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FOREIGN JUDGMENTS AND THE FREEDOM OF SPEECH: LOOK WHO'S TALKING

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INTRODUCTION

Ajitabh Bachchan, longtime friend of countryman Rajiv Gandhi, won a £40,000 judgment in the High Court of Justice, London, England, in 1991. The judgment for defamation was awarded against a wire news service and its reporter after the High Court had instructed the jury on the English law of defamation. But, because the English law of defamation does not comport with current interpretations of the First Amendment, a New York trial court refused to recognize the judgment when Bachchan sued the wire service at its New York home later in 1991. In *Bachchan v. India Abroad Publications, Inc.*,[1] the court found the English cause of action repugnant to the public policy of New York.

Although the English and the American jurisprudence of defamation differ, it is questionable whether such a difference entails "repugnance" of the sort to bar recognition of the English judgment in an American court. The trial court in *Bachchan* failed to discuss the important conflict-of-laws and first amendment questions that lie at the center of disputes over the enforcement in American courts of foreign defamation disputes. This Article discusses whether the court's judgment might have been different had its inquiry been more searching.

The New York *Bachchan* decision received broad attention in the press, hailed by one commentator as a "breakthrough" case, one "that made legal history."[2] The trial court judge,

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[1] 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. County 1992).

[2] Adam Sage, *American Court Rejects English Libel Award*, INDEPENDENT, Apr. 17, 1992, at 3; *see also* Laura R. Handman & Robert D. Balin, Bachchan v. India

Justice Shirley Fingerhood, described the case as "the first time that a New York court has been asked to apply [constitutional] limitations [on libel actions] to bar enforcement of a foreign judgment."[3] But *Bachchan* merits attention for more than its novelty and the weight of its issues. *Bachchan* suggests the notion that differences in substantive law between a foreign rendering jurisdiction and a proposed American recognizing jurisdiction will be considered so repugnant to public policy as to permit, or even to require, nonrecognition solely because those differences are based upon American constitutional law. The outcome of *Bachchan* might rest upon the notion that first amendment rights are so fundamental as to inhere in *all* human beings (or even newspapers), and thus a foreign jurisdiction that lacks a defamation law with first amendment-type protections is per se repugnant. Do these notions accord with the First Amendment?

Bachchan also contains procedural implications; for instance, it implies that, at least in this case, repugnance flows from an erroneous choice of law in the English High Court of Justice. *Bachchan* also suggests that enforcement by a New York court changes the premises of the litigation, so that whatever the proper choice of law in the High Court *for* the High Court, enforcement by a New York court obviates that choice and requires a different choice of law. This choice-of-law determination relies too heavily on the identity of the enforcing forum and, therefore, does not accord with the law of recognition of foreign judgments.

All these aspects of *Bachchan* combine to pose one problem: how do the conflicts principles adopted by the Uniform Foreign Money-Judgments Recognition Act ("Recog-

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Abroad: *Non Recognition of British Libel Judgments: The American Revolution Revisited*, COMM. LAW., Fall 1992, at 1, 21-22 (counsel for India Abroad applaud *Bachchan* decision and paint its political backdrop).

[3] *Bachchan*, 154 Misc. 2d at 229, 585 N.Y.S.2d at 661. Two scholarly articles also have addressed the importance of *Bachchan*. *See* Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law?*, 16 HASTINGS COMM./ENT. L.J. 235 (1994); Jeff Sanders, Comment, *Extraterritorial Application of the First Amendment to Defamation Claims Against American Media*, 19 N.C. J. INT'L L. & COM. REG. 515 (1994). As this Article went to press, a federal district court ruled in accord with *Bachchan*. *See* Matusevitch v. Telnikofff, No. CIV.A.94-1151, 1995 WL 58741, at *3 (D.D.C. Jan. 27, 1995).

nition Act") apply in the context of constitutional principles of the dignity and primacy of the First Amendment? Resolving this problem first requires discerning the scope of the First Amendment—what and whose speech does it protect. Second, it requires establishing how conflicts law accounts for forum law when considering foreign judgments.

Part I of this Article examines the freedom of speech protected by the First Amendment and argues that the freedom is one belonging to the American people when exercising their sovereignty. Part II reviews *Bachchan* and the analysis that led the court to hold that the Free Speech Clause bars enforcement of an English defamation award. Part III explores the public policy exception to the recognition and enforcement of foreign judgments, and discerns two separate approaches to the exception. Part IV synthesizes the discussion of the First Amendment, *Bachchan*, and the conflict of laws, suggesting that *Bachchan* misconstrued the First Amendment, the Recognition Act, or both.

I. PROTECTED SPEECH: WHOSE UNDER (THE) FIRST?

Bachchan determined that New York courts would violate the First Amendment if they enforced an English judgment against an American defendant for a defamation aimed at a resident of England and published in England.[4] Thus the *Bachchan* court held the English cause of action for libel to be repugnant to New York public policy. Before discussing the conflict of laws, an analysis of *Bachchan* should consider the text, history, and judicial interpretation[5] of the First Amend-

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[4] 154 Misc. 2d at 229, 585 N.Y.S.2d at 661.

[5] The United States Supreme Court consulted these three sources before holding that the Fourth Amendment does not reach the search by U.S. officers of the foreign residences of a foreigner. *See* United States v. Verdugo-Urquidez, 494 U.S. 258 (1990). Because *Verdugo-Urquidez* articulates the territorial limits of a constitutional right, it is of special interest here. Some commentators have assailed *Verdugo-Urquidez* as a rejection of the tradition of universal human rights that undergirds the Constitution (and the Declaration of Independence). *See* Jon A. Dobson, Comment, Verdugo-Urquidez: *A Move Away from Belief in the Universal Pre-Existing Rights of All People*, 36 S.D. L. REV. 120 (1991); Gail T. Kikawa, Case Note, Verdugo-Urquidez: *How the Majority Stumbled*, 13 HOUS. J. INT'L L. 369 (1991); Mark L. Labollita, Note, *The Extraterritorial Rights of Nonresident Aliens: An Alternative Theoretical Approach*, 12 B.C. THIRD WORLD L.J. 363 (1992); Vaughan Lowe, Comment, *Self-Evident and Inalienable Rights Stop at the US*

ment.[6]

A. *The Text of the First Amendment*

The text of the First Amendment itself supplies the key to interpreting its scope. The First Amendment comprises both free speech and free press components: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[7] Usual canons of statutory construction require us to read these two components as distinct. However the freedom of the press is defined, the freedom of speech is neither its equivalent, nor a larger category embracing within it the freedom of the press. The suggestion that "speech" refers to speaking and "press" means printing falters under a more careful analysis of the text.

The text of the Free Speech Clause does not provide that Congress make no law abridging speech or even freedom of speech. Rather, it provides that Congress make no law abridging *the* freedom of speech.[8] "The freedom of speech" bespeaks a

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Frontier, 50 CAMBRIDGE L.J. 16 (1991); Janet E. Mitchell, Comment, *The Selective Application of the Fourth Amendment:* United States v. Verdugo-Urquidez, 41 CATH. U. L. REV. 29 (1991); *see also* David Haug, Comment, 32 HARV. INT'L L.J. 295 (1991); Note, *The Extraterritorial Applicability of the Fourth Amendment*, 102 HARV. L. REV. 1672 (1989). Presumably, to be free from unreasonable police searches and seizures is a right all humankind is entitled to, and a constraint upon all civil governments. To deny Verdugo-Urquidez's claim is to deny his fundamental human right. Because this right is protected by the Fourth Amendment, so the argument goes, anyone should be able to assert it against the United States government, especially when prosecuted in its courts for violating its laws.

Yet, however much the intendment of the Fourth Amendment rests upon "the Laws of Nature and of Nature's God" and universal human rights, the scope of a constitutional right reflects other factors as well—factors such as principles of jurisdiction and prudence. In other words, a positive law does not become universal by virtue of protecting a universal right. Perhaps the universality of the protected fundamental right counsels generosity when construing the positive right, but this right still must be independently construed. One may fault the Supreme Court for drawing the line where it did, but not for drawing the line.

[6] *Bachchan* involves the free speech component of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. CONST. amend. I. This Article will address what speech—especially *whose* speech and *where* it is communicated—is protected by the Constitution, putting aside a more direct inquiry into what agencies are forbidden to abridge that speech.

[7] U.S. CONST. amend. I.

[8] This important detail has not gone unrecognized. *See, e.g.*, William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CAL. L. REV. 107, 118 (1982).

legal concept, a specific zone of liberty described by this term of art.[9] It need not, as a term of art, be limited only to speaking, just as surely as it need not be extended to all speaking. The definite article in the term suggests that the freedom labeled by this term of art had received some specific definition by the time the framers had included it within the First Amendment.

B. *History of "The Freedom of Speech"*

The historical context of the Constitution clarifies what was intended to be included in "the freedom of speech." If the freedom of speech referred to a freedom traditionally enjoyed by the people of the United States at the time, then this freedom is very limited indeed.[10] How did the First Amendment work a revolution in popular liberty if the amendment uses a term of art already familiar to its framers and, presumably, to the common law? The answer is that the First Amendment did not secure a novel freedom, but rather extended a preexisting freedom to a novel class of possessors. Today, the people at large enjoy the security of First Amendment rights, but at that time a smaller class of people had enjoyed the freedom of speech: Parliament.[11]

The phrase "the freedom of speech" likely would have been familiar to the framers, for the 1689 Bill of Rights, enacted by Parliament and agreed to by William and Mary at their accession, stated "that *the Freedom of Speech*, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[12] During the

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[9] *Id.* at 116.

[10] *See* LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY at vii (1960) [hereinafter LEVY, LEGACY OF SUPPRESSION]; *see also* LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE (1963).

[11] I am indebted to Herbert W. Titus, former Dean of Regent University Law School, for this suggestion.

[12] 1 W. & M., Sess. 2, ch. 2 (Eng. 1689) (emphasis added). The pedigree of the freedom of speech guaranteed to Parliament in the 1689 Bill of Rights evokes the ancient contest between crown and Parliament. *See* RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 233-35 (1978); *see also* GEORGE ANASTAPLO, THE CONSTITUTIONALIST: NOTES ON THE FIRST AMENDMENT 115-18 (1971). "The freedom of speech" may differ from "debates or proceedings in parliament" by encompassing addresses generally, while the latter category encompasses participation in actual

War of Independence, some state constitutions adopted similar phraseology—often without the definite article—but rather than applying the rights to their legislatures, the states secured the rights to the people.[13]

The substitution of popular sovereignty for parliamentary sovereignty brought the freedom of speech for the people as a necessary concomitant. The Constitution secures to members of Congress that "for any Speech or Debate in either House, they shall not be questioned in any other Place."[14] The First Amendment secures to the people that Congress shall not make any law abridging their analogous right to deliberate as the sovereign body of the civil government. Of course, the people already possessed this right, and the Constitution had not given Congress the power to abridge it; otherwise the Federalists—among them Madison himself—could not have claimed credibly that the Bill of Rights was a needless measure.[15] Thus, constitutional history indicates that "the freedom of speech" is a term of art[16] that embraces a specific legal concept well-known to the framers.[17]

While "the freedom of speech" stands for the former parliamentary right, to discern the precise meaning of "the freedom of speech" as it appears in the First Amendment is no easy task. The history of commentary on the First Amendment

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debate and votes on specific questions. This distinction accords with the diverse phraseology of the Speech and Debate Clause of Article I and the Free Speech Clause of the First Amendment.

[13] *See, e.g.*, PA. CONST. OF 1776, Decl. of Rights XII; VT. CONST. OF 1777, Decl. of Rights XIV.

[14] U.S. CONST. art. I, § 6, cl. 1.

[15] *See generally* 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (J. Gales & W. Seaton eds., 1834).

[16] Terms of art used in legislation are to be understood in their technical sense and not as the laity might understand them. Morissette v. United States, 342 U.S. 246 (1951).

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Id. at 263; *see also* United States v. Staats, 49 U.S. 41, 44 (1850) ("when words or terms of art are used . . . that have a technical meaning at common law, these should be followed, being the only terms to express in apt and legal language").

[17] Perhaps familiarity, rather than opacity, led to the dearth of early discussion on the meaning of this phrase.

offers an *embarras de richesses* that fails to provide a final word. In general, commentators have huddled around one of two poles. Those at one pole—the "human right" pole—have viewed the Free Speech Clause as a guarantee of a fundamental human right to communicate.[18] The other pole—the "political right" pole—marks commentators who, more or less, hold the Free Speech Clause to be limited to guaranteeing a freedom more directly analogous to that enjoyed by eighteenth-century parliamentarians. While political right and human right theorists may agree that the political roots of the Free Speech Clause provide its occasion, the human rights theorists do not agree that the political roots provide its limit. It is helpful to imagine these poles as marking theoretical approaches rather than divergent sets of actual outcomes in given cases involving supposed abridgment of the freedom of speech. For example, theorists at the political right pole, via liberal construction, may find that a rather broad range of communications ultimately furthers the political responsibility of the people.[19] Others at this pole may find that practical matters broaden the reach of the Free Speech Clause.[20] Still others, while emphasizing the freedom of speech as a political right, may make their case without insisting that the clause embraces only such a political role.[21]

Although this is no place to rehearse the rich diversity of scholarship on the Free Speech Clause, a representative sampling of options for interpreting the Clause is particularly

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[18] Writers often have not distinguished between the Free Speech and the Free Press Clauses of the First Amendment, frequently labelling the content of both together as the "freedom of expression." *See, e.g.*, Edward J. Bloustein, *The First Amendment and Privacy: The Supreme Court Justice and the Philosopher*, 28 RUTGERS L. REV. 41 (1974); David Elder, *Freedom of Expression and the Law of Defamation: The American Approach to Problems Raised by the* Lingens *Case*, 35 INT'L & COMP. L.Q. 891 (1986); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963). Although the clauses are textually distinct, these writers offer us no practical choice but to take their remarks as apropos free speech alone or to ignore them.

[19] Professor Meiklejohn is the preeminent exponent of such a position. *See infra* text accompanying notes 26-28.

[20] *See, e.g.*, Lillian BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). *See infra* text accompanying notes 33-34.

[21] *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. *See infra* text accompanying notes 35-37.

useful. The survey of this scholarship presented here is compressed towards the contemporary, since the most telling effects of the clause have become apparent only since the Supreme Court declared the First Amendment to be applicable to state, as well as federal, governments.[22]

The most expansive reading of the Free Speech Clause is eloquently espoused in the work of Professor Thomas Emerson, who postulated that the clause protects a broad "freedom of expression" as a human right. Far from identifying the freedom of speech with the parliamentary right to deliberate on matters of state, Emerson proposed four broad categories for justifying this freedom: "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society."[23] The first of his four categories—individual self-fulfillment—most clearly distinguishes Professor Emerson as an advocate for a broad freedom of expression within the First Amendment:

> The right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual. It derives from the widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.
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> . . . .
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> . . . [E]xpression is an integral part of the development of ideas, of mental exploration and of the affirmation of self. The power to realize his potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted.
>
> Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.[24]

For Emerson, the First Amendment is rooted in a fundamental universal human right, inherent in all human beings whatever their role in civil government. To be human is to communicate, and the freedom of speech comprises the whole of this right to

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[22] Gitlow v. New York, 268 U.S. 652 (1925); *see also* Stromberg v. California, 283 U.S. 359 (1931); Fiske v. Kansas, 274 U.S. 380 (1927). *But see* Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

[23] Emerson, *supra* note 18, at 878-79.

[24] Emerson, *supra* note 18, at 879.

communicate.[25]

In contrast, Professor Alexander Meiklejohn espoused a reading of the Free Speech Clause based specifically upon the role of the people in a democratic polity. Under this theory the freedom of speech protected by the First Amendment is a corollary of self-government, an instrument to preserve a sovereign people from subordination to its delegate, civil government.[26] At first Meiklejohn propounded a rather narrow First Amendment theory:

> If . . . as our argument has tried to show, the principle of the freedom of speech is derived, not from some supposed "Natural Right," but from the necessities of self-government by universal suffrage, there follows at once a very large limitation of the scope of the principle. The guarantee given by the First Amendment . . . is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.[27]

Later, however, Meiklejohn was willing to grant that the First Amendment prohibits abridgment in such realms as literature and the arts.[28] Meiklejohn located the freedom of speech squarely within the power of popular sovereignty but allowed it to reach expression that serves only to lay the foundation of sound political deliberation.

Harking back to the earlier of Meiklejohn's approaches, Judge Robert Bork has expressed an analysis that would limit the freedom of speech to political deliberation itself. In a fa-

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[25] *But see* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that the human right pole rightly strips commercial speech of first amendment protection).

[26] "The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage." ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948).

[27] *Id.* at 93-94.

[28] "They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created." Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257; *see also* PAUL JOHNSON, THE BIRTH OF THE MODERN: WORLD SOCIETY 1815-1830, at 419 (1991) (commenting on the political nature and motivation of much of early nineteenth-century English poetry).

mous article—one might say "historic" considering its effect on his nomination to the Supreme Court—Judge Bork wedded Meiklejohn's analysis of the First Amendment to Professor Herbert Wechsler's analysis of constitutional hermeneutics.[29] Bork started with Wechsler's argument that the Court's decisions must be grounded in principle. Such decisions rest upon "reasons with respect to all the issues in a case, reasons that in their generality and their neutrality transcend any immediate result that is involved"—the court is not to act as a "naked power organ."[30] Finding that the freedom of speech yields "principled" outcomes only if its content is limited to "explicitly and predominantly political speech,"[31] Judge Bork endorsed Meiklejohn's theory. But Bork stopped short of endorsing Meiklejohn's later application of his theory to protect such things as literature and the arts since, "[i]f the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech."[32]

While agreeing with Judge Bork's analysis, Professor Lillian BeVier has been able to discover a broader reach for the Free Speech Clause by adverting to "pragmatic and institutional concerns."[33] Political speech is the only communication protected by the Free Speech Clause. Yet, rules formulated by the Supreme Court in the course of judicial review must consider more than the clause itself, and may therefore be more generous in accounting for the rules in actual operation and

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[29] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

[30] *Id.* at 2 (footnotes omitted).

[31] *Id.* at 26.

[32] *Id.* at 27.

> I agree that there is an analogy between criticism of official behavior and the publication of a novel like *Ulysses*, for the latter may form attitudes that ultimately affect politics. But it is an analogy, not an identity. Other human activities and experiences also form personality, teach and create attitudes just as much as does the novel, but no one would on that account, I take it, suggest that the First Amendment strikes down regulations of economic activity, control of entry into a trade, laws about sexual behavior, marriage, and the like. Yet these activities, in their capacity to create attitudes that ultimately impinge upon the political process, are more like literature and science than literature and science are like political speech.

Id.

[33] BeVier, *supra* note 20, at 301.

the complexity of first amendment law.[34] This approach, in effect, rehabilitates Meiklejohn. Meiklejohn's "political speech" theory need not lead in practice to Judge Bork's strictures if courts can adopt rules of decision broader than the amendment itself when deciding cases of abridgment.

One last sample completes this survey of First Amendment scholarship. Professor Vincent Blasi proposes a theory of the Free Speech Clause that is narrower than Meiklejohn's and yet does not discount theories as broad as Emerson's.[35] For Professor Blasi, a central purpose of the First Amendment is to protect those who take public officials to task for perceived breaches of the public trust. This purpose is actually narrower than that described by Meiklejohn.[36] But unlike Meiklejohn's, Blasi's analysis serves more to focus first amendment protection than to limit it. On this point he is explicit: "Throughout the analysis, one must keep in mind that the checking value is to be viewed as a possible supplement to, not a substitute for, the values that have been at the center of twentieth-century thinking about the First Amendment."[37] Blasi, then, represents scholars who propose a first amendment theory without claiming that their theory is the *only* legitimate one. It also is noteworthy that Blasi's own theory does corroborate one portion of the findings from the provenance of the First Amendment. Calling officers of state to account is very much a part of the parliamentary role.

This brief review of first amendment scholarship demonstrates that the Free Speech Clause has enjoyed no single authoritative interpretation, and yet a range of interpretations accords with the textual evidence adduced above. The likely

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[34] *See* BeVier, *supra* note 20, at 325.

> Rules broader than those required by principle respond to two concerns. The first is a pragmatic concern that announced rules will, *in their actual operation*, assure that speech rightfully within the purview of first amendment principle is not subjected inadvertently to punishment or restriction. The second is an institutional concern that rules simultaneously respect the very significant institutional limitations of the Court yet sensitively respond to the factual complexity and contextual variety of first amendment challenges to governmental action.

Id. (footnote omitted).

[35] Blasi, *supra* note 21, at 521.

[36] Blasi, *supra* note 21, at 558.

[37] Blasi, *supra* note 21, at 528.

origins of the clause support the political right theory. But both the human right pole of Emerson and the political right pole of Meiklejohn continue to have their adherents. Even at the political right pole, theorists have differed over the formulation of rules of decision to govern cases implicating the clause. Thus, the scholarly understanding of the freedom of speech yields no clear counsel.

C. *Judicial Precedent on Defamation and the Freedom of Speech*

The third prong of this analysis, Supreme Court precedent, generally is not much more revealing than commentators' work on the question of the scope of the freedom of speech secured by the First Amendment. Precedent has lent some protection to nude dancing,[38] pornography,[39] and credit reports[40]; and not because their content was political. These cases might corroborate an approach such as Professor Emerson's preferred protection for virtually all speech. At the same time, however, other precedent has reflected more of the Meiklejohn approach based in self-government when determining what may be called the depth of protection rather than its breadth. That is, in some cases the Court has adopted rules especially solicitous of certain speech—speech at the "core" of the First Amendment—forcing civil governments to give some communications a deeper channel. These cases stand not so much for the proposition that a wider range of speech is to be protected *simpliciter*; rather, they hold that some speech is so precious that to protect it, they will grant protection to other speech not protected in its own right.

Until 1964, defamatory speech was thought to be without first amendment protection. On this point, theorists at both poles were in agreement,[41] along with the Supreme Court.[42]

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[38] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

[39] Miller v. California, 413 U.S. 15 (1973).

[40] Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

[41] *See* MEIKLEJOHN, *supra* note 26, at 18; Emerson, *supra* note 18, at 922-24. On the eve of *Sullivan*, Meiklejohn somewhat hedged his position. *See* Meiklejohn, *supra* note 28, at 259.

[42] Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Then, in 1964, the Supreme Court decided *New York Times Co. v. Sullivan*[43] and inaugurated an entirely new era in the law of defamation, an era that one commentator argues actually supplanted the tort of defamation with a substitute punitive action for the publication of falsehood.[44] However that may be, it is sure that *Sullivan* found defamation a creature of the common law and left it a monument of the First Amendment.[45]

Sullivan involved a dispute between the police commissioner of Montgomery, Alabama, L.B. Sullivan, and the *New York Times*. Sullivan sued the *Times* for running an advertisement that accused the Montgomery police of harassing Martin Luther King, Jr., and his colleagues.[46] Without proving much more than this, he won a jury verdict of $500,000.[47] The Supreme Court reversed on the grounds that to permit such an award would chill the free speech necessary to criticize official conduct and that it would be tantamount to enforcing the hated Sedition Act of 1788.[48] Instead,

> [t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves [with "convincing clarity"] that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[49]

The Court's reasoning plainly embraced the Meiklejohn theory, with its emphasis on free speech protection for public deliberation on public affairs directed against wayward public officials. Sealing this affinity is the argument the Court now founded upon its earlier decision in *Barr v. Matteo*.[50] The

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[43] 376 U.S. 254 (1964).

[44] Randall P. Bezanson, *The Libel Tort Today*, 45 WASH. & LEE L. REV. 535, 535 (1988); *see also* ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 234 (1991) (general discussion and celebration of the "sea change" begun by *Sullivan*).

[45] For a discussion of the law of defamation on the eve of *Sullivan*, see Herbert W. Titus, *Statement of Fact Versus Statement of Opinion—A Spurious Dispute in Fair Comment*, 15 VAND. L. REV. 1203 (1962). The pre-*Sullivan* common law resembles the law upon which Bachchan won his English judgment.

[46] *Sullivan*, 376 U.S. at 256-58.

[47] *Id.* at 256.

[48] *Id.* at 270, 273.

[49] *Id.* at 279-80.

[50] 360 U.S. 564 (1959).

Court in *Barr* had held that defamed private citizens must prove that defamatory remarks by federal officials lie outside the "outer perimeter" of the official's duties. In *Sullivan*, the Court added that all states required private citizens to prove actual malice in defamation suits against state officials. This official privilege fosters the "fearless, vigorous, and effective administration of policies of government." *Barr* was for government officials what *Sullivan* was to be for citizens. The Court asserted the importance of the "citizen-critic": "It is as much his duty to criticize as it is the official's duty to administer. . . . It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."[51]

Citizens hold a position in the body politic no less protected than an office of the government. The freedom of speech secures to the citizen the right (Meiklejohn would call it a "power") to fulfill this position. *Sullivan* does not hold that all human beings have inalienable rights to communicate. Rather, it holds that public criticism of public officials on public matters is to be protected, even at the expense of some defamation.[52]

Following *Sullivan*, the Court explored the extent to which the actual-malice standard might govern actions brought by private citizens. Specifically, the Court considered whether a plaintiff's status as a public "figure,"[53] or the classification of defamatory speech as concerning "matters of public or general interest,"[54] might require application of the actual malice standard of *Sullivan*. Eventually, the Court determined that suits brought by public figures and public officials are gov-

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[51] *Sullivan*, 376 U.S. at 282-83.

[52] Justice William Brennan, Jr., who wrote for the majority in *Sullivan*, later acknowledged the force of Meiklejohn's arguments and their similarity to the arguments in *Sullivan*. *See* William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965). Justice Brennan noted that a protege of Meiklejohn even more forcefully claimed that *Sullivan* had adopted his mentor's theory, relating that Meiklejohn had called the decision "'an occasion for dancing in the streets.'" *Id.* at 17 (quoting Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125).

[53] Curtis Pub. Co. v. Butts, 388 U.S. 130, 162 (1967).

[54] Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43 (1971).

erned by *Sullivan* since these groups of people voluntarily wield special authority in the polity.[55] Suits brought by private individuals, regardless of the subject matter of the defamatory communication, are governed by a lesser standard, unless presumed or punitive damages are sought.[56] To recover actual damages, private plaintiffs need only meet the standard established by state law, provided that state law requires some proof of fault and damages.[57] Even this lesser standard for defamation does not apply to actions that involve "no issue of public concern."[58]

Ultimately, the Court has recognized three levels of defamation actions.[59] The various depths of protection derived from the Free Speech Clause appear to reflect, however confusedly,[60] the degree to which the type of defamatory speech fosters political self-government. Presumably, any type of speech on any subject can foster individual self-fulfillment—Emerson's view of the goal of first amendment protection.[61] But the Court has not deigned to extend First Amendment protection equally to all types of speech. Instead, it has found the First Amendment to be especially solicitous of the type of speech protected by theories at the political right pole—the pole supported by Meiklejohn.[62] In sum, defamation precedent stands for this: the more direct the role speech plays in the deliberation of a sovereign people, the greater the protection afforded.

D. *Further Implications for Defamation*

The text and early history suggest that the freedom of speech resembles the freedom enjoyed by English parliamentarians, and although scholarly interpretation of the First

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[55] Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-44 (1973).

[56] *Id.* at 346.

[57] *Id.*

[58] Dunn & Bradstreet, Inc., v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985).

[59] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[60] *See* Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601 (1990).

[61] *See supra* text accompanying notes 23-25.

[62] *See supra* text accompanying notes 26-28.

Amendment admits of a broad range of theories, a prominent set of those theories joins in this suggestion. Supreme Court precedent may reflect a broad range of interpretations, but when the Court struggles with the law of defamation, the subject of *Bachchan*, precedent has corroborated that same suggestion. The freedom of speech protected by the First Amendment is essentially the freedom of speech especially suited to members of a sovereign people acting as such.

If the freedom of speech is not an inalienable human right but instead a political right, a concomitant of sovereignty, for whom does the First Amendment secure that political right? This question requires us to explore how the people can be said to be sovereign in the United States. Not all Americans are permitted to vote. But the electors alone are not "the people," though they may be appointed to speak for "the people" at the polls. Ultimately, "the people" in this sovereign capacity are the whole of the polity that adopted—albeit again through delegates—the Declaration of Independence and the Constitution of the United States.[63] It would seem that the First Amendment secured the freedom of speech to members of the fundamental polity, the body that in John Locke's analysis, for instance, came into being by social contract and then contracted with a government to which it delegated sovereignty.[64] In American political theory, however, this delegation does not take place. The people remain sovereign,[65] under God. There-

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[63] *See* DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("When in the Course of human events, it becomes necessary for *one People* to dissolve the Political Bands which have connected them with another . . . .") (emphasis added); *id.* at para. 31 ("We, therefore, the Representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS, Assembled, appealing to the Supreme judge of the World for the Rectitude of our Intentions, do in the Name, and by the Authority of the *good People of these Colonies*, solemnly Publish and Declare . . . .") (emphasis added); U.S. CONST. pmbl. ("We *the People* of the United States, in order to form a more perfect union . . . .") (emphasis added); *see also* U.S. CONST. amend. X (reserving "to the people" "powers not delegated"); EDWARD A. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 89 (1955); *cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("the people" in the Fourth Amendment "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community").

[64] *See generally* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 168-69 (Thomas I. Cook ed., 1947) (1690).

[65] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN

fore, it is the members of this people, the American polity, who are to enjoy the freedom of speech in order to exercise their sovereignty.[66]

This cursory review of the principles of the first amendment right of the freedom of speech yields an abstract conclusion. The freedom of speech is a prerogative of sovereignty to be enjoyed by members of the sovereign people as they communicate to exercise their sovereignty. This is not to deny that there exists an inalienable right to communicate. The Constitution protects this right to some extent in the Bill of Rights[67] and perhaps to a greater extent in its structural provisions.[68] Nor does this conclusion deny that the freedom of the press protects a more varied range of speech than does the freedom of speech.[69] What this conclusion denies, however, is that the first amendment right of the freedom of speech indiscriminately protects all categories of communication against abridgment by American government.

We now turn again to *Bachchan*, the defamation case specifically before us for consideration. Later we shall examine

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UNION 28, 598 (1868).

[66] This is not to say that "the people" in their sovereign role do not benefit from hearing the speech of those outside the polity. Members of Parliament benefitted similarly. But if "the freedom of speech" is a term of art crafted to describe parliamentary speech and not speech to parliamentarians, it would seem most likely to possess the contours described here.

[67] *See* U.S. CONST. amend. I (Free Exercise Clause); *see also* VA. CONST. OF 1776, Bill of Rights § 16; Thomas Jefferson, *Act for Establishing Religious Freedom in Virginia*, *in* CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA 263 app. H (1971) (1786) (to the extent speech fulfills a duty towards the Creator, it is a component of religion); JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE COMPLETE JAMES MADISON: HIS BASIC WRITINGS 299, 299 (Saul K. Padover, ed., 1953) (1785) (equating the free exercise of religion and all other fundamental rights, including the freedom of speech, to "fundamental and undeniable truth").

[68] *See* THE FEDERALIST No. 84 (Alexander Hamilton).

[69] Although the freedom of the press protects only against prior restraint, *see* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 414-21 (1868); LEVY, LEGACY OF SUPPRESSION, *supra* note 10; Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 949-53 (1993), it presumably protects communications without regard to whether they have anything to do with the sovereignty of the people. *But see* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS at xi (1985) (abjuring his earlier view "that freedom of the press meant to the Framers merely the absence of prior restraints").

what, if anything, the First Amendment has to do with it.

II. *BACHCHAN*: A TALE OF TWO CITIES

On January 31, 1990, India Abroad Publications, Inc. ("India Abroad"), wired a story from England to a news service in India. The story, penned by a London reporter for India Abroad, told that the Swedish daily newspaper *Dagens Nyjeter* had reported that Swiss authorities had frozen Ajitabh Bachchan's bank account. Various publications previously had connected Bachchan with a kickback scheme involving arms sales by the Swedish firm Bofars to the Indian government. The India Abroad story reported that *Dagens Nyjeter* had revealed that Bachchan's bank account had received transfers from a Bofars account. Upon receiving the India Abroad wire, the Indian news service forwarded the story to newspapers in India. Two Indian newspapers, distributed in the United Kingdom, carried the story.[70] Three days later, India Abroad wired Bachchan's denial. Bachchan brought suit against *Dagens Nyjeter* and India Abroad. *Dagens Nyjeter* settled their suit and, as part of the settlement, apologized, explaining that sources within the Indian government had misled it. India Abroad, however, did not apologize.[71]

Bachchan sued India Abroad and its London reporter[72] for the wire service story that had been transmitted to India from England. The High Court of Justice in London tried the case before a jury under the English law of defamation, which, according to Justice Fingerhood's later discussion in *Bachchan*,[73] requires only that plaintiffs prove that the defendant published a statement harmful to the reputation of the

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[70] 154 Misc. 2d at 229, 585 N.Y.S.2d at 661.

[71] *Id.* at 229, 585 N.Y.S.2d at 661-62.

[72] Bachchan later added a claim against the English subsidiary of India Abroad for distributing its New York newspaper in the United Kingdom. This claim yielded a £40,000 judgment but was not at issue in the New York *Bachchan* action. *Id.* at 229, 585 N.Y.S.2d at 662.

[73] The purposes of this Article impose no need to go beyond Justice Fingerhood's exposition of English law. To the contrary, our examination of *Bachchan* for its significance to the law of conflicts and the First Amendment will fare best if her exposition is accepted as correct. For a more thorough exposition, see Kathleen A. O'Connell, Note, *Libel Suits Against American Media in Foreign Courts*, 9 DICK. J. INT'L L. 147, 152-57 (1991).

plaintiff. The plaintiff need not prove the falsity of the statement or the fault of the defendant. The defendant may raise the truth of the statement as a defense to the charge. Failure to succeed in such a defense exposes the defendant to aggravated damages. In addition, the news media may establish a qualified privilege provided that, among other conditions, the statement is of public concern.[74] Applying this law, the London jury awarded Bachchan a judgment for £40,000 in damages plus attorneys' fees.[75]

Bachchan took his London judgment to New York City, home of India Abroad, for enforcement. He filed a motion for summary judgment in lieu of complaint, an option granted him by the New York version of the Recognition Act.[76] Both the Recognition Act and its New York version generally consider such a judgment "conclusive between the parties" in such an action.[77] Availing itself of another provision of the Recognition Act as found in the New York Civil Practice Law and Rules ("CPLR"), India Abroad opposed the motion. CPLR section 5304 lists grounds upon which a court need not recognize a foreign money judgment,[78] including when "the cause of action on which the judgment is based is repugnant to the public policy of this state."[79] India Abroad argued that the English cause of action was repugnant to the public policy "embodied in the First Amendment."[80] Bachchan countered that the public

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[74] *Bachchan*, 154 Misc. 2d at 229, 585 N.Y.S.2d at 663. The precise contours of this qualified privilege eluded Justice Fingerhood's opinion: it apparently played no part in Bachchan's successful English action.

[75] *Id.* at 231, 585 N.Y.S.2d at 662.

[76] N.Y. CIV. PRAC. L. & R. 5303 (McKinney 1978).

[77] UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 3, 13 U.L.A. 265 (1962); *see also* N.Y. CIV. PRAC. L. & R. 5302.

[78] "Recognition" occurs when a court treats a judgment as binding; "enforcement" occurs when a court "grants the relief ordered by the foreign judgment." Jonathan H. Pittman, Note, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969, 970-71 (1989). While recognition must accompany enforcement, collateral estoppel, for instance, may obtain if the judgment is recognized even without enforcement. *Id.*

[79] N.Y. CIV. PRAC. L. & R. 5304(b)(4). The Recognition Act presents states with two options for the quoted public policy exception. One is the "cause of action" language adopted by New York. The other option replaces "cause of action" with "claim for relief." UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 U.L.A. 268 (1962).

[80] *Bachchan*, 154 Misc. 2d 231, 585 N.Y.S.2d at 662. India Abroad raised an issue regarding the New York Constitution as well, but the court paid little atten-

policy exception to recognition of foreign judgments is narrow, that New York entertains "causes of action" for defamation, and that the American law of defamation is cognate to the English law.[81]

Justice Fingerhood rejected these arguments, using as her major premise that divergence of the English law of defamation from the American constitutional standard would render the English judgment repugnant to New York public policy, and indeed so repugnant as to make "the refusal to recognize the judgment . . . 'constitutionally mandatory.'"[82] Justice Fingerhood focused her opinion primarily on the minor premise that the newly-constitutionalized American law of defamation differs from English law. Unlike the English law,[83] American law requires defamation plaintiffs to prove both the falsity of the opprobrious statement and the fault—to varying degrees—of the defendant.[84] Justice Fingerhood eschewed the opportunity to classify Bachchan as a public figure and thereby require him to prove the defendant's actual malice under American precedents. Instead, she classified him as a private person and the defamatory statement as "a public concern."[85]

Even under such classifications, Bachchan would have had to prove falsity and some degree of fault to recover under first amendment precedent.[86] The defamatory statement "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."[87] That such a statement "relates to a matter of public concern" was "obvious" to Justice Fingerhood.[88]

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tion to it.

[81] *Id.* at 230, 585 N.Y.S.2d at 662.

[82] *Id.* Justice Fingerhood made an analogy to section 5304(a)(1) of the New York Civil Practice Law and Rules ("CPLR"), which allows non-recognition of foreign judgments entered in actions where judgment was rendered without due process. *See id.* One commentator has suggested that, notwithstanding the discretion granted in section 5304(b), to refuse to recognize such a judgment "may be constitutionally mandatory." *Id.* (quoting N.Y. CIV. PRAC. L. & R. 5304 commentary at 493 (McKinney 1978)).

[83] *See supra* text accompanying notes 72-74.

[84] *See supra* text accompanying notes 43-58.

[85] *Bachchan*, 154 Misc. 2d 233, 585 N.Y.S.2d at 664.

[86] *Id.*

[87] *Id.*

[88] *Id.*

As the justice discussed the two chief legal consequences of this classification, she touched upon both her minor and major premises. First, Justice Fingerhood stated that: "[p]lacing the burden of proving truth upon media defendants who publish speech of public concern has been held unconstitutional because fear of liability may deter such speech."[89] She further expressed that the "'chilling effect' [would be] no different where liability results from enforcement in the United States of a foreign judgment obtained where the burden of proving truth is upon media defendants."[90] Accordingly, she concluded that Bachchan's failure to prove falsity in England's High Court of Justice made his judgment unenforceable in New York courts.[91] Justice Fingerhood's analysis, however, went beyond merely resting repugnance upon the difference between English and American law. Rather, the justice's analysis concluded that the effect of recognizing and enforcing the English judgment would be to compromise first amendment protections. Justice Fingerhood discerned not just a jurisprudential difference of constitutional magnitude, but also a constitutional imperative to prevent her court from being used to diminish the freedom of speech in New York.

Similar reasoning shaped her discussion of the second major consequence of classifying the defamatory statement as one of public concern. Justice Fingerhood found "that enforcement of the English judgment *would violate the First Amendment*: in England, plaintiff was not required to and did not meet the . . . constitutional requirement that a private figure show that a media defendant was at fault."[92]

While recognizing that English and American law were based upon similar principles, Justice Fingerhood emphasized that England lacks an equivalent to the First Amendment.[93] Thus, she stated that first amendment protections "*would be seriously jeopardized* by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the

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[89] *Id.*

[90] *Bachchan*, 154 Misc. 2d 233, 585 N.Y.S.2d at 664.

[91] *Id.* at 234, 585 N.Y.S.2d at 664.

[92] *Id.* (emphasis added).

[93] *Id.* at 235, 585 N.Y.S.2d at 665.

press by the U.S. Constitution."[94] Once again, the repugnance is derived not so much from the degree of difference between the two legal regimes as from the notion that, if New York courts recognized and enforced the English judgment, one regime would invade another.

Justice Fingerhood claimed that the Constitution permits no discretion. Whatever the New York CPLR provides regarding discretionary grounds for nonrecognition[95]—including the "public policy exception"—the First Amendment forbids any U.S. court from recognizing and enforcing Bachchan's English award. Believing that to recognize and enforce the judgment would be to chill and jeopardize free speech in New York, Justice Fingerhood denied Bachchan's motion for summary judgment.[96]

III. JUDGMENTS AND THE POLICIES OF "PUBLIC POLICY"

The *Bachchan* court felt compelled not to recognize an English defamation judgment because it found that judgment—or the "cause of action" upon which it was based—to be repugnant to the public policy of New York. Indeed, the court found it so repugnant that to enforce it would have violated the First Amendment.[97] The exploration of the First Amendment right of freedom of speech in Part I of this Article calls into question the correctness—or at least the inexorability—of the *Bachchan* court's implicit assertion that the First Amendment protects speech in India or England. Furthermore, it is debatable whether the court focused its analysis on the proper questions.

The New York statute at issue in *Bachchan* was a version of the Uniform Foreign Money-Judgments Recognition Act.[98] This Act, now in force in twenty-two states,[99] codifies what is

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[94] *Id.* at 234, 585 N.Y.S.2d at 664-65 (emphasis added).

[95] N.Y. CIV. PRAC. L. & R. 5304(b).

[96] *Bachchan*, 154 Misc. 2d 235, 585 N.Y.S.2d at 665.

[97] *See supra* text accompanying notes 92-94.

[98] N.Y. CIV. PRAC. L. & R. 5303; *see also supra* notes 76-81 and accompanying text.

[99] ALASKA STAT. § 09.30.100-09.30.180 (1983 & Supp. 1991); CAL. CIV. PROC. CODE §§ 1713-1713.8 (West 1982 & Supp. 1994); COLO. REV. STAT. ANN. §§ 13-62-101 to 13-62-109 (West 1987 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 50a-30 to 50a-38 (West 1994); GA. CODE ANN. §§ 9-12-110 to 9-12-117 (Harrison 1981); IDA-

thought to have been the general practice of the states. In fact, a chief objective of the Recognition Act was to translate common-law precedent into statutory form to convince foreign civil law courts that American jurisdictions recognize foreign judgments, with the ultimate goal being to obtain better recognition of American judgments overseas when foreign jurisdictions condition recognition on reciprocity.[100] The purpose of the Recognition Act was not to modify the law, but to manifest it.

A. *Comity*

The law of the recognition of foreign judgments has long been under the sway of "comity," a doctrine embracing the concept of a legal obligation that ranges somewhere between binding duty and no duty at all.[101] Even as the schools of vested rights, interest analysis, and others, have battled for ascendancy in choice of law or legislative jurisdiction, the rhetoric of the recognition and enforcement of foreign judgments strangely has remained the rhetoric of comity.[102] This use of

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HO CODE §§ 10-1401 to 10-1409 (1990); ILL. ANN. STAT. ch. 735, para 5/12-618 to 5/12-626 (Smith-Hurd 1993); IOWA CODE ANN. § 626B.1-B.8 (West 1989); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-701 to 10-709 (1989); MASS. GEN. L. ch. 235, § 23A (1986); MICH. COMP. LAWS § 27.995(1)-27.995(8) (1987); MINN. STAT. ANN. § 548.35 (West 1988 & Supp. 1994); MO. REV. STAT. §§ 511.770-511.787 (Supp. 1994); N.M. STAT. ANN. § 39-4B-1 to 39-4B-9 (Michie 1978 & Supp. 1991); N.Y. CIV. PRAC. L. & R. 5303, 5304(b) (McKinney 1978 & Supp. 1991); OHIO REV. CODE ANN. §§ 2329.90-2329.94 (Anderson 1991); OKLA. ST. ANN. tit. 12, §§ 710-718 (West 1988); OR. REV. STAT. § 24.200-24.255 (1993); 42 PA. CONS. STAT. ANN. §§ 22001-22009 (Supp. 1993); TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-36.008 (West 1986 & Supp. 1993); VA. CODE ANN. § 8.01-465.6 to 8.01-465.13 (Michie 1994); WASH. REV. CODE ANN. § 6.40.010 to 6.40.915 (West Supp. 1994).

[100] Adolf Homburger, *Recognition and Enforcement of Foreign Judgments: A New Yorker Reflects on Uniform Acts*, 18 AM. J. COMP. L. 367, 370, 404 (1970).

[101] *See* Hilton v. Guyot, 159 U.S. 113 (1895).

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

Id. at 163-64. Though weakened by the demise of general federal common law as announced in Erie R.R. Co. v. Tomkins, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in state whether they be local in their nature or 'general'"), and by the lapsing of the erstwhile requirement of reciprocity, *Hilton* remains the leading American authority on recognizing and enforcing foreign judgments.

[102] *See, e.g.*, Cunard Steamship Co. v. Salar Reefer Servs., 773 F.2d 452 (2d Cir.

comity suggests that a judgment is *less* of a vested right than are rights not reduced to judgment, surely an anomaly. Likewise, it suggests that the interest analysis method of assessing the policies of rules of law and the interests of jurisdictions somehow fails when faced with a judgment.[103] How it is that comity survives in the realm of foreign judgments is a story that figures prominently later in this Article.

The doctrine of comity rests upon two principles: one international, addressing the relations of civil governments, the other personal, concerned with the rights of individuals. Comity is to have regard for proprieties at both levels.[104] But still

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1985) (the laws and public policy of the United States would not be violated or infringed by granting comity to Swedish bankruptcy proceedings); Clarkson Co. v. Shaheen, 544 F.2d 624 (2d Cir. 1976) (it would violate the public policy of New York and the doctrine of comity not to recognize a Canadian bankruptcy judgment); Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971) (under the doctrine of comity an English judgment permitting recovery for breach of contract is not against the public policy of Pennsylvania), *cert. denied*, 405 U.S. 1017 (1972); Pilkington Bros. v. AFG Indus. Inc., 581 F. Supp. 1039 (D. Del. 1984) (the principle of international comity that recognizes a judgment of a foreign nation does not apply to arbitration disputes); Cooley v. Weinberger, 398 F. Supp. 479 (E.D. Okla. 1974) (comity extends to an Iranian homicide conviction so as to bar American Social Security benefits for the killer of the wage earner), *aff'd*, 518 F.2d 1151 (10th Cir. 1975).

[103] Comity may embrace a range of notions. As understood in *Hilton*, however, it would seem inconsistent with most twentieth-century approaches in preferring statesmanship to either jurisdiction-selecting rules or interest analysis. Comity, understood as a system of "neutral and independent tie-breaking rules," is, to the contrary, a subject of heated debate. *See, e.g.*, Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991), and sources cited therein.

[104] A classic article by Professors Arthur von Mehren and Donald Trautman expanded upon the policies that prompt one jurisdiction to recognize judgments from another:

> We believe that at least five policies are important: a desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated; a related concern to protect the successful litigant, whether plaintiff or defendant, from harassing or evasive tactics on the part of his previously unsuccessful opponent; a policy against making the availability of local enforcement the decisive element, as a practical matter, in the plaintiff's choice of forum; an interest in fostering stability and unity in an international order in which many aspects of life are not confined to any single jurisdiction; and, in certain classes of cases, a belief that the rendering jurisdiction is a more appropriate forum than the recognizing jurisdiction, either because the former was more convenient as the predominantly concerned jurisdiction or for some other reason its views as to the merits should prevail.

Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and A Suggested Approach*, 81 HARV. L. REV. 1601, 1603-04

more fundamental considerations than these underlie comity and, indeed, the entire subject of the conflict of laws. Ultimately, the conflict of laws is the spawn of the problem of the One and the Many, a favorite of philosophy since before Socrates at least.

At its most basic, the problem is posed by the simultaneous presence of unity and multiplicity in being, a tension that has direct consequences on all branches of philosophy.[105] For the orthodox Christian, the problem finds its solution in the Triune Godhead, with the equal ultimacy of both the One and the Many. For the lawyer parsing the conflict of laws, the most immediate presentation derives from the simultaneous presence of the unity of (at least some) principles of justice and the multiplicity of civil jurisdictions entrusted with the administration of those principles. On the international level, for instance, principles of "duty and convenience" will be apprehended and applied in diverse nations, as will principles of the rights of persons on the individual level.

To the extent one embraces legal rules, one is ultimately making some claim of universality—if not for the rules themselves, then at least for their deontological basis. And yet, legal rules are diversely enforced by a multiplicity of civil jurisdictions.[106] Thus, conflict of laws is a jurisprudential formulation of the problem of the One and the Many, with neither the One nor the Many being ultimate.

When comity is extended, a jurisdiction yields part of its role as one of many jurisdictions in order to recognize, and perhaps enforce, a judgment from another jurisdiction. But it does not yield its role wholly. For example, the court presented with a judgment must determine that it is indeed a judgment and that a court with appropriate jurisdiction rendered it.[107]

(1968). Each of these five policies can be categorized under either or both of the principles that underlie comity: concern for civil government relationships and concern for the rights of individuals. Significantly, these policies also bear upon the exceptions made for public policy.

[105] *See generally* ROUSAS J. RUSHDOONY, THE ONE AND THE MANY: STUDIES IN THE PHILOSOPHY OF ORDER AND ULTIMACY (1971).

[106] This situation in turn rests upon legal principle. *See generally* HAROLD BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

[107] *See, e.g.*, UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a), 13 U.L.A. 268 (1962).

Essentially, in testing the judgment against such a standard, the second court indicates its willingness to allow the claims of the One—the claims of general legal rules founded upon presupposed universal principles—to regulate the claims of the Many—the claims of one court of a multiplicity of civil jurisdictions to determine and apply the law for itself. If the judgment departs radically from standards of justice, the second court will accord the judgment no respect. Instead, the second court itself will identify and apply legal principles as if it were the only forum to do so. It will reassert the fullness of its authority as one of the many civil authorities because the first court departed too far from standards that the second court recognizes as having sufficient universality as to apply to a foreign judgment.

B. *The Public Policy Exception*

Bachchan involved the so-called public policy exception to the recognition of foreign judgments. This exception extends to situations where "the cause of action on which the judgment is based is repugnant to the public policy of [the second] state."[108] In this situation a court permits the One—the universal principles of justice—to regulate the Many—the diversity of civil jurisdictions—by refusing to respect the work of another forum in order to vindicate the demands of justice. The public policy doctrine in choice of law generally illuminates the interaction of public policy and foreign judgments.

Judge Cardozo's description of the reach of the public policy exception in conflicts cases is the traditional place to begin such an analysis. In *Loucks v. Standard Oil Co.*, Cardozo wrote that a court should "refuse to enforce a foreign right," otherwise applicable to a conflicts case, if to enforce it would "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the

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[108] *See supra* notes 79-96 and accompanying text; *cf.* Ackermann v. Levine, 610 F. Supp. 633 (S.D.N.Y. 1985); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973); Barry E. v. Ingraham, 43 N.Y.2d 87, 371 N.E.2d 492, 400 N.Y.S.2d 772 (1977); Aspinall's Club Ltd. v. Aryeh, 86 A.D.2d 428, 450 N.Y.S.2d 199 (2d Dep't 1982); *In re* Davis' Will, 31 Misc. 2d 270, 219 N.Y.S.2d 533 (Sur. Ct. Westchester County 1961), *aff'd*, 16 A.D.2d 683, 227 N.Y.S.2d 894 (2d Dep't 1962).

common weal."[109] If the foreign law is so obnoxious as to outrage the forum, as to be "pernicious and detestable,"[110] the forum need not apply the foreign law. This is so even among states of the Union bound by the obligation to grant to the law of each other "full faith and credit."[111]

Without such an exception, foreign jurisdictions would presume upon fora, forcing them to be agencies of injustice. Cardozo's approach to the public policy exception reflects the view that when a court finds that a foreign jurisdiction has so erred that its law is a gross violation of justice—where perhaps it is no law at all according to the analysis of Sir William Blackstone[112]—the court will look to its own law. This approach, for convenience the Justice Approach, parallels the approach to comity presented above.[113] It also is the approach to the public policy exception that most directly yields the statutory provision cited by the *Bachchan* court, if not the court's analysis of that provision.

As early as six years after Cardozo described the Justice Approach in *Loucks*, Professor Ernest Lorenzen argued that the exception served a greater function than merely as a choice-of-law safety valve set to open only when a foreign substantive law outraged the view of justice held in the forum.[114] He saw in the doctrine a broader purpose: to escape, whenever appropriate, territorial choice-of-law rules. In this early attack on territorialism—a harbinger of much to come—Lorenzen claimed that the public policy exception demonstrated the illegitimacy of territorial choice of law rules themselves.[115] According to Lorenzen, public policy provides a way to bypass territorial rules, and provides an out to courts even when otherwise applicable foreign law does not meet the *Loucks* standard of obnoxiousness. Public policy arguments are asserted whenever "the local interests of the state demand that its law

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[109] 224 N.Y.2d 99, 111, 120 N.E. 198, 202 (1918).

[110] Herbert F. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 33-34 (1938) (quoting Veytia v. Alvarez, 247 P. 117 (Ariz. 1926)).

[111] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90 (1971).

[112] 1 WILLIAM BLACKSTONE, COMMENTARIES *40-41.

[113] *See supra* notes 101-07 and accompanying text.

[114] *See* Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924).

[115] *Id.* at 747.

should not be allowed to be evaded . . . and that its local rule should therefore prevail."[116]

Lorenzen showed that in addition to the Justice Approach to the public policy exception there exists another. This other—which we shall call the Selection Approach—extends to situations where a forum discerns injustice not so much in a substantive foreign rule of law, but rather in a choice-of-law rule that would select and apply the foreign substantive rule. Some commentators have argued that most public policy cases exemplify the common themes of both approaches.[117] But sometimes the Justice Approach alone will serve to direct a court away from applying a foreign law even in the absence of "some important connection" between the forum and the case.[118] At other times, the public policy exception may reflect only a court's disagreement with a choice-of-law rule and not a disagreement with a foreign substantive rule.[119]

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[116] *Id.* at 749 (footnote omitted). In fact, this brand of public policy exception was to help usher in the modern approach. *See, e.g.*, Lilienthal v. Kaufman, 395 P.2d 543 (Or. 1964).

[117] *See* Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956).

> "[P]ublic policy" is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it. In such a view the "public policy" doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function. It is a way of saying, "In these circumstances this forum makes reference to its internal law rather than to the law of another state to which our 'normal' choice of law rule would direct us."
>
> The overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection. It is apparent, then, that in most cases the choice of local rather than foreign law cannot be regarded simply as a matter of parochialism. The common invocation of the public policy argument to defeat a foreign claim is a denial that foreign law should govern at all and an assertion of the forum's right to have its law applied to the transaction because of the forum's relationship to it.

Id. at 981.

[118] *Id.* at 972-80, 1001.

[119] Paulsen and Sovern suggest that courts use the Selection Approach more frequently than the Justice Approach. Furthermore, in addition to the Justice and Selection Approaches, Paulsen and Sovern note a third approach, one dedicated to

Despite Professor Lorenzen's characterization of the public policy exception as an escape from territorialism, the advent of nonterritorial choice-of-law rules has not obviated the exception, or even the Selection Approach. However "flexible" the modern theories have proven to be, and however much observers insist that these theories ought to relieve courts of the necessity to revert to the public policy safety valve,[120] the public policy exception to even these flexible rules has been very useful to courts, and promises to continue to be useful.[121] Both approaches to the public policy exception survive.

Both approaches to the choice-of-law public policy exception also are relevant to the recognition and enforcement of judgments. In domestic cases involving states, however, the Full Faith and Credit Clause of the Constitution dampens the public policy exception.[122] Spillover from these cases may have dampened the exception in international cases,[123] yet both approaches to the public policy exception have served to justify the denial of recognition and enforcement in international cases.[124] As discussed above, a court faced with a foreign judgment may deny comity based on repugnance to public policy.[125] As with the choice-of-law public policy exception

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cases involving public law. But they suggest this third approach might best be considered a part of the Selection Approach. *Id.* at 1003-08.

[120] *See, e.g.*, Champagnie v. W.E. O'Neil Constr. Co., 395 N.E.2d 990 (Ill. 1979); Holly Sprague, Note, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447 (1986).

[121] John B. Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647 (1985).

[122] *See, e.g.*, Fauntleroy v. Lum, 210 U.S. 230 (1908); Parker v. Hoefer, 2 N.Y.2d 612, 142 N.E.2d 194 (1957).

[123] *See* Mehren & Trautman, *supra* note 104, at 1606-07, 1695.

[124] Mehren & Trautman, *supra* note 104, at 1670. Mehren and Trautman advocate an explicit choice-of-law analysis in cases involving foreign judgments, and decry the confused application of the Full Faith and Credit Clause doctrine to such cases.

[125] *See* Ruth Bader Ginsburg, *Recognition and Enforcement of Foreign Civil Judgments: A Summary View of the Situation in the United States*, 4 INT'L LAW. 720, 729 (1970); Charles W. Joiner, *The Recognition of Foreign Country Money Judgments by American Courts*, 34 AM. J. COMP. L. 193, 210-11 (Supp. 1986); Barbara Kulzer, *Some Aspects of Enforceability of Foreign Judgments: A Comparative Summary*, 16 BUFF. L. REV. 84, 96-97 (1966); Courtland H. Peterson, *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 COLUM. L. REV. 220, 252-54 (1972); Willis L.M. Reese, *The Status in this Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 796-98 (1950); Carol C. Honigberg, Note, *The Uniform Foreign Money-Judgments Recognition Act: A Survey*

generally, this repugnance can reflect the Justice Approach or the Selection Approach. That is, the judgment may be repulsive for applying either an obnoxious substantive rule of law or an obnoxious choice-of-law rule.[126]

Returning again to the principle of the One and the Many,[127] the public policy exception to extending comity with respect to a foreign judgment may reflect one of two different analyses by the forum being asked to recognize or enforce a foreign judgment. The Justice Approach applies when the judgment is a gross misperception of the transcendent law, and thus the judgment is so beyond the options available to the *Many* civil governments seeking to do justice that the second forum will assert its authority to vindicate the *One*—justice. In such a situation it is not enough that the earlier judgment differs from how the new forum would rule.[128] The judgment must be so wrong, such a violation of justice, that it works an injustice wherever it may be given effect. Therefore, there is no "vested right" to have such a judgment recognized. Regardless of "contacts" or "interests" that may favor the rendering forum over the proposed recognizing or enforcing forum, the judgment is deemed wrong and unworthy of recognition and enforcement.

The Selection Approach addresses a different fault. Here, it is not that a particular jurisdiction misperceived the *One*, but rather that the particular jurisdiction supplying the substantive rule lacked authority. The judgment falters because the civil government giving the rule of law lacked legislative jurisdiction.[129]

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of the Case Law, 14 VAND. J. TRANSNAT'L L. 171, 186 (1981); Behrooz Moghaddam, Note, *Recognition of Foreign Country Judgments-A Case for Federalization*, 22 TEX. INT'L L.J. 331, 340-41 (1987); Jonathan M. Pittman, Note, *The Public Policy Exception to the Recognition of Foreign Judgments*, 22 VAND. J. TRANSNAT'L L. 969 (1989).

[126] Reese, *supra* note 125, at 797-98.

[127] *See supra* notes 107-109 and accompanying text.

[128] Drexel Burnham Lambert Group, Inc. v. Galadari, 610 F. Supp. 114, 118 (S.D.N.Y.), *aff'd in part and vacated in part*, 777 F.2d 877 (2d Cir. 1985); Toronto-Dominion Bank v. Hall, 367 F. Supp. 1009 (E.D. Ark. 1973); Compañia Mexicana Rediodifusora Franteriza v. Spann, 41 F. Supp. 907 (N.D. Tex. 1941), *aff'd*, 131 F.2d 609 (5th Cir. 1942); Knothe v. Rose, 392 S.E.2d 570 (Ga. 1990).

[129] *See supra* notes 114-19 and accompanying text. Recognition of judgments regarding matters of family appear most often to raise this type of public policy exception. *See* Zanzonico v. Neeld, 111 A.D.2d 772 (N.J. 1955); *In re* Gillies' Es-

This Selection Approach to the public policy exception with respect to foreign judgments differs from the Justice Approach in another important respect. In principle, the Selection Approach allows the proposed recognizing forum to reach any error in choice of law, however slight. Thus, if it finds a discrepancy between its choice-of-law rule and that embodied in the judgment, the judgment need not be recognized. In contrast, the Justice Approach is based on a principle of deference to the rendering court. The judgment must work a gross injustice, a marked departure from the transcendent rule, before it is rejected. (At the same time, a failure to approximate justice is regarded as a greater defect than is a mistake in choosing which civil government must lend its substantive rule to the case.) In practice, however, the Selection Approach actually is less powerful than the Justice Approach. The Selection Approach invites moderation, and cases have further tempered its principles with prudence.[130]

The public policy exception to the recognition and enforcement of judgments comprises two approaches, each addressing a distinct question.[131] The Justice Approach asks whether the foreign judgment embodies a rule of law simply too erroneous to enforce. The Selection Approach asks whether the foreign judgment embodies a rule of law that, although not erroneous itself, nevertheless is the incorrect rule to govern the case under choice-of-law principles. We turn now specifically to how the Uniform Foreign Money-Judgments Recognition Act, New York law, and *Bachchan* treat the public policy exception and its two approaches in the presence of the First Amendment.

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tate, 83 A.2d 889, 894-95 (N.J. 1951); DePena v. DePena, 31 A.2d 415, 417, 298 N.Y.S.2d 188, 191 (1st Dep't 1969); *In re* Estate of Christoff, 192 A.2d 737, 738-39 (Pa. 1963), *cert. denied*, 375 U.S. 965 (1964); Chaudhary v. Chaudhary, 1985 Fam. 19; Formosa v. Formosa, 1963 P. 259; Lepre v. Lepre, 1962 P. 52. *But see* Stein v. Siegel, 50 A.D.2d 916, 916, 377 N.Y.S.2d 580, 581-82 (2d Dep't 1975) (Austrian automobile accident involving New York parties).

[130] That is why Mehren and Trautman endorsed an explicit evaluation of the choice of law embodied in a foreign judgment before recognition. *See* Mehren and Trautman, *supra* note 104.

[131] As with the public policy exception in choice of law generally, many cases apply the exception to recognition when both approaches apply. *See supra* note 128.

IV. THE FIRST AMENDMENT AND FOREIGN DEFAMATION JUDGMENTS

The Uniform Foreign Money-Judgments Recognition Act casts the public policy exception to mandatory recognition and enforcement as one that applies when "the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state."[132] Two commentators have remarked, "In focusing wholly on the underlying cause of action or claims for relief, the Act has a somewhat narrower scope than the test of public policy generally applied by the courts."[133] This remark is true despite the intention of the Recognition Act's framers to restate the law.[134] The Recognition Act contemplates only the Justice Approach to the public policy exception and neglects the Selection Approach. It is the repugnance of the substantive law itself, not the choice of that law, that the Recognition Act contemplates.[135]

The *Bachchan* court did emphasize the special quality of constitutional limitations, suggesting that their importance and dignity might make repugnance to them a case of mandatory nonrecognition.[136] But the court rested the repugnance more clearly upon the domestic effect of recognizing the judgment.[137] This reasoning invokes the Selection Approach to the

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[132] UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(b)(3), 13 U.L.A. 268 (1962). The bracketed language signifies alternative formulations included in the Act.

[133] Robert B. von Mehren & Michael E. Patterson, *Recognition and Enforcement of Foreign-Country Judgments in the United States*, 6 L. & POL'Y INT'L BUS. 37, 61 n.129 (1974).

[134] *See* Homburger, *supra* note 100, at 370, 404.

[135] In a reported case in which a party raised an erroneous-choice-of-law argument to support the invocation of the public policy exception of section 4(b)(3), the court declined the invitation, minimizing the degree of error. Ingersoll Milling Mach. Co. v. Granger, 631 F. Supp. 314 (N.D. Ill. 1986), *aff'd*, 833 F.2d 680 (7th Cir. 1987). Before New York adopted the Recognition Act, the New York Court of Appeals had noted: "Recognition will not be withheld merely because the choice of law process in the rendering jurisdiction applies a law at variance with that which would be applied under New York choice of law principles." Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 279, 265 N.E.2d 739, 744, 317 N.Y.S.2d 315, 322 (1970) (citation omitted). *But see* Pentz v. Kuppinger, 107 Cal. Rptr. 540 (Ct. App. 1973).

[136] Bachchan v. India Abroad Pubs., Inc., 154 Misc. 2d 228, 230, 585 N.Y.S.2d 661, 662 (Sup. Ct. N.Y. County 1992). *But see* Webster v. Doe, 486 U.S. 592, 614-621 (1988) (Scalia, J., dissenting).

[137] *Bachchan*, 154 Misc. 2d at 234, 585 N.Y.S.2d at 664.

public policy exception: it is not the repugnance of the English law of defamation, but the repugnance of applying it in such a way as to chill speech in New York that is the grounds of non-recognition. The court adumbrates this approach early in its opinion when it substitutes repugnance of the "judgment" for repugnance of the "cause of action."[138]

The *Bachchan* court found the effect of enforcing the English judgment in the United States to be repugnant. *Bachchan* does not suggest, for instance, that the First Amendment protects a fundamental, inalienable human right, infringement of which would be such an injustice that no American court would countenance it. The court's decision lacks a Justice Approach and any support for the idea of a universal right to free expression.

Most likely the Recognition Act cannot be made to support a public policy exception of the Selection Approach sort. If so, eschewing the "universal freedom of expression" theory of the First Amendment should end the discussion and block the exception. The instrumental view of "the freedom of speech" espoused above and embraced in *Sullivan*, is a matter of political convention—politics and constitutions may vary. Even those embracing popular sovereignty might assign political rights in a manner different from our own. Unless these political arrangements are made absolute, the English law of defamation cannot be "pernicious and detestable."[139]

Hypothetically, if the Recognition Act could be made to support a Selection Approach public policy exception, as *Bachchan* appears to hold,[140] the question becomes whether the High Court of Justice in England erred by applying English law. Considered as a defamation case, a pure tort case, it is unlikely that the English court erred by applying its own law to the byzantine facts of *Bachchan*. Presumably, English choice of law supports that result. The First Restatement of

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[138] *Id.* at 230, 585 N.Y.S.2d at 662.

[139] *See* Goodrich, *supra* note 110, at 33-34.

[140] This approach to the public policy doctrine, however confused, is alive and well in New York jurisprudence with respect to choice of law. *See, e.g.*, Schultz v. Boy Scouts of America, Inc., 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985); Corr, *supra* note 121, at 678-82.

Conflicts supports it,[141] as does the Second.[142] Interest analysis would likely find a "true conflict," with New York law protecting publishers like the New York defendant and English law protecting victims of defamation like the plaintiff resident in England and, therefore, probably support the application of the law of the forum, England.[143] Similarly, the unique approach of the New York courts would likely yield the conclusion that English law should apply.[144]

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[141] RESTATEMENT OF CONFLICT OF LAWS § 377 (1934) ("Where harm is done to the reputation of a person, the place of wrong is where the defamatory statement is communicated.").

[142] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 149, 150 (1971). Section 149 points to the place of publication, section 150 to the victim's domicile for multistate defamation. While these directives are subject to the general provisions of section 6 and its manipulable choice-of-law factors, those factors are unlikely to *require* an English court to choose New York law.

[143] *See* ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW 267-70 (4th ed. 1986). Interest analysis supposedly makes the choice of law by discerning the legal policies of the legal rule of each competing jurisdiction and whether those policies would be advanced if the rule were applied to the particular case. If the policies only of a foreign rule would be advanced, the foreign rule applies. Otherwise, the rule of the forum applies. The results of the approach are far from predictable. The results of the comparative impairment and "better rule" approaches may be even more difficult to predict. *Id.* at 297-300; *see also* Anderson v. Hearst Pub. Co., 120 F. Supp. 850 (S.D. Cal. 1954) (holding the California retraction law applicable to a defamation committed in California by a California newspaper against a Maryland resident, and that an action based upon out-of-state law would violate public policy); Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980). *Anderson* received valuable attention. *See, e.g*, Comment, *Public Policy and the Conflict of Laws*, 7 STAN. L. REV. 275 (1955). Of course, if the English court had cast the case as a "false conflict," with only England having an interest—perhaps by viewing defamation rules as local conduct regulation—English law plainly would apply.

[144] For example, Nader v. General Motors Corp., 25 N.Y.2d 560, 255 N.E.2d 765, 307 N.Y.S.2d 647 (1970), was in part an action for invasion of privacy brought by Ralph Nader against General Motors. Chief Judge Fuld, architect of the contemporary choice of law for New York, opined for the court:

> The District [of Columbia] is the jurisdiction in which most of the acts are alleged to have occurred, and it was there, too, that the plaintiff lived and suffered the impact of those acts. It is, in short, the place which has the most significant relationship with the subject matter of the tort charged.

25 N.Y.2d at 565, 255 N.E.2d 767-78, 307 N.Y.S.2d at 651. Bachchan "lived and suffered" in England. The immediate acts of publication that caused him to suffer occurred in England. *Nader* suggests the application of English law in *Bachchan*. *See also* Arochem Int'l v. Buirkle, 968 F.2d 266 (2d Cir. 1992) (New York conflicts law provides that the California judicial-proceedings privilege applies to defamation in California by a New Jersey defendant of Connecticut plaintiffs because the

The intriguing question is whether it is right to consider *Bachchan* as a defamation case, a tort case pure and simple. Apparently, the *Bachchan* court did not view the case this simply. Since *Sullivan*,[145] all American defamation cases have entailed a first amendment analysis. If the Recognition Act permits the Selection Approach to the public policy doctrine, how does the first amendment component of American defamation law affect selection of the governing rule under choice of law?

Justice Fingerhood decided in *Bachchan* that first amendment considerations pointed towards the application of New York law. The chill from the judgment would be felt in New York. Because the First Amendment prohibits that chill, English law cannot apply. This untrumpeted interest analysis led her to apply section 4(b)(3) of the Recognition Act.

The better reasoning suggests that the first amendment considerations within defamation law militate against using New York law here as a vehicle to apply the First Amendment. The First Amendment—especially the First Amendment as applied in *Sullivan* and its progeny—protects "the freedom of speech," the prerogative of the sovereign people of the United States to communicate as they exercise that sovereignty. The First Amendment does not fundamentally and directly protect all manner of expression regardless of person, circumstance, and content.

In *Bachchan*, the American defendant addressed an Indian audience and, eventually, an English audience. The wire story was an English product sold to an Indian customer. While its use in India and England were instances of expression protected by law, it was not deserving of first amendment protection; it did not constitute, an exercise of "the freedom of speech." Awarding damages for such speech does not chill first amendment rights, so the first amendment component in the law of defamation actually makes *Bachchan*, as interest analysis would have it, a case of false conflict. That is, the policies of the freedom of speech indicate that neither the United States

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privilege regulates conduct). *Accord* Palmisano v. News Syndicate Co., 130 F. Supp. 17 (S.D.N.Y. 1955); Dale Sys., Inc. v. General Teleradio, Inc. 105 F. Supp. 745 (S.D.N.Y. 1952).

[145] 376 U.S. 254 (1964).

nor New York has an interest in applying the Free Speech Clause to *Bachchan*, while England apparently does have an interest in applying its law of defamation.[146] The *Bachchan* court was so solicitous of the First Amendment that it short-circuited the analysis, failing to explore the First Amendment and the conflict rules the court was using to apply it.

Yet another factor may have moved the *Bachchan* court to decide as it did. The court writes that "enforcement of the English judgment would violate the First Amendment."[147] It is doubtful that the enforcement by an American court of a typical foreign defamation judgment could chill "the freedom of speech" of the sovereign American people. If India Abroad is subject to a foreign defamation judgment in the United States, however, the possibility exists that the freedom of speech would suffer for fear of overseas republication of speech spoken domestically among sovereign Americans.

The answer to this fear is that *Bachchan* was not such a case. India Abroad sent a story from outside the United States to news agencies outside the United States. Further, the story was published outside the United States, and defamed Bachchan outside the United States. The First Amendment should require that such a case be distinguished from scenarios such as publication within the United States, republication elsewhere, or even publication abroad with republication in the United States.[148] The First Amendment protects "the freedom

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[146] *Bachchan* is reminiscent of Wong v. Tenneco, Inc., 702 P.2d 570 (Cal. 1985), where a California farmer sued the parent company of a California marketing corporation after that corporation had bypassed the farmer and dealt directly with his Mexican growers. The farmer's dealings with the growers violated Mexican law, according to the California court. The court found that awarding the farmer damages, even against a fellow-Californian and even regarding transactions wholly within California, violated the principle of comity vis-a-vis Mexico. The court saw the farmer's legal efforts as designed to circumvent Mexican law and refused to use the public policy exception to excuse a departure from comity. Plainly, however, the court was motivated by a desire not to offend the Mexican law against foreign ownership of land, regardless of the normal principles of choice of law. *Id.* at 578-83 (dissenting opinion); *see also* Corr, *supra* note 121.

[147] *Bachchan*, 154 Misc. 2d at 234, 585 N.Y.S.2d at 664.

[148] *See* Kimberly Richards, Comment, *Defamation Via Modern Communication: Can Countries Preserve Their Traditional Policies?*, 3 TRANSNAT'L LAW. 613 (1990); *see also* Desai v. Hersh, 719 F. Supp. 670 (N.D. Ill. 1989), *aff'd*, 954 F.2d 1408 (7th Cir. 1992). Recall that Bachchan had won a separate £40,000 judgment for the distribution in the United Kingdom of India Abroad's New York newspaper, but this separate judgment was not at issue in the New York *Bachchan* action.

of speech," and categorical analysis should reduce whatever first amendment chill there might otherwise be from cases like *Bachchan*.[149]

Still, the fundamental question remains: how can interest analysis—the principle that apparently guided Justice Fingerhood—apply New York law to a case after the English judgment already had applied English law? The English judgment plainly vindicates the English interests in the case by compensating an English resident victim and by regulating speech in England.[150] Therefore, interest analysis—and surely the New York brand of interest analysis—does not suggest that the English High Court erred in the choice of law. An English forum is permitted, perhaps even required, to vindicate English interests. Add to this fact the additional interest the United Kingdom has in the recognition and enforcement of judgments of its courts, and *Bachchan* is even more suspect. Modern choice of law contemplates that some cases invite two courts, rightly, to reach opposite choice-of-law conclusions. Justice Fingerhood, who never explained how the English court erred, was selective in her adherence to the modern approach.[151]

CONCLUSION

The error of *Bachchan* is an error of authority, or rather, a collection of errors. The New York version of the Uniform Foreign Money-Judgments Recognition Act authorizes a court to deny recognition when "the cause of action on which the judgment is based is repugnant to the public policy" of the forum

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See supra text accompanying note 72.

[149] Members of Congress have no protection from the Speech and Debate Clause for press releases or newsletters. Hutchinson v. Proxmire, 443 U.S. 111 (1979). If the Free Speech Clause is analogous to the Speech and Debate Clause, the First Amendment should offer no protection for speech directed and received wholly overseas.

[150] *See supra* note 143.

[151] Unless, of course, the approach actually embraces an even more virulent provincialism than Dean Ely has described. *See* John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981) (questioning the constitutionality and wisdom of modern choice-of-law techniques that lead states to protect their own residents more than others).

state.[152] But to find such repugnance between an English libel judgment and the freedom of speech secured by the First Amendment requires a court to misconstrue the First Amendment, making the clause a universal declaration of human rights rather than a limitation designed specifically for American civil government. This enterprise is provincialism by universalization.[153]

To support *Bachchan* without mistaking the freedom of speech requires the court to distort the Recognition Act and choice of law. The Recognition Act must be made to invite a Selection Approach to the public policy exception, not just the Justice Approach invited by the text of the Act. Further, choice-of-law rules themselves must be improperly employed to undo not only the traditional teaching, but also the modern teaching that most certainly would have allowed an English court to apply English law to the case. Here too is provincialism, a provincialism in disregard of the measure of authority meted out by the Act and by the doctrines of choice of law. Either way, *Bachchan* adds confusion to a jurisprudence already well-enough confused.

It is obvious that the presence of constitutional issues misled the *Bachchan* court. Those issues led Justice Fingerhood to find a non-existent repugnance in the English judgment. If anything, the presence of constitutional issues counsels a more careful analysis of conflicts principles, lest conflicts errors become "constitutionalized." The importance of constitutional law demands care and precision of a court, not an over-generous enthusiasm.

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[152] N.Y. CIV. PRAC. L. & R. 5304(b)(4).

[153] "So too, [*Bachchan*] may also fuel the efforts of several prominent English lawyers to reform England's outdated libel laws and to bring them into conformity with modern jurisprudential principles of press freedom," writes the counsel for India Abroad. Handman & Balin, *supra* note 2, at 24.