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The SPEECH Act’s Unfortunate Parochialism: Of Libel Tourism and Legitimate Pluralism (invited symposium contribution)

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Article

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The recently enacted Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act or Act) provides that a foreign country’s defamation judgment is recognizable and enforceable in the United States only if the foreign court’s conclusion of defamation liability is consistent with American First Amendment doctrine. This Article argues that the Act’s refusal to credit any alternatives to the American approach to constitutionally protecting speech is problematically parochial. Foreign defamation judgments based on foreign laws that could not have been enacted by an American polity due to the First Amendment may be “Un-American,” but they cannot be unconstitutional. Nor would it be unconstitutional for an American court to enforce an Un-American foreign judgment. Whether such judgments should be enforced is a policy decision, and a wide range of approaches to foreign policy concludes that at least some Un-American judgments should be enforced. It follows that the SPEECH Act’s rule — that Un-American defamation judgments are categorically unenforceable — is wrongheaded.

The political branches are better suited than courts, on both institutional and democratic grounds, to decide which Un-American judgments should be enforced. The SPEECH Act, however, demonstrates the dangers of formulating policies directly affecting other countries in the purely domestic institutional context of statute making. Rather, such decisions are best made in a setting in which all affected countries are present so that competing interests can be aired and differences can be negotiated. The Hague Conference’s past

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failure to adopt a convention addressing judgments does not mean that future agreement is not possible — an array of alternatives to the Hague Conference’s approach could be used to negotiate an agreement concerning the enforceability of foreign defamation judgments.

INTRODUCTION

The legislative history and preamble of the Securing the Protection of our Enduring and Established Constitution Heritage Act1 (the “SPEECH Act” or the “Act”) indicate that Congress intended to take aim at so called “libel tourism” — the filing of libel lawsuits, against U.S. authors and publishers, in foreign countries so that the foreign country’s pro-plaintiff law, unavailable in the United States due to the First Amendment, will

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apply.\footnote{Id. § 4101.} Even assuming libel tourism to be sufficiently troublesome to merit a governmental response, the SPEECH Act is deeply flawed for three reasons. The Act parochially disregards the legitimate interests of other countries that constitutionally protect speech differently than the United States. The Act also is constitutionally parochial in relation to due process limits on personal jurisdiction, withholding recognition and enforcement unless the foreign court’s assertion of jurisdiction complies with American due process requirements. Finally, the Act’s systematic parochialism has the potential to cause harms that are greater than might be anticipated, because the Act’s broad language makes it applicable to far more than just libel tourism.

Part I explains the SPEECH Act’s operation, demonstrating its unexpected breadth as well as its systematic and categorical parochialism. Part II explains why the Act’s constitutional parochialism is normatively problematic. Part III tries to explain why Congress took the parochial path, and it then considers more promising approaches that might be taken in the future to address libel tourism.

I. **The SPEECH Act’s Operation: Surprising Breadth and Categorical Parochialism**

The SPEECH Act does three main things. First, it categorically prohibits the recognition or enforcement, in both federal and state courts, of all “defamation” judgments from foreign countries that could not have been successfully asserted under American defamation law.\footnote{Id. § 4102(a).} Second, the Act creates a cause of action that allows for a declaratory judgment that any foreign claim that could \textit{not} have been successfully asserted under American law is “repugnant to the Constitution or laws of the United States.”\footnote{Id. § 4104.} Third, the Act authorizes the recovery of reasonable attorney’s fees for a defendant who successfully invokes its provisions against a plaintiff who sought to enforce a foreign country’s defamation judgment in a federal or state court.\footnote{Id. § 4105.}

Virtually no reported case law has yet interpreted the recently enacted SPEECH Act. A careful reading of the statute, however, reveals that it is surprisingly broad and systematically parochial.
A. The Act’s Surprising Breadth

The Act is unexpectedly broad in two critical respects: (1) as to who may invoke it; and (2) against what types of judgments it may be invoked.

1. To Whom the SPEECH Act is Available

Who is eligible to invoke the Act’s absolute defense against recognition and enforcement? One might naturally expect that the Act is available only to United States citizens and corporations. After all, the Act’s findings recite that “[s]ome persons are obstructing the free expression rights of United States authors and publishers” through libel tourism.6 The findings also speak of foreign lawsuits “against United States persons within their courts,”7 and the Act provides a full definition of “United States person.”8

A careful reading of the statute, however, leads to the conclusion that anyone against whom domestic enforcement of a foreign country’s judgment is sought may rely on the Act’s absolute defense against recognition and enforcement. The Act mandates that “a domestic court” — which the Act defines as including both federal and state courts9 — “shall not recognize or enforce a foreign judgment for defamation,” with only two (soon to be analyzed) caveats, neither of which confines the Act’s invocation to United States persons.10 Indeed, the caveats’ only mention of the defendant refers to “the party opposing recognition or enforcement of that foreign judgment”11 — not to “the United States person” opposing recognition or enforcement.12

Accordingly, under the Act’s plain language, foreign corporations, foreign citizens, and other foreign entities would appear to be eligible to

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6. Id. § 4101 Note § 2(2) (emphasis added).
7. Id. § 4101 Note § 2(5) (emphasis added).
8. 28 U.S.C. § 4101(6) (defining “United States person” as a citizen, a legal alien, or “a business entity incorporated in, or with its primary location or place of operation in, the United States”); see also H.R. REP. NO. 111-154, at 2–3 (2009), reprinted in 2010 U.S.C.C.A.N. 812, 813–814 (speaking, consistent with the Act’s findings, of the problem of “defamation suits against American authors and publishers,” and describing several lawsuits against “American defendants”); S. REP. NO. 111-224, at 4 (2010) (explaining that “[f]ederal legislation is necessary to ensure that American authors, reporters, and publishers have nationwide protection from foreign libel judgments”) (emphasis added); H.R. REP. NO. 111-154, at 4 (2010), reprinted in 2010 U.S.C.C.A.N. 812, 815 (“American authors and publishers should be able to write and publish for an American audience . . . .”).
10. Id. § 4102(a)(1)(A)–(B) (emphasis added).
11. Id. § 4102(a)(1)(B) (emphasis added).
12. Apart from the Act’s definitions provision, “United States person” is mentioned only once in the declaratory judgment provision. Id. § 4104(a)(1) (“Any United States person . . . may bring an action in district court . . . for a declaration that the foreign judgment is repugnant to the Constitution or laws of the United States.”).
invoke its absolute defense against recognition and enforcement in a state or federal court.\footnote{13}

2. To What the SPEECH Act Applies

The Act applies to an unexpectedly broad range of foreign judgments. At first glance, the Act’s absolute defense appears to have only narrow application since the Act applies only to “a foreign judgment for defamation”\footnote{14} and specifically provides that it should not be “construed to . . . affect the enforceability of any foreign judgment other than a foreign judgment for defamation.”\footnote{13} But the Act is more broadly applicable than might be expected in two respects. First, despite the fact that the SPEECH Act’s legislative history and preamble clearly indicate that the Act was intended to address only a subset of foreign defamation judgments — libel tourism\footnote{16} — the Act’s defense appears to be applicable to all foreign defamation judgments. It mandates nonrecognition and nonenforcement of any foreign country defamation judgment that could not have been successfully pressed in the United States under federal or state law,\footnote{17} and allows a United States person to sue for a declaration that any such foreign judgment is “repugnant to the Constitution or laws of the United States.”\footnote{18} The Act makes no effort to distinguish between libel tourism — the suing in a foreign jurisdiction to wrongfully gain access to that country’s pro-plaintiff law — and a defamation claim that does not constitute libel tourism (for instance, a claim litigated in a foreign country, under that

\footnote{13. Only a “United States person,” however, may obtain a declaratory judgment that a foreign judgment is repugnant to the Constitution or laws of the United States. \textit{Id}.}

\footnote{14. \textit{Id.} § 4102(a)(1) (emphasis added). The Act applies to foreign defamation claims that meet certain (soon to be discussed) criteria.}

\footnote{15. \textit{Id.} § 4102(e) (emphasis added).}


\footnote{17. 28 U.S.C. § 4102(a) (“A domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that (A) the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or (B) even if the defamation law applied in the foreign court’s adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.”).}

\footnote{18. \textit{Id.} § 4104(a)(1). A foreign judgment is “repugnant” if “it would not be enforceable” under the SPEECH Act. \textit{Id.} The Act allows a “United States person” to obtain a declaratory judgment of repugnance \textit{vis-à-vis} “a foreign judgment [that] is entered on the basis of the content of any writing, utterance, or other speech by that person that has been published,” without providing any geographical limitations as to the location of publication or speech. In other words, the Act empowers a domestic court to issue a repugnance declaration to a French judgment based on a French hate speech law that was applied to a French Nazi who violated the French act in France. For more on this, see \textit{infra} Part II.}
country’s defamation law, because everything relevant to the defamation occurred there. Let us provisionally call this second type of defamation lawsuit an instance of “legitimate libel pluralism” (LLP). Part II of this article justifies the proposition that there indeed exists a category of LLP. For now, all that is necessary is to recognize that the Act does not distinguish between libel tourism and LLP.

Second, the Act adopts an expansive definition of defamation. Defamation includes not only “any action for other proceeding for defamation, libel, [or] slander,” but also any “similar claim alleging that forms of speech are false, have caused damage to reputation or emotional distress . . . or have resulted in criticism, dishonor, or condemnation of any person.” Under this definition, the SPEECH Act could be applied to matters not typically considered defamation in the United States. For example, the Act plausibly could apply to a damages judgment predicated on (what we in the United States would call) a foreign country’s hate speech laws. After all, hate speech prohibitions apply to speech that is false, that causes damage to “reputation” or “emotional distress,” or that “result[s] in criticism, dishonor, or condemnation” of persons in the protected group. Accordingly, a foreign judgment based on what we in the United States would call a hate speech violation may be “similar” to a libel, slander, or defamation claim and thereby fall under the SPEECH Act’s absolute immunization against recognition and enforcement. Application of the Act to hate speech judgments from other countries might harm U.S. foreign relations. This is because hate speech regulations have high political salience in many countries — hate speech regulations may be seen as important to maintaining domestic stability, or as a core expression of a country’s foundational political commitments.

B. The Act’s Systematic and Categorical Parochialism

The SPEECH Act is systematically parochial in the sense that it treats all U.S. constitutional requirements within its purview — both substantive

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19. Id. § 4101(1) (emphasis added).
20. Jeremy Waldron notes that what we in the United States typically call “hate speech” is labeled as “group libel” or “group defamation” in other countries. See Jeremy Waldron, Dignity and Defamation: The Visibility of Hate, 123 HARV. L. REV. 1596, 1601 (2010). One of Waldron’s main points is that hate speech laws are best understood as “protecting vulnerable minorities against the evil of group defamation.” Id. at 1600. I largely agree with Waldron, but the very fact that he wrote this article demonstrates the point made above in text that hate speech is not typically understood in the United States as a form of defamation law. For that reason, the Act’s definition of defamation is surprisingly broad. At the same time, the Act’s (even unintended) breadth pushes in the direction Waldron advocates, i.e., it assimilates hate speech into defamation.
21. Though European hate speech laws generally are criminal, many also allow civil lawsuits for damages. This is true, for example, under both German and French law. See Winfried Brugger, The Treatment of Hate Speech in German Constitutional Law (Part I), 4 GERMAN L.J. 1, 20 (2003).
and procedural — as the standard against which other countries are to be judged. The Act is *categorically* parochial in the sense that defamation judgments from countries with different standards cannot — without exception — be recognized or enforced unless the claim could have been successfully brought in a domestic court.

Regarding substantive constitutional standards, the Act disregards the possibility that other liberal democracies constitutionally protect speech in defensibly different ways than does the United States. All that matters under the SPEECH Act is whether the defamation law of the country from which the judgment has issued (the “Issuing Country”) grants “at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States . . .”\(^{23}\) If the foreign country’s defamation law does not, then the foreign judgment categorically “shall not” be enforced unless “the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.”\(^{24}\) Though there is some ambiguity in this language,\(^{25}\) it almost certainly was intended by Congress to mean that the foreign judgment can be enforced only if the plaintiff would have been able to assert a successful claim for defamation under the substantive defamation law of the state in which the domestic court is located, had all relevant acts occurred within that state.\(^{26}\)

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23. 28 U.S.C. § 4102(a)(1)(A). In fact, the Act’s parochialism is even more extreme. If the “State in which the domestic court is located” has stricter constitutional or statutory protections of freedom of speech and press than the First Amendment, then that state’s law becomes the baseline against which the foreign country is judged. *Id.* § 4102(a)(1)(A). In other words, if the foreign country protects speech “as much” as the First Amendment, but less than the state in which the domestic court sits, then the foreign country’s judgment cannot be enforced. *Id.*

24. *Id.* § 4102(a)(1)(B) (emphasis added).

25. The ambiguity is this: If the “law of the State in which the domestic court is located” is understood as including the state’s choice of law rules, then the foreign country’s law frequently may be the chosen substantive law. The domestic court could constitutionally apply the foreign law, even if an American polity would not have been constitutionally able to have enacted it, for reasons explained later. See infra Part II.B. Consequently, on this interpretation of the statutory language, the SPEECH Act’s “unless” clause would be satisfied, thereby permitting a domestic court to enforce many foreign defamation judgments. Though a possible reading, the legislative history discussed above leaves no doubt that this was not what Congress intended. Instead, the “law of the State in which the domestic court is located” undoubtedly was not intended to encompass the state’s choice of law rules, but only its substantive defamation law, leading to the interpretation of the Act provided above in text.

26. One other point of ambiguity bears mention at this point: if the above condition is met, is enforcement of the foreign judgment *mandatory* or *permissible*? The Act says only that foreign defamation judgments “shall not” be enforced “unless” conditions (A) or (B) are met. 28 U.S.C. § 4102(a)(1). Accordingly, it is not entirely clear as to whether a foreign judgment meeting either criterion (A) or (B) can be, or *shall* be, enforced. The slightly more natural interpretation may be “shall be” on the ground that such a construction more perfectly contrasts with the “shall not . . . unless” formulation. There are policy reasons, however, for favoring the permissive interpretation.
As to procedural constitutional standards, the SPEECH Act provides that domestic courts “shall not recognize or enforce” foreign defamation judgments “unless the domestic court determines that the exercise of personal jurisdiction by the foreign court comported with the due process requirements that are imposed on domestic courts by the Constitution of the United States.”27 This is a second example of constitutional parochialism: the Act does not credit the possibility that other countries might instantiate constitutional limits on adjudicatory jurisdiction in defensibly different ways than the United States.

II. WHY THE SPEECH ACT’S PAROCHIALISM IS NORMATIVELY UNDESIRABLE

A five-step argument establishes that the SPEECH Act’s systematic parochialism is undesirable and that there can exist a category of legitimate libel pluralism: (1) it is normatively legitimate for other countries — including other liberal democracies — to understand and give effect to constitutional protections (such as the commitments to free speech and due process) differently than we do in the United States; (2) it would not be unconstitutional for a domestic court to enforce a foreign judgment based on substantive legal standards that could not have been enacted by the jurisdiction in which the court sits on account of the First Amendment (what I shall call an “Un-American Judgment”); (3) deciding whether to enforce Un-American Judgments is a matter of policy; (4) there are strong policy reasons for enforcing Un-American Judgments in some circumstances; and (5) the Act’s supporters did not provide any justifications for categorically denying recognition and enforcement to Un-American judgments, nor are there any convincing reasons to do so.

A. Legitimate Constitutional Pluralism

As is well known, the United States provides more constitutional protection for speech than do other liberal democracies. For example, many other countries, including Germany and France, ban what we in the United States call hate speech,28 whereas such regulations of speech are unconstitutional in the United States.29 Also, most other countries strike a different balance between dignitary interests and speech than does the

28. See Waldron, supra note 20, at 1597–98 (noting that England, Canada, France, Denmark, Germany, New Zealand, and some of the states of Australia have laws “prohibiting statements ‘by which a group of people are threatened, insulted or degraded on account of their race, colour, national or ethnic origin,’ what Waldron correctly notes is typically called “hate speech legislation” in the United States).
United States, more readily allowing lawsuits for defamation than the First Amendment has been interpreted to permit.\textsuperscript{30} 

Normatively, what is one to make of this diversity of approaches to the constitutional protection of speech? Is the variety of approaches something to bemoan while hoping that other countries will adopt our ways?\textsuperscript{31} Call this the “constitutional uniformity” view. Or is such diversity something to tolerate or even applaud? Let us call this the “constitutional pluralism” view.

There are four reasons to think that constitutional pluralism is a sounder view than constitutional uniformity. First, countries differ with regard to their histories and their social and political circumstances. For example, notwithstanding the American commitment to free political association, after World War II the United States approved a constitution for Germany\textsuperscript{32} that subjected the freedom of association to a content based restriction that “explicitly forb[ade] the formation of antidemocratic and other antithetical groups.”\textsuperscript{33} This is not an example of American hypocrisy. Rather, because Germany had been controlled by the viciously deadly Nazi party, political activities by Nazis in that country would have carried different meaning and risks than in the United States. Securing political stability and reforming Germany’s politics may have justifiably required restrictions that would not have been necessary, or justifiable, in the United States. Similar considerations may well justify the anti-Nazi laws still found in France,\textsuperscript{34} which was governed by the pro-Nazi Vichy government during the Second World War.\textsuperscript{35}

This first reason — that different countries have different histories and circumstances — on its own may provide only a modest justification for constitutional pluralism. This is because the first reason is consistent with, though not necessarily driven by, a view of constitutionalism quite close to constitutional uniformity: that all countries should share the same meaning


\textsuperscript{31} This view pervades the Act’s legislative history. See, e.g., S. REP. NO. 111-224, at 9 (2010) (“Regrettably, many other countries place lesser value on free expression and do not provide the strong legal protection for speech and the press that exists in the United States.”). But see 155 CONG. REC. H6772 (daily ed. June 15, 2009) (statement of Rep. King) (“We cannot change other countries’ libel laws, nor would we want to. We must respect their laws, as they ought to respect ours.”).


\textsuperscript{34} See, e.g., CODE PENAL art. R645-2 (Fr.).

of free speech, but that identical meaning necessarily will have different applications across countries. Let us call this view the “soft constitutional pluralism” view.

Three additional reasons not only counsel in favor of constitutional pluralism over constitutional uniformity, but justify a more extensive form of diversity than “soft constitutional pluralism” which might be called “hard constitutional pluralism.” Let me first explain what hard constitutional pluralism is before providing justifications for it. John Rawls states that there are multiple “liberalisms” because “[p]olitical conceptions differ” across liberal societies “in how they order, or balance, political principles and values even when they specify the same principles and values as significant.” For instance, liberal polities differ as to how they “order” or “balance” the value of speech as against political stability, or of speech as against dignity. Rawls states that these different balancings reflect countries’ differing “political conceptions.” Such cross country differences are not merely different applications of shared meaning. For instance, disagreements as to how commitments to speech are to be harmonized with the competing commitments of political stability or dignity constitute genuine substantive differences concerning the scope of speech’s constitutional protection, not just different “applications” of identical meaning. Further, under Rawls’ reasoning, there is no hope or expectation of convergence over time. Rather, a multiplicity of liberalisms — and a corresponding diversity of balancings — is what is to be expected under free conditions.

Having defined hard constitutional pluralism, I shall now provide three justifications for it vis-à-vis both soft constitutional pluralism and constitutional uniformity.

First, we presently live in a world of hard constitutional pluralism, not soft constitutional pluralism. Peace and stability is best achieved by

36. Speech is only one example, of course. The argument above in text can apply to any or all constitutional commitments.
37. This is the international analogue of the argument made by some as to why originalists are bound by the original “meaning” of the Constitution but not by the Framers’ expected applications. See Mark D. Greenberg & Harry Litman, The Meaning of Original Meaning, 86 GEO. L.J. 569 (1998). For a succinct explanation of their subtle argument, see Mark D. Rosen, The Structural Constitutional Principle of Republican Legitimacy, 54 WM. & MARY L. REV. 372, 401–02 (2012). I myself question the extent to which “meanings” are distinct from “applications,” but this is not the place to explain why. Even if the distinction is not analytically defensible, it still performs real political work insofar as it allows people to simultaneously claim allegiance to originalism and reject certain of the Framers’ views and expectations as to what was required by the Constitution they had drafted.
38. JOHN RAWLS, THE LAW OF PEOPLES 14 (1999); see also id. at 141 (“Political conceptions differ also in how they order, or balance, political principles and values even when they specify the same ones.”).
39. Id at 14.
40. To be clear, on this account some differences across countries may well be characterized as soft pluralism — but not all are.
generally respecting these sorts of constitutional differences41 across countries — something that myriad legal doctrines (such as comity and the margin of appreciation) already do.

The second justification for hard constitutional pluralism rests on foundational liberal principles.42 Rawls concludes that there are multiple “liberalisms” — each of which balances competing values differently — because reasonable people can come to different conclusions as to which “political conception” they think is best. “Citizens will differ as to which of these conceptions they think the most reasonable, but they should be able to agree that all are reasonable, even if barely so.”43 The respect that is owed to reasonable people in other countries requires that we respect the political conceptions that they use to govern themselves, even if we choose another political conception to operate in our country.44 In Rawls’ words:

Even when two or more people 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 people who are thus diverse; and it must be fair between them and effective in shaping the larger schemes of their cooperation.45

The third and fourth justifications for hard constitutional pluralism are international analogues of two common arguments for federalism: experimentation and diversity. Though frequently considered together, experimentation and diversity are conceptually distinct. Paralleling Justice Brandeis’ New State Ice Company dissent,46 the third rationale is that hard constitutional pluralism permits laboratories for experimentation among different constitutional democracies as to the best way of “ordering” or “balancing” constitutional values against competing (constitutional and

41. I say “these sorts of constitutional differences” because Rawls is speaking about differences across liberal polities. Respecting the different ways that different liberal polities balance competing values does not necessarily entail respecting the ways that nonliberal polities strike such a balance. Rawls creates an illuminating typology of governmental forms, concluding that liberal polities should tolerate certain nonliberal polities (“decent hierarchical peoples”) but not others. See RAWLS, supra note 38, at 59–88. Without necessarily defending the specifics of Rawls’ scheme, the important point for present purposes is that respecting different liberal countries’ constitutional balancings does not mean that all other countries’ judgments would have to be recognized and enforced. For more on the appropriate limits on what types of foreign judgments should not be recognized or enforced, see infra pp. 118–19.
42. So does the fourth. See infra p. 112.
43. RAWLS, supra note 38, at 14.
44. Indeed, Rawls goes so far as to conclude that liberal polities have a duty to tolerate certain nonliberal polities. Id. at 59–88. Liberal polities a fortiori have a duty to tolerate the different political conceptions that may be chosen by other liberal polities.
45. Id. at 11–12.
nonconstitutional values. To be sure, how one assesses the strength of the experimentation justification likely turns on one’s answer to the contested question of whether foreign constitutional law can illuminate American constitutional law. In my view, there are at least two sorts of relevant inputs that experimentation may provide. First, some constitutional questions turn on empirical predictions as to how governmental institutions or personnel are likely to behave when subject to rules and other incentives. Second, many constitutional questions boil down to a determination of how constitutional values are to be balanced against competing values. In my view, other countries’ experiences may provide normative guidance in these two domains, though they ought not to be dispositive.

Whereas the “experimentation” justification generally (though not necessarily) implies an expectation of convergence over time as the “best” solution is found, the fourth justification — “diversity” — presumes that differences are likely to endure, and views this as a normative good. An intuitive argument for diversity proceeds from the assumption that the differences that give rise to distinct liberalisms reflect different underlying psychological or cultural values that are not subject to logical proof and disproof. If this is so, then a diversity of polities permits individuals or cultural groups with differing values to move to or otherwise associate with the polity that reflects their values. The diversity justification can also be more formally derived under standard Rawlsian premises. Rawls uses the “second original position” to derive the “law of peoples” that should govern the different peoples of the world. As in the domestic version of the “original position,” participants in the second original position are behind a veil of ignorance, meaning that they do not know the identity of the people they represent. Participants accordingly would choose a law of peoples that allowed for a diversity of liberal polities to maximize the chance that each participant’s preferences would be able to be satisfied.

47. I say competing “constitutional and nonconstitutional” values because it is commonplace in contemporary constitutional democracies that sufficiently powerful nonconstitutional considerations can justify the regulation of constitutional values. For instructive discussions of this phenomenon, see Stephen Gardbaum, Limiting Constitutional Rights, 54 UCLA L. Rev. 789 (2007); Frederick Schauer, A Comment on the Structure of Rights, 27 GA. L. Rev. 415, 429, 431 (1993).


49. As noted above, the competing value may be either of constitutional dimension, or significant, but less than constitutional significance. See supra note 47.

50. Other countries’ experiences should not be deterministic because, as to the first type of input, social and cultural differences might lead an incentive structure to operate differently across countries and, as to the second input, how a country harmonizes competing commitments is an important determinant of that country’s unique political culture. See RAWLS, supra note 38.

51. See RAWLS, supra note 38, at 30–35.

52. See id. at 41.
To quickly conclude, I have sketched three positions regarding constitutional differences across polities: (1) constitutional uniformity; (2) soft constitutional pluralism; and (3) hard constitutional pluralism. I have provided four arguments against constitutional uniformity, three of which constitute arguments for preferring hard constitutional pluralism to soft constitutional pluralism.

Two clarifications are in order. First, the arguments above are not limited to free speech, but *prima facie* extend to all constitutional principles. The arguments for pluralism accordingly extend to the constitutional principles used by different countries to determine due process' limits to adjudicatory jurisdiction — the other constitutional principle with respect to which the SPEECH Act takes a parochial position.

Second, the four arguments for constitutional pluralism do not lead to the conclusion that all countries’ constitutional doctrines should be respected. Rawls, for example, provides a framework under which respect is accorded to all liberal countries (and even some nonliberal countries), but not to all countries. In other words, the analysis above explains the error of parochially using U.S. constitutional law as the criterion against which all other countries’ constitutional orders is judged, but does not indicate constitutional pluralism’s appropriate outer limits. More concretely, the analysis to this point has explained why the Act’s categorical parochialism is a mistake, but has not provided a basis for specifying what limits the Act should have adopted. (I provide a preliminary answer to that question in subsection D of this Part).

B. Unconstitutional Judgments versus Un-American Judgments

Even if one agrees that there are strong normative arguments for constitutional pluralism, the SPEECH Act’s parochialism could be defended on positive grounds, if it were unconstitutional for domestic courts to enforce foreign judgments predicated on foreign law that could not have been enacted in this country on account of the First Amendment. Prior to the Act’s passage, most domestic courts that were asked to enforce such foreign defamation judgments concluded that the Constitution precluded them from doing so, and some of the Act’s supporters repeated this claim.

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53. More specifically, Rawls concludes that the Law of Peoples that is generated by liberal peoples should tolerate “decent hierarchical peoples,” but not “outlaw states,” “societies burdened by unfavorable conditions,” or “benevolent absolutisms.” *Id.* at 63.


55. See, e.g., *Are Foreign Libel Lawsuits Chilling Americans’ First Amendment Rights?: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 8 (2010)* [hereinafter *Foreign Libel Lawsuits*] (testimony of Bruce D. Brown, Partner, Baker Hostetler) (advocating the creation of a “uniform national policy that would say recognition of these judgments violates the First Amendment”); see also *id.* at 17 (criticizing the then status quo as one in which “you are dealing with State public policy, not the constitutional
An earlier article of mine debunked this view.\(^{56}\) It argued that while such a foreign judgment may be “Un-American” insofar as it comes from a non-American polity and reflects political values at variance with American constitutional law, neither the foreign judgment itself, nor its recognition or enforcement by an American court, could be unconstitutional.\(^{57}\) Though I cannot distill an entire article’s argument into four short paragraphs, I nonetheless will try to briefly explain why foreign defamation judgments may be “Un-American,” but cannot be unconstitutional.

Let the analysis start by identifying a fact of judicial practice in the United States. Courts enforce antidisclosure clauses in settlement agreements, even though a statute prohibiting disclosure of the same information would violate the First Amendment.\(^{58}\) Similarly, while the Establishment Clause bars states from enacting intestacy laws that would disinherit children who married out of a particular religious faith, state courts regularly enforce wills that contain such anti-intermarriage provisions.\(^{59}\)

These examples show that domestic courts enforce privately created restrictions that state and federal legislatures could not constitutionally make.\(^{60}\) This is because the U.S. Constitution limits governments, not individuals.\(^{61}\) Though courts unquestionably are state actors, the substance of the restrictions they judicially enforce is not attributed to the state for purposes of the state action doctrine if state law is not the source of the restriction. There are only two cases to the contrary — Shelley v. Kraemer\(^{62}\) and Barrows v. Jackson\(^{63}\) — the famous decisions in which the Supreme Court held that judicial enforcement of racially restrictive covenants — privately created restrictions — violate the Constitution.\(^{64}\) As shown by the antidisclosure and anti-intermarriage examples above, the Court has not extended Shelley’s (and Barrows’) holdings: Shelley did not allow state

\(^{56}\) See Rosen, supra note 54, at 186–209.

\(^{57}\) See id.


\(^{59}\) See Rosen, supra note 58, at 460 n.41.

\(^{60}\) For more examples, see id. at 458–61.

\(^{61}\) There are one or two exceptions here. See The Civil Rights Cases, 109 U.S. 3, 30 (1883) (addressing the Thirteenth Amendment); Saenz v. Roe, 526 U.S. 489 (1999) (addressing the right to travel).

\(^{62}\) 334 U.S. 1 (1948).

\(^{63}\) 346 U.S. 249 (1953).

\(^{64}\) Shelley concerned an injunction to enforce the covenant against a nonparty to the covenant, and Barrows extended Shelley’s holding to a suit for damages against one of the signatories of the covenant. See Rosen, supra note 58, at 462.
courts to enforce racially restrictive covenants because state legislatures could not have enacted racial zoning law, yet post-*Shelley* courts enforce privately created antidisclosure restriction despite the fact that the First Amendment precludes legislatures from enacting such a restriction. More generally, as I have shown elsewhere, the Supreme Court in practice has limited *Shelley* to its facts,\(^\text{65}\) because doing otherwise would have effectively applied constitutional limitations to contracts that were made by individuals.\(^\text{66}\)

We are now in a position to understand why it is not unconstitutional for a domestic court to enforce a foreign defamation judgment, even if the law on which the judgment is based could not have been enacted in the United States due to the First Amendment. Just as American constitutional limitations do not apply to American citizens, the U.S. Constitution also does not apply to foreign countries.\(^\text{67}\) So long as an American government was not the progenitor of the restriction, an American court can constitutionally enforce that restriction. In other words, for purposes of the state action doctrine’s application to courts, foreign governments stand on the same footing as American citizens, insofar as the U.S. Constitution limits neither.\(^\text{68}\)

As a result, the U.S. Constitution does not prevent a domestic court from applying a foreign country’s law in the course of litigation, even if that law could not constitutionally have been enacted by a state. From this, it follows that a domestic court may recognize or enforce a foreign country’s judgment without triggering the U.S. Constitution, even if the U.S. Constitution would prevent a state from enacting the law underlying the foreign judgment.\(^\text{69}\) In short, the foreign law and judgment may well be Un-American, but neither the law nor the judgment’s domestic enforcement can be *unconstitutional* under the U.S. Constitution.

\section*{C. A Matter of Policy}

If constitutional pluralism is normatively superior to constitutional uniformity (Part II.A) and the Constitution does not preclude domestic

\begin{itemize}
  \item \textit{Id.} at 458–70.
  \item \textit{See, e.g., Laurence H. Tribe, American Constitutional Law} 1697 (2d ed. 1988) (noting that *Shelley*’s approach, “consistently applied, would require individuals to conform their private agreements to constitutional standards whenever individuals might later seek the security of judicial enforcement, as if often the case”).
  \item \textit{See Rosen, supra note} 54, at 206–09.
  \item \textit{See id.}
  \item With one caveat: judicial enforcement of a foreign judgment would violate due process if the foreign court had not had a legitimate basis for asserting either adjudicatory or regulatory jurisdiction. An interesting question, which I shall not pursue here, is whether this determination regarding adjudicatory and regulatory jurisdiction should be made on the basis of U.S. constitutional or other standards.
\end{itemize}
courts from enforcing Un-American Judgments (Part II.B), does it follow that domestic courts must enforce Un-American foreign judgments? The answer, normatively and doctrinally, is “no.” Whether Un-American Judgments should be enforced is a matter of policy.

There are many important implications. The Constitution neither requires, nor forbids, the enforcement of an Un-American Judgment. In the absence of law or treaty, courts must decide whether, as a matter of policy, Un-American Judgments should be enforced. As a doctrinal matter, this determination is properly made under the “public policy” exception. However, the federal government has the power to displace the public policy exception and to determine for itself whether Un-American foreign judgments should be enforced. Un-American Judgments unquestionably could be the subject of a treaty, or alternatively could be addressed by ordinary legislation under Congress’ power to regulate foreign commerce. It also is possible that the President alone could enter into executive agreements with foreign countries. It is worth reiterating that when negotiating with other countries, the political branches have wide flexibility insofar as the Constitution does not prevent them from requiring domestic courts to recognize or enforce Un-American Judgments.

D. Policy Reasons for Enforcing Un-American Judgments

The fourth part of the argument against the SPEECH Act’s categorical parochialism is that there are powerful policy reasons for sometimes enforcing Un-American Judgments. Elsewhere I have explored at length the considerations that appropriately inform the enforceability of Un-American Judgments. It might be useful to provide an overview of some of that article’s most salient conclusions, without purporting to reproduce its full analysis here.

My earlier article showed that there is a range of plausible normative approaches that can be taken to the enforcement of Un-American Judgments. It did so by considering enforcement from the perspectives of two polar opposite approaches to foreign affairs. First, a Rawlsian approach identifies rules that participants in a “second original position” would think to be fair. This generates what conflicts-of-law scholars call a “multilateralist” approach that takes account of the interests of both the

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70. The seminal case concerning the enforcement of foreign judgments is Hilton v. Guyot, 159 U.S. 113 (1895). For a discussion of the public policy exception, see Rosen, supra note 54, at 176–79.

71. The President conceivably could rely on his power to receive ambassadors, his general foreign affairs powers, or longstanding historical practice. For a skeptical view, see Bradford C. Clark, Domesticating Sole Executive Agreements, 93 VA. L. REV. 1573 (2007). I shall not say more about this interesting question here.


73. See id. at 799–839.
forum country (where enforcement is sought) and the foreign country (from where the judgment issued).\textsuperscript{74} Second, a game theoretic approach analyzes enforcement “unilaterally,” i.e., exclusively from the perspective of maximizing the forum state’s interests.\textsuperscript{75}

Many important implications follow. First, deciding between the Rawlsian and game theoretic approaches, or where along the continuum between them to be, is a quintessential policy choice. For basic democratic reasons, such a choice is best made by the more political branches of government.\textsuperscript{76}

Second, both the Rawlsian and game theoretic approaches concur that some Un-American Judgments should be enforced\textsuperscript{77} — an outcome not permitted under the SPEECH Act.\textsuperscript{78} For example, enforcement is desirable under both game theoretic and Rawlsian approaches if enforcement is deemed to be important to support a foreign country’s political stability.\textsuperscript{79}

Third, a Rawlsian approach favors enforcement more frequently than does a game theoretic approach. Consider a case in which A, a public figure, obtains a judgment against B under U.K. law for defamatory statements made by B in the United Kingdom, while both lived in the United Kingdom.\textsuperscript{80} Assume as well that B’s statements would not have been actionable in the United States, on account of the tougher defamation standards demanded by the First Amendment. If B refuses to pay the judgment and moves himself and his assets to the United States, A will have to enforce the judgment in the United States. Though a game theoretic approach would likely lead to the conclusion that the British judgment should not be enforced,\textsuperscript{81} a Rawlsian approach would allow enforcement.\textsuperscript{82}

\begin{itemize}
\item \textsuperscript{74} See id. at 811–23, 856–57.
\item \textsuperscript{75} See id. at 802–11, 842–46.
\item \textsuperscript{76} See id. at 800–02.
\item \textsuperscript{77} See id. at 845–46 (discussing when game theory would conclude that an Un-American Judgment should be enforced); see also id. at 846–49 (discussing when Rawlsian theory would conclude that an Un-American Judgment should be enforced).
\item \textsuperscript{78} Nor is enforcement allowed under the erroneous notion addressed above that the Constitution flatly prohibits a domestic court’s enforcement of an Un-American Judgment.
\item \textsuperscript{79} See Rosen, supra note 72, at 845–49.
\item \textsuperscript{80} This is a slight variant of the facts in Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997), which I analyzed fully in Rosen, supra note 72, at 859–863.
\item \textsuperscript{81} A game theoretic approach asks only whether enforcement is desirable from the perspective of the United States, taking account of the costs and benefits of enforcing and not enforcing the judgment. Enforcing A’s judgment would deplete assets of a United States citizen and transfer wealth outside the United States. As to the costs of nonenforcement, there would appear to be little likelihood that nonenforcement would harm the U.S.-U.K. relationship.
\item \textsuperscript{82} For a full explanation as to why, see Rosen, supra note 72, at 859–863. For a similar argument, see Libel Tourism: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 111th Cong. 59–71 (2009) (statement of Linda J. Silberman, Professor, New York University
Fourth, a Rawlsian approach nonetheless does not lead to the conclusion that all Un-American Judgments should be enforced. To the contrary, it provides two criteria for determining those Un-American Judgments that should not be enforced. Some Un-American Judgments would not be enforced on account of the content of the foreign country’s substantive law. This category of flatly unenforceable judgments, however, would be a small subset of Un-American Judgments, and would not include foreign judgments based on other liberal democracy’s laws. As to all other Un-American Judgments, enforcement would be determined on the basis of what I have dubbed an “international comparative impairment” analysis. This analysis takes account of the domestic costs of enforcement and the costs of nonenforcement vis-à-vis the defendant, the international system, and the foreign country that issued the judgment. International comparative impairment counsels choosing the course that minimizes the total costs. That is to say, it does not privilege the costs that fall on the enforcing state, but instead insists that all costs count equally regardless on whom they fall.

Though I shall not repeat here my earlier article’s detailed discussion of the various costs relevant to international comparative impairment, two considerations merit mention. One important factor regarding domestic costs is the domestic social meaning that enforcement would carry. There are strong reasons to think that an American court’s enforcement of foreign judgments would not ordinarily be viewed by citizens as the court’s endorsement of these judgments. Another relevant consideration with regard to domestic enforcement costs is the fragility (or strength) of the American constitutional principle with which the Un-American Judgment is in tension. American courts can afford to be more supportive of foreign countries’ different approaches to the extent enforcement does not endanger American norms.

83. For Rawls’ definition of these three types of societies, see RAWLS, supra note 38, at 4–5, 90. See also Rosen, supra note 72, at 847 (“[T]hose judgments based on laws that reflect the problematic practices of outlaw states, societies burdened by unfavorable conditions, and benevolent absolutisms should not be enforced.”).
84. For a full discussion, see Rosen, supra note 72, at 819–23, 847–49.
85. See id. at 824–54.
86. This may help explain why the quasi-Tenth Amendment anticommandeering doctrines apply to state executives (and legislatures), but not to state courts. See id. at 848 n.283. One of the Supreme Court’s justifications for its rule that state executives cannot be commandeered to enforce federal law is that citizens who dislike the federal law may mistakenly blame the state executives who are enforcing it. This justification for anticommandeering does not carry over to state courts if, as hypothesized above in text, courts’ application of law is not typically understood by citizens as the court’s endorsement of that law. See id.
Fifth, because international comparative analysis is institutionally difficult for courts to undertake, it may be the case that the judicial “public policy” analysis should be implemented by a simpler test (the contours of which I shall not discuss here). Relatedly, the types of analysis that international comparative impairment demand are better suited to the more political branches, and are best undertaken by means of ex ante negotiations and precommitments with other countries, typically through bilateral or multilateral agreements or treaties.

In short, sometimes — perhaps often, depending upon one’s preferred policy regarding foreign affairs — there may be compelling reasons for enforcing an Un-American Judgment.

E. Possible Justifications for the SPEECH Act’s Categorical Parochialism

The preceding four arguments (in Parts II.A–D) provide strong cause for concluding that the SPEECH Act’s categorical parochialism is misguided. But are there any possible justifications for the Act’s approach? I can think of three, though none in the end justifies the Act’s systematic and categorical parochialism.

1. Reducing Decisional and Error Costs

First, perhaps a categorical rule is preferable on account of the decisional and error costs that would accompany a nonabsolute rule. It is notable, of course, that none of the SPEECH Act’s supporters justified its approach on this ground. Regardless, this possibility cannot be rejected out of hand. The types of considerations that I have argued should determine whether an Un-American Judgment should be recognized or enforced are difficult for courts to manage. This is particularly true if a court utilizes a Rawlsian approach, which requires a comparison between the projected costs of enforcement to the forum and the projected costs of nonenforcement to the foreign country and the international system.

But there are many alternatives to the Act’s absolute parochialism that could have reduced decisional and error costs. For example, the Act could have provided a presumption of nonenforcement that was rebuttable only upon a showing that the foreign country’s law would have been selected as the applicable law on the basis of one, or several, specified choice of law test(s). If Un-American Judgments were domestically enforced only where there was overwhelming consensus that another country’s law was the

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87. See id. at 819–23.
88. For one suggestion, see id. at 854–58.
89. See id. at 819–23.
90. See id. at 842–54.
91. See id. at 819–23.
normatively applicable law (as was true of the aforementioned hypothetical about U.K. public figure A’s lawsuit against U.K. citizen B) then the speech of American publishers and writers likely would not be chilled. After all, avoiding chilling requires predictability, not categorical immunity, as is shown by the fact that the First Amendment does not give the press categorical immunity from defamation suits. Alternatively, the Act could have included an exception requiring enforcement if the federal executive branch formally indicated (for instance, through a letter from the State Department) that enforcement would be in the national interest and that the foreign law was the applicable law in the case.

In short, decisional and error costs do not justify the Act’s categorical parochialism because such costs can be addressed by less draconian measures.

2. Protecting Freedom of Speech

Second, it might be thought that categorical parochialism was necessary to best realize the Act’s goal of freeing American publishers and writers from the specter of foreign defamation suits to preserve an open press. The argument presumably would go something like this: unless American publishers and writers knew with certainty that an Un-American Judgment would not be enforced, their speech (or at least the speech of some of them) may have been chilled.

Whether or not this is true ultimately turns on prognostications as to how people will respond to various incentives. While such empirical uncertainties obviously counsel caution to a critic of the legislation, there are strong reasons to doubt the claim that only categorical parochialism could have worked. To begin, the absence of evidence in the legislative history that Congress considered any alternative strategies to categorical parochialism undermines confidence that the Act’s approach reflects a considered determination that this was the best way to accomplish the task. To the contrary, it seems that nobody in Congress considered any alternatives.

This is particularly troublesome because there is reason to think that some middle ground could have provided writers and publishers adequate assurances without wholly disregarding foreign countries’ legitimate

92. See supra p. 117; supra note 80 and accompanying text.
93. See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 280–83 (1964) (stating that a newspaper can be liable for publishing a defamatory falsehood concerning a public official upon showing that the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or [not]”).
94. This suggestion is parallel to the institution of so-called “Bernstein Letters” in the context of act of state determinations. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: THE ACT OF STATE DOCTRINE § 443 Reporters’ Note 8 (1987).
interests. The two alternatives described immediately above suggest this is so.

Furthermore — and ironically — categorical parochialism may not be the best way to avoid chilling the speech of American writers and publishers. The Act does nothing to directly deter the wrongfully filed libel tourist lawsuits themselves. The filing and prosecution of those foreign lawsuits might chill American writers and publishers even if their judgments are unenforceable in the United States. After all, foreign lawsuits will be an expense and distraction if defended, may be a harassing distraction even if the defendant chooses not to appear, and can result in judgments that might be enforceable abroad if the defendant has assets in, or travels to, the foreign country. For these reasons, some congressmen wanted to fortify the Act so that it would directly discourage the filing of the foreign lawsuits, but they were unable to garner broad support for this, presumably because of a fear that this risked problematically interfering with other countries’ internal affairs. Such concern about overreaching, however, may have been due to Congress’ failure to differentiate between problematic libel tourism and legitimate libel pluralism. It certainly would have been troublesome had the Bill penalized all the foreign libel lawsuits to which the SPEECH Act applies. But if the SPEECH Act’s drafters had not taken the path of categorical parochialism vis-à-vis all foreign defamation lawsuits, legislators may have been willing to enact stronger measures that would only have targeted the smaller category of problematic libel tourism. Rather than interfering with other countries’ legitimate internal affairs, legislation targeting libel tourism would affect only those foreign lawsuits that problematically interfered with American interests, and which for that reason may plausibly be justified as falling within the United States’ powers to discourage.

3. Encouraging Negotiation

A third possible justification for the Act’s categorical parochialism is that its unpalatability was designed to pressure other countries to come to the negotiation table. This seems farfetched — none of the Act’s supporters justified it on this ground. Further, the Act’s efficacy in this regard is uncertain, and such a strategy might actually backfire by angering foreign countries.


96. Senator Kyl unsuccessfully sought to add a provision to the Act “to force their accusers to pay for legal fees incurred abroad and, in certain cases, additional damages.” S. REP. NO. 111-224, at 10 (2010) (additional views of Senator Kyl).
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The bottom line is this: the Act’s categorical parochialism is difficult to justify. At the very least, those wishing to defend the Act’s approach have a heavy burden, which has not yet been met.

III. **Better institutional contexts for addressing libel judgments**

The best way to think about the SPEECH Act, and what possibly might be done in the future, is to approach the enforcement of Un-American Judgments from an institutional perspective. There are five possible institutional contexts in which the enforceability of Un-American Judgments can be determined: (1) state courts; (2) federal courts; (3) state legislatures; (4) the Congress and President when enacting statutes; and (5) the President and either the Senate or both Houses of Congress when negotiating treaties or agreements with other countries. Prior to the Act, most enforcement decisions came from contexts (1) and (3): state courts either made case by case decisions or applied state statutes that addressed the enforcement of foreign judgments.97

Institutionally, the SPEECH Act seems to be a step in the right direction for two reasons. First, since the enforcement of foreign judgments implicates foreign policy, the federal government is better suited than states to formulate rules regarding their enforcement. Second, because the enforceability of foreign judgments implicates deeply subjective political considerations, the rules of enforcement are better chosen by legislatures and the President than by courts.

This Article has argued, however, that Congress enacted a crude solution without giving consideration to alternatives that could have taken some account of foreign countries’ legitimate interests. What went wrong? Two possibilities come to mind.

A. **Purely domestic solutions**

First, the Act’s supporters may have thought that the Constitution prohibited enforcement of all Un-American Judgments, and hence did not understand that Congress and the President had to make a policy decision as to whether such foreign judgments should be enforced. For the reasons explained above, this view is mistaken: the foreign judgments may be Un-American, but their enforcement would not be unconstitutional.

Second, the purely domestic political context in which the Act was created was inadequate to assure normatively good results because not all affected interests were represented. Enforceability implicates foreign countries, yet these countries were not present in Congress, before committees, or at hearings to express their views. Congress and the President made a decision that imposed costs on unrepresented outsiders.98

B. International Solutions

The analysis above suggests that enforceability decisions are best made in a context in which all interested parties' views are represented. A promising candidate to provide such context is *ex ante* negotiations among the interested countries. This would allow enforcement decisions to be made in a process in which the interested parties — the United States and the foreign countries — could communicate their interests and aim to negotiate solutions.99 The United States would not have to guess how important a particular category of foreign judgment was to another country, and vice versa. By putting many or all types of foreign judgments on the negotiation table at once, countries might be able to agree upon prospective enforcement rules that advance all their interests. Negotiations also present the opportunity for countries to create novel institutions that could facilitate enforcement of the rules on which they agree. Furthermore, negotiated solutions with other countries provide the only hope for addressing the source of the problem of libel tourism — the foreign lawsuits themselves. While the United States unilaterally can do little to limit the prosecution of such suits, foreign countries can — and might — work to limit such suits if a fair regime governing defamation judgments were to be negotiated.

To be sure, arriving at an internationally negotiated solution would not be simple. As is well known, the Hague Conference on International Private Law's attempt to draft a convention concerning the recognition and enforcement of foreign judgments in the 1990s did not succeed. But it would be premature to conclude from this that no negotiated international solution is possible. To begin, many mistakes were made during that earlier effort, and these pitfalls could be avoided in a future attempt. Though this

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is not the place to fully explain why the Hague Conference failed, a few examples suffice to establish the point. The Hague Conference’s rules of procedure were “based on the majoritarian principle, which [did] not encourage the reaching of consensus through compromise.” Pursuant to the Conference’s procedural rules, the Conference chose as its model the Brussels Convention. This turned out to be an unfortunate starting model, because the Brussels Convention was drafted for a small group of states whose jurisdictional and substantive law converged far more than the legal systems of the many countries that participated in the Hague Conference. Drawing from the Brussels Convention, the Hague Conference’s Preliminary Draft took firm positions on many issues that the United States could not accept. Professor Von Mehren, a member of the U.S. Delegation for the Hague Conference’s Special Commission, has suggested that a convention can be achieved “if its scope is more modest and its provisions more tolerant of differences in practices and values . . .” His point can be generalized: things can be done differently next time that may lead to a successful outcome.

Without purporting to comprehensively explain what might be done differently in the future, I would like to make three brief points: two more modest approaches that might be taken in future international negotiations, and a proposal that careful thought be given to what types of professionals ought to be involved in the future negotiating and drafting of agreements.

1. Subject-Matter Specific Conventions

First, whereas the Hague Conference sought to comprehensively address all civil and business judgments, it might be better to seek agreement with regard to only one or a few areas of the law at first. After

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101. Von Mehren, supra note 100, at 192.

102. See Calliess, supra note 100 at 1497–98 (“It has to be concluded that it was a serious mistake to draft the Hague Convention on the basis of the Brussels Convention.”); Von Mehren, supra note 100, at 196–97 (“Clearly, the Brussels Convention was in many respects and at many levels a thoroughly inappropriate model for the work of the Special Commission on international jurisdiction and the effects of foreign judgments in civil and commercial matters.”).

103. See Von Mehren, supra note 100, at 192 (quoting a letter from Assistant Legal Adviser and Head of the U.S. Delegation to Secretary General of the Conference that “[t]he project as currently embodied . . . stands no chance of being accepted in the United States”).

104. Id.
all, defamation judgments raise different issues — and likely strike national sensibilities differently — than do judgments concerning commercial contract disputes or intellectual property. Accordingly, trying to enact a single convention that addresses all judgments — as the Hague Conference tried to do in the 1990s — might be too complex an undertaking. Moreover, since less would be at stake in each subject matter specific convention agreement insofar as no single agreement would address all judgments, it might be easier to reach consensus on single subject conventions. Further, if different approaches were taken in different legal contexts, each might serve as an experiment that allowed for the identification of best practices, or even a single best practice, over time. This might facilitate the adoption of additional international agreements so that, in time, most or all judgments would be covered.

Regarding the choice between single subject conventions and a single trans-substantive convention, consider what has happened in the field of intellectual property. After it became clear that the Hague Convention was unlikely to succeed, intellectual property academics centered in Europe (at the Max Planck Institute) and the United States (through the American Law Institute (ALI)) each began separate projects that sought to develop principles concerning jurisdiction, choice of law, and the recognition and enforcement of judgments involving only intellectual property rights. Though each group worked independently, there was some communication and coordination because two members of the European group also served as advisers in the ALI project.

Both groups have now adopted a set of principles. A recent study, coauthored by one of the academics who served on both groups, concludes that “the basic policy objectives reflected in the two [projects] do not diverge strongly.” Interestingly, the study also concludes that “when the texts [of each group] in their (nearly) final form are compared with the early drafts, it can be observed that over time, a certain convergence has occurred between them — both texts now appear as more balanced than in their initial versions.” While it remains to be seen what, if anything, the international community does with the results, the

105. See, e.g., Annette Kur & Benedetta Ubertazzi, The ALI Principles and the CLIP Project: A Comparison, in LITIGATING INTELLECTUAL PROPERTY RIGHTS DISPUTES CROSS-BORDER: EU REGULATIONS, ALI PRINCIPLES, CLIP PROJECT 89, 92 (Stefania Bariati ed., 2010), available at http://works.bepress.com/benedetta_ubertazzi/4 (discussing aspects of the principles concerning jurisdiction and enforcement “that require a more intellectual property specific approach”); see also id. at 147 (discussing “an issue of central importance for intellectual property right, namely that the possibility should be granted for consolidation of infringement jurisdiction outside the country of registration even when invalidity of a registered right is claimed as a defence.”).
106. Id. at 90–92.
107. Id. at 92.
108. Id.
109. Id.
two groups’ experiences confirm the existence of intellectual property specific considerations and suggest that substantive convergence over time is possible. All this suggests that there may indeed be benefits to a single subject approach.

2. **Bilateral and Multilateral Agreements**

There is a second path of moderation that could be taken in future international negotiations. In contrast to the Hague Conference’s aim to achieve a global convention, a future effort might instead pursue a series of bilateral or multilateral agreements. Though the payoffs are less, it likely would be simpler to find agreement among two (or a few) rather than the seventy-plus countries that currently are members of the Hague Conference. Such an approach may be particularly promising where there are conflicts with one or only a handful of countries in a discrete field of law. This aptly describes the current problem of libel tourism: the handful of instances where it has occurred have all involved lawsuits from the United Kingdom.

3. **Academics and Politicians**

Third, and finally, it may be wise to give more thought to what types of people ought to populate the delegations tasked with coming to an international agreement regarding judgments. The main actors in the Hague Conference were academics, not politicians. This is not surprising insofar as the fields of jurisdiction, choice of law, and judgment enforcement typically are viewed as largely technical in nature. But as the first Hague Conference showed, different countries take vastly different approaches to these subjects, and these differences reflect substantial cultural differences about which countries feel strongly. Academics might not be the people best suited to negotiating a solution to such

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113. For instance, Linda Silberman has suggested that “[M]uch of the attack on American-style judicial jurisdiction is not really about jurisdiction at all, but unhappiness with other aspects of civil litigation in the United States — juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules in U.S. courts.” Silberman, supra note 100, at 319–20. Likewise, a German professor has explained the widespread European approach in which the defendant’s domicile has adjudicatory jurisdiction as the product of “[T]he idea that the claimant is perceived as a kind of aggressor who interferes with the peaceful status quo by raising a claim and asking the state in executing a judgment to transfer assets from the defendant to the claimant.” Calliess, supra note 100, at 1494.
entrenched differences across countries because professors do not typically have well honed political skills. Because politicians and diplomats generally have superior political skills, they perhaps should play a more prominent role in settling on an acceptable general framework that the academic experts then could be asked to operationalize. To be sure, academics still likely would have to be involved in the first stage of framework articulation because the choice among competing frameworks itself is quite technical. For the same reason, politicians or diplomats would have to invest significant time to master the issues if they are to meaningfully negotiate.

On the other hand, the success of the Max Planck Institute’s and ALI’s intellectual property projects may suggest that academics can come to agreement. It is hard to know, however, how much can be generalized from the intellectual property experience insofar as both groups had only a few carefully selected members. At the very least, however, the apparent success of the Max Planck Institute and ALI projects underscores the point that more thought should be directed to who should serve on the committees that are tasked with drawing up any future conventions or agreements.

**CONCLUSION**

The SPEECH Act is systematically and categorically parochial: a foreign defamation judgment is domestically enforceable only if the foreign court’s exercise of adjudicatory jurisdiction is consistent with American due process and the defamation liability is at least as protective as American First Amendment doctrine. Further, the SPEECH Act is surprisingly broad: it applies to all foreign defamation judgments—even defamation claims by non-Americans against non-Americans for defamatory acts that occurred outside of the United States.

This Article has argued that the Act’s unqualified parochialism is normatively undesirable. Foreign defamation judgments based on laws that an American polity could not have enacted due to the First Amendment may be “Un-American,” but they cannot be unconstitutional. Nor would it be unconstitutional for an American court to enforce an Un-American foreign judgment. Whether such judgments should be enforced is a policy

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114. For example, judgment enforcement agreements generally must also address questions of adjudicatory jurisdiction, and it must be decided whether an agreement as to adjudicatory jurisdiction takes the form of a “double convention” that identified only mandatory and prohibited grounds for jurisdiction or a “mixed convention” that also included a category of “permitted” jurisdiction. See Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 Brook. J. Int’l L. 17 (1998); Silberman, *supra* note 100, at 324.
decision, and a wide range of foreign policy approaches conclude that some (perhaps most) Un-American judgments should be enforced.

The political branches are better suited than courts, on institutional and democratic grounds, to decide which Un-American judgments should be enforced. The SPEECH Act, however, demonstrates the dangers of formulating policies that directly affect other countries in the purely domestic institutional context of statute making. Rather, such decisions are best made in a setting in which all affected countries are present so that competing interests can be aired and differences can be negotiated. The Hague Conference’s past failure to adopt a convention regarding foreign judgments does not mean that future agreement is not possible. An array of alternative approaches to that taken by the Hague Conference could be taken to negotiating a future agreement concerning the enforceability of foreign defamation judgments.