STATE-ACTION DOCTRINE — ENFORCEMENT OF FOREIGN JUDGMENTS — NINTH CIRCUIT HOLDS THAT ENFORCEMENT OF FOREIGN JUDGMENT IS NOT STATE ACTION FOR PURPOSES OF CONSTITUTIONAL SCRUTINY. — *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984 (9th Cir. 2013).

The enforcement of foreign money judgments is a critical concern for American courts as international commercial ties proliferate and strengthen. One question that has arisen in this area is to what extent a judgment rendered by a foreign legal system will be subjected to constitutional scrutiny as state action when enforced by an American court. Under the Federal Constitution, with a few exceptions, only state action can violate constitutional rights. Recently, in *Naoko Ohno v. Yuko Yasuma*,[1] the Ninth Circuit held that enforcement of a Japanese money judgment did not constitute state action triggering constitutional scrutiny.[2] The court's state-action analysis turned on an analogy between privately created rights and foreign judgments. By failing to address seemingly relevant differences between these two contexts, the *Ohno* court's conclusion that the foreign judgment enforcement was not state action remains unconvincing.

While working in London, Naoko Ohno, a citizen of Japan, joined the Saints of Glory Church, a California religious corporation headed by California resident Yuko Yasuma.[3] After moving back to Japan, Ohno maintained her devotion to the Saints of Glory, tithing her income to the Church, severing family connections, and terminating a medically advised drug regime for her depression — all at Yasuma's exhortation.[4] In 2002, moved by Yasuma's demands and warnings of divine retribution for disobedience, Ohno transferred the entirety of her savings to the Church, the equivalent of approximately $500,000.[5] A year later, citing disobedience to the faith and failure to repent, Church personnel banned Ohno from meetings; she was shunned by Church members and directed to leave her Church-owned residence.[6] Ohno subsequently came to believe the Church had defrauded her.[7]

In 2007, Ohno sued the Church, Yasuma, and two other Church personnel in the Tokyo District Court, alleging tort and unjust enrichment liability arising from the defendants' wrongful inducements of

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[1] 723 F.3d 984 (9th Cir. 2013).

[2] *Id.* at 987.

[3] *Id.* at 987–88.

[4] *Id.*

[5] *Id.* at 988.

[6] Appellants' Opening Brief at 9, *Ohno*, 723 F.3d 984 (No. 11-55081); Appellee's Answering Brief at 4, *Ohno*, 723 F.3d 984 (No. 11-55081).

[7] *Ohno*, 723 F.3d at 988.

her transfer of savings.[8] Finding that the defendants had exploited Ohno's psychological vulnerabilities with statements designed "to incite anxiety and cause terror," the court awarded Ohno the equivalent of $843,235.66 in restitution, damages for emotional harm, and attorney's fees.[9]

On August 26, 2010, Ohno filed a Complaint for Recognition of Foreign Money Judgment in the U.S. District Court for the Central District of California,[10] seeking enforcement of the Tokyo court's award against Yasuma and the Church under California's Uniform Foreign-Country Money Judgments Recognition Act.[11] The Act provides that a court shall recognize a foreign judgment provided, inter alia, that it was reached by an impartial tribunal with proper jurisdiction and procedures compatible with due process of law.[12] Where a judgment or its underlying substantive law is "repugnant to the public policy of [California] or of the United States," the Act provides the court discretion to refuse to enforce the judgment.[13]

Opposing the motion for summary judgment, the defendants argued that the Japanese judgment was unenforceable on constitutional grounds. The district court granted summary judgment for Ohno, and the defendants appealed.[14] They argued that the allegedly tortious conduct had been religious in nature: Yasuma had persuaded Ohno to transfer her savings on the basis of religious obligation and belief in divine punishment.[15] By imposing liability on Yasuma's espousals of doctrine, the Japanese court had made a "determination as to the truth of such teachings" and had burdened the defendants' religious practice.[16] Arguing that the district court lacked a narrowly tailored, compelling government interest in enforcing the Japanese judgment, the defendants claimed that enforcement would be an unconstitutional

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[8] *Id.*

[9] *Id.* at 989 (quoting the Tokyo District Court). The Tokyo High Court affirmed the decision and award on appeal. *Id.*

[10] Appellants' Opening Brief, *supra* note 6, at 3.

[11] CAL. CIV. PROC. CODE §§ 1713–1724 (West Supp. 2014); *see Ohno*, 723 F.3d at 987. The Act is California's version of the 1962 model law drafted by the National Conference of Commissioners on Uniform State Laws, which has been adopted in various forms by thirty states. *See* Neil A.F. Popovic, *"Do You Recognize This?" Domestication of Foreign-Country Money Judgments in California*, 2 BERKELEY J. INT'L L. PUBLICIST 44, 45–46 (2009).

[12] CAL. CIV. PROC. CODE § 1716(a)–(b).

[13] *Id.* § 1716(c)(3) (allowing for discretion not to recognize a foreign judgment when "[t]he judgment or the cause of action or claim for relief on which the judgment is based" is repugnant to public policy); *see Ohno*, 723 F.3d at 1001.

[14] *See Ohno*, 723 F.3d at 989.

[15] *See* Appellants' Opening Brief, *supra* note 6, at 2–3.

[16] *Id.* at 3.

limitation of their rights to Free Exercise.[17] Additionally and alternatively, the defendants argued that the court should exercise its statutorily authorized discretion to refuse enforcement as "repugnant to public policy."[18]

The Ninth Circuit affirmed the grant of summary judgment.[19] Writing for the panel, Judge Berzon[20] noted the novelty of the issues before the court.[21] She began by restating that the district court sitting in diversity was bound to follow California state law.[22] Under California's Uniform Act, "the presumption in favor of enforcement applies, and the party resisting recognition of a foreign-country judgment 'has the burden of establishing that a ground for nonrecognition . . . exists.'"[23] The court held that the defendants had established no constitutional prohibition on enforcement and that the statutory challenge failed to overcome the presumption in favor of enforcement.

The court first rejected the defendants' constitutional challenge. Since the Religion Clauses establish rights against the state, the court considered the threshold question of whether the Japanese judgment once enforced by the district court entailed state action.[24] To answer this question, the court started from the "parallelism, for constitutional state action purposes, between private domestic action and the actions of foreign governments."[25] In the private-rights context, the substance of underlying rights being enforced is not attributed to the state.[26] Just as courts had "preserv[ed] a sphere for private action and private actors" by shielding the enforcement of privately created rights from con-

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[17] *Id.* at 4–6; *see also id.* at 43 ("Imposing tort liability for teaching religious doctrine and/or for warning Church members with respect to conformity with Church teachings violates the Constitution of the United States and the Constitution of California.").

[18] *Id.* at 19.

[19] *Ohno*, 723 F.3d at 1014.

[20] The opinion was joined by Judges Pregerson and Graber.

[21] *Ohno*, 723 F.3d at 991–92 ("This case presents questions of first impression in this circuit, relating to the enforcement of a foreign-country money judgment challenged on constitutional grounds.").

[22] *Id.* at 990.

[23] *Id.* at 991 (quoting CAL. CIV. PROC. CODE § 1716(d) (West Supp. 2014)). As in the opinion, "enforcement" will be used here to designate both recognition and enforcement of the judgment. Though it does not bear on the analysis above — and the Ninth Circuit deliberately elided the distinction, *see id.* at 987 n.2 — formally, under California law, a court grants recognition under the Act, at which point "a foreign-country judgment is treated like a domestic judgment, and thus becomes enforceable under California's generally applicable Enforcement of Judgments Law." Popovic, *supra* note 11, at 44–45.

[24] *Ohno*, 723 F.3d at 992.

[25] *Id.* at 994; *see also id.* at 999 (drawing and relying upon the "loos[e] analog[y]" of "judicial confirmation of arbitral awards" and "recognition of foreign-country money judgments").

[26] *Id.* at 993 ("The success of the Church's direct constitutional arguments therefore depends upon showing that, through its enforcement by a domestic court, the judgment issued in Japan becomes action of the government . . . .").

stitutional scrutiny,[27] the court would similarly protect the underlying rights created by a foreign sovereign in accord with principles of international comity.[28]

Had Ohno's alleged right to damages been privately created, enforcement would not have entailed state action, the court found. A 1982 case, *Lugar v. Edmondson Oil Co.*,[29] established the test for whether government involvement in private action entailed state action.[30] In *Lugar*, the Edmondson Oil Company, suing on a debt, had procured a writ of prejudgment attachment on the debtor's property.[31] When its property was attached, the debtor commenced a separate 42 U.S.C. § 1983 action against Edmondson, seeking damages for an unconstitutional deprivation of property without due process of law.[32] The Court held that Edmondson's procurement of the writ was state action, because enforcement entails state action when (1) the underlying right is "created by the State or by a rule of conduct imposed by the state" and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor."[33]

In the instant case, under the first prong of *Lugar*'s test, the substantive right vindicated by enforcement was "of Japan, not of California," and so "not attributable to a domestic state actor."[34] Under the second *Lugar* prong, the court noted that the defendants' briefings challenged actions of the "organs of the State of Japan . . . not organs of the federal or California government."[35] Even by a generous construal of the defendants' argument, the district court had not participated in the alleged "violation of [defendants'] First Amendment rights"[36]: the Uniform Act mandated "indifference to the underlying merits" of the foreign judgment, "refut[ing] any characterization . . . of Ohno's enforcement effort as a joint action with California or the fed-

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[27] *Id.* at 999.

[28] *Id.* at 1000.

[29] 457 U.S. 922 (1982).

[30] *Ohno*, 723 F.3d. at 994.

[31] *Lugar*, 457 U.S. at 924.

[32] *Id.* at 924–25. In the interim, a court had dismissed the attachment, ruling that Edmondson had not sufficiently established a belief in the debtor's imminent fraudulent transfer. *Id.* at 925.

[33] *Id.* at 937. The state's provision of the writ created Edmondson's right to seize the debtor's property. *See id.* at 941. Further, due to Edmondson's joint participation with the local sheriff in seizing the debtor's property, the Court classified Edmondson as a state actor in this case. *Id.* at 941–42. Therefore, the Court found that the seizure was state action. *Id.* at 942.

[34] *Ohno*, 723 F.3d at 995.

[35] *Id.* Noting the flaw in the defendants' brief, Ohno had nonetheless briefed counterarguments to a hypothetical challenge to the enforcement itself. Appellee's Answering Brief, *supra* note 6, at 20–25 ("It's no good to say, as appellants *might*, that the requisite state action is supplied by the district court's enforcement because recognition is plainly not the sort of governmental action that's required." (emphasis added)).

[36] *Ohno*, 723 F.3d at 996.

eral judiciary."[37] Since enforcement passed the *Lugar* test, it was not state action subject to constitutional scrutiny.[38]

The court also distinguished the seminal civil rights case *Shelley v. Kraemer*,[39] which had held enforcement of a privately created right to constitute state action for constitutional purposes.[40] In *Shelley*, African American litigants had challenged the enforcement of racially restrictive covenants burdening real property to which they had acquired title, alleging violations of equal protection of the laws, violations of their privileges and immunities as citizens of the United States, and unconstitutional takings.[41] The *Shelley* Court held that in enforcing the covenants, the state had used its "full coercive power of government to deny to petitioners . . . the enjoyment of property rights"; the judicial action thus "b[ore] the clear and unmistakable imprimatur of the State" and was constitutionally scrutinizable.[42] Noting "[c]ourts' reluctance, since *Shelley*, to expand that case's holding,"[43] the *Ohno* court confined *Shelley*'s holding to "the context of discrimination claims under the Equal Protection Clause."[44]

The court then turned to the defendants' statutory argument and held that neither the underlying Japanese law nor its application to Ohno's case was "repugnant" to public policy.[45] Reviewing the district court's determination de novo as a conclusion of law,[46] the court observed that California courts find foreign judgments repugnant to American and Californian public policy only where they are "so antagonistic to California [or federal] public policy interests as to preclude the extension of comity."[47] Even where a foreign judgment could not have been rendered under American law — for example, English libel decisions that could not have been reached under the First Amendment[48] — discretion to refuse enforcement is triggered only in cases of

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[37] *Id*. at 997.
[38] *See id*.
[39] 334 U.S. 1 (1948).
[40] *See id*. at 19.
[41] *See id*. at 4–8.
[42] *Id.* at 19–20.
[43] *Ohno*, 723 F.3d at 999.
[44] *Id.* at 998.
[45] *Id*. at 992.
[46] *Id*. at 1002.
[47] *Id*. (alteration in original) (quoting Crockford's Club Ltd. v. Si-Ahmed, 250 Cal. Rptr. 728, 730 (Ct. App. 1988)) (internal quotation marks omitted). The California Act's repugnancy standard was derived from the Supreme Court's pre-*Erie* common law doctrine of international comity. *See id*. (discussing the "repugnancy . . . standard, rooted in the public policy exception to the comity doctrine at common law" in Hilton v. Guyot, 159 U.S. 113 (1895)).
[48] *See id*. at 1003–04 (discussing Telnikoff v. Matusevitch, 702 A.2d 230 (Md. 1997), and Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992), which contemplated, respectively, provisions in the Maryland and New York analogues to the California Uniform Act § 1716 public policy exception).

"stark differences,"[49] with judgments in "direct and definite conflict with fundamental American constitutional principles."[50]

Neither the underlying Japanese law, nor its application in the Tokyo court's judgment, presented a "direct and definite conflict" with the Free Exercise Clause. The substantive law on which the judgment was reached, Article 709 of the Japanese Civil Code,[51] does not target religious activity; indeed, it has analogues in American tort law.[52] As applied, however, Article 709 was more "debatable."[53] Even if it did burden the defendants' free exercise, the law as applied might pass strict scrutiny.[54] Ultimately, the very "debatability of . . . [the defendants'] legal position [was] its downfall."[55] Neither aspect of the judgment rendered it so "outrageous" a departure from American or Californian law as to furnish the district court with discretion to spurn comity and refuse enforcement.[56] The court thus affirmed the district court's grant of summary judgment.

An equivalence between privately created rights and foreign judgments led the *Ohno* court to reach its decision. On closer examination, however, generalizing a distinction between *enforcement* and the underlying *substance* of the rights enforced from the private-rights context appears more questionable. Precedents suggest that private-rights enforcement will not be treated as state action because courts have interpreted constitutional policy as protecting an autonomous private sphere — not because of a distinction between the substance and form of judicial enforcement. Before it distilled a general rule from the case law on private-rights enforcement and applied it to the seemingly dissimilar foreign-judgments context, the *Ohno* court should have addressed potentially relevant distinctions between the two. Without fully justifying the analogy between the contexts, *Ohno*'s state-action holding remains unconvincing.

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[49] *See id.*

[50] *Id.* at 1004.

[51] *See id.* at 1005–06 ("[A]rticle 709 . . . provides that '[a] person who has intentionally or negligently infringe[d] any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.'" (second and third alterations in original) (quoting MINPŌ [MINPŌ] [CIV. C.] art. 709 (Japan))).

[52] *See id.* at 1005 ("American law recognizes generally parallel causes of action . . . .").

[53] *Id.* at 1012. Though "[b]y its plain language, the Japanese judgment does appear to attach liability to the speech of a religious entity," *id.* at 1009, it was unclear whether the judgment burdened "protected religious beliefs, not merely . . . conduct accompanied by such beliefs," *id.* at 1011.

[54] "[A] California court could . . . conclude that 'the state's interest in allowing tort liability' . . . [wa]s compelling enough 'to outweigh any burden'" and "deem tort law the least restrictive means of pursuing the state's compelling interests." *Id.* at 1012 (emphasis omitted).

[55] *Id.* at 1009.

[56] *Id.* at 1003 (quoting British Midland Airways Ltd. v. Int'l Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974)).

The Ninth Circuit assumed an uncontroversial equivalence between contracts and foreign judgments when it applied a general rule from the contract-enforcement context to the instant case of foreign-judgment enforcement. Proceeding inductively from contract-enforcement cases, the court reasoned that *enforcement* must be analytically separated from the underlying *substance* of the rights enforced.[57] It was a "truism"[58] that the enforcement itself was state action for constitutional purposes; the substance was treated differently. The court distilled the general rule that where the underlying right enforced was not created by state action, the substance could not be transformed into state action merely by the process of judicial enforcement.[59] It then, in turn, applied the rule formulaically to the instant case, finding that the Japanese judgment — like a private contract — was not rendered state action via its enforcement.[60]

The *Ohno* court did not consider, however, that the evolution of state-action case law militates against distillation of general rules from the private-rights context. State-action doctrine was first articulated in the post-Reconstruction *Civil Rights Cases*,[61] which established that the Fourteenth Amendment,[62] and all pre–Civil War constitutional rights,[63] limited only state action, not private conduct. In the mid-twentieth century, the Supreme Court adopted a straightforward "logical"[64] treatment of judicial enforcement of private rights in *Shelley v. Kraemer*: the Court held that judicial enforcement was state action, bound by the Constitution.[65] In the decades following *Shelley*, however, courts narrowed that decision's holding, treating government conduct exceptionally, as though it were not state action when it came to the judiciary's enforcement of private rights. Courts feared that "if, for constitutional purposes, every private right were transformed into governmental action by the mere fact of court enforcement of it, the distinction between private and governmental action would be obliterated";[66] without consciously "preserving a sphere for private action

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[57] *See id.* at 993.

[58] *See id.* at 994.

[59] *See id.* at 997.

[60] *See id.*

[61] 109 U.S. 3 (1883).

[62] *Id.* at 11 ("It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.").

[63] *Id.* at 10 ("[N]o one will contend that the power to pass [the statute] was contained in the Constitution before the adoption of the last three amendments.").

[64] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 524 (1985) (describing *Shelley* as taking state-action doctrine to its "logical conclusion . . . under a positivist analysis" to find that "state action is present in all private violations of constitutional rights").

[65] *See supra* notes 39–42 and accompanying text.

[66] *Ohno*, 723 F.3d at 999–1000 (alteration omitted) (quoting Edwards v. Habib, 397 F.2d 687, 691 (D.C. Cir. 1968)); *see also, e.g.*, Evans v. Abney, 396 U.S. 435, 445 (1970) (explaining that a

and private actors," a court might fail "to protect our populace from governmental control and overreaching."[67]

Courts' increasing solicitude for an autonomous private sphere after *Shelley* culminated in the Burger and Rehnquist Courts' interpretation of the Constitution as generally "preserv[ing] an area of individual freedom by limiting the reach of federal law and federal judicial power"[68] — revivifying the *Civil Rights Cases*.[69] While statutes might be passed to regulate the private realm of contracting and property ownership,[70] the Constitution — including the Free Exercise Clause[71] — largely does not regulate such affairs.[72] Privately created rights, and their corresponding enforcement, therefore escape constitutional scrutiny.[73] Indeed, far from being potentially unconstitutional, court enforcement of private rights affirmatively manifests the Constitution's preservation of a realm of private autonomy.[74] For this rea-

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Georgia court's enforcement of a racially restrictive testamentary right was not subject to constitutional scrutiny because, even if it effected racial discrimination, this discrimination was "solely the product" of a private exercise of rights).

67 *Ohno*, 723 F.3d at 999 (emphasis omitted).

68 Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982); *see also* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1492–93 (1989) (describing certain constitutional provisions as "function[ing] to preserve spheres of autonomy . . . [for] the realm of private ordering rather than government control," *id.* at 1492); Mark Tushnet, *State Action in 2020*, *in* THE CONSTITUTION IN 2020, at 69, 74 (Jack M. Balkin & Reva B. Siegel eds., 2009) ("The state-action doctrine . . . appeals to a vaguely libertarian sense that Americans have about the proper relation between them and their government.").

69 *See, e.g.*, Tushnet, *supra* note 68, at 74 ("Today's state-action doctrine is largely the reinvention of the Burger and Rehnquist courts of a doctrine initiated by the reactionary post-Reconstruction Supreme Court."); *Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1261 (2010) (describing the Rehnquist Court's "resurrecting the classical reasoning that originally produced the [state-action] doctrine in the *Civil Rights Cases*").

70 *See, e.g.*, Tushnet, *supra* note 68, at 75 ("[S]tate legislatures and Congress can invade the domain of freedom purportedly carved out by the state-action doctrine.").

71 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 402 (1963) ("The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious beliefs as such." (emphasis omitted) (citation omitted)); Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963) ("[T]he Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone . . . ." (emphasis omitted)).

72 *See* United States v. Morrison, 529 U.S. 598, 621 (2000). As noted above, *Shelley*'s rule still prohibits, as a constitutional matter, enforcement of private rights used in a racially discriminatory manner, and the Thirteenth Amendment has always regulated private conduct, *see* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (explaining that the Thirteenth Amendment "reaches beyond state action to regulate the conduct of private individuals").

73 *See* City of Boerne v. Flores, 521 U.S. 507, 525 (1997) ("The power to 'legislate generally upon' life, liberty, and property, as opposed to the 'power to provide modes of redress' against offensive state action, was 'repugnant' to the Constitution." (quoting The Civil Rights Cases, 109 U.S. 3, 15 (1883))); Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 171, 206 (2004) ("U.S. courts have routinely held that the enforcement of legal rights created via private contract does not constitute state action.").

74 *See supra* note 68 and accompanying text; *cf.* Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 52–53 (D. Mass. 1997) ("[T]hat contractual promises can be enforced in the

son, as the *Ohno* court observed, courts enforce contractual obligations even when these provisions, for example, burden free speech[75] or curtail an individual's right to a jury trial.[76] The approach is counterintuitive, employing something like a legal fiction[77]: a judge applies the law and aligns the coercive power of the state behind one of the private disputants and against the other, but the judge's conduct is not state action. This understanding of the state-action doctrine has been subjected to trenchant criticism,[78] but it is the Supreme Court's prevailing position.

Case law on private-rights enforcement provides no indication that this general rule about state action can be extended to other contexts. Outside of the private-rights context, there is no general rule that the judiciary ceases to be a state actor when it enforces rights not created by an American government.[79] Regarding foreign sovereigns, American courts treat their judgments deferentially — even independent of statutory instructions to honor them. However, such deference follows from judge-created doctrines of international comity,[80] not the Constitution.[81] Prior to *Erie Railroad Co. v.*

courts . . . pre-dates Magna Carta. It is the very bedrock of our notion of individual autonomy and property rights." (footnote omitted)); Richard A. Epstein, *Classical Liberalism Meets the New Constitutional Order: A Comment on Mark Tushnet*, 3 CHI. J. INT'L L. 455, 459–60 (2002) (connecting the constitutional treatment of private-rights enforcement with Lockean political theory).

[75] *Ohno*, 723 F.3d at 998–99 (discussing speech-restrictive contractual provisions).

[76] *Id.* at 999 (discussing arbitrations); *see also* Sarah Rudolph Cole, *Arbitration and State Action*, 2005 B.Y.U. L. REV. 1, 4 & n.11 (listing cases holding that arbitration-clause enforcement is not state action).

[77] *See, e.g*, LON L. FULLER, LEGAL FICTIONS 9 (1967) ("A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility."); *cf.* Sullivan, *supra* note 68, at 1493 ("The boundary between public and private spheres, of course, is not natural or prepolitical, but rather a social construct.").

[78] *See, e.g.*, Tushnet, *supra* note 68, at 74 ("The state-action doctrine . . . contributes nothing but obfuscation to constitutional analysis."); *cf.* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 63 (David M. Trubek & Alvaro Santos eds., 2006) (describing late-twentieth-century "neoformalism").

[79] *See* Shelley v. Kraemer, 334 U.S. 1, 17–18 (1948) (listing previous cases in which court enforcement of common law rights — that is, rights created neither by legislatures nor by private parties — were held unconstitutional state actions).

[80] *See Ohno*, 723 F.3d at 1000 (stating that "principles of comity and respect for sovereignty underl[ie] the recognition of foreign judgments").

[81] Courts have made clear that comity is not a constitutional doctrine; rather it is a separate source of prudential rules. *See* Morrison v. Budget Rent A Car Sys., Inc., 657 N.Y.S.2d 721, 729 (App. Div. 1997) ("[C]omity is based not on a constitutional provision, but on concepts such as harmony, accommodation, policy, and compatibility, in either an interstate context . . . or one involving other nations . . . ."). The Supreme Court has delineated the sources of comity in cases explaining the "act of state" doctrine, *see, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (plurality opinion) ("The act of state doctrine . . . has its roots, not in the Constitution, but in the notion of comity between independent sovereigns."), and sovereign immunity doctrine, *see, e.g.*, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)

Tompkins,[82] federal courts applied comity as a federal common law rule when enforcing foreign judgments; the rule of comity is subordinate to the Constitution.[83] Contrary to *Ohno*, courts in these situations even specified that foreign judgments were not to be treated similarly to contracts.[84] Cases after *Erie*, applying rules of comity either as state law or as federal common law, similarly observed that comity gives way to the Constitution.[85] Unlike the context of privately created rights, prior to *Ohno*, foreign judgment enforcement had never been marked for special insulation from constitutional restrictions.

On its face, a foreign judgment seems dissimilar to a privately created right: The latter is often generated from autonomous and voluntary choices of private individuals, while the former is rendered by a sovereign authority. The latter arises via decentralized spontaneous ordering; the former via organized, institutional procedures. Most importantly, the latter's judicial enforcement had been subject to a special state-action rule before *Ohno*; not so the former. By characterizing the state-action rule in the private-rights context as proceeding from a distinction between judicial enforcement and the substance of the rights enforced, the Ninth Circuit obscured the special treatment that this context had been afforded by state-action precedents. As a result, the court failed to analyze how differences between private rights and foreign judgments might be relevant to state-action analysis. *Ohno*'s refusal to scrutinize the constitutionality of enforcement of the Japanese judgment thus remains unconvincing.

("[F]oreign sovereign immunity is a matter of grace and comity . . . not a restriction imposed by the Constitution.").

[82] 304 U.S. 64 (1938).

[83] *See* Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) ("'[T]he comity of nations' . . . in the legal sense, is [not] a matter of absolute obligation."). In states where foreign judgments are not enforced under statute, *Hilton*'s comity doctrine is still applied as common law. *See Ohno*, 723 F.3d at 990 n.8.

[84] *See Hilton*, 159 U.S. at 195–96, 205–06 (contrasting the Court's position that a foreign judgment is "*prima facie* evidence . . . of the truth of the matter adjudged . . . [and] conclusive upon the merits," *id.* at 206, with the position of the English jurist Lord Brougham who "considered it to be well settled that . . . a foreign judgment was *not*, like a judgment of a domestic court of record, conclusive evidence, but only, *like a simple contract*, *prima facie* evidence of a [liability]," *id.* at 195–96 (emphases added)).

[85] *See, e.g.*, Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1193 (N.D. Cal. 2001) ("[T]he principle of comity is outweighed by the Court's obligation to uphold the First Amendment."), *rev'd en banc on other grounds*, 433 F.3d 1199 (9th Cir. 2006).