libel Judgments in U.S. Courts, 94 COLUM. L. REV. 1978, 1982 (1994). The note analyzes these costs much differently than this Article does, however. See id. at 1982–83. Among other things, the note concludes that these costs trigger constitutional concerns. See id. I have explained in another piece why enforcing un-American judgments does not implicate the Constitution. See Rosen, supra note 1 (manuscript at Part II).
costs fall naturally under a public policy exception analysis, and they constitute a cultural cost under a Rawlsian approach. For these reasons, it is worthwhile inquiring further into each of the four possible responses India Abroad would have had under a regime in which un-American judgments were enforced.

Consider first the option of publishing an international edition. To be sure, such a choice would impose a genuine financial cost, particularly for a publisher of modest size; India Abroad is no Time or Newsweek. But it is important not to exaggerate these costs. The newspaper that India Abroad published in England already was not identical to its New York publication, for advertisements were tailored to the different audiences. The requirement to abide by English libel laws would have imposed costs that differed in degree, but not in kind, from costs that India Abroad already incurred.

Would India Abroad have chosen to produce a special edition for England that omitted passages or articles that would have run afoul of English libel law? The choice presumably would have been made on the basis of some combination of financial considerations and publishing principles. For example, although publishing an international edition would have eaten into India Abroad’s profits, it is possible that publishing abroad still would have been profit-generating. Indeed, the fact that Indian Abroad already produced a publication tailored to England suggests the plausibility of this prospect. Alternatively, even if generating a single edition that omitted material offensive to English law might have been more profitable, the company’s publishing ethic might have led it to publish an international edition so it could communicate as much as possible to its American audience. Information about India Abroad’s costs and publishing ethics accordingly would have been legally relevant to analyzing the enforcement question under a Rawlsian approach.

The question then becomes how the possible domestic costs should be harmonized with the competing interests of the parties and England. This ultimately is a political determination. It is worth noting, however, that the level of difficulty posed by this question is a function of facts. Consider first the possibility that publishing an international edition would have been profitable, meaning that compliance simply would have diminished India Abroad’s profit margin. Although this would impose no

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337. Telephone Interview with Sales Representative Shahnaz, India Abroad Publications, Inc. (June 6, 2002) (explaining that the United States and United Kingdom editions have differences including, but not limited to, different advertisements that appear in each); see also India Abroad, Classifieds, Frequently Asked Questions, Rediff.com at http://shopping.rediff.com/shopping/ia-classfaq_ind.html (last visited Jan. 22, 2004) (indicating that ads can be placed in various local editions, or nationally).

legitimate costs on America’s culture, it nonetheless would exact a real financial cost on an American corporation. It is unclear how comity would treat this, but preservation of culture takes precedence over profits under a Rawlsian analysis, for persons in the second original position would not prioritize profits over the protection of acceptable cultures.

Next, consider the possibility that the duty to comply with English law would lead *India Abroad* to maintain its full American publication but to discontinue publishing in England altogether. The domestic costs incurred under this outcome would not appear to be appreciably different from the analysis immediately above.

The hardest cases would be if the duty to comply with English law led *India Abroad* to publish only a single “watered down” edition that excluded certain news coverage so as to comply with the most restrictive law (i.e., English law), or to go out of business altogether. Either would impose a genuine cost on American culture, for it would mean that enforcing the foreign judgment would diminish the information available to American citizens. This scenario poses a bona fide dilemma, for not enforcing such judgments would effectively immunize American publishers from more restrictive foreign laws and thereby impose costs on

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339. I say “legitimate” so as to exclude any claim that American culture is advanced by publishing materials in England that are consonant with American free speech values but that violate the dignity norms that motivate English libel law. See Douglas W. Vick & Linda Macpherson, *Anglicizing Defamation Law*, 36 Va. J. Int’l L. 933, 933–38 (1996) (explaining that “defamation laws reflect the relative weight that society assigns to certain fundamental but conflicting values and introducing English libel law”). Any such purported hegemonic American political cultural “value” would be illegitimate on many grounds. For example, it would violate norms of noninterference that are incorporated into international law. In Rawlsian terms, it would violate the principle of equality that appropriately applies to liberal societies and decent hierarchical societies. See supra Part IV.C.3. Such principles do not apply to outlaw states or benevolent absolutisms, which explains why Rawlsian principles would not preclude Voice of America-type activities. See supra Part IV.C.3.

340. *India Abroad* might elect this rather than publishing only a single edition that conformed to British libel standards for several reasons. It might face media competition in the United States and fear that it would lose readership by restricting its news coverage. Alternatively, it might be committed on the basis of publishing principles to keeping its American readers minimally informed.

341. But compare 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, 714–15 (2003) (arguing that speech is a “network good” whose value increases with the number of speakers), with infra note 377 (asking whether there may be diminishing marginal returns to the size of speech networks). To the extent there were domestic consequences to a decision by *India Abroad* not to publish internationally due to speech’s character as a network good, the second possibility discussed above in the text would not be identical to the first possibility. While the quantum of the benefit of the increased network size is not likely to be significant, how such domestic costs should be weighed would appear to be a political determination.

the foreign culture. Comity is not sufficiently theoretically developed to answer how such a dilemma should be resolved. Under a Rawlsian analysis, the question would be whether enforcement would impose greater cost on American culture than nonenforcement would put on English culture. It would be best to encourage the countries to negotiate such a tradeoff in an *ex ante* manner by means of an executive agreement or treaty. If the legislative and executive branches did not step in to formulate an enforcement policy but left it to the courts, a Rawlsian analysis suggests that more information is necessary to make a decision. It is plausible that even publications of relatively modest size would elect to publish international editions and that there would be little if no domestic information costs. Not enforcing the judgment, on the other hand, would open the door to large-scale circumvention of English law, thereby threatening to undermine the cultural norms that English libel law sought to advance.

c. **International System**

For the most part, the interests of the international system point in favor of enforcement insofar as the enforcement of foreign judgments generally leads to stability and predictability. Unlike *Telnikoff*, however, *Bachchan* concerns a multinational corporation and contemplates that different countries’ laws might apply to the corporation’s operations in different countries. This generates the transaction costs of tailoring policies to different countries’ laws.\(^343\) Compliance costs have not to date been taken into account under a comity analysis, though comity’s uncertain character by no means guarantees that they won’t be in the future. Such costs are not relevant, however, under a Rawlsian analysis.

3. **Yahoo!**\(^344\)

The *Yahoo!* case is more difficult than either *Bachchan* or *Telnikoff*. Under both comity and a Rawlsian approach, the correct outcome turns on contested technological considerations and the faith that one places in continued technological developments. Game theory suggests the judgment should not have been enforced because France does not enforce many American judgments.

a. **The Parties**

It would appear that enforcing the judgment would have been fair

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343. The option of publishing an international edition, however, forecloses the possibility that the company might be subject to inconsistent obligations.

from the perspective of the parties. The victorious plaintiffs resided in France, and there was no suggestion that the French trial was procedurally unfair. Enforcement accordingly would have been fair from the vantage point of the plaintiff.

It also would have been fair from the perspective of the losing defendant Yahoo! to enforce the judgment. Although Yahoo! operated its Web site from the United States and had neither hardware nor significant assets in France, it apparently customized its advertisement banners so that persons who accessed the site from France saw French advertisements that were tailored to a French audience. Furthermore, Yahoo! had a “French subsidiary in which it own[ed] a 70% ownership stake” and “exerted substantial control over this subsidiary, dictating some of the links and content of the site and requiring the subsidiary to maintain links to its United States based site.” Moreover, Yahoo! routinely profiled French users in order to target them with advertisements written in French. These facts establish that Yahoo!.com targeted business to France. Accordingly, it is not unfair to require Yahoo! to abide by French laws that comply with customary international law limits on prescriptive jurisdiction. This conclusion is buttressed by recent American decisions finding personal jurisdiction where a defendant targets forum residents or intends an effect in the forum state.

On the other hand, if Yahoo!.com had not customized its banners, it would have been far more difficult to conclude that the company had meaningfully consented to French law. Merely posting a Web site that can be visited anywhere in the world probably does not constitute meaningful consent to abide by the laws of all countries. The bulk of American case law supports this point.

345. See id. at 1183.
346. See id. at 1188–89.
347. For an illuminating account of some of the financial assets that Yahoo! could be said to have held in France, see Joel R. Reidenberg, Yahoo and Democracy on the Internet, 42 JURIMETRICS J. 261, 269 (2002).
348. CITE?
350. Id.
351. See, e.g., Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1321–22 (9th Cir. 1998); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1265 (6th Cir. 1996) (finding personal jurisdiction in Ohio because the defendant “deliberately set in motion an ongoing marketing relationship with CompuServe, and he should have reasonably foreseen that doing so would have consequences in Ohio”).
352. This preliminary conclusion, however, may well be a function of technology. For example, posting alone perhaps would constitute purposeful availment everywhere if there existed simple technology that a poster could use that permitted geographical targeting. I leave this point for another day.
The final check to ensure the fairness of applying the foreign judgment to an American citizen is to determine whether the foreign law is the sort of regulation to which an American citizen paternalistically should not be permitted to consent. It is hard to conclude that France’s hate speech law so qualifies. American courts have regularly upheld settlement agreements among Americans that contractually limit speech that virtually everyone would agree is more valuable than the speech curtailed by France’s law.\footnote{The site would mean that there would be nationwide (indeed, worldwide) personal jurisdiction over anyone and everyone who establishes an Internet web site. Such nationwide jurisdiction is not consistent with traditional personal jurisdiction case law. \textit{See also} Remick \textit{v.} Manfredy, 238 F.3d 248, 259 n.3 (3d Cir. 2001); GTE New Media Serv., Inc. \textit{v.} BellSouth Corp., 199 F.3d 1343, 1349–50 (D.C. Cir. 2000); Mink \textit{v.} AAAA Dev. LLC, 190 F.3d 333, 336–37 (5th Cir. 1999); 3D Syst., Inc. \textit{v.} Aarotech Labs., Inc., 160 F.3d 1373, 1930 (Fed. Cir. 1998); Bensusan Rest. Corp. \textit{v.} King, 126 F.3d 25, 29 (2d Cir. 1997); Cybersell, Inc. \textit{v.} Cybersell, Inc., 130 F.3d 414, 419–20 (9th Cir. 1997) (holding that advertising on the Internet alone is not sufficient to establish personal jurisdiction); Zippo Mfg. Co. \textit{v.} Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (holding that a Web site that “does little more than make information available to those who are interested in it” does not establish personal jurisdiction). But see Telco Communications \textit{v.} An Apple a Day, 977 F. Supp. 404, 406–07 (E.D. Va. 1997); Inset Sys., Inc. \textit{v.} Instruction Set, Inc., 937 F. Supp. 161–64 (D. Conn. 1996) (holding that advertising on Web site and listing a toll-free number establishes personal jurisdiction); State \textit{ex rel} Humphrey \textit{v.} Granite Gate Resorts, Inc., 568 N.W.2d 715, 721 (Minn. Ct. App. 1997), \textit{aff’d} 576 N.W.2d 747 (Minn. 1998); \textit{cf.} Gator.com Corp. \textit{v.} L.L. Bean Inc., 341 F.3d 1072, 1077–78 (9th Cir. 2003) (holding that operation of a virtual store in California generated jurisdiction, whereas a business that was not registered or licensed in California and targeting no advertising toward the state would not).}

\begin{itemize}
  \item \textit{The Countries and the International System}
  \begin{itemize}
    \item The threshold analysis under comity would ask whether France’s hate speech law is repugnant to American society. Once again, comity’s lack of theoretical sophistication prevents a principled and predictable answer to the question.
    \item The fact that regulating hate speech is so contested within American political culture—many mainstream commentators think such regulations should be constitutional—arguably suggests that such regulations are
  \end{itemize}
\end{itemize}

not “repugnant” to American public policy, even if they are not consistent with contemporary First Amendment doctrine. The analysis is completely determinate, however, under a Rawlsian approach: France’s law emerges from a liberal democratic society and does not reflect values found only in outlaw states, societies burdened by unfavorable conditions, or benevolent absolutisms. Under a Rawlsian analysis, the French law accordingly deserves respect. Persons in the second original position, opting for culture-preserving rules, would not conclude that foreign judgments based on such laws categorically should not be enforced.

The next questions concern the nature of France’s interests. It cannot be disputed that Yahoo!’s activities undermined the efficacy of the French law that proscribed the visualization of Nazi memorabilia for purposes of commerce. One of the several hard questions presented by the Yahoo! case is whether France had the power to regulate a non-national’s out-of-country activities. Stated differently, was France’s exercise of regulatory jurisdiction consistent with the customary international law doctrines that govern the scope of extraterritorial prescriptive jurisdiction? The French regulation (as applied to Yahoo) is premised on one of the bases of prescriptive jurisdiction whose scope is subject to deep disagreement across countries: the so-called effects doctrine. For the reasons described below, however, there is a strong basis for concluding that France’s interests were legitimate under this criterion.

Under the effects doctrine, regulatory power is based not on the physical location of the regulated behavior or the citizenship of the regulated party, but on the fact that a non-citizen’s out-of-country activities have effects on the regulating country. The legitimacy of premising prescriptive jurisdiction on effects is widely acknowledged by the international community, but there is a significant difference of opinion across countries with regard to how serious the effects must be and

357. The analysis here will not second-guess the French court’s determination that France had the power as a matter of internal French law to regulate Yahoo!.
358. CITE?
359. CITE?

Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules . . . .

Id. See generally Gary B. Born, A Reappraisal of the Extraterritorial Reach of U.S. Law, 24 LAW & POL’Y INT’L BUS. 1, 21–26 (1992) (discussing the development of the effects doctrine in international law).
whether there is some additional “reasonableness” requirement.\footnote{See Restatement (Third) of Foreign Relations Law § 403(1) (1986) (“[A] state may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable.”); \textsc{The Int’l Chamber of Commerce}, supra note 268, at 36–40.} International agreement concerning the appropriate scope of the effects doctrine is not necessary, however, to formulate a workable policy as regards the enforcement of foreign judgments. Although the appropriate bounds of the effects doctrine are still unsettled as a matter of international law, principles of fairness suggest that when deciding whether to enforce the foreign judgment, the United States should determine the legitimacy of other countries’ assertions of prescriptive jurisdiction by no stricter a standard than the United States uses to judge its own powers.\footnote{As discussed above, this step in the analysis is relevant only if the issuing country’s exercise of regulatory jurisdiction is consistent with the issuing country’s internal law. \textit{See supra} note 199.} The second original position’s veil of ignorance precludes the selection of more expansive powers for one’s own country than for other countries.\footnote{To be sure, the second original position does not demand that all countries be treated identically in all circumstances; as discussed above, for instance, a Rawlsian analysis rejects the doctrine of reciprocity. \textit{See supra} note 168. Such differential treatment is a consequence of the Rawlsian principle of equality, which demands tailored treatment for peoples that are relevantly different. France and the United States do not appear to be relevantly different, however, with respect to the appropriate scope of legislative jurisdiction. For this reason, a Rawlsian analysis suggests that an American court should analyze the legitimacy of France’s exercise of legislative jurisdiction by no stricter a standard than it would examine the legitimacy of Congress’s exercise of legislative jurisdiction.} Under this standard, France’s regulation of Yahoo! is legitimate. The United States has adopted a broad understanding of the effects doctrine, applying American antitrust, intellectual property, and securities law to the out-of-state activities of noncitizens.\footnote{See, e.g., Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993) (applying United States antitrust law to British reinsurance companies without a United States presence). \textit{See generally} Born, supra note 360, at 29–54 (discussing the gradual erosion of the “territoriality presumption” in American courts). Germany and the European Union have adopted similarly broad formulations of the effects doctrine, whereas the United Kingdom has a narrower doctrine that requires an element of the offense to have occurred within British territory. \textsc{The Int’l Chamber of Commerce}, supra note 268, at 37. One might object that because the powers of the United States Congress are delimited by the United States Constitution but not by principles of international law, \textit{see} Philip R. Trimble, \textsc{International Law: United States Foreign Relations Law} 102 (2002), merely analyzing U.S. legislation does not necessarily inform a person of the U.S. conception of the scope of the effects doctrine. After all, a piece of legislation could represent Congress’s decision to legislate in contravention of international law rather than an expression of Congress’s understanding of the scope of the effects principle. In practice, however, surveying American legislation is a good index of the U.S. view concerning the limits of prescriptive jurisdiction. There is a longstanding canon of judicial construction under which acts of Congress are to be construed if possible so as not to violate international law, which reflects a true reluctance on the part of Congress to legislate in violation of international law. \textit{See id.} at 102.} Although American
courts have not adopted a singular formulation applicable across all substantive contexts to explain when U.S. legislation can apply extraterritorially, there are some patterns. Typically there must be a “substantial” harm to United States interests. There also typically is an intentionality requirement, although courts have not been consistent as to whether foreseeability alone suffices or whether, as a recent Supreme Court decision in the antitrust context suggests, a defendant must have intended to cause the effect experienced in the United States. The Restatement (Third) of Foreign Relations Law adopts a similar approach, with the exception that it deploys an objective test. It permits regulation of conduct outside a country’s territory “that has or is intended to have substantial effect within its territory,” subject to a reasonableness requirement.

France’s regulation of Yahoo! satisfies all these approaches. Yahoo!’s actions had significant effects in France insofar as they undermined the efficacy of an important public law. To the extent intentionality is required, Yahoo!’s targeting of the French market by tailoring its banners would likely suffice. The French regulation also would likely survive the Restatement’s “reasonableness” requirement. A crucial consideration is the likelihood of conflict with another state’s laws, and a majority of the Supreme Court has ruled that this conflict determination turns on whether “a person subject to regulation by two states can comply with the laws of both.” There is no question that the French law would pass muster under this understanding of the black letter law, for U.S. law does not mandate that Yahoo! make the auction site available. There are good reasons, however, to believe that the Supreme Court’s approach omits some conflicts that are relevant to determining whether a

365. Compare Hartford Fire Ins., 509 U.S. at 796 (“The Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”), with Steele v. Bulova Watch Co., 344 U.S. 280, 282–89 (1952) (considering purposes underlying the Lanham Act, effects of out-of-state conduct within the United States, defendant’s nationality and residence, and absence of conflict between U.S. and foreign law before determining that U.S. law applied extraterritorially), and Tamari v. Bache & Co. (Lebanon), 730 F.2d 1103, 1108 (7th Cir. 1984) (construing the effects test as inquiring “whether conduct occurring in foreign countries had caused foreseeable and substantial harm to interests in the United States”).

366. See, e.g., Tamari, 730 F.2d at 1108.


368. See supra note 365 (discussing Hartford Fire Insurance).


370. Id. § 402(1)(c).

371. See id. § 403(1).

country’s regulation is reasonable. A more plausible conception of conflict instead would look to whether compliance with the foreign law would undermine legitimate domestic policy. The answer to this question turns primarily on technology. If, as the French court held, Yahoo! has the technology to limit only computers in France from accessing the prescribed auction sites such that complying with French law would not affect the material available outside of France, it is hard to see why application of the French law would be unreasonable. The analysis here shows why this technological issue was crucial to a proper legal determination, contrary to the United States district court’s averments.

Having shown that France’s exercise of prescriptive jurisdiction in respect to Yahoo! com likely is consistent with the U.S. view of the scope of the effects doctrine and accordingly is legitimate from the U.S. perspective, the next inquiry concerns the effects that enforcement would have on the United States. Under the international comparative impairment approach suggested by a Rawlsian analysis, the costs to France of not enforcing would have to be compared to the costs to the United States of enforcing. The French court’s order required Yahoo! to configure computers that were located in the United States so that people in France could not access the Nazi auction sites. One might say that American culture was affected because the computers that were to be reconfigured were physically situated in the United States. What, however, is the real impact on American culture? There would be a real and significant effect on American culture if complying with the French order meant that Yahoo! had to deprive computers worldwide (including computers in the United States) of access to the auction sites. Any impact on American culture would be significantly diminished, however, if it were technologically and financially feasible for Yahoo! to restrict access only to computer users located in France. (This is yet another reason why the


374. But see infra note 377.


376. Id. at 1185.

377. Indeed, it is hard to see how a company’s compliance with foreign laws when doing business in a foreign country affects the domestic culture, even when its compliance actions are undertaken in its home country. It might be objected that American culture is impacted insofar as America is kept from exporting information to which it thinks foreigners should have access. Such an interest in exporting American values, however, is inappropriate under most accounts. Under a Rawlsian approach for example, it is a violation of the principle of noninterference with other peoples. See RAWL S, supra note 79, at 37 (discussing the duty of nonintervention). A plausible account of possible domestic conse-
technological question was crucial.)\textsuperscript{378} If the cost of filtering technology were sufficiently low, Yahoo! could be expected on its own to utilize geographical filtering technology, with the result that non-French computers still would have access to the auction sites. If there were concern that Yahoo! might opt to altogether eliminate access to the auction sites, thereby impacting American culture, American law could respond by disallowing Internet service providers from eliminating U.S. access to materials for the purpose of complying with foreign countries’ content restrictions.\textsuperscript{379}

To be sure, enforcing the French judgment would have imposed some costs—perhaps even some cultural costs\textsuperscript{380}—in the United States. It must be recalled, however, that such costs are not dispositive under an international comparative impairment analysis. The question is how the costs to France of not enforcing compare to the costs to the United States of enforcing. Persons in the second original position would take account of the reasonable measures that enforcing jurisdictions could take to limit the costs of enforcement when undertaking this calculation. If filtering technology is adequate—a point addressed soon below—steps to limit enforcement’s domestic costs could be taken.

It might be objected that American culture would be threatened even if technology permitted Yahoo! to target only French computers. After all, other countries likewise might demand compliance with their laws, forcing Yahoo! to restrict access to certain sites for people within their

\textsuperscript{378} A related factual question is what percentage of French users the technology would have to be able to identify to ensure that the law is efficacious. As Professor Goldsmith has insightfully observed, laws need not be one-hundred percent enforced to be effective as a practical matter. See Goldsmith, supra note 303, at 1229–30.

\textsuperscript{379} Although the Court has not yet clarified the First Amendment’s application to new media such as the Internet, there is good reason to think that the type of content-neutral publication requirement discussed above in the text would not offend the First Amendment. See Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189–90 (1997) (upholding “must-carry” provisions as applied to cable operators); see also Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, \textit{645–15} (1994). Considering possible American legislative responses to deal with the consequences of enforcing foreign judgments is wholly consistent with this Article’s thesis that the enforcement of foreign judgments is best suited to executive and legislative determinations.

\textsuperscript{380} \textit{See supra} note 377 (discussing Professor Van Houweling’s argument).
borders. Accordingly, it might be argued, filtering technology would not resolve the problem, but would only invite a new and different circumstance under which Yahoo! and other Internet service providers would be overwhelmed: they would have to tailor their output to the different laws of many different countries. The inability of Yahoo! to comply with the laws of so many different countries might mean the end of the Internet altogether.

It furthermore might be argued that even if Yahoo! could survive these costs, ordinary Internet users could not. Enforcing the French judgment against Yahoo!, the argument goes, would mean that American courts would have to enforce foreign judgments against individuals as well. If individual users of the Internet were required to comply with all countries’ laws when posting information on the Web, the Internet as we know it would be crippled.

Further reflection, however, shows that these concerns are exaggerated. First, the number of countries that could enforce their laws against noncitizens is far less than the total number of countries in the world. Recovery could be had only in those jurisdictions in which the noncitizen had purposely availed herself so that the prerequisite of meaningful consent were met. The case law almost unanimously holds that merely posting materials on the Internet does not create personal jurisdiction in every country in which an Internet connection is found, and this is normatively correct under the consent analysis provided above. If Yahoo! had not targeted France by tailoring its advertisement banners, then the French judgment should not have been enforced due to the absence of meaningful consent.

Second, the argument against filtering technology is based on the mistaken assumption that complying with multiple countries’ laws is infeasible. The costs of tailoring output on a country-by-country basis might be prohibitive for small Internet users, but likely is not for large companies such as Yahoo!. As a normative matter, the question is how to balance the costs of compliance against the benefits of respecting each country’s laws, and it may well be sensible for the law to distinguish between “mice” and “elephants,” constraining the big players that can afford to conform their actions while leaving small players alone. Resolution of this question, once again, turns on political considerations. What is important to observe is that the existence of compliance costs alone does not mean that the foreign judgment should not be enforced.

381. I leave for another day the question of whether such a limitation is normatively desirable vis-à-vis Internet service providers.
382. See supra Part IV.A.2.
Third, and finally, compliance costs themselves are not a fixed and unchanging quantity, but are the result of technology, conventions, and social institutions. Moreover, the factors that determine compliance costs are not static. Instead, they are responsive to external influences, such as the law. If Internet service providers were required to comply with local laws, one would expect to find the development of technologies, conventions, and institutions that would facilitate compliance and reduce costs.384

To be sure, this would result in a different type of Internet than the free-wheeling, unregulated Internet described by many Internet advocates.385 This, however, is merely an observation, not an argument. There is nothing inevitable about or inherent in the Internet these advocates envision.386 Their conception of the unregulated Internet reflects American ideals with which other cultures can disagree,387 and would create extensive costs insofar as people, things, and polities can be injured by the Internet in the same way that damages and injuries can be inflicted in real space.388 In short, noting the consequences that a legal doctrine (such as enforcing foreign judgments) would have on the Internet is the start, not the end, of an enormously complex analysis that turns on both technological and normative considerations. Though I cannot hope to definitively resolve these difficult Internet-related questions here, it is vital to recognize that these are the relevant considerations to resolving the enforcement question posed by the Yahoo! case. The evident complexity of these factors strengthens the conclusion offered throughout this Article that enforcement determinations are best undertaken by the political branches of government.

CONCLUSION

Although foreign judgments based on foreign laws that the Constitution would not permit an American government to enact certainly are “un-American” insofar as they are premised on laws that are at variance with American constitutional principles, American courts are not constitutionally precluded from enforcing them.389 The question then arises as to whether un-American judgments should be enforced as a matter of policy. Because an extensive body of comity case law examines whether

384. For the locus classicus of this argument, see Lawrence Lessig, Code and Other Laws of Cyberspace 59 (1999).
386. See Lessig, supra note 384, at 59, 58–90.
387. See id. at 203–04; Reidenberg, supra note 347, at 264–66.
388. Goldsmith, supra note 303, at 1200, 1239–42.
389. See Rosen, supra note 1 (manuscript at Part V).
“simple” foreign judgments should be enforced, this Article looked first to this repository for guidance in analyzing un-American judgments. The comity case law usefully identifies the various entities that are affected by the enforcement determination, but the case law is problematically undertheorized. Comity does not provide principled guidance when enforcement involves tradeoffs among competing interests, as always is the case with un-American judgments.

Prioritizing among competing principles is a subjective process that is informed by the decision maker’s ante-legal commitments, a point illustrated by this Article’s consideration of the different analyses that result depending upon whether one utilizes a game theoretic or a Rawlsian approach to foreign relations. Several important conclusions follow. To begin, notwithstanding the foundational differences between game theory and Rawls’s *The Law of Peoples*—the former seeks to advance only the interests of the United States whereas the latter aims to realize “fair” outcomes from the perspective of a disinterested third party—both concur that at least some un-American judgments should be enforced. This highlights the practical costs to the mistaken constitutional analysis that has been relied upon by American courts to date, which has led them to conclude that un-American judgments categorically cannot be enforced as a matter of constitutional law.

Moreover, game theory and Rawlsian analysis both have institutional implications. Both suggest that the political branches of government are better suited than courts to formulating a policy regarding the enforcement of un-American judgments. Game theory and Rawlsian analysis also suggest that international treaties or executive agreements may be particularly good vehicles for generating rules of enforcement. This is because treaties and executive agreements can help identify focal points that encourage the mutually beneficial cooperative solution of enforcement (game theory) and can encourage countries to clarify on an *ex ante* basis the cultural consequences of nonenforcement so that fair enforcement policies can be generated through a process of international comparative impairment (Rawls).

If the political branches do not take the initiative, then enforcement determinations by default will fall to the courts. Courts will necessarily be called upon to make deeply political decisions that affect international relations. The Article does not champion any one of the plausible competing normative approaches that could be taken to determine whether un-American judgments should be enforced. The Article does show, however, that many arguments against enforcement fall away upon careful analysis as it pinpoints the tradeoffs that invariably are involved in deciding whether un-American judgments are to be enforced.