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Preserving Free Speech in a Global Courtroom: The Proposed Hague Convention and the First Amendment

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The United States is one of forty-seven countries currently in the process of negotiating and drafting a convention dealing with the jurisdiction and enforcement of foreign judgments across international boundaries.[1] Because the United States is not, and has never been, a party to a treaty or international agreement dealing with the enforcement of judgments from foreign nations,[2] and because of the recent growth of global trade and commerce,[3] there is a national push[4] for the adoption of the proposed Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters ("Hague Judgments Convention"). Proponents believe the treaty will foster increased international business and provide uniform rules for parties engaged in worldwide transactions.[5]

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1. *See* Hague Conference on Private International Law *available at* http://www.hcch.net/e/workprog/jdgm.html (last visited Oct. 15, 2000). On October 30, 1999, the Special Commission adopted the preliminary draft of the Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters [hereinafter Hague Convention]. *See id.* The Diplomatic Conference that was to convene in October 2000 will now meet in two sessions beginning in June of 2001. *See id.*

2. *See* Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition / Enforcement of Judgments in Civil and Commercial Matters*, 24 BROOK. J. INT'L L. 7, 8 (1998).

3. *See generally* Patrick Lane, Survey, *World Trade*, ECONOMIST, Oct. 3, 1998, at 1 (showing that in the last fifty years global trade has increased sixteen fold); Symposium, *Trade Policy and Trade Politics*, 25 N.Y.U. J. INT'L L. & POL. 281, 283 (1993) (stating world trade has grown fifty percent faster than the global economy).

4. *See* Elizabeth Neff, *Treaty Aims to Ease Actions Against Foreign Defendants*, CHICAGO DAILY LAW BULLETIN, September 20, 1999, at 1. A 1999 conference of the U.S. delegates to the Hague Judgments Convention at the Chicago Bar Association exemplifies practitioners' desire to see the Hague Treaty go into effect to help their clients collect on judgments against foreign defendants. *See id.*

5. *See* Edward C. Y. Lau, *Update on the Hague Convention on the Recognition*

Though American businesses and interests favor having U.S. judgments enforced systematically across the globe, the responsibility of enforcing foreign court rulings domestically could erode constitutional protections. The U.S. Constitution provides fundamental guarantees of liberties and rights that may not be present in the legal systems of various member states of the Hague Conference. As a result, the decisions of their courts would not reflect these legal requirements. Thus, enforcing some foreign judgments could require U.S. courts to contravene constitutional mandates and limitations including the First Amendment protection of freedom of speech and the press.[6] Notably, a public policy exception to enforcement exists which allows a court to refuse to recognize a foreign judgment that is "manifestly incompatible with the public policy of the state addressed."[7] In light of the foreign affairs concerns encouraging narrow and infrequent application of such a potential loophole,[8] courts may be encouraged and may choose to systematically recognize foreign judgments rendered under standards unacceptable to First Amendment jurisprudence.

This Note analyzes the potential requirements and applications of the Hague Judgments Convention, focusing on the enforcement of foreign judgments that offend American notions of free speech and press. Part I outlines the evolution and current state of U.S. law on the enforceability of foreign judgments. Next, Part I describes the Constitutional law governing defamation actions and two recent British libel judgments brought before U.S. courts by litigants seeking enforcement. It then introduces the relevant portions of the

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and Enforcement of Foreign Judgments, 6 ANN. SURV. INT'L & COMP. L. 1, 14 (2000); *see also infra* note 31 (emphasizing the professional support of the Judgments Convention in the United States).

6. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging freedom of speech or of the press"). This liberty is considered as essential to the search for truth, self-expression, and democratic government and an enlightened and free populace. *See, e.g.*, Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-87 (1963) (describing the various theories that underlie the constitutional protection of free expression).

7. Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters [hereinafter Hague Judgments Convention] art. 28, para. 1(f), *available at* http://www.hcch.net/e/workprog/jdgm.html (last visited October 15, 2000).

8. The international affairs issues of national sovereignty and cooperation among nations encourage the U.S. government to subordinate some of its interests in the name of political compromise and for the creation of a successful treaty. *See infra* part III.A. (mentioning this potential limiting of courts' discretion to refuse judgments).

proposed Hague Judgments Convention. Part II explains the constitutional significance of the U.S. treaty power and First Amendment jurisprudence standards. Part III discusses the implications of enforcement rules based on international standards instead of domestic law. It then examines different ways courts may treat foreign libel cases or other judgments where liability is based on the defendant's speech. Further, it asserts that the First Amendment must be considered in assessing enforcement of these foreign judgments. Part IV advocates for a balancing test that considers both the trade relations and speech interests at stake. This part uses the two British libel judgments as models for when a court should and should not enforce judgments that would be inconsistent with First Amendment standards. This Note concludes that in order to meaningfully effectuate the Hague Judgments Convention courts must enforce foreign speech-related judgments unless enforcement directly implicates U.S. interests and creates a significant burden on free speech.

I. THE FIRST AMENDMENT AND THE ENFORCEMENT OF FOREIGN JUDGMENTS

A. UNITED STATES RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

1. Common Law Comity Doctrine

Although the Full Faith and Credit Clause of the U.S. Constitution requires recognition and enforcement of judgments among the several states, it does not apply to judgments of courts in foreign countries.[9] Thus, when a party seeks to enforce a foreign judgment neither state nor federal courts must recognize decisions rendered abroad. In the 1895 case, *Hilton v. Guyot*, the U.S. Supreme Court held that the common law doctrine of comity guides such determinations.[10] Lower courts have described this principle as a rule of practice, convenience, and understanding, used to facilitate and express international

9. *See* U.S. CONST., art. IV, § 1.

10. *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) (evaluating traders from a French company attempted to enforce French judgments against U.S. merchants).

cooperation between the tribunals of various nation states.[11] In the *Hilton* case, the Court laid out the federal standard for recognition and enforcement of foreign judgments that focused on assessing the adequacy of the procedural safeguards of the adjudicating forum.[12] The decision sets out five main elements to establish a *prima facie* case for enforcement of a foreign court judgment:

1. The foreign judgment must have been final and complete;
2. The competent court had personal jurisdiction;
3. The competent court had subject matter jurisdiction;
4. The defendant had timely and proper notice of the proceedings and an opportunity to defend himself;
5. The courtroom proceedings were of a civilized jurisprudence recorded formally and clear.[13]

This *prima facie* case of recognition could be overcome by showing fraud, prejudice, or other compelling reasons.[14] The *Hilton* case also required reciprocity, such that a court would enforce a judgment only if the country in which the foreign court sat would similarly enforce a judgment from a U.S. court.[15] Courts have since discredited this part of the ruling, as now reciprocity is not necessary in most jurisdictions.[16]

2. *Enforcement as a Matter of State Law and the Uniform Money-Judgments Recognition Act*

States courts have always determined their own standards for enforcement of foreign judgments, thus *Hilton* only applied in federal courts. After the Supreme Court decision in *Erie Railroad Co. v. Tompkins*, state common law also controlled in federal courts as well as state jurisdictions for questions of

11. *See* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 (3d Cir. 1971).

12. *See Hilton*, 159 U.S. at 202-03.

13. William Sturm, *Enforcement of Foreign Judgments*, 95 COM. L. J. 200, 204 (1990).

14. *See id.* at 205.

15. *See Hilton*, 159 U.S. at 228.

16. *See, e.g.*, Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) (court refused to require reciprocity in an action to enforce a tribal court judgment); Tahan v. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981) (stating that the logical rule is for courts to refrain from imposing reciprocity requirements); Tonga Air Servs., Ltd. v. Fowler, 826 P.2d. 204, 209 (Wash. 1992) (holding that reciprocity is not required in a contract action); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. k (1971).

recognition and enforcement of foreign judgments.[17] As a result, federal district courts looked to the law of the state in which they sat and did not directly apply *Hilton*, as it was part of the "federal common law" that *Erie* deemed inapplicable in federal diversity suits.[18]

Leaving enforcement determination to state law means there is currently no uniform standard. Therefore, parties to a suit may theoretically face different results depending on which state or federal jurisdiction is the chosen forum. In practice, however, because state courts and legislatures have prescribed similar rules for assessing foreign judgment recognition, some consistency has developed.[19] For example, twenty-nine states and the District of Columbia adopted the Uniform Foreign Money-Judgments Recognition Act ("Foreign Money-Judgments Act") that prescribes criteria for recognition and enforcement similar to the analysis proposed by the *Hilton* decision.[20] Under the Foreign Money-Judgments Act, except as set out in section four, any final and conclusive foreign judgment is to be given full faith and credit, and thus enforced in the same way that judgments of sister states are enforced.[21] Section four describes grounds for non-recognition stating that a court must not recognize a judgment issued by a court that did not have subject matter or personal jurisdiction, or that was rendered under a system that did not provide due process of law or was not impartial.[22] Beyond these requirements, the state court has

17. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (tort action in which the plaintiff's success depended on whether the court applied state or federal law).

18. *Id.* at 78. Prior to this decision federal courts had applied "federal common law" to diversity suits (where the court has jurisdiction by virtue of the parties being citizens of different states) instead of the law of the state in which the courts sat. This led to a concern about forum shopping by plaintiffs and differing results in cases based on the same cause of action depending on whether the plaintiff chose federal or state court. *See id.* at 74-75; Hanna v. Plumer, 380 U.S. 460, 467 (1965) (clarifying the two purposes of the *Erie* rule—limiting forum shopping and avoiding inequities).

19. *See* Linda Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 624 PLI/Lit 323, 325-26 (2000).

20. *See* UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT, 13 U.L.A. 263 (1962) [hereinafter Foreign Money-Judgments Act].

21. *See id.* § 2-4 at 264-72. "Except as provided in section 4, a foreign judgment meeting the requirements of section 2 is . . . enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." *Id.* § 3 at 265.

22. *See id.* § 4(a) at 268.

> A foreign judgment is not conclusive if (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law; (2) the foreign

discretion to decline recognition if the defendant did not have sufficient time to defend herself, the ruling was procured by fraud, the substantive claim on which the judgment is based is "repugnant to the public policy of the state,"[23] the judgment conflicts with another conclusive judgment, the foreign proceeding contravened a prior agreement between the parties regarding dispute resolution, or the trial court was a seriously inconvenient forum.[24] Those states that have not formally adopted the Foreign Money-Judgments Act generally apply the same principles.[25]

It is important to note that recognition and enforcement of judgments under the Foreign Money-Judgments Act are not synonymous but tend to overlap in application.[26] Recognition occurs when the U.S. court finds that the subject matter of the foreign case has been decided and cannot be litigated further.[27] Enforcement occurs when the party seeking to effectuate the judgment is granted the relief sought.[28] The Foreign Money-Judgments Act covers both issues, yet it does not provide explicit directions for actual enforcement. States must therefore apply their own procedural rules for the enforcement of sister state judgments (or those entitled to full faith and credit).[29]

Because not all states have adopted the Foreign Money-Judgments Act or other identical standards regarding the recognition and enforcement of foreign judgments and because

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court did not have personal jurisdiction over the defendant; or (3) the foreign court did not have jurisdiction over the subject matter.

Id.

23. *See infra* part I.B.2 for two British cases that were declined enforcement under this exception. For cases rejecting the public policy exception as a bar to enforcement, *see, e.g.*, S.W. Livestock Trucking Co. v. Hargrove, 169 F.3d 317 (5th Cir. 1999) (Mexican judgment based on loan agreement despite the fact that the agreement violated Texas law); McCord v. Jet Spray Int'l Corp., 874 F. Supp. 436 (D. Mass. 1994) (difference in law regarding at-will employment contracts not sufficient to preclude enforcement of Belgium judgment).

24. *See id.* § 4(b) at 268. A few states that have adopted the act continue to include reciprocity as a ground for discretionary denial of recognition or enforcement. *See* Silberman, *supra* note 19, at 328. *See supra* notes 15-16 and accompanying text for a discussion of reciprocity.

25. *See* Michael Traynor, *An Introductory Framework for Analyzing the Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters: U.S. and European Perspectives*, 6 ANN. SURV. INT'L & COMP. L. 1, 5 (2000).

26. *See* Sturm, *supra* note 13, at 200.

27. *See id.*

28. *See id.* For the purposes of this note, the terms will be used interchangeably.

29. *See id.* at 213.

of the potential for differing results inherent in a discretionary system of decision, states forseeably could reach different conclusions when faced with an identical foreign decree. Although opponents believe that a truly uniform rule may be of slight necessity and may offer little improvement in the estimation of other nations,[30] there is a significant amount of support for a federal standard of enforcement. This support stems from desires to keep up with and promote further global business and trade, to establish a predictable, even-handed international jurisdiction regime, and to minimize worldwide forum shopping.[31]

B. FIRST AMENDMENT AND PUBLIC POLICY CONCERNS

The abundance of international communication present in our globalized society, particularly with the advent and proliferation of the Internet, increases the likelihood that seeking to enforce a foreign judgment in this country may implicate the guarantees of free speech and expression embodied in the First Amendment of the U.S. Constitution.[32] Two cases, both involving the enforcement of British decisions in libel suits, demonstrate this problem. In both state and federal jurisdictions, courts interpreted the British holdings as contrary to public policy because they did not meet the legal standards required by the Supreme Court in a defamation action.[33] Though both U.S. and United Kingdom libel laws derive from the same common law source,[34] the First

30. *See* Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT'L L. 111, 113 (1998).

31. *See* Edward C. Y. Lau, *Update on the Hague Convention on the Recognition and Enforcement of Foreign Judgments*, 6 ANN. SURV. INT'L & COMP. L. 1, 5 (2000) ("There is a great need for this treaty due to the growth of global business and trade."); Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 ALB. L. REV. 1207 (1998) (stating a multilateral convention creating uniform rules is "long overdue"); Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1239 (1998) (explaining that advantages of a treaty regime would include the reduction in potential forum shopping and the cessation of discriminatory treatment of American citizens in the jurisdictional reach of European courts).

32. *See* Traynor, *supra* note 25, at 8.

33. *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 2 (D.C. 1995); Bachchan v. India Abroad Publ., Inc., 585 N.Y.S.2d. 661, 661 (Sup. Ct. 1992); discussion *infra* part I.B.2.

34. *See* Derek Devgun, *United States Enforcement of English Defamation Judgments: Exporting the First Amendment?*, 23 ANGLO-AM. L. REV. 195, 196 (1994).

Amendment of the U.S. Constitution creates additional protection for defendants in U.S. defamation cases. As a result, the courts declined to enforce the foreign courts' judgments.[35] These cases demonstrate the differences between American and British defamation law and the concomitant concerns that arise when foreign laws that allow penalties for speech that would be constitutionally protected in the United States are presented for enforcement in American courts.

1. Defamation Causes of Action in the United States

In the United States, state law governs a defamation cause of action. Though the precise legal standard of defamation claims may differ between jurisdictions, most states base the cause of action on the English common law tort.[36] Generally, a plaintiff must prove the defendant made an unprivileged, false statement negatively reflecting upon and concerning the plaintiff to a third party.[37] Truth is an absolute defense for the defendant.[38] In certain cases, recovery for this action is limited by the guarantee of free speech found in the First Amendment.[39]

In the landmark 1964 decision, *New York Times Co. v. Sullivan*, the Supreme Court held that a public official suing for defamation must establish by clear and convincing evidence that the defendant made the defamatory statement knowing of its falsity or with reckless disregard for its truth.[40] The Court later extended this standard to public figures, so as to include those individuals who have all-around notoriety and influence or who have voluntarily put themselves at the forefront of a public controversy in order to influence its outcome.[41] In *Gertz v. Robert Welch, Inc.*, the Court held that a private plaintiff in a

35. *See Matusevitch*, 877 F. Supp. at 6; *Bachchan*, 585 N.Y.S.2d. at 665.

36. *See Bachchan*, 585 N.Y.S.2d. at 665.

37. *See, e.g.*, Smith v. Maldonado, 85 Cal. Rptr. 2d 397, 402 (Cal. App. 1999); Cianci v. Pettibone Corp., 698 N.E.2d 674, 678 (Ill. App. 1998); RESTATEMENT (SECOND) OF TORTS § 558(a)-(b) (1976).

38. *See, e.g.*, Pollnow v. Poughkeepsie Newspapers, Inc., 501 N.Y.S.2d 17,18 (App. Div. 1986); RESTATEMENT (SECOND) OF TORTS § 581A (1976).

39. *See infra* notes 40-43 and accompanying text.

40. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). This standard required the plaintiff to show "actual malice" on the part of the defendant. *Id.* at 280. Applying this test the Court held that the New York Times was not liable for an advertisement printed in the *Times* that was purchased by a civil rights group and contained factual mistakes. *See id.* at 258-59, 286.

41. *See* Curtis Publ. Co. v. Butts, 388 U.S. 130, 154 (1967) (holding that a University of Georgia athletic director and former football coach was a public figure).

defamation suit involving a matter of public concern must similarly face a higher standard of proof than in a traditional defamation action.[42] Further, state laws allowing presumed or punitive damages in suits involving private citizens regarding matters of public concern, were held unconstitutional if they did not require the plaintiff to prove knowing falsity or reckless disregard for the truth to recover these awards.[43]

The Court began establishing these additional burdens in the context of defamation to safeguard society's interest in open and robust communication.[44] Protection of the criticism of public officials and matters, and free expression and debate is generally seen as central to the purpose of the First Amendment.[45] Such political speech is considered core expression because it facilitates self-government and maintenance of a democratic society.[46] The Court has thus been very cautious in allowing liability for speech about the government or important social affairs so as to avoid deterring controversial speech protected under the U.S. Constitution.[47] Unlike the United States' system, English libel law is not limited by the requirements of a constitutional provision ensuring free speech.[48]

2. *British Libel Judgments*

English common law principles provide the major substance

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42. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (holding an attorney was a private figure but his involvement in a highly publicized trial was a matter of public concern). The Court held, "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability. . ." *Id.* at 347. In suits by private persons involving matters of private concern, a state may allow recovery of punitive damages without any showing of fault by the defendant. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 762-63 (1985) (giving an erroneous credit report to a bank was not a public matter).

43. *See Gertz*, 418 U.S. at 349.

44. *See New York Times Co.*, 376 U.S. at 270.

45. *See id.* at 273-75.

46. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 24-28 (1960); Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204-10.

47. *See New York Times Co.*, 376 U.S. at 279 (stating that "[W]ould-be critics of official conduct may be deterred from voicing their criticism even though it is in fact true. . .," and that such a chilling effect on speech "dampens the vigor and limits the variety of public debate."); *See generally Gertz*, 418 U.S. at 350 (permitting excessive liability "unnecessarily exacerbates the danger of media self-censorship.").

48. *See* Devgun, *supra* note 34, at 197.

of the United Kingdom's defamation law.[49] A plaintiff can establish the elements of a defamation case by showing the defendant communicated, to a third party, a statement that refers directly or indirectly to the plaintiff and that tends to lower the plaintiff's reputation or expresses "hatred, contempt, or ridicule."[50] If these elements are established, the statement is presumed false and the plaintiff can recover without showing any bad faith or fault on the part of the defendant.[51] If the statement was a libel, meaning it was in writing or other permanent form, injury is presumed.[52] The defendant can defeat a claim by establishing that the statement was substantially true or making out the affirmative defense of "fair comment," which applies to expressions of opinion about issues of public concern.[53] Other defenses include qualified and absolute privilege and innocent dissemination.[54]

Two cases decided under this body of law were brought to the United States when plaintiffs of two British libel actions attempted to enforce their judgments against defendants residing in the United States. In the first case, *Bachchan v. India Abroad Publications, Inc.*, the plaintiff sought to enforce a money judgment from the High Court of Justice in London rendered against a New York-based operator of an Indian news service in New York court.[55] The defendant, India Abroad Publications, Inc., published a story in the United Kingdom

49. *See* Douglas W. Vick & Linda Macpherson, *An Opportunity Lost: The United Kingdom's Failed Reform of Defamation Law*, 49 FED. COMM. L. J. 621, 621 (1997).

50. *Id.* at 624-25.

51. *See id.* at 625.

52. *See id.*

53. *See id.* In assessing whether a defendant's statements are "fair comment," the words are read alone, out of the context of the overall speech, and thus are less likely to meet this defense than if the statement was evaluated in context. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 235 (Md. 1997). Proof of ill will or intent to injure defeats a "fair comment" defense. *See id.* at 234, n.4.

54. *See* Vick & MacPherson, *supra* note 49, at 625-26. The Defamation Act of 1996 made some changes to this area of law in three general respects. *See id.* at 629. These alterations, which modify defenses for application to the internet and international communications and procedural reforms, and allowing for waiver of Parliamentary privilege, are not drastic and do not affect the subject within the scope of this note. *See id.* In fact, some British commentary has criticized the statute as posing even greater dangers of inhibiting free press by continuing to and possibly even increasingly favoring the plaintiffs. *See* Alex Wade, *The Defamation Act of 1996: Potential Impact and Relationship With the Present Law Of Libel*, 1 TOLLEY'S COMM. L. 186, 186 (1996).

55. *See* Bachchan v. India Abroad Publ., Inc., 585 N.Y.S.2d. 661, 661 (Sup. Ct. 1992).

claiming that the plaintiff, an Indian national and former member of Parliament, had been involved in a scandal between Sweden and India regarding a munitions contract.[56] The court found that the subject of the defendant's publication, "an international scandal," was a matter of public concern.[57] As such, constitutional law would require that the plaintiff bear the burden of showing falsity if the suit was brought in a U.S. court.[58] Under English law, however, the falsity of the statements was presumed and the burden of proving truth placed on the defendant.[59]

Because the English law did not protect the defendant to the extent the First Amendment would have, the court held that the judgment was unenforceable as repugnant to public policy under the New York foreign judgments statute.[60] Having adopted the standards found in the Foreign Money-Judgments Act,[61] the New York Civil Practice Rules allowed for discretionary non-recognition in cases presenting conflicts with public policy.[62] The judge ruled that allowing recovery under a defamation standard that did not meet the requirements of American jurisprudence would contravene the policy and protections of free speech and debate found in the Federal and New York Constitutions.[63] The potential for creating a "chilling effect" on free press publication and expression was held to be too great to enforce the British ruling.[64]

Faced with a somewhat similar case, the court in *Matusevitch v. Telnikoff* again refused to recognize a judgment based on English libel law.[65] Both Matusevitch and Telnikoff grew up in Russia.[66] After Matusevitch defected and Telnikoff

56. *See id.*

57. *Id.* at 664.

58. *See id.*

59. *See id.* at 663.

60. *See id.* at 665.

61. *See supra* part I.A.2 (discussing the Uniform Foreign-Money Judgments Recognition Act).

62. *See Bachchan*, 585 N.Y.S.2d at 662.

63. *See id.* at 662, 665. The opinion also states that under New York defamation law the plaintiff may only recover by establishing the publisher acted in "'a grossly irresponsible manner'" if the statement at issue is of legitimate public concern and the suit is against a media defendant. *Id.* at 665. In contrast, the English rule required no showing of fault or disregard for standard journalistic practice. *See id.* at 663.

64. *See id.* at 664.

65. *See* Matusevitch v. Telnikoff, 877 F. Supp. 1, 6 (D.C. 1995).

66. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 232 (Md. 1997). This is the opinion given by a Maryland court after the United States Court of Appeals for the

emigrated both spent time working as journalists for a publicly funded radio station broadcasting to Eastern Europe and former Soviet territory.[67] Telnikoff, the plaintiff in the English libel suit, had previously worked for the British Broadcasting Corporation (BBC).[68] In 1984, he wrote a letter that was published in the London newspaper, *The Daily Telegraph*, which criticized the BBC's service to Russia.[69] In response, Matusevitch, the original defendant, wrote a letter also published in the *Telegraph* that indicated his belief that Telnikoff's letter was anti-Semitic.[70] After writing a rebuttal letter, Telnikoff sued and obtained a judgment for libel based on the remarks in Matusevitch's letter.[71]

The court found that the Telnikoff was a public figure for purposes of the case, as he was a prominent human rights activist in the former Soviet Union, and the speech at issue was made in this context.[72] Thus, Matusevitch was entitled, under the First Amendment, to the safeguards established by the heightened standards of U.S. law when defending a defamation action brought by a public figure.[73]

The opinion acknowledged the tradition and utility of comity principles in international adjudication matters, but found that to award Telnikoff's judgment full faith and credit in a U.S. court "would deprive the plaintiff of his constitutional rights."[74] As in the *Bachchan* case, the court focused on the substantive differences between American and English defamation laws, concluding that the lack of an "actual malice" standard [75] and of a fault requirement in U.K. law rendered the judgment "repugnant to the public policies of the State of Maryland and the United States."[76]

Because the British law failed to take into account the libel

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District of Columbia Circuit certified a question of Maryland law to the state court when Telnikoff appealed the ruling of the D.C. District Court. *See id.* at 236. The D.C. Circuit's opinion does not give a lot of information about the parties and facts of the case, thus cites to both are used.

67. *See id.* at 232.
68. *See id.*
69. *See id.*
70. *See id.* at 233, 235.
71. *See id.* at 233-34.
72. *See Matusevitch*, 877 F. Supp. at 5.
73. *See id.* at 5-6.
74. *Id.*
75. *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (describing "actual malice").
76. *Matusevitch*, 877 F. Supp. at 4.

plaintiff's status, the defendant's state of mind, or the context of the allegedly defamatory speech, the court believed the judgment offended public policy embodied in our notions of free speech and press.[77] The opinion asserts that when the statements at issue are read in context, they appear to be mere hyperbole or opinions and therefore not actionable under U.S. law.[78] The court relied on the public policy exception to the Foreign Money-Judgments Act,[79] adopted by Maryland to govern foreign enforcement proceedings, to exercise its discretion to decline enforcement of the judgment.[80] The rationale on which these cases are based is that allowing recognition of awards resulting from restrictions on speech is incompatible with the protection of freedom of expression as set out in the First Amendment of the Constitution.[81]

C. THE PROPOSED HAGUE JUDGMENTS CONVENTION

In 1992, the United States Department of State proposed a project on international jurisdiction and enforcement of judgments to the Secretary General of the Hague Conference.[82] In 1996, the Conference agreed to include a Convention on its forthcoming agenda,[83] and on October 30, 1999, the special commission adopted the revised preliminary draft. This text is currently awaiting approval by a Diplomatic Conference, scheduled for 2001.[84]

The proposed Hague Judgments Convention covers two fundamental principles of civil and commercial law—judgment recognition and enforcement, and jurisdiction.[85] Chapter II of the Convention contains a three-step approach that prescribes mandatory bases of jurisdiction,[86] grounds to which domestic

77. *See id.* at 4-6.

78. *See id.* at 4-5.

79. *See supra* notes 20-22 and accompanying text.

80. *See Matusevitch*, 877 F. Supp. at 3.

81. *See id.*

82. *See* Pfund, *supra* note 2, at 8. The Hague Conference is made up of forty-seven nation states, including Canada and Mexico, the European Union member states, China, Japan, and Israel, and several Latin American countries. *See id.* at 11.

83. *See* Hague Conference on Private International Law, Final Act of the Eighteenth Session, Oct. 19, 1996, pt. B(1), 35 I.L.M. 1391, 1405.

84. *See supra* note 1 and accompanying text.

85. *See* Hague Convention, *supra* note 7, chs. II-III.

86. *See id.* arts. 3-16. "A defendant may be sued in the courts of the State where that defendant is habitually resident." *Id.* art. 3, para. 1. "If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle

rules may be applied,[87] and prohibited grounds of jurisdiction, which may not be asserted by the member states.[88] These have been deemed "Required Bases," "Permitted Bases" and "Prohibited Bases" of jurisdiction.[89]

Chapter III deals with recognition and enforcement of foreign judgments.[90] It establishes that a final judgment of one Member State must be recognized in the courts of any other contracting party, provided that the issuing court had valid jurisdiction.[91] The enforcing state cannot review the merits of the claim on which the judgment is based.[92] Discretionary grounds for refusal, set out in Article 28, limit this general rule of recognition.[93] The residual public policy exception is of particular interest and significance in the context of judgments involving liability resulting from a party's speech or expression.[94] It provides for the denial or refusal of a judgment when "recognition or enforcement would be manifestly incompatible with the public policy of the State addressed."[95]

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any dispute. . .that jurisdiction shall be exclusive unless the parties have agreed otherwise." *Id.* art. 4, para. 1. Article five deals with waiver of jurisdiction by appearance, stating that "[a] court has jurisdiction if the defendant proceeds on the merits without contesting jurisdiction." *Id.* art. 5. Articles six and seven cover contract actions, such that, "[a] plaintiff may bring an action in contract in the courts of a State in which-in matters relating to the supply of goods, the goods were supplied in whole or in part. . .", and articles 8-16 cover other specific subjects, such as employment contracts (article 8), torts (article 10), and trusts (article 11). *See id.* arts. 6-16.

87. *See id.* art. 17 ("Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18").

88. *See id.* art. 18. "Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under national law of a Contracting State is prohibited if there is no substantial connection between that State and the dispute." *Id.* para. 1. Paragraph two lists particular grounds on which jurisdiction may not be asserted without further basis (such as the presence of property owned by the defendant, the nationality of either of the parties, or service of writ on the defendant). *See id.* para. 2.

89. Lau, *supra* note 5, at 15.

90. *See* Hague Judgments Convention, *supra* note 7, ch. III.

91. *See id.* art. 25.

92. *See id.* art. 28, para. 2.

93. *See id.* art. 28. A judgment may be refused if: (a) a suit involving the same subject matter is pending before a court first seised; (b) the judgment is inconsistent with a prior, enforceable judgment; (c) the issuing court was partial or violated fundamental principles of procedure; (d) the defendant did not have sufficient time to prepare a defense; (e) the ruling was procured by fraud; or (f) recognition would be incompatible with the public policy of the enforcing state. *See id.*

94. *See id.* art. 28, para. 1(f).

95. *Id.*

This language mirrors the discretionary rule found in the Foreign Money Judgments Act that allows courts to refuse to enforce a judgment "repugnant to the public policy of the state."[96] As explained above, two U.S. courts utilized this language to deny enforcement of libel judgments rendered abroad.[97]

The impetus behind the U.S. support of the Hague Convention is primarily the lack of enforcement given to U.S. judgments abroad relative to the United States' generosity in recognition of other nations' judgments.[98] American attorneys with clients involved in international commerce frequently inquire with the State Department regarding enforcement concerns when U.S. businesses and citizens have obtained judgments abroad or are considering legal action.[99]

Concern with European nations possibly subjecting American parties to discriminatory assertions of jurisdiction also motivated supporters of the Convention.[100] European international jurisdiction and enforcement issues are covered by the Brussels and Lugano Conventions, which generally require recognition of judgments of other contracting parties.[101] Judgments of member states are enforced in other European jurisdictions routinely with a great deal of success.[102] The Brussels Convention, from which the Lugano Convention is derived, has been deemed "the single most important private international law treaty in history."[103] Though these states are

96. Foreign Money-Judgments Act, *supra* note 20, § 4(b)(3). *See supra* part I.A.2 for an explanation of the Uniform Act.

97. *See supra* part I.B.2 (discussing the *Matusevitch* and *Bachchan* cases).

98. *See* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV., 89, 89 (1999); Lau, *supra* note 5, at 14; Pfund, *supra* note 2, at 9.

99. *See* Pfund, *supra* note 2, at 8.

100. *See id.* at 9; Juenger, *supra* note 30, at 115.

101. *See* Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32, reprinted in 8 I.L.M. 229 (1969), as amended by 1990 O.J. (C 189) 1, reprinted as amended in 29 I.L.M. 1413 (1990) [hereinafter Brussels Convention]; Lugano Convention on Jurisdiction and Enforcement of Judgments on Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620 (1989) [hereinafter Lugano Convention].

Exceptions to the rule of mandatory recognition exist for conflict with public policy or prior final judgments, certain jurisdiction inconsistencies, default judgments without proper service and opportunity to present a defense, and judgments regarding status, capacity, or succession. *See* Brussels Convention, *supra* art. 27; Lugano Convention, *supra* art. 27.

102. *See* Juenger, *supra* note 30, at 116.

103. *Id.*

bound by this uniform and well-functioning jurisdiction treaty regime with respect to other European countries, they are free to use broad domestic jurisdiction laws for non-member parties, such as the United States.[104] The use of these laws is problematic for U.S. businesses and interests because American defendants could be haled into court in very inconvenient forums. Consequently, the U.S. delegates desire to enter into an agreement with the *Brussels* and *Lugano* nations.[105] However, as U.S. representatives work with these potential contracting parties to create a final Hague Judgments Convention, they must ensure that the United States' responsibilities under this international treaty will comply with the demands of the Constitution.[106]

II. CONSTITUTIONAL DEMANDS: FIRST AMENDMENT SCRUTINY AND FOREIGN AFFAIRS

The limits placed by the First Amendment on the role of American courts in international litigation are specific to the United States, as imposed by the constitutional guarantees of our judicial framework. The supremacy of the Constitution in our legal order demands the attention and adherence of law and policy makers in all domestic contexts,[107] yet with the growth of the global marketplace for goods and ideas, the United States is confronted with legal issues of international implication. As trade across national borders continues to flourish and expand, questions of jurisdiction and enforcement of judgments involving foreign courts, nations, and parties are coming to the forefront of the private international law community.[108] The internal constitutional implications of this phenomenon must be considered in the formulation of multinational policies and rules.

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104. *See* Brussels Convention, *supra* note 101, at tit. III. "A judgment given in a *Contracting State* shall be recognized in the other *Contracting States* . . ." (emphasis added). *Id.* sec. 1, art. 26.

105. *See supra* note 101 and accompanying text.

106. *See* De Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution . . . It can only act in accordance with all the limitations imposed by the Constitution . . . ").

107. *See* U.S. CONST. art. VI (the constitution is the supreme law of the land); Marbury v. Madison, 5 U.S. 137, 180 (1803) (legislation contrary to the dictates of the constitution is void); THE FEDERALIST No. 78, at 525 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("the constitution ought to be preferred to the statute").

108. *See* Neff, *supra* note 4, at X.

A. FIRST AMENDMENT JURISPRUDENCE

As the *Bachchan* and *Matusevitch* cases demonstrate, U.S. courts have thus far been unwilling to enforce libel judgments based on laws not meeting First Amendment standards. The New York and Maryland[109] courts found the defamation judgments contradictory to state and national public policy and therefore subject to discretionary rejection.[110] Because the courts rejected recognition of these judgments through application of their state enforcement laws, they did not use the traditional Supreme Court analysis for issues of suppression of speech.

In determining the validity of laws infringing on expression, the Court has developed different degrees of review depending on the type of law at issue and its affect on freedom of expression.[111] In traditional First Amendment analysis, laws aimed at the content of speech receive strict scrutiny, that is, they must serve a compelling government interest and be narrowly tailored to that end.[112] Laws that are content-neutral and regulate the time, place and manner of speech, or are not aimed at expression but have an incidental burden on expression are subject to intermediate scrutiny, generally requiring a substantial or significant government interest and a close fit between that end and the means employed.[113] This intermediate level of review is also applied to symbolic speech,

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109. The *Matusevitch* case was heard by the District Court, District of Columbia, which certified the question of whether enforcement of the libel judgment would be repugnant to Maryland public policy to the Maryland Court of Appeals.

110. *See* discussion, *supra* part I.B.2 (describing the facts and rulings of the *Bachchan* and *Matusevitch* cases).

111. This analysis applies to state or federal actions abridging First Amendment rights. The First Amendment reads "Congress shall make no law. . .abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This proscription was made applicable to the states through enactment of the 14th amendment and cases incorporating the speech clause into the amendment's due process provision. *See id.* amend. XIV; Gitlow v. New York, 268 U.S. 652, 654 (1925) (criminal anarchy conviction under New York statute upheld against First Amendment challenge); Whitney v. California, 274 U.S. 357, 371 (1927) (conviction of member of Communist Labor Party upheld over challenge that California Criminal Syndicalism Act was unconstitutional). There must be some state action to assert a constitutional challenge. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (holding that the constitution protects against all forms of government action including judicial enforcement of laws).

112. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 120 (1991).

113. *See* Heffron v. Int'l. Soc'y for Krishna Consciousness, 452 U.S. 640, 649, 654 (1981); United States v. O'Brien, 391 U.S. 367, 377 (1968).

or action that is intended and understood to be expressive.[114] Under the test articulated in *United States v. O'Brien*, the classic application of intermediate scrutiny, a law will be upheld despite its burden on expression if it furthers a substantial or important government interest that is unrelated to suppressing speech, and the incidental restriction on expression is no greater than necessary to further this goal.[115] Laws of general applicability or those that are not aimed at and do not involve significant expression receive no First Amendment scrutiny.[116] As an example of such a case, in *Cohen v. Cowles Media, Co.*,[117] the Supreme Court upheld an award of damages in a promissory estoppel cause of action against a newspaper, an entity protected explicitly by the First Amendment.[118] Cohen, the plaintiff, campaigned for a Republican gubernatorial candidate and, days before the election, revealed information to the defendant newspapers about the criminal record of the Democratic Lieutenant Governor candidate.[119] Reporters for the papers promised confidentiality but made editorial decisions to publish Cohen's name as an important part of the story.[120] The newspaper asserted that because the suit was based on a published story and a reporter's judgment that revelation of a source's name was newsworthy in and of itself, allowing the plaintiff to keep his recovery would inhibit journalistic discretion and candid reporting.[121] The Court rejected this argument, holding that newspapers could not be immunized from laws of general applicability.[122]

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114. *See* Spence v. Washington, 418 U.S. 405, 409 (1974) (defendant's display of an American flag with a peace sign affixed held to be symbolic speech); Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (*O'Brien* test applied to nude dancing, a form of expressive conduct).

115. *See O'Brien*, 391 U.S. at 377 (1968). In this decision, the court upheld a federal military law against destruction of draft cards, even as applied to an individual who burned his draft card as a form of protest, and therefore argued that it was expressive conduct. *See id.*

116. *See* Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (promissory estoppel action allowed against the defendant newspaper); Arcara v. Cloud Books, Inc., 478 U.S. 697, 707 (1986) (the Court allowed New York to shut down an adult bookstore for violation of the public health code).

117. 501 U.S. 663 (1991).

118. *See id.* at 670. The press is an institution uniquely singled out for protection under the First Amendment. *See* U.S. CONST. amend. I (". . .or of the press").

119. *See* 501 U.S. at 665.

120. *See id.* at 665-66.

121. *See Cohen*, 501 U.S. at 669.

122. *See id.* at 670.

The values protected[123] by this scrutiny regime may collide with the interests of international relations when speech-related judgments obtained abroad are presented for enforcement in the United States. Courts will have to consider both the potential threat to freedom of speech and the concerns of foreign relations and international cooperation when evaluating a judgment for recognition. This is particularly true in light of the place of treaties and international affairs in the structure of our government.

B. TREATY SUPREMACY

If the Hague Judgments Convention is adopted, it would raise the issue of enforcement of foreign judgments from a state law matter to a nationally uniform standard controlled by a federal treaty. The 1920 Supreme Court decision in *Missouri v. Holland*[124] established that a treaty made pursuant to the U.S. Constitution is superior to state law, even in areas generally reserved for state regulation.[125] Thus the states, which now apply their individual laws to questions of enforcement of foreign judgments, would be required to apply the provisions of the Hague treaty governing enforcement.[126] This distinction is of hierarchical importance even though the relevant terms of the Convention are quite similar to those currently used in state laws on foreign enforcement,[127] because it implicates the broader powers of the federal government legislating in the international realm.

Article II of the Constitution gives the president the power to make treaties, provided that two-thirds of the Senate

123. *See,* Emerson, *supra* note 6, at 878 (examining the four primary categorical rationales for protecting freedom of speech: self-fulfillment, the search for truth, facilitation of the democratic political process, and social control to balance stability and change).

124. Missouri v. Holland, 252 U.S. 416 (1920) (holding a migratory bird treaty between the United States and Canada trumped a conflicting state law).

125. *See id.* at 435.

126. *See* Hague Convention, *supra* note 7, ch. III. The treaty is not self-executing, and members of the American Law Institute are currently working on drafting implementing legislation for a federal statute that would import the rules of the Convention to U.S. domestic law. *See* Silberman & Lowenfeld, *infra* note 134, at 635. In order to simplify this area of discussion, for the purposes of this note the Hague Judgments Convention will be referred to as directly applicable to federal and state courts.

127. *See supra* part I.A.2 (discussing current state law practices for enforcing foreign nation judgments).

concurs.[128] The Supreme Court has thus given the president a great deal of latitude in foreign affairs, according him, "within the international field[,] . . . a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[129] A treaty is still subordinate to the Constitution, and its rules must conform to this inferior position,[130] but Supreme Court case law establishes that when an international interest is at stake, claims of unconstitutionality will not be easily recognized.[131]

III. THE HAGUE CONVENTION, THE FIRST AMENDMENT, AND FUTURE DOMESTIC ENFORCEMENT OF FOREIGN JUDGMENTS

A. FROM STATE LAW TO INTERNATIONAL OBLIGATIONS: THE FOREIGN AFFAIRS AND TREATY POWERS ADD A NEW DIMENSION TO ENFORCEMENT.

Should the United States adopt the Hague Judgments Convention, the foreign relations and global trade issues implicated in a multilateral international treaty may cause the number of discretionary denials of foreign judgment recognition to decline. The courts may become wary of exercising discretion to refuse enforcement pursuant to a public policy exception such as that found in the Hague Judgments Convention draft.[132] The political realities of having to please other Parties in order to assure the Convention's effectiveness and the give-and-take inherent in negotiation of a large-scale treaty regime,[133] may push the U.S. government to call for enforcement in all but the

128. *See* U.S. CONST. art. II, § 2.

129. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

130. *See supra* note 106 and accompanying text.

131. *See, e.g.*, Missouri, 252 U.S. at 434 (treaty held superior to state law in arguable violation of the 10th Amendment); United States v. Pink, 315 U.S. 203, 234 (Presidential agreement with the former Soviet Union controlled disposition of Russian Insurance funds held by the New York Superintendent of Insurance pursuant to New York law); Curtiss-Wright Export Corp., 299 U.S. at 320 (the president's historical role as the organ of the nation in foreign affairs provides him greater discretion and freedom to act than in domestic affairs); Edwards v. Carter, 580 F.2d 1055, 1056 (1978) (suit by members of Congress challenging president's use of treaty power to transfer the Panama Canal to Panama as unconstitutional dismissed for failure to state a claim).

132. *See supra* text accompanying note 93 for the public policy exception.

133. *See* Pfund, *supra* note 2, at 15.

most egregious circumstances. [134]

As mentioned above, the foreign affairs interests involved do not change the fact that state courts applying the Hague Judgments Convention will still have the discretionary public policy exemption available. The Convention does, however, add a federal government claim to demand judgment enforcement as it directs according to the terms of the treaty (i.e., recognition of judgments in all but the most extreme circumstances). While the national government wants inclusion of a public policy exception to protect itself from being bound to honor very unsavory foreign rulings, it must also contend with the concern of other nations that the exception "might be a potential 'loophole' for abuse."[135] Thus, during the final negotiation process the United States may be encouraged to require its courts to interpret this provision very narrowly.[136] Such a position is also indicated in the language of the Convention, as a judgment must be "manifestly incompatible," not merely contrary to the public policy of the addressed state.[137]

B. INTERNATIONAL COOPERATION OR FREE SPEECH: BETWEEN A ROCK AND A HARD PLACE?

While post-Hague Convention courts may not automatically decline enforcement of, for example, libel or hate speech[138]

134. *See generally* Linda J. Silberman & Andreas Lowenfeld, *A Different Project for the ALI: Herein of Foreign Country Judgments, an International Treaty and an American Statute*, 75 IND. L. J. 635 (2000) (arguing that the Hague Convention should facilitate a "correct understanding of a meaningful public policy defense" in order to differentiate between cases with which U.S. courts may not agree and those that truly threaten U.S. interests.)

135. Lau, *supra* note 5, at 23.

136. This may be especially true with respect to the United Kingdom, as the U.S. attempted to negotiate a bilateral enforcement treaty with Britain in the 1970s, but was unsuccessful due to opposition from the U.K. *See* Pfund, *supra* note 2, at 8.

137. *See* Hague Judgments Convention, *supra* note 7, art. 28, para. 1(f); *supra* text accompanying note 93 ("Recognition or enforcement of a judgment may be refused if . . . recognition or enforcement would be manifestly incompatible with the public policy of the state addressed").

138. *See, e.g.*, Sionadh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RIGHTS J. 305, 319 (1999) (explaining that Germany has stringent criminal laws against hate speech and activities aimed at encouraging racial hatred). While many Western nations have such statutes prohibiting "hate speech," American courts may not sanction such expression because it amounts to "viewpoint" discrimination intolerable under the First Amendment. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1992). *See generally* Collin v. Smith, 578 F.2d. 1197 (7th Cir. 1978) (upholding Nazi group's right to demonstrate in a predominately Jewish neighborhood).

judgments that could not be obtained in the United States, diplomacy concerns should not require courts to altogether disregard consideration of First Amendment concerns. There is an argument to be made, however, that because the grounds for refusal of recognition are discretionary, a court is under no obligation to even consider the constitutional implications of enforcing a given judgment. The free speech clause only prohibits the U.S. government from prohibiting expression.[139] Neither Congress nor a state government would have created a law abridging free speech when a U.S. court enforces a foreign libel judgment, even if the holding would not be constitutional under U.S. law. The fact is the substantive rule behind the judgment would come from another country. With the added implications of a treaty, courts may prefer to defer to the foreign affairs power of the executive branch[140] and routinely enforce judgments to further the goals of treaty.[141] In fact, under current judgment enforcement rules,[142] a number of American courts have rejected the public policy exemption and enforced foreign judgments where the cause of action on which the judgment was based had been abolished or did not exist in the addressed forum.[143] Yet, the Constitution is the ultimate body of controlling law in the United States, and its guarantees are not truly comparable to state statutes or common law.[144] There is, however, no prohibition in its provisions against creating a treaty that requires enforcement of a ruling of a court not subject to the mandates of the U.S. Constitution.

Following this reasoning, courts could quite conceivably choose to subordinate speech policy concerns to foreign affairs. It might thus be argued that U.S. tribunals could enforce judgments without regard to the First Amendment, even though enforcing such judgments could have serious detrimental affects on free speech.[145] However, under the Supreme Court's interpretation of what constitutes action attributable to the government,[146] and thus subject to the constraints of the Constitution, such treatment of judgments should not be

139. Thus, a U.S. law or even a treaty directly infringing free speech could not be allowed. *See supra* note 130 and accompanying text.

140. *See supra* notes 129, 131 and accompanying text.

141. *See supra* notes 98-100 and accompanying text.

142. *See* discussion, *supra* part I.A.2.

143. *See supra* note 23.

144. *See supra* notes 107, 131 and accompanying text.

145. *See infra* notes 182-184 and accompanying text.

146. *See supra* note 111, *infra* notes 148-149 and accompanying text.

permissible.

Invoking the Constitution as a source of law requires showing the complained of action is attributable to the state.[147] In 1948, the Supreme Court held that judicial enforcement of a private real estate covenant that prohibited a black family from purchasing a home would constitute government sanction of the racial terms of the deed and therefore be unconstitutional.[148] The Court declared that the Constitution applies to "exertions of state power in all forms" such that the simple act of enforcing a rule through judicial process, though the rule itself is not subject to the constraints and requirements of the Constitution, is enough to implicate state action and require the rule to conform to Constitutional standards.[149] Though in this case the covenant at issue was an agreement between private citizens and not a European law regulating speech, the analogy of a rule outside the scope and jurisdiction of the U.S. Constitution applies. Neither the actions of private parties, nor the laws of other nations can be directly regulated by the Constitution.[150] Yet, an attempt to enforce private covenants and foreign judgments subjects them to the government of the United States by bringing them before the judicial branch.[151] Thus, the Supreme Court would likely hold that enforcement of foreign libel judgments requires First Amendment analysis by the addressed court. The issue then becomes a determination of the level of scrutiny that will apply.[152]

C. POTENTIAL CHOICES AND A POTENTIAL SOLUTION

One way to ensure protection of free speech values may be to avoid determining how closely the courts should scrutinize a judgment enforcement that indirectly implicated free speech concerns, and simply apply our own defamation laws to each

147. *See supra* note 111 (citing the Supreme Court's holding in *Shelley v. Kramer* that judicial enforcement of private agreements creates state action).

148. *See* Shelley v. Kraemer, 334 U.S. 1, 14. Because the Constitution is only applicable to government action, a private actor may generally racially discriminate or abridge free speech where the Fourteenth and First Amendments would forbid similar state action.

149. *Id.* at 20.

150. As noted, the Constitution restricts and prescribes *government* action against citizens. *See supra* notes 111, 148-149. There are exceptions to this rule, such as the Thirteenth Amendment prohibition against slavery, which does directly restrict private action. *See* U.S. CONST. amend. XIII.

151. *See supra* notes 148-149 and accompanying text.

152. *See supra* part II.A (explaining levels of First Amendment scrutiny).

case and see if they pass constitutional muster.[153] No matter how strongly ethnocentrism or the desire to "export[] the First Amendment"[154] may encourage this type of approach, courts are prohibited from reexamining the merits of a valid, final foreign judgment, and may only inquire into the facts enough to establish whether there exists manifest incompatibility with public policy.[155] Such treatment would also render the treaty pointless, as a requirement of enforcement necessarily means giving up the right to substitute one's own laws for that of a foreign state. Yet, if the First Amendment is going to be considered, as this Note argues it must, there needs to be some standards for determining whether a particular case contradicts free speech policy enough to be denied recognition.

Whatever the possible effects of enforcing a British libel judgment in this country the Hague Judgment Convention, is not aimed at regulating the content[156] of free expression, or any speech at all. An analysis of whether enforcing a foreign judgment is precluded by the policies protected in the guarantees of the First Amendment would therefore fall under one of the Court's precedents involving laws of general applicability or incidental burdens on freedom of speech.[157]

When speech is burdened not directly by a law aimed at regulation of expression, but incidentally as a result of application of a facially neutral rule the general standard of review is intermediate scrutiny.[158] The *O'Brien* test[159] dictates that a law that incidentally burdens expression will be upheld if it furthers a substantial government interest and is narrowly tailored to achieving this end.[160] Enforcement in the United States of a libel judgment rendered under standards not conforming to the First Amendment would likely burden free speech in certain circumstances.[161] A law, such as the Hague

153. *See supra* part I.B.1 (describing defamation standards in U.S. law).

154. Devgun, *supra* note 34, at 195.

155. *See supra* notes 91, 95 and accompanying text.

156. *See Simon & Schuster*, 502 U.S. 105, 120.

157. *See Heffron*, 452 U.S. 649, 654; *O'Brien*, 391 U.S. 377; *Spence*, 418 U.S. 409; *Barnes*, 501 U.S. 566; *Cohen*, 501 U.S. 670; *Arcara*, 478 U.S. 707.

158. *See Heffron*, 452 U.S. 649, 654; *O'Brien*, 391 U.S. 377; *Spence*, 418 U.S. 409; *Barnes*, 501 U.S. 566; *Cohen*, 501 U.S. 670.

159. *See O'Brien*, 391 U.S. 377.

160. *See Id.*

161. Enforcing these judgments when doing so would punish and potentially chill expression occurring within the United States and dealing with matters of public concern would affect free speech. *See infra* notes 181-185, 187 and accompanying text.

Judgments Convention, allowing for recovery under such relatively lax foreign standards,[162] could thus infringe on the guarantees of freedom of speech, though aimed only at regulating international civil and commercial litigation. The Hague Judgments Convention would then appear to be subject to the *O'Brien* test, as it would further government interests in foreign relations and certainty in global trade dispute resolution. Moreover, its impact on speech would be indirect. The use of this test would provide a good degree of protection for the policies embedded in the First Amendment when analyzing whether to decline recognition of a judgment, because the restriction imposed on the particular speech would be considered and the government would have to show that its international relations interests were directly advanced by mandatory enforcement.[163] This standard, however, takes no account of whether the parties and interests involved are truly proper subjects for application of U.S. constitutional scrutiny.[164] Further, the Court has focused the *O'Brien* analysis on situations in which conduct "with a significant expressive element" is at issue.[165] It is most applicable to cases in which a law impacts physical activity, versus actual speech, that is considered to fall under the ambit of the First Amendment by virtue of its expressive nature.[166] As a result, the *O'Brien* test may not provide useful guidance for a judge attempting to determine whether enforcement of a specific judgment would be so incompatible with freedom of expression that it warranted non-recognition despite the factors mitigating toward enforcement.[167]

In another line of cases addressing "incidental" restrictions on speech, the Court declined to apply any First Amendment consideration.[168] In *Cohen v. Cowles Media*, the Court upheld the liability of the defendant newspaper in a promissory

162. *See supra* part I.B.2 (explaining elements of British libel law not acceptable under the Constitution).

163. *See O'Brien*, 391 U.S. at 377.

164. *See infra* notes 177-179 and accompanying text (suggesting factors a court should consider in determining whether to apply the public policy exemption in the name of the First Amendment).

165. Arcara v. Cloud Books, Inc., 478 U.S. 697, 706 (1986).

166. *See Spence*, 418 U.S. 409; *Barnes*, 501 U.S. 566.

167. *See supra* notes 132-134 and accompanying text (foreign affairs and predictability in trade matters call for limited use of discretion to decline enforcement).

168. *See Conen*, 501 U.S. at 670; *Arcara*, 478 U.S. 707;

estoppel suit.[169] Though the press argued that allowing the ruling to stand would inhibit its constitutionally protected right and duty to facilitate speech and ideas, the Court refused to exempt the press from liability, declaring that "generally applicable laws do not offend the First Amendment simply because their enforcement . . . has incidental effects [on speech.]"[170] Here again the parallel exists between two laws unrelated to the suppression of speech. The enforcement provisions of the Hague Judgments Convention are rules of general applicability, as they are to apply to any type of final judgment founded on valid jurisdiction.[171] *Cohen* could then be said to apply by analogy, as enforcing a European restriction on speech could place a burden on a U.S. speaker or publisher similar to that imposed by the common law judgment upheld against the press in that case. Neither the promissory estoppel law nor the Hague Judgments Convention single out speech as their targets, nor even mention expression in their texts. But applying this type of analysis would afford the speech at issue in foreign libel or hate speech cases[172] no protection whatsoever.[173] While this may further the government interest in minimizing use of the public policy exception to mandatory enforcement,[174] it does not give due attention to the free speech issues at stake.

IV. RECONSILING THE FIRST AMENDMENT AND THE HAGUE JUDGMENTS CONVENTION

Once it is established that a court should consider the First Amendment when faced with the decision of whether to honor a foreign judgment pursuant to the Hague Convention,[175] there will be difficulty in analyzing the competing interests between global responsibility and facilitation of commerce and protecting freedom of speech under current U.S. Supreme Court jurisprudence. None of the First Amendment cases to date consider the issue of recognizing in this country a judgment of a

169. *See Cohen*, 501 U.S. at 663, 669-70; *supra* notes 116-122 and accompanying text.

170. *Cohen*, 501 U.S. at 669.

171. *See* Hague Judgment Convention, *supra* note 7, ch. III.

172. *See supra* note 138 and accompanying text.

173. *See Cohen*, 501 U.S. at 669.

174. *See supra* notes 133-134 and accompanying text.

175. *See supra* notes 148-149 and accompanying text (state action that occurs when there is judicial enforcement of an agreement or judgment requires courts to refrain from enforcing judgments that infringe the First Amendment).

foreign jurisdiction not bound by the U.S. Constitution. Further, the two recent British libel judgments presented for enforcement were denied recognition irrespective of the identity of the defendant as an American citizen, resident or otherwise. Also, the courts did not consider whether recognition of the judgment would abrogate the purposes behind the First Amendment and "chill" protected expression.[176] An explicit analysis of the competing interests at stake and the relation of the judgment to the United States could develop a more useful and meaningful public policy exception.

In determining whether to apply the public policy exception to a foreign libel or other speech inhibiting judgment that would not be tenable under U.S. law, courts should not routinely refuse enforcement without examining the facts of the specific case at hand. They should balance First Amendment interests against interests in maintaining the integrity and purpose of the Hague Convention, as well as considering the importance of according a level of respect to Member States that the United States would itself expect to receive in a foreign forum.[177] In making this adjudication, a judge should examine the United States' interests at stake, in light of the purposes of the First Amendment,[178] and the level of the burden on freedom of speech. If a U.S. interest or party is implicated and the burden on speech is significant,[179] the judgment should be denied

176. *See supra* part I.B.2 for a description of the *Bachchan* and *Matusevitch* cases.

177. Although balancing interests tends to sacrifice predictability and is inherently discretionary, the weighing of various interests pervades Supreme Court resolution of First Amendment questions. *See* Koningsberg v. State Bar of California, 366 U.S. 36, 49-51 (1961) ("Throughout its history this Court has consistently recognized [that] constitutionally protected speech is. . .[not] unlimited. [When] . . . constitutional protections are asserted against the exercise of valid governmental power a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved."). *Id.*

178. *See supra* notes 6, 45-47 and accompanying text (explaining the purposes behind the free speech clause of the First Amendment).

179. Ambiguity inheres in words like "significant," but the Court has used this term and others like it ("compelling," "important," "substantial") frequently to assess the relative government interests advanced in various cases. *See* Police Dep't v. Mosley, 408 U.S. 92, 98 (1972) ("may be necessary to further significant government interests"); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991) ("undisputed compelling interest"); United States v. O'Brien, 391 U.S. 367, 377 (1968) ("if it furthers an important or substantial government interest"). "Significant" is sometimes used when the Court is exercising intermediate scrutiny, when there are important interests to balance on both sides of the issue. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that the ordinance regulating noise level in Central Park was "narrowly tailored to serve a

recognition as manifestly incompatible with the public policy of the United States.

The *Bachchan* and *Matusevitch* cases illustrate how this analysis should work.[180] In *Bachchan*, the party held liable for defamation in Britain was a New York publisher whose allegedly libelous article was circulated in the United States in addition to Britain and India.[181] American interests were therefore directly affected by the adverse judgment. Allowing the judgment to be enforced against the U.S. publisher could easily, as the court noted, deter future publication of controversial speech, thereby defeating one of the fundamental purposes of the First Amendment.[182] Since the periodical at issue was disseminated in the United States as well as abroad, such a chilling effect could deprive not just the newspaper owner of the right to free publication, but the public at large of access to information of international import.[183]

Secondly, the speech at issue concerned and criticized the Indian government,[184] and such scrutiny of authority is deemed to be a central purpose of the First Amendment.[185] Because such criticism of government and politics is "core" speech, exacting a penalty on its dissemination without requiring the application of the stringent standards imposed by the United States constitution amounts to a serious and significant burden on free expression in this country.

Other member states may argue that criticism of foreign governments and affairs intended for a foreign audience has no bearing on American interests or Constitutional freedoms and should not concern the courts.[186] With the increasing globalization of society, however, leaders of foreign nations interact constantly and take a number of actions that directly impact the United States and should be made known to citizens. Further, as mentioned above, because the defendant was a U.S.

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significant government interest").

180. *See supra* part I.B.2 for a description of these British libel cases.

181. *See* Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661, 661 (N.Y. Gen. Term 1992).

182. *See id.* at 664.

183. *See id.* ("the wire service report was related to an international scandal which touched major players in Indian politics and was reported in India, Sweden, the United States, England and elsewhere in the world.").

184. *See id.*

185. *See supra* notes 45-47 and accompanying text.

186. *See generally* Devgun, *supra* note 34, at 203 ("Recognition or non-recognition would not affect freedom of speech in the United States, because [the publication of the allegedly defamatory story] occurred in England").

resident, it is quite conceivable that enforcement of this and similar judgments would chill speech by international publishers on hotly debated issues.[187] Enforcement in some situations could also force small press organizations out of business due to the financial burden that can result from even a single finding of defamation liability.[188] Such results are not acceptable under the First Amendment, and thus the *Buchanan* court was correct in refusing to honor the British damages award.

In contrast, in the *Matusevitch* case, the punished speech was a letter, written and published solely in Britain.[189] At the time of the suit, both parties to the libel action were residents of the United Kingdom who emigrated from Russia.[190] Though the publication concerned human rights issues and political activists, both matters of public concern, the expression in this case simply had no relation to the United States other than the fact that the defendant had moved to Maryland for his job.[191] As a new inhabitant of the United States, Matusevitch can now freely express his political opinions within the confines of American defamation standards.[192] Therefore, recognition of the British award would not impermissibly deter this constitutionally important type of expression and the burden on free speech in the United States would not be significant. The court's assertion that enforcement would have deprived him of his constitutional rights[193] is not accurate because at the time Matusevitch made the relevant statements in his reply letter to Telknikoff, he was not a United States resident and thus was not under the jurisdiction of the U.S. Constitution.[194] Though British libel laws clearly would not be acceptable under established First Amendment principles,[195] disagreement with the wisdom of Britain's choice of laws is not a valid reason to refuse judgments rendered under such standards. In this case, the court should have enforced the judgment instead of, in

187. *See Bachchan*, 585 N.Y.S.2d at 664.

188. The judgment in the *Matusevitch* case, for example, would have amounted to $370,800 plus interest. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 236 n.9 (Md. 1997).

189. *See* Telnikoff v. Matusevitch, 702 A.2d 230, 232-35 (Md. 1997).

190. *See id.* at 257 (Chasanow, J., dissenting).

191. *See Telnikoff*, 702 A.2d at 232.

192. *See supra* part I.B1.

193. *See Matusevitch*, 877 F. Supp. at 5,6.

194. *See* Telnikoff, 702 A.2d at 232.

195. *See supra* parts I.B.1, I.B.2 (outlining differences between U.S. and U.K. defamation law).

effect, inserting U.S. constitutional requirements into British law. The case for refraining from applying the public policy exemption in this situation would be even stronger under the proposed Hague Convention, as the countervailing interests in trade relations and fair treaty application would demand consideration.[196]

CONCLUSION

The proposed Hague Convention on International Jurisdiction and the Effects of Judgments in Civil and Commercial Matters offers the United States and the world an opportunity to benefit from a predicable and uniform regime for dealing with disputes arising from the transnational movement of goods and persons. Such conformity would promote and facilitate increased global commerce and cooperation. In order to secure the certainty required for such a regime, the United States must consistently honor judgments of foreign nations, even some that would not be possible to procure under U.S. constitutional law. The United States must also, however, not sacrifice the protections of the First Amendment by failing to exercise any scrutiny over speech abridging judgments, such as those found in the British libel cases recently addressed in American courts.

In order not to undermine the efficacy of the proposed Hague treaty and avoid abuse of its provisions, the government and courts should require a narrow and strict construction of the catchall public policy exemption to mandatory enforcement. At the same time, the system must pay due regard to the constitutional liberties that supercede the substantive rules of a treaty. In particular, when faced with foreign libel or hate speech judgments rendered under standards offending First Amendment protections, courts should formally analyze the U.S. interests involved and the burden on the relevant speech as a means of balancing international trade and domestic expression issues.

196. *See supra* notes 133-134 and accompanying text.