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The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law

by
Mark D. Greenberg†

INTRODUCTION

The *forum non conveniens* doctrine¹ allows a court with proper jurisdiction and venue to dismiss a case when factors such as convenience to the parties and the court indicate that an alternative forum would be more appropriate. The U.S. Supreme Court has not yet decided whether federal or state law controls a court's decision to grant or deny a *forum non conveniens* motion in an international case,² although such a decision may affect the relations of the United States with foreign nations.³

This Article examines the authority for and desirability of federal rules for *forum non conveniens* decisions in international cases in both state⁴ and federal courts. Part I describes the historical development of the *forum non*

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1. The *forum non conveniens* doctrine originated in eighteenth century Scotland as a reaction against far-reaching jurisdiction of the Scottish courts based solely on attachment of property. A. GIBB, *THE INTERNATIONAL LAW OF JURISDICTION* 212-30 (1926); Note, *The Doctrine of Forum Non Conveniens*, 34 VA. L. REV. 811 (1948); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386-87 (1947); see generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981), *reh'g denied*, 455 U.S. 928 (1982). Later, in the United States, the doctrine was applied by the courts in many states, although it rarely was known by the name of *forum non conveniens* until the publication of an influential 1929 law review article. See Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929); Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 911-12 (1947). State courts exercised discretion to dismiss suits properly before them as early as 1817. *Id.* at 1-2.

2. See *Piper*, 454 U.S. at 248 n.13.

3. See *infra* notes 222-232 and accompanying text.

4. Currently, state courts decide all *forum non conveniens* motions under state law. See *infra* notes 72-118 and 233-239 and accompanying text.

conveniens doctrine and the current state of *forum non conveniens* law in federal and state courts. Part II analyzes the power of the federal courts to create federal common law in general, including a discussion of the *Erie Railroad v. Tompkins*⁵ doctrine. Part III discusses the possibility of a federal common law governing *forum non conveniens* issues in international cases. It suggests that under the national power over foreign relations Congress should enact a statute authorizing the federal courts to develop *forum non conveniens* rules serving U.S. foreign relations goals. The statute would apply in both federal and state courts. Because the proposed statute may not be enacted, Part III continues with an analysis of the competence of federal courts under *Banco Nacional de Cuba v. Sabbatino*⁶ to fashion such rules without congressional authorization. It concludes that such federal judicial competency probably should be recognized since the only alternative in the absence of congressional action is to defer to state law in matters having a significant effect on foreign relations. Finally, Part III examines *Piper Aircraft Co. v. Reyno*⁷ to determine the Supreme Court's current position on the source of *forum non conveniens* rules in international cases and discusses the functioning of federal common law *forum non conveniens* rules in the U.S. federal system.

I

DEVELOPMENT OF THE FORUM NON CONVENIENS DOCTRINE

An analysis of the appropriate sources of law for *forum non conveniens* decisions in international cases must begin with an understanding of the doctrine's development. Accordingly, this Part describes the doctrine under both federal and state court applications.

A. The Federal Courts

In the federal courts, the *forum non conveniens* doctrine first became well-established and was frequently applied in admiralty law.⁸ The Supreme Court approved the application of *forum non conveniens* in other limited situations⁹ prior to the seminal case of *Gulf Oil Corp. v. Gilbert*.¹⁰

5. 304 U.S. 64 (1938).

6. 376 U.S. 398 (1964).

7. 454 U.S. 235 (1981).

8. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty*, 35 CORNELL L. REV. 12 (1949); *Canada Malting Co. v. Paterson Steamships, Ltd.*, 285 U.S. 413 (1932). The earliest admiralty case to suggest the possibility of a court declining jurisdiction is *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 143, 157 (1804).

9. *Rogers v. Guaranty Trust*, 288 U.S. 123 (1933) (internal affairs of foreign corporation); *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (state courts); *Williams v. Green Bay & Western R.R. Co.*, 326 U.S. 549 (1946) (federal diversity actions).

10. 330 U.S. 501 (1947).

1. *The Gilbert Balancing Test*

In *Gilbert*¹¹ and its companion case, *Koster v. Lumbermen's Mutual Casualty Corp.*,¹² the Supreme Court confirmed the general power of federal courts to apply the *forum non conveniens* doctrine and set forth the analysis by which courts were to decide *forum non conveniens* motions. The Supreme Court emphasized that a decision on a *forum non conveniens* motion lay within the sound discretion of the trial judge.¹³ The proper standard of review was therefore whether the trial court had abused its discretion.¹⁴

Gilbert requires, as a prerequisite to the application of the *forum non conveniens* doctrine, an adequate alternative forum.¹⁵ An alternative forum is normally deemed adequate if the defendant is "amenable to process" in that jurisdiction.¹⁶

Once an adequate alternative forum is found, the next step in the *Gilbert* analysis is a two-part balancing process. First, the court must weigh private interests to determine whether maintaining an action in the chosen forum would cause oppression and vexation to the defendant out of proportion to the convenience to the plaintiff.¹⁷ The Court identified several private interest factors to be considered in this process: ease of access to sources of proof; availability of compulsory process; cost of obtaining attendance of willing witnesses; appropriateness of view of premises; enforceability of a judgment;

11. The case arose out of the destruction of plaintiff's warehouse in Virginia. Plaintiff, a Virginia resident, brought suit in federal district court in New York City against defendant, a Pennsylvania corporation doing business in Virginia and New York. Plaintiff alleged that defendant's negligence had caused plaintiff's loss. Plaintiff's justification for bringing suit in New York was that a local Lynchburg, Virginia jury would be overwhelmed by the size of the plaintiff's claim for damages. *Id.* at 510. The Supreme Court upheld the district court's grant of a motion for dismissal based on *forum non conveniens*. *Id.* at 512.

12. 330 U.S. at 518.

13. *Gilbert*, 330 U.S. at 508.

14. *Id.* at 512.

15. *Id.* at 506-07.

16. A trial court may condition a *forum non conveniens* motion on the defendant's consent to jurisdiction in the alternative forum. *Piper*, 454 U.S. at 242; see, e.g., *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, MDL No. 626, Misc. No. 21-38 (S.D.N.Y. May 12, 1986); *Dowling v. Richardson Merrell, Inc.*, 727 F.2d 608, 611, 615-16 (6th Cir. 1984); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1978) (en banc), cert. denied, 449 U.S. 890 (1980), reh'g denied, 450 U.S. 1050 (1981); see also *Schertenleib v. Traum*, 589 F.2d 1156, 1159-60, 1164 (2d Cir. 1978). Other factors making an alternative forum problematic, such as a statute of limitations bar, anticipated difficulty in satisfying a foreign judgment, or inability to compel production of evidence or witnesses (over whom the defendant has control) in the foreign forum, can be dealt with by similar impositions of conditions. See *Piper*, 454 U.S. at 257 n.25; see, e.g., *Dowling*, 727 F.2d at 611; *Alcoa S.S. Co.*, 654 F.2d at 147; *Dahl v. United Technologies Corp.*, 632 F.2d 1027, 1031 (3d Cir. 1980). In extreme circumstances, an alternative forum could be unsuitable because that forum provides a totally unsatisfactory remedy or does not even permit litigation of the subject matter of the action. *Piper*, 454 U.S. at 254 n.22; see, e.g., *Phoenix Can. Oil Co. v. Texaco, Inc.*, 78 F.R.D. 445 (D. Del. 1978) (refusal to grant *forum non conveniens* motion on the grounds that the proposed alternative forum provides no remedy of the type requested and may not even hear cases of this type).

17. *Koster*, 330 U.S. at 524; *Gilbert*, 330 U.S. at 508.

and other practical concerns that make the adjudication of a case easy, expeditious, and inexpensive.¹⁸ The Court added that the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant.¹⁹

Second in the balancing process, the court must determine whether its own administrative or legal problems outweigh the plaintiff's convenience.²⁰ Public interest factors to be considered at this point include: administrative difficulties caused by burdening crowded court calendars with suits originating elsewhere; burdens of jury duty on a community unrelated to the litigation; the desirability of resolving localized disputes in a local forum; the avoidance of conflict of laws problems and of the application of foreign laws.²¹

In balancing the public and private factors, the ultimate goal under the *Gilbert* analysis is to decide which forum would "best serve the convenience of the parties and the ends of justice."²²

2. Section 1404(a)

One year after *Gilbert*, Congress enacted 28 U.S.C. section 1404(a),²³ which in part preempted the common law doctrine of *forum non conveniens* in federal courts by providing for transfer of venue between federal district courts. The Supreme Court has held that section 1404(a) was intended to revise, not merely codify, the common law doctrine of *forum non conveniens*.²⁴ A section 1404(a) transfer does not require as great a showing of increased convenience in the alternative forum as does a *forum non conveniens* dismissal.²⁵ The rationale for the court's wider discretion under section 1404(a) is that a *forum non conveniens* dismissal results in a harsher outcome than a section 1404(a) transfer²⁶ since such a dismissal excludes any requirement that another forum will in fact take the case.

18. *Gilbert*, 330 U.S. at 508.

19. *Id.* Under *Piper*, this presumption favoring the plaintiff's choice has less force when the plaintiff is foreign. *Piper*, 454 U.S. at 256, 261.

20. *Koster*, 330 U.S. at 524; *Gilbert*, 330 U.S. at 508-09.

21. *Gilbert*, 330 U.S. at 508-09.

22. *Koster*, 330 U.S. at 527.

23. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

24. *Norwood v. Kirkpatrick*, 349 U.S. 29, 31-32 (1955).

25. *Id.*

26. *Id.*

In a federal court, section 1404(a) replaces the *forum non conveniens* dismissal with a change of venue in cases where the alternative forum is another federal court.²⁷ However, when the alternative forum is in a foreign nation, section 1404(a) is inapplicable and *forum non conveniens* survives.²⁸

The existence of section 1404(a) and *forum non conveniens* doctrine also raises issues of choice of law. In *Van Dusen v. Barrack*,²⁹ the Supreme Court held that a section 1404(a) transfer did not affect the applicable law; instead, the transferee court must apply the law that the transferor court would have applied.³⁰ Thus, when the *Erie* doctrine requires the application of state choice of law rules,³¹ the federal district court to which an action is transferred must apply the choice of law rules of the state from which the action was transferred.³² The purpose of this rule is to prevent defendants from using section 1404(a) to forum shop for more favorable law.³³ The relaxed standards for transfers under section 1404(a) were designed to increase convenience, not to give defendants an opportunity to seek favorable laws.³⁴ The *Van Dusen* rule thus prevents a change in law unfavorable for the plaintiff resulting from a section 1404(a) transfer.

3. *International Applications and Piper Aircraft Co. v. Reyno*

*Piper Aircraft Co. v. Reyno*³⁵ arose out of the 1976 crash of a small commercial airline in Scotland in which the pilot and five passengers, all Scottish residents and citizens, were killed. The airplane was registered, owned, and operated in the United Kingdom by British corporations.³⁶ The case had

27. Federal courts apply section 1404(a) even in cases based on state law claims. See the discussion of the question of the application of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *infra* note 221.

28. See, e.g., *Piper*, 454 U.S. 235; *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980). In theory, the *forum non conveniens* doctrine still applies in cases where the alternative forum is a state court. See *Gross v. Owen*, 221 F.2d 94 (D.C. Cir. 1955); J. LANDERS & J. MARTIN, *CIVIL PROCEDURE* 184 (1981); Note, *Federal Courts - Forum Non Conveniens - The Mere Possibility of Laws in an Alternative Forum Being Less Favorable to a Plaintiff Should Not Bar Dismissal of a Suit on the Grounds of Forum Non Conveniens*, 48 J. AIR L. & COM. 407, 414 (1983). The greater convenience of a state court over a federal court is probably not often an important factor, however, because of the possibility of easy transfer between federal courts under section 1404(a). The remaining considerations that might affect a federal court's decision to stay or dismiss an action in favor of a state court are better dealt with as questions of federal court abstention than as *forum non conveniens* issues. See, e.g., *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

29. 376 U.S. 612 (1964).

30. *Id.* at 639.

31. See *Erie*, 304 U.S. 64 and text accompanying notes 121-135.

32. *Van Dusen*, 376 U.S. at 639.

33. *Id.*

34. *Id.* at 613, 636.

35. 454 U.S. 235 (1981).

36. *Id.* at 239. The origin and destination of the flight were in the United Kingdom. The heirs and next of kin of the decedents were all Scottish subjects and residents. The crash occurred while the plane was under Scottish air traffic control. The wreckage of the plane was stored in the United Kingdom, and the British Department of Trade investigated the accident. *Id.* at 238-39.

only two connections with the United States; the airplane had been manufactured in Pennsylvania by Piper Aircraft Company (Piper) and the propellers in Ohio by Hartzell Propeller, Inc. (Hartzell). Reyno, the administratrix of the estates of the five passengers,³⁷ instituted wrongful death actions in the Superior Court of California against Piper and Hartzell on theories of negligence and strict liability.³⁸ This forum was chosen because California tort law was more advantageous to the plaintiff than that of Scotland, where strict liability was not recognized.³⁹ The suit was removed to the U.S. District Court for the Central District of California.⁴⁰ The district court subsequently quashed service on Hartzell and transferred the case to the Middle District of Pennsylvania pursuant to 28 U.S.C. section 1404(a).⁴¹ Process was then properly served on Hartzell in Pennsylvania.⁴²

After the transfer, Piper and Hartzell moved for dismissal of the action on the ground of *forum non conveniens*. The district court granted the motions based on the *forum non conveniens* analysis set forth in *Gilbert and Koster*.⁴³ The district court found that an alternative forum existed in Scotland since Piper and Hartzell had agreed to submit to jurisdiction in Scotland and to waive any statute of limitations defenses.⁴⁴ The court refused to give the plaintiff's choice of forum substantial deference⁴⁵ because the real parties in interest were foreign citizens and residents suing in the United States to take advantage of more favorable tort rules.

The court of appeals reversed the district court on apparently alternative theories. First, the court of appeals held that the district court had improperly applied the *Gilbert* analysis. The court of appeals stated that the plaintiff's choice of forum should be given substantial deference even when the plaintiff represents foreign citizens and residents. Moreover, the court disagreed with the district court's evaluation of the private and public interest factors.⁴⁶ Second, the court of appeals held that a *forum non conveniens* dismissal is always improper if it leads to a change in applicable law unfavorable to the plaintiff.⁴⁷ The court reached this holding in part through an analogy

37. Reyno was the secretary of the lawyer who filed the actions. She had no other connection with the decedents or their survivors. *Id.* at 239.

38. *Id.* at 239-40. Another defendant, Avco-Lycoming, Inc. (the manufacturer of the plane's engine), was dismissed from the suit by stipulation. *Id.* at 240 n.1.

39. *Id.* at 240. Moreover, Scottish law does not allow wrongful death actions unless brought by a decedent's relatives, and it limits the damages recoverable in such actions to "loss of support and society." *Id.*

40. *Id.*

41. The district court did not grant Hartzell's motion to dismiss for lack of personal jurisdiction, because Hartzell could be properly served in Pennsylvania. *Id.* at 240-41, 240 n.5.

42. *Id.* at 241.

43. *Id.*

44. *Id.* at 242.

45. *Id.* Substantial deference to the plaintiff's choice of forum was called for by *Gilbert*, 330 U.S. at 508.

46. *Piper*, 454 U.S. at 244.

47. *Id.* at 246.

to the *Van Dusen* rule that a section 1404(a) transfer cannot change the applicable law.⁴⁸ The court concluded that a *forum non conveniens* dismissal was barred because a trial in Scotland would remove the possibility of a plaintiff's recovering on a strict liability theory.⁴⁹

The Supreme Court granted certiorari and reversed the decision of the court of appeals.⁵⁰ Although the grant of certiorari was to consider the question whether a *forum non conveniens* motion should be denied whenever dismissal would lead to a change in the applicable law unfavorable to the plaintiff,⁵¹ the Supreme Court also reviewed the court of appeals' holding on the *Gilbert* analysis.⁵² In a footnote to *Piper*, the Supreme Court asserted that it was unnecessary to decide whether federal or state law should control the *forum non conveniens* issue on the ground that the relevant federal and state rules were virtually identical.⁵³

The Supreme Court held that, far from automatically preventing a *forum non conveniens* dismissal, the possibility of a change in the substantive law applicable to the case should not ordinarily be given substantial weight in the *forum non conveniens* analysis.⁵⁴ The unfavorable change in law may be given substantial weight only if the remedy provided in the alternative forum is "so clearly inadequate that . . . it is no remedy at all."⁵⁵ This was not the case in the Scottish courts despite the absence of strict liability and the potentially smaller damage awards.⁵⁶

If a change in law unfavorable to the plaintiff were given substantial weight, the central *forum non conveniens* purpose, convenience, would often be defeated since "dismissal might be barred even where trial in the chosen forum was plainly inconvenient."⁵⁷ Giving substantial weight to the possibility of an unfavorable change in law would also result in a loss of valuable flexibility in the *forum non conveniens* doctrine.⁵⁸ Furthermore, the Court reasoned, since plaintiffs naturally try to select the forum with the most favorable choice of law rules, the court of appeals' rule would make the *forum non conveniens* doctrine "virtually useless" by barring dismissal in almost every case.⁵⁹

48. *Id.* at 253.

49. *Id.* at 246. The court of appeals determined through choice-of-law analyses that U.S. law would govern in a trial in the United States and Scottish law would govern in a trial in Scotland. *Id.* at 245.

50. *Id.* at 246, 261.

51. *Id.* at 246 n.12.

52. *Id.* at 255-61.

53. See *infra* notes 217-218 and accompanying text.

54. *Piper*, 454 U.S. at 247.

55. *Id.* at 254.

56. *Id.* at 254-55.

57. *Id.* at 249.

58. *Id.* at 249-50.

59. *Id.* at 250. Many plaintiffs have wide latitude in the choice of a forum because "[j]urisdiction and venue requirements are often easily satisfied." *Id.*

The Court pointed out two “practical problems”⁶⁰ with the court of appeals’ rule barring dismissal whenever a change in law unfavorable to the plaintiff would result. First, an analysis of the substantive legal consequences of dismissal would involve the trial court in problems of choice of law and interpretation of foreign law that the *forum non conveniens* doctrine was in part designed to avoid.⁶¹ Second, the court of appeals’ rule would also increase the number of foreign plaintiffs suing in the already crowded U.S. courts.⁶²

The Supreme Court rejected the analogy drawn by the court of appeals between *forum non conveniens* dismissals and section 1404(a) transfers. The *Van Dusen* rule that a section 1404(a) transfer should cause no change in applicable law was necessary to prevent forum shopping because of the relaxed standards for change of venue under section 1404(a). This reasoning “is simply inapplicable to dismissals on grounds of *forum non conveniens*.”⁶³

The Supreme Court also held that the court of appeals had erred in its review of the district court’s *Gilbert* analysis. The Court emphasized the discretionary nature of a *forum non conveniens* decision; the standard of review is clear abuse of discretion.⁶⁴

First, the Supreme Court approved the district court’s decision to give less deference to a foreign plaintiff’s choice of forum than to that of a plaintiff who chooses his home forum.⁶⁵ The Supreme Court reasoned that the presumption in favor of a plaintiff’s choice of forum is based on the central *forum non conveniens* purpose of convenience. When a plaintiff chooses a foreign forum, his choice is not likely to be convenient, so the presumption in favor of the plaintiff’s choice is weakened.⁶⁶ The Court noted, however, that a plaintiff’s choice of home forum does not bar a *forum non conveniens* dismissal. If a trial in the plaintiff’s home forum is unnecessarily burdensome for the defendant or the court, then dismissal may be proper.⁶⁷

The Supreme Court next reviewed the district court’s analysis of the private interest factors under *Gilbert*. The district court’s determination that trial in Scotland would create fewer evidentiary problems was not unreasonable since a large part of the relevant evidence was in Great Britain.⁶⁸ The

60. *Id.* at 251.

61. *Id.*

62. *Id.* at 251–52, 251 n.17.

63. *Id.* at 253.

64. *Id.* at 257.

65. *Id.* at 255.

66. *Id.* at 255–56. A logically preferable statement of this *Piper* principle would be that the plaintiff’s choice of forum is given no special weight, but that the residence of the plaintiff is a major factor bearing on convenience. If a plaintiff’s choice of forum will be given special weight only when the plaintiff chooses a home forum, then it is the residence of the plaintiff in the forum, and not the plaintiff’s choice, which is relevant. Treating the plaintiff’s forum choice as a factor relevant in itself accomplishes no more than including the plaintiff’s residence in the balancing of convenience factors.

67. *Id.* at 255 n.23.

68. *Id.* at 257–58.

Supreme Court agreed with the district court that the defendants' inability to implead in the United States as third party defendants the pilot's estate, the airplane's owner and maintainer, and the airplane's operator was strong support for the appropriateness of trial in Scotland.⁶⁹

The Supreme Court also approved the district court's balancing of public interest factors. The Court emphasized Scotland's strong interest in deciding a controversy largely concerning Scotland on its home base.⁷⁰ The Court deemed it unlikely that holding the trial in a U.S. rather than a Scottish court would significantly advance any U.S. interest in deterring American manufacturers from producing unsafe products.⁷¹

B. The State Courts

Although *Gilbert* has influenced many state courts,⁷² *forum non conveniens* rules vary widely among the states. The status of *forum non conveniens* in the state courts ranges from close adherence to the federal cases,⁷³ to more restricted use, to no *forum non conveniens*, to unclear rules of *forum non conveniens*. Many state legislatures have enacted statutes authorizing courts of those states to dismiss actions on the ground of *forum non conveniens*.⁷⁴ The courts have then been left free to develop standards for the application of the doctrine on a case-by-case basis.⁷⁵ The discussion of state *forum non conveniens* law that follows is limited to influential jurisdictions and jurisdictions taking extreme positions.

69. *Id.* at 259.

70. *Id.* at 260. The Court also noted that the need to apply unfamiliar foreign law is an appropriate consideration in the *forum non conveniens* inquiry. *Id.*

71. *Id.* at 260-61.

72. *See, e.g.*, *Wieser v. Missouri Pac. R.R. Co.*, 98 Ill. 2d 359, 456 N.E.2d 98 (1983); *Kear-sarge Metallurgical Corp. v. Peerless Ins. Co.*, 383 Mass. 162, 169, 418 N.E.2d 580, 584 (1981); *Archibald v. Cinerama Hotels*, 15 Cal. 3d 853, 860, 544 P.2d 947, 952, 126 Cal. Rptr. 811, 816 (1976); *Flaiz v. Moore*, 359 S.W.2d 872, 874 (Tex. 1962).

73. References to federal *forum non conveniens* cases or federal *forum non conveniens* law in this section should be understood to refer to federal *forum non conveniens* cases decided before the enactment of 28 U.S.C. § 1404(a) and those decided subsequently that had not been pre-empted by section 1404(a). For a discussion of whether state or federal law controls a *forum non conveniens* issue in a case in federal court based on a state law cause of action, see *infra* notes 249-250 and accompanying text.

74. *See, e.g.*, Cal. Civ. Proc. Code § 410.30 (1982); N.Y. Civ. Prac. Law § 510:3 (Consol. 1976); Minn. Stat. Ann. § 542.11 (1947); Fla. Stat. Ann. § 47.122 (Supp. 1983).

75. *See, e.g.*, *Archibald*, 15 Cal. 3d at 853, 544 P.2d at 947, 126 Cal. Rptr. at 811; *Great N. Ry. v. Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970), *cert. denied*, 401 U.S. 1013 (1971).

1. States Following the Federal Cases

Illinois' *forum non conveniens* law closely follows the leading federal cases.⁷⁶ The trial judge has discretion to decline jurisdiction when the balancing of public and private interest factors discussed in *Gilbert* shows another available forum to be more convenient or just.⁷⁷ Since convenience is the central issue, the plaintiff's choice of forum does not receive great deference if the plaintiff chooses a foreign forum⁷⁸ or if the plaintiff is a nominal party.⁷⁹ The trial court's decision will be reversed only upon a finding of abuse of discretion.⁸⁰

New York's *forum non conveniens* doctrine is also similar to the federal doctrine, although the trial court's decision may receive greater deference on review in the New York courts than in the federal courts. A New York court may in its discretion grant a motion to dismiss on the ground of *forum non conveniens* when it finds, based on all relevant factors, that New York is an inconvenient forum and that another available forum will better serve the ends of justice and convenience.⁸¹ A party's residence in New York is not a conclusive factor.⁸² The New York Court of Appeals will reverse a lower court *forum non conveniens* decision only if the lower court has abused its discretion as a matter of law or has failed to consider all relevant factors.⁸³

2. California's Unclear Forum Non Conveniens Law

Although the California Supreme Court derived the California *forum non conveniens* doctrine from federal *forum non conveniens* law,⁸⁴ the California doctrine has become confused⁸⁵ and may be directly contrary to federal *forum non conveniens* law on important issues.⁸⁶ In the leading case, *Archibald*

76. *Moore v. Chicago & N.W. Transp. Co.*, 99 Ill. 2d 73, 457 N.E.2d 417 (1983); *Wieser*, 98 Ill. 2d 359, 456 N.E.2d 98; *Jones v. Searle Laboratories*, 93 Ill. 2d 366, 444 N.E.2d 157 (1982).

77. *Moore*, 99 Ill. 2d at 76-77, 457 N.E.2d at 418-19; *Wieser*, 98 Ill. 2d at 364-65, 456 N.E.2d at 100-01.

78. *Wieser*, 98 Ill. 2d at 367, 456 N.E.2d at 101-02.

79. *Moore*, 99 Ill. 2d at 79, 457 N.E.2d at 420.

80. *Id.* at 77, 457 N.E.2d at 419; *Wieser*, 98 Ill. 2d at 362, 456 N.E.2d at 99.

81. *Irrigation & Indus. Dev. Corp. v. Indag S.A.*, 37 N.Y.2d 522, 525, 337 N.E.2d 749, 751, 375 N.Y.S.2d 296, 299 (1975); *Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 363, 278 N.E.2d 619, 623, 328 N.Y.S.2d 398, 404 (1972).

82. *Silver*, 29 N.Y.2d at 361, 278 N.E.2d at 622, 328 N.Y.S.2d at 402.

83. *Irrigation & Indus. Dev. Corp.*, 37 N.Y.2d at 525, 337 N.E.2d at 751, 375 N.Y.S.2d at 298; see, e.g., *Blais v. Deyo*, 60 N.Y.2d 679, 455 N.E.2d 622, 468 N.Y.S.2d 103 (1983); *Belachew v. Michael*, 59 N.Y.2d 1004, 453 N.E.2d 1243, 466 N.Y.S.2d 954 (1983) (summary affirmances on the grounds that the lower courts did not abuse their discretion and did not fail to take into account all relevant factors).

84. See *Price v. Atchison, T. & S.F. Ry. Co.*, 42 Cal. 2d 577, 580-83, 268 P.2d 457, 458-61 (1954).

85. See *Hemmelgarn v. Boeing Co.*, 106 Cal. App. 3d 576, 165 Cal. Rptr. 190 (1980); *Jagger v. Superior Court*, 96 Cal. App. 3d 579, 158 Cal. Rptr. 163 (1979); *Brown v. Clorox*, 56 Cal. App. 3d 306, 128 Cal. Rptr. 385 (1976); *Great N. Ry. Co. v. Superior Court*, 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970).

86. See discussion of *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984), *infra* notes 96-102 and accompanying text.

v. Cinerama Hotels,⁸⁷ the California Supreme Court held that a *forum non conveniens* dismissal is generally not within the trial court's discretion when the plaintiff is a California resident. The court decided, however, that staying such an action would be appropriate since the trial court would retain jurisdiction over the parties and could therefore resume proceedings if the action did not proceed satisfactorily in the alternative forum.⁸⁸ Thus, the rule barring dismissal when the plaintiff is a California resident seems to be more of an administrative rule calling for *forum non conveniens* stays rather than dismissals. The *Archibald* court also cited with approval the *Gilbert* discussion of the convenience factors to be considered.⁸⁹ In another California case, *Great Northern Railway Co. v. Superior Court*,⁹⁰ a California appellate court listed twenty-five factors to be considered in the *forum non conveniens* inquiry⁹¹ and then examined each factor to see if the facts in the instant case supported or opposed dismissal. This approach has been frequently followed in subsequent California cases.⁹²

According to several California cases, great weight is to be given to the plaintiff's choice of forum, even if the plaintiff is not a citizen or resident of California.⁹³ Nevertheless, in some of these cases, the weight given to the plaintiff's choice was not sufficient to prevent dismissal.⁹⁴ In two of the cases stating that the plaintiff's choice of forum is entitled to great weight, the plaintiffs were citizens of foreign nations.⁹⁵

A recent California case, *Holmes v. Syntex Laboratories, Inc.*,⁹⁶ explicitly stated that California law did not follow *Piper* in important respects. In *Holmes*, British plaintiffs brought suit in California state court against a U.S. drug manufacturer for injuries allegedly caused by a drug marketed in the United Kingdom.⁹⁷ The California court of appeal reversed the trial court's

87. 15 Cal. 3d 853, 544 P.2d 947, 126 Cal. Rptr. 811 (1976).

88. *Archibald*, 15 Cal. 3d at 857-58, 544 P.2d at 950, 126 Cal. Rptr. at 814.

89. *Id.* at 860, 544 P.2d at 952, 126 Cal. Rptr. at 816.

90. 12 Cal. App. 3d 105, 90 Cal. Rptr. 461 (1970).

91. *Id.* at 112-15, 90 Cal. Rptr. at 466-68. The list includes the convenience and expense for the parties, evidentiary considerations, considerations of fairness, the burden on the courts and community, state and public interests in the case, differences in conflict of law rules, and connections of the case to the forum.

92. See, e.g., *Rehm v. Aero Engines, Inc.*, 164 Cal. App. 3d 715, 718-20, 210 Cal. Rptr. 594, 595-96 (1985); *Jagger*, 96 Cal. App. 3d 579, 585-86, 158 Cal. Rptr. 163, 166-67; *Henderson v. Superior Court*, 77 Cal. App. 3d 583, 595-97, 142 Cal. Rptr. 478, 485-86 (1978).

93. See *Rehm*, 164 Cal. App. 3d at 720-21, 210 Cal. Rptr. at 597; *Holmes*, 156 Cal. App. 3d at 380-81, 202 Cal. Rptr. at 778; *Jagger*, 96 Cal. App. 3d at 579, 158 Cal. Rptr. at 163; *Brown*, 56 Cal. App. 3d at 310-11, 128 Cal. Rptr. at 388-89; *Great N. Ry. Co.*, 12 Cal. App. 3d at 110, 90 Cal. Rptr. at 464; see also Judicial Council comment to Cal. Civ. Proc. Code § 410.30 (West 1973).

94. The trial court's granting of the *forum non conveniens* motion was approved in *Rehm*. In *Jagger* and *Great N. Ry.*, the trial court's denial of the motion was reversed.

95. *Holmes*, 156 Cal. App. 3d at 380-81, 202 Cal. Rptr. at 778; *Jagger*, 96 Cal. App. 3d at 579, 158 Cal. Rptr. at 163.

96. 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984).

97. *Id.* at 376-77, 202 Cal. Rptr. at 774-75.

granting of the *forum non conveniens* motion.⁹⁸ The court refused to follow *Piper* in two important respects. First, in California, even a foreign plaintiff's choice of forum is entitled to substantial weight.⁹⁹ Second, a *forum non conveniens* dismissal is inappropriate when the resulting change in applicable law will disadvantage the plaintiff.¹⁰⁰ The court recognized that its articulation of California law more closely agrees with the Third Circuit's opinion in *Piper*¹⁰¹ than with the U.S. Supreme Court's opinion reversing the Third Circuit.¹⁰²

Whether *Holmes* is an accurate pronouncement of California law remains to be seen. Another recent case, *Rehm v. Aero Engines, Inc.*,¹⁰³ distinguished *Holmes* and thereby avoided deciding its correctness.¹⁰⁴ *Rehm* approved of the deference to be given to the plaintiff's choice of forum without suggesting any decreased weight because the plaintiffs were not California residents.¹⁰⁵

3. States With More Restricted Use of Forum Non Conveniens Than the Federal Cases

Although Massachusetts law leaves the decision whether to grant a *forum non conveniens* motion largely within the discretion of the trial judge,¹⁰⁶ the trial judge should give the plaintiff's choice of forum great weight in the balancing process, probably even if the plaintiff is not a Massachusetts resident.¹⁰⁷

In Colorado, *forum non conveniens* is not to be applied if the plaintiff is a Colorado resident, except in "most unusual circumstances".¹⁰⁸ The Colorado Supreme Court, however, has not explained what constitutes "most unusual circumstances". The court did make clear that inconvenience and expense, particularly in connection with obtaining witnesses or physical evidence, will not constitute the circumstances necessary for the application of the *forum non conveniens* doctrine to a case brought by a resident plaintiff.¹⁰⁹

98. *Id.* at 391, 202 Cal. Rptr. at 785.

99. *Id.* at 380-81, 202 Cal. Rptr. at 777-78.

100. *Id.* at 381-82, 202 Cal. Rptr. at 778-79.

101. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1980).

102. *Holmes*, 156 Cal. App. 3d at 382, 202 Cal. Rptr. at 779; *see Piper*, 454 U.S. at 261.

103. 164 Cal. App. 3d 715, 210 Cal. Rptr. 594 (1985).

104. *Id.* at 721-23, 210 Cal. Rptr. at 597-98. It is arguable that strict adherence to *Holmes* would have led to a different result in *Rehm*.

105. *Id.* at 720, 210 Cal. Rptr. at 597.

106. *Kearsarge Metallurgical Corp. v. Peerless Ins. Co.*, 383 Mass. 162, 168-69, 418 N.E.2d 580, 583-84 (1981).

107. *Id.* at 169, 418 N.E.2d at 584 (quoting from *Universal Adjustment Corp. v. Midland Bank, Ltd.*, 281 Mass. 303, 315, 184 N.E. 152, 159 (1933)).

108. *McDonnell-Douglas Corp. v. Lohn*, 192 Colo. 200, 201, 557 P.2d 373, 374 (1976) (en banc); *Kelce v. Touche Ross & Co.*, 192 Colo. 202, 203-04, 557 P.2d 374, 375 (1976) (en banc).

109. *Lohn*, 192 Colo. at 202, 557 P.2d at 374; *Kelce*, 192 Colo. at 204, 557 P.2d at 375.

In a footnote, the court mentioned that "in other forums such 'unusual circumstances' have struck close to the very basis of jurisdiction. Some exceptions have been carved out for very particular classes of cases, e.g., where the resident plaintiff is only a nominal party."¹¹⁰ Even in a case involving a non-resident plaintiff, the *forum non conveniens* doctrine may be very limited in Colorado.¹¹¹

The Florida Supreme Court has repeatedly held that *forum non conveniens* will not be applied in Florida if either party is a Florida resident.¹¹²

A Georgia court recently declined to apply the doctrine of *forum non conveniens* without legislative authorization, although the court recognized that the case under consideration would have been an appropriate one for a *forum non conveniens* dismissal.¹¹³

In Texas, the contours of the *forum non conveniens* doctrine are not well-developed. The state supreme court has suggested in dicta that the doctrine may be invoked on at least two grounds: (1) the parties are not residents of Texas or (2) the applicable substantive law is so different from Texas law that it cannot be administered in the Texas courts or violates the public policy of Texas.¹¹⁴ The court did not decide whether the doctrine could be extended beyond these two situations.¹¹⁵ Once the doctrine is invoked, the trial judge is to make a discretionary decision based on the circumstances of the particular case.¹¹⁶ The Texas Supreme Court has quoted, apparently with approval, the discussion in *Gilbert* of the factors to be considered in a *forum non conveniens* decision.¹¹⁷ A Texas appellate court, relying on *Piper*, has decided to give less weight to a foreign plaintiff's choice of forum than to that of a resident plaintiff.¹¹⁸

110. *Lohn*, 192 Colo. at 201 n.1, 557 P.2d at 374 n.1.

111. *Id.* at 201-02, 557 P.2d at 373-74. Of course, the court's statements regarding the extent of the *forum non conveniens* doctrine not specifically restricted to cases involving resident plaintiffs are dicta.

Note also the situation in Montana, whose policy of keeping its courts open to all suits dilutes its *forum non conveniens* law. *Bevacqua v. Burlington Northern, Inc.*, 183 Mont. 237, 598 P.2d 1124 (1979); *Labella v. Burlington Northern, Inc.*, 182 Mont. 202, 595 P.2d 1184 (1979).

112. *Seaboard Coast Line R.R. v. Swain*, 362 So.2d 17 (Fla. 1978); *Houston v. Caldwell*, 359 So.2d 858 (Fla. 1978); see *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985). For a brief discussion of *Sibaja*, see *infra* note 217.

113. *Smith v. Board of Regents of the University System of Georgia*, 165 Ga. App. 565, 566, 302 S.E.2d 124, 126 (1983).

114. *Flaiz v. Moore*, 359 S.W.2d 872, 875-76 (Tex. 1962).

115. *Id.* at 876.

116. *Id.* at 875; see also *Couch v. Chevron Int'l Oil Co.*, 672 S.W.2d 16, 19 (Tex. Ct. App. 1984).

117. *Flaiz*, 359 S.W.2d at 874.

118. *Couch*, 672 S.W.2d at 19.

II FEDERAL COMMON LAW

This Part reviews the power of the federal courts to create federal common law, especially in the area of foreign relations, when no federal provision controls an issue.

A. *The Doctrine of Erie R.R. v. Tompkins*

It is basic to the structure of our federal system that certain limited powers are ceded by the states to the national government; all other powers have been retained by the states.¹¹⁹ Leaving aside self-executing constitutional provisions, state laws are to govern in all situations until the national government, within its powers, has provided otherwise.¹²⁰ Thus, state law prevails both in areas where the national government has not been granted rule-making power and where the national government has not yet exercised that power.

In accordance with the foregoing principles of our federalism, the Supreme Court in *Erie R.R. v. Tompkins*¹²¹ interpreted the Rules of Decision Act¹²² to require that federal courts apply substantive state law, including common law, when no federal provision controls an issue.¹²³ Before *Erie*, federal courts had been largely free to develop common law rules when no state statutory or constitutional provision applied.¹²⁴ *Erie* established that the general federal common law was beyond the law-making powers of the federal courts; the mere grant of jurisdiction to hear a case did not authorize fashioning the applicable legal rule, displacing state law in the process.¹²⁵

Moreover, the *Erie* decision was based on a strong policy that the substantive rule of law applicable to a given issue should be the same in state and federal courts within one jurisdiction. Because pre-*Erie* federal common law was not binding on state courts, the governing rule of law of a particular case depended on whether it was heard in federal or state court. The existence of

119. U.S. CONST. amend. X; *United States v. Sprague*, 282 U.S. 716, 733 (1931).

120. See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953).

121. 304 U.S. 64 (1938).

122. 28 U.S.C. § 1652 (1976). "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

123. Whether this interpretation was constitutionally compelled has been a matter of controversy. See Note, *The Competence of Federal Courts to Formulate Rules of Decision*, 77 HARV. L. REV. 1084, 1086 (1964); Comment, *Federal Common Law and Article III: A Jurisdictional Approach to Erie*, 74 YALE L.J. 325, 325 nn.4,7 (1964); Friendly, *In Praise of Erie - And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 384-98 (1964); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 799, 799 n.9 (1957).

124. This practice was referred to as the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

125. See Mishkin, *supra* note 123, at 799.

two rules of law potentially applicable to a given transaction created three problems: (1) an inability to predict what rule of law would govern a transaction; (2) a possibility of forum shopping by litigants seeking the most favorable law;¹²⁶ and (3) a discrimination in favor of non-citizen plaintiffs since diversity jurisdiction gave them a choice of a federal or state forum in a suit against a resident defendant.¹²⁷

In order to resolve these three problems, the Supreme Court in *Erie* had only to require that federal and state law not overlap. This could have been accomplished equally as well by making federal common law binding in state courts¹²⁸ as by making state common law binding in federal courts.

In order to allow state law its proper role in the federal system, however, the Supreme Court had to require the federal courts to follow state common law, absent a governing federal provision. First, state law *must* govern outside the area of national legislative competence, a principle implicit in the idea of a national government of limited powers.¹²⁹ Second, even in areas where the national government possesses legislative power, state law is normally controlling¹³⁰ until the national government chooses to exercise its law-making power.¹³¹ Thus, the national government, within its area of law-making competence, acts interstitially "against the background of the total *corpus juris* of the states"¹³² and thus may "supplant or alter preexisting state-created policies."¹³³ For various reasons, "whether latent federal power should be exercised to displace state law is primarily a decision for Congress."¹³⁴ Consequently, the federal courts ordinarily may not make law, even within the area of national law-making competence, without congressional authorization.¹³⁵

126. *Erie* was concerned with forum-shopping within a state and did not address problems of interstate forum-shopping. See *infra* note 128.

127. See *Erie*, 304 U.S. at 73-76; see also *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945); Note, *The Federal Common Law*, 82 HARV. L. REV. 1512 (1969). Although jurisdiction in the *Erie* case was based on diversity of citizenship, it is now clear "that *Erie* applies, whatever the basis of jurisdiction, to any issue in the case which is governed by state law operating of its own force." P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 766 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]; see also Note, *supra* note 123, at 1087-88 and cases cited therein.

128. Comment, *supra* note 123, at 329. Note that this solution would have prevented interstate forum-shopping for favorable law, which *Erie* did not accomplish.

129. *Hanna*, 380 U.S. at 471-72. See HART & WECHSLER, *supra* note 127, at 767.

130. Certain "self-executing" constitutional provisions may exclude state law without legislative implementation. Examples are specific prohibitions of state action and, in some circumstances, the Commerce Clause. See Note, *supra* note 123, at 1089, 1089 nn. 44-46. In these cases, the national policy choice has been made by the Constitution.

131. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544-45 (1954).

132. H. HART & H. WECHSLER, *supra* note 120, at 435.

133. Note, *supra* note 123, at 1085.

134. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).

135. See *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981); *Wallis*, 384 U.S. at 68; Hart, *The Relation*

B. The Post-Erie Federal Common Law

Even after *Erie*, there are areas in which the federal courts may create federal common law. This post-*Erie* federal common law is binding in the state courts; therefore, it does not violate those policies behind the *Erie* doctrine that condemn two potentially applicable rules of law.¹³⁶

Federal common law may be based on a finding that Congress has authorized the use of the national law-making powers. In this category of cases, the Supreme Court has held that a federal statute specifically contemplates the development of substantive law by the federal courts.¹³⁷ Such a specific statutory authorization, however, is rarely found.¹³⁸

The Supreme Court has applied federal common law in certain areas without finding congressional authorization. Some of these cases involve federal statutory programs, which at least provide evidence of congressional initiative in the area.¹³⁹ For example, federal common law is created in some cases to protect a federal interest derived from a statute¹⁴⁰ or to "fill in interstitially"¹⁴¹ a network of statutes.¹⁴² Federal common law is also fashioned in areas where Congress has not exerted the national legislative power.¹⁴³ In this category, federal common law has been held to govern cases involving disputes between the states,¹⁴⁴ admiralty,¹⁴⁵ and foreign affairs.¹⁴⁶

In the leading case of *Clearfield Trust Co. v. United States*,¹⁴⁷ the Supreme Court decided that, in the absence of an applicable statute, the federal courts were free to create the governing rule of law concerning the right of the United States to recover on a guarantee of prior endorsements on a U.S. government check. The Court based this decision on the constitutional

between State and Federal Law, 54 COLUM. L. REV. 489, 497-98 (1954). The substantive legal question in the *Erie* case itself was likely within the area of Congressional legislative competence under the Commerce Clause, as it involved the liability of an interstate railroad in an accident with a pedestrian on railroad property. The Supreme Court properly did not consider this aspect because "in that situation, even clearly established legislative power would not automatically imply law-making competence in the federal courts." Mishkin, *supra* note 123, at 800 n.12.

136. Note, *supra* note 127, at 1512; Comment, *supra* note 123, at 329-31; Friendly, *supra* note 123, at 422; Note, *Exceptions to Erie v. Tompkins: The Survival of Federal Common Law*, 59 HARV. L. REV. 966, 968 (1946).

137. *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *Texas Industries*, 451 U.S. at 640.

138. See Note, *supra* note 123, at 1089.

139. See Comment, *supra* note 123, at 327. See generally Note, *supra* note 123, at 1090-94; Mishkin, *supra* note 123, at 800-01.

140. *E.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

141. Mishkin, *supra* note 123, at 800.

142. *E.g.*, *Howard v. Lyons*, 360 U.S. 593 (1959); see Note, *supra* note 123, at 1093.

143. See Note, *supra* note 123, at 188-89; Comment, *supra* note 123, at 327-28 & n.29.

144. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

145. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

146. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). For a discussion of *Sabbatino* and federal common law in the area of foreign affairs, see *infra* notes 187-216 and accompanying text.

147. 318 U.S. 363 (1943).

function and authority of the national government to issue the check.¹⁴⁸ The Supreme Court has since cited *Clearfield* as an example of the making of federal common law "necessary to protect uniquely federal interests . . . derived from a federal statute."¹⁴⁹ The Court in *Sabbatino* recognized that federal common law is also fashioned to protect intrinsically federal interests of a non-statutory nature.¹⁵⁰ The Supreme Court recently summarized:

[a]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as a sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.¹⁵¹

Commentators have proposed various analyses to explain when the federal courts may create common law.¹⁵² In general, Congress must make the initial decision to create national legal rules.¹⁵³ Congressional authorization for federal common law is clearly unnecessary where the Constitution demands a creative role for the federal courts. The Constitution, however, is not explicit on this question.¹⁵⁴ Therefore, in order to divine the law-making role of the federal courts in the constitutional plan, the logic of the system created by the Constitution must be examined.

Since the general rule is that Congress must authorize national law-making, federal common law is proper either when congressionally authorized or when the reasons for the general rule are not present or are outweighed by other considerations.¹⁵⁵ The reasons for the general rule are primarily considerations of federalism and secondarily considerations of the separation of

148. *Id.* at 366-67. The Supreme Court in *Clearfield* did not cite the need for uniformity as a reason for finding law-making competence in the federal courts. Rather, once that law-making competence was established, the need for uniformity was a reason for creating a nationwide federal rule rather than adopting existing state rules. *Id.* at 367. *See infra* note 174.

149. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

150. *Id.* at 426-27.

151. *Texas Industries*, 451 U.S. at 641 (footnotes omitted). In *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966), the Supreme Court said: "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown." *Id.* at 68.

152. *Wallis*, 384 U.S. at 68; *see also* Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967); Note, *supra* note 123; Mishkin, *supra* note 123, at 799-800, 800 n.15.

153. *See* Hill, *supra* note 152; Comment, *supra* note 149, at 330-37; *see also* Edwards, *The Erie Doctrine in Foreign Affairs Cases*, 42 N.Y.U. L. REV. 674, 682-88 (1967).

154. *See supra* notes 134-135 and accompanying text.

155. For a similar analysis, *see* Note, *supra* note 127, at 1517.

powers.¹⁵⁶ The inner logic of our federal scheme, as well as practical advantages, normally favor state law as the basic source of governing legal rules.¹⁵⁷ A supervening federal rule normally requires special justification.¹⁵⁸ Our political structure insulates the federal judiciary from political responsibility but "gives the states per se very significant power in the Congress."¹⁵⁹ Therefore, the discretionary decision to displace state law by enacting a federal rule should be made "not by the federal judiciary . . . but by the people through their elected representatives in Congress."¹⁶⁰ Congress' political responsibility may also lead to separation of powers considerations in favor of the general rule that Congress should be the initiator of federal policy-making.¹⁶¹

The considerations of federal-state relations that support the general rule are absent or carry less weight in areas where state legal rules are lacking,¹⁶² where state law-making competence does not exist,¹⁶³ where local experimentation and local solutions are undesirable,¹⁶⁴ or where the concept of national sovereignty demands a national solution.¹⁶⁵ Similarly, separation of powers considerations apply with less force than otherwise in many situations: where Congress has not been explicitly granted legislative power;¹⁶⁶ where legislative and executive branch solutions alone are incapable of solving a problem;¹⁶⁷ where an issue arising in a court proceeding by its nature cannot be

156. See Note, *supra* note 123, at 1085; cf. Mishkin, *supra* note 123, at 800 n.12 (maintaining that separation of power concerns also are important). The author discusses considerations of the separation of powers, *infra* notes 161, 166-175 and accompanying text.

157. Note, *supra* note 127, at 1517-18; see also Wechsler, *supra* note 131, at 545-46.

158. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.6 (1981) (quoting Hart, *supra* note 135, at 497).

159. Mishkin, *supra* note 123, at 800 n.12.

160. *City of Milwaukee*, 451 U.S. at 312-13; see Wechsler, *supra* note 131.

161. Separation of powers considerations are, in part, derivative of considerations of federal-state relations. Interference with the congressional role as the preemptor of state law is not an independent separation of powers consideration. Evidence of this principle is the boldness of the federal judiciary in areas where state action is excluded by the Constitution. See *supra* note 130. Thus, where there has been no possibility of treading on state toes, the Supreme Court has not hesitated to establish court-made standards.

The Article III grant of "judicial power" to the federal courts suggests that the position of the federal judiciary with respect to Congress is substantially the same as the position of any common law court vis-a-vis its corresponding legislative body. The crucial distinction is the respect for state policies and laws demanded by our federal system. See Note, *supra* note 127, at 1515-16; Hill, *supra* note 152. This is not to suggest that certain issues are not by nature more appropriate for presidential or congressional resolution, completely aside from questions of federal-state relations.

162. Admiralty is an example of an area where state legal rules and state authority were originally lacking. HART & WECHSLER, *supra* note 127, at 15.

163. See Note, *supra* note 123, at 1089.

164. This would be the case in the area of foreign affairs. See Note, *supra* note 127, at 1521.

165. This notion overlaps with the previous one. Interstate disputes provide an example of the need for a national solution. See Note, *supra* note 127, at 1519-21.

166. An example is the national power to create admiralty law. Congressional legislative power is derived from the grant of admiralty jurisdiction to the federal courts in Article III of the Constitution. HART & WECHSLER, *supra* note 127, at 786.

167. See Hill, *supra* note 152, at 1049-56; Mishkin, *supra* note 123, at 800.

left for presidential or congressional decision;¹⁶⁸ where federal court law-making is necessary to preserve a question for decision by Congress or the executive branch,¹⁶⁹ where court action will not as a practical matter remove a question from the reach of the other branches of government.¹⁷⁰

Some of the circumstances that diminish the force of federalism and separation of powers concerns may also, if extreme enough, justify overriding such considerations altogether. An additional reason for overriding federalism and separation of powers concerns is the protection and advancement of federal policies.¹⁷¹ In some circumstances, judicial creativity is necessary to achieve constitutionally determined national purposes.¹⁷² Federal judges will be more likely than state judges to consider and sympathize with federal policies.¹⁷³ Finally, a strong need for a uniform national rule can also justify overriding considerations of federal-state relations¹⁷⁴ when federal common law could realistically achieve such uniformity.¹⁷⁵

Once it is established that the federal courts have competence to declare the governing law on a given issue, they may in their discretion choose to adopt state law as the federal rule,¹⁷⁶ rather than impose a single, nationwide substantive federal rule.¹⁷⁷ Incorporating state law by choice allows much more flexibility than applying state law under the compulsion of the *Erie* doctrine.¹⁷⁸ The incorporation of state law may be desirable when that law plays an important role in an area of federal policy.¹⁷⁹ In areas where state law-making competence does not exist, where state law is absent or undesirable, or where the competence to create federal legal rules is based on a need for uniformity, the question of incorporating state law obviously does not arise.

168. *Forum non conveniens* and sovereign immunity are examples of such issues. See Hill, *supra* note 152, at 1049–55, 1067.

169. For example, when irreversible action on an issue is imminent, an injunction may be necessary to preserve the opportunity for meaningful resolution by the political branches. But see *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), in which the Supreme Court held that the substantive legal question, the United States' right to recover damages for an injury to a U.S. soldier, must be governed by federal law. The Court then refused to declare the content of the federal rule, saying that it was a matter for Congress to decide.

170. Although Congress or the President acting within their powers may theoretically override court-made rules that are not constitutionally grounded, some judicial decisions may have irreversible effects on the parties to the litigation. For example, a judicial order releasing funds from the country may make recovery of those funds impossible.

171. See Note, *supra* note 127, at 1527–29.

172. See Hill, *supra* note 152, at 1049–56.

173. See Note, *supra* note 127, at 1528.

174. However, the need for uniformity is a frequently misused reason for creating federal common law. First, the need for uniformity is often overstated. See Mishkin, *supra* note 123, at 814, 830–32; Note, *supra* note 127, at 1529–31. Second, although in some cases uniformity is indeed a valid goal, it cannot always be realistically achieved through federal common law rules. See Mishkin, *supra* note 123, at 820–23, 831–32; Note, *supra* note 127, at 1530–31.

175. Note, *supra* note 127, at 1529–31.

176. See *Clearfield Trust Co.*, 318 U.S. at 367; Mishkin, *supra* note 123, at 802.

177. See Mishkin, *supra* note 123, at 810–14.

178. See *id.* at 803–10.

179. See *id.* at 810–12.

D. Federal Common Law in Foreign Affairs

1. Federal Power Over Foreign Relations

The federal government has exclusive power in the area of foreign relations.¹⁸⁰ The framers of the Constitution agreed that the states should have no part in ordering relations with foreign nations.¹⁸¹ Provisions in the Constitution confer various powers relating to foreign affairs on the branches of the federal government.¹⁸² According to the Supreme Court, these provisions (as well as statutory ones) demonstrate "a concern for uniformity in the country's dealings with foreign nations and . . . a desire to give matters of international significance to the jurisdiction of federal institutions."¹⁸³ The Constitution is not more specific only because "the power to deal with foreign affairs is implied by the very act of constituting a sovereign nation."¹⁸⁴ In fact, the establishment of national sovereignty was "in large measure, if not primarily, for the purpose of receiving an *exclusive* competence in [the realm of foreign affairs]."¹⁸⁵ The Supreme Court has strongly affirmed these views on several occasions.¹⁸⁶

2. Banco Nacional de Cuba v. Sabbatino: An Enclave of Federal Common Law

In *Banco Nacional de Cuba v. Sabbatino*,¹⁸⁷ the Supreme Court declared the power of the federal courts to create federal rules on matters affecting foreign relations. The *Sabbatino* case involved a decree of the Cuban government nationalizing a shipment of sugar in Cuba at the time of the decree. Banco Nacional de Cuba, an agency of the Cuban government, sued in federal district court in New York to recover the proceeds from the sale of the sugar, which were being held in New York by a receiver appointed by a New York court.¹⁸⁸ The district court and the court of appeals held for the defendant on the ground that the Cuban expropriation decree violated international law and therefore failed to vest good title in Cuba.¹⁸⁹ The Supreme

180. See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

181. HART & WECHSLER, *supra* note 127, at 15-16; see THE FEDERALIST No. 3, at 22 (Jay) (1 Bourne ed. 1914); THE FEDERALIST No. 80, at 112-13 (Hamilton) (2 Bourne ed. 1914).

182. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); U.S. CONST. art. II, §§ 2, 3 (Powers of the President, Duties of the President); U.S. CONST. art. III, § 2 (Jurisdiction of the United States Courts).

183. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1963).

184. Note, *supra* note 127, at 1521 (citing mention of analogous areas of law, as recognized by Hamilton).

185. Hill, *supra* note 152, at 1046.

186. See *United States v. Pink*, 315 U.S. 203, 233-34 (1942); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937); *Curtiss-Wright*, 299 U.S. at 318; *Zschernig v. Miller*, 389 U.S. 429, 432, 440-41 (1968); *Perez v. Brownell*, 356 U.S. 44, 57 (1958) (*overruled on other grounds*, *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967)); *Hines v. Davidowitz*, 312 U.S. 52, 62-63, 66 (1941).

187. 376 U.S. 398 (1964).

188. *Id.* at 401-06.

189. *Id.* at 406-07.

Court reversed, holding as a matter of federal common law¹⁹⁰ that the Act of State doctrine¹⁹¹ precludes courts from judging the validity of acts of a foreign government nationalizing property located within its territory.¹⁹²

The *Sabbatino* holding has significance on two levels. First, federal common law should control the scope of the Act of State doctrine, that is, whether or to what extent a court may examine an act of a foreign sovereign under international law. Second, the Act of State doctrine is applicable to decrees of a recognized foreign government taking property within its territory; thus, a court may not examine such decrees, even if violations of international law are alleged.

In reaching the first conclusion, the Court used broad language indicating that federal courts may fashion the governing law on matters affecting the relations of the United States with foreign nations and that this law is binding on state courts.¹⁹³ The Court drew an analogy to the enclave of federal judge-made law governing interstate disputes: "the problems surrounding the act of state doctrine are . . . as intrinsically federal as are those involved in water apportionment or boundary disputes." Therefore, the Court concluded, the scope of the doctrine is exclusively a matter of federal law.¹⁹⁴ The Court's rationale for determining the scope of the Act of State doctrine under federal common law was ambiguous. It was not clear whether the decisive factor demanding the application of federal law to the scope of the Act of State doctrine was that the doctrine affected foreign relations or that it concerned the division of powers between the courts and the executive branch in the federal system (or both).¹⁹⁵ The Court apparently did decide that international relations should be a new enclave of federal common law, relying on a short article¹⁹⁶ suggesting that *Erie* should not be applied to rules of

190. *Id.* at 427.

191. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Sabbatino*, 376 U.S. at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

192. *Sabbatino*, 376 U.S. at 428.

193. *Id.* at 431.

194. *Id.* at 427.

195. "However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Id.* at 425 (footnote omitted).

196. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

international law.¹⁹⁷ However, because of the ambiguity in the Court's reasoning, the decision to apply federal common law to matters affecting foreign relations may be viewed as dicta.¹⁹⁸

After deciding to apply federal law, the Court proceeded to consider the second level of its opinion — the proper role of the judiciary in examining acts of foreign states. The Court's discussion can be read to indicate a limited law-making role for the courts on questions of international law that are sensitive or controversial.¹⁹⁹ However, the Court had already decided, on the first level of its opinion, to apply federal court-made law to a broad policy question in the realm of foreign affairs. The language indicating that sensitive issues are better left to the political branches concerned the content of the federal common law rule, not whether federal courts may create such a rule. Thus, this language should not be read to preclude the federal courts from displacing state law on even sensitive issues of foreign relations; rather it argues that the appropriate *federal* judge-made rule should in some circumstances be a rule of deference to the federal political branches.

In fact, in *Sabbatino*, this deference was not an instance of judicial non-intervention or abstention but a broad policy decision by the Court in the area of foreign affairs: the validity of expropriations of a foreign government within its territory may not be contested in private litigation in state and federal courts, and state and federal courts must affirmatively enforce such expropriations.²⁰⁰ Thus, the Court's argument that sensitive questions of international law should be left to the federal political branches was actually support for a policy decision by the Court on a very sensitive matter of foreign relations.²⁰¹ The conclusion to be drawn is that the federal courts cannot leave matters affecting foreign relations to state law, even if their sensitive or controversial nature makes them more appropriate for resolution by the political branches than by the courts.

Federal courts must be free to declare the law on matters affecting foreign affairs so that they can protect or advance national interests. They can fulfill this role in two ways. First, when deference to the political branches would avoid friction in sensitive areas, the federal courts can defer. Second,

197. *Sabbatino*, 376 U.S. at 425. The Court's footnote 25 also provided support for federalizing foreign relations: "Various constitutional and statutory provisions indirectly support this determination, U.S. CONST. art. I, § 8, cls. 3, 10; art. II, §§ 2, 3; art. III, § 2; 28 U.S.C. §§ 1251 (a)(2), (b)(1), (b)(3), 1332(a)(2), 1333, 1350, 1351, by reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions . . ." *Id.* at 427 n.25.

This footnote was appended to the Court's concluding statement that federal law governs the scope of the act of state doctrine. It is thus strong evidence that the Court based its decision to apply federal law on the federal affairs aspect of the act of state doctrine.

198. See Hill, *supra* note 152, at 1046, 1066.

199. *Sabbatino*, 376 U.S. at 428.

200. See Edwards, *supra* note 153, at 678, 686.

201. "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." *Sabbatino*, 376 U.S. at 430.

when judicial development of rules is helpful or necessary, the courts can fashion substantive legal rules.²⁰² The decision whether to defer to the political branches should be made under federal court-made law in the absence of an applicable federal statute, treaty, or judicially cognizable executive policy.

3. *An Analysis of Federal Common Law for Cases Affecting Foreign Relations*

Commentators have generally read *Sabbatino* broadly as creating a new enclave of federal common law for matters affecting foreign relations.²⁰³ Several analyses have been proposed to justify this new enclave.²⁰⁴ Matters affecting foreign relations are appropriately governed by federal common law since, with respect to such matters, the reasons for the requirement of congressional authorization prior to judicial lawmaking are often absent or weak. The Supreme Court has recently confirmed, citing *Sabbatino*, that it views "international disputes implicating . . . our relations with foreign nations" as one of the areas of federal common law.²⁰⁵

Because the federal government has exclusive law-making power in this area and state laws affecting foreign relations are rare, the risk of displacing state law or overriding state policies is low.²⁰⁶ Moreover, the reasons normally favoring state law are absent, since "[t]he inner logic of federalism does not require state solutions to problems which affect each state alike and affect the nation as a whole more than any particular state [and since] [e]xperimentation and varying local solutions are positively undesirable."²⁰⁷

Although for reasons of the separation of powers some issues are best left by the federal courts to the political branches, such reasons are unconvincing

202. See Hill, *supra* note 152, at 1066–67. See *infra* notes 210–216 and accompanying text.

203. See HART & WECHSLER, *supra* note 127, at 806; Hill, *supra* note 152, at 1046, 1065–68; Note, *supra* note 127, at 1520; Comment, *supra* note 123, at 326–27; Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 817–19 (1964); see also Friendly, *supra* note 123, at 408 n.119; Edwards, *supra* note 153, at 674, 690 (criticizing *Sabbatino* and proposing an alternative rationale for the federal judiciary's exercise of control in the area of foreign relations analogous to the Court's use of the Commerce Clause to control state laws burdening interstate commerce: the Constitution's grant of foreign affairs powers to the federal government (see *supra* note 197) could be interpreted as giving the federal courts power to fashion governing federal law when the application of state law would interfere with foreign relations).

204. See, e.g., Hill, *supra* note 152, at 1042–68; Note, *supra* note 127, at 1512–21; Comment, *supra* note 123, at 326–37; see also Edwards, *supra* note 153, at 690. See *supra* note 203 for a parenthetical description of an alternative rationale.

205. *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (footnote omitted).

206. See Note, *supra* note 127, at 1521.

207. Note, *supra* note 127, at 1521 (footnote omitted) (the footnote reads: "Cf. *Zschernig v. Miller*, 389 U.S. 429 (1968) . . . (holding unconstitutional a state statute based on foreign policy considerations as an intrusion on exclusive federal domain).").

in many situations.²⁰⁸ First, the lack of specificity in the Constitution concerning the distribution of power over foreign affairs tends to weaken arguments for exclusivity in the political branches.²⁰⁹ Second, when issues arise in litigation, the decision whether to defer to the political branches must be made by a court under court-made rules in the absence of a specific command from the other branches. In this situation, apparent deference by the federal courts would in fact leave the decision to state judge-made law. This would be inappropriate since federal judges will be more likely than state judges to take into account federal policies in fashioning rules for deciding whether to defer to the political branches. Next, in order to carry out the purpose of the exclusive grant of power over foreign relations to the federal government, judicial creativity at the federal level may be necessary.²¹⁰ Congressional solutions are limited by political pressures, time, and foresight (and, in some areas, interest). Perhaps more importantly, Congress lacks the institutional ability to provide the flexible case-by-case development often needed in the field of international relations.²¹¹ The President also needs the help of a creative judiciary in the area of foreign relations in order to maintain flexible national foreign policy. The limits of his own competence in the area are uncertain; court decisions can allow the president freedom to avoid committing himself to a position and can be helpful in developing solutions to difficult foreign policy problems.²¹² Furthermore, many issues arise in court that have not received prior executive or legislative resolution.²¹³ When this occurs, judicial creativity is often needed to advance or protect federal interests. Allowing state law to govern the decision or, when possible, refusing to decide the question may result in harm to national policies or interests. The

208. It is important to note that separation of powers considerations are intertwined with questions of federal-state relations. When the political branches have not acted, deference to them will often result in state law governing by default. As a result, the decision whether to defer to another branch of the government must take into account the appropriateness of allowing state law to govern.

209. "The framers of the Constitution were in accord that the United States must speak with one voice in the area of foreign relations and established the federal judiciary as the supreme judicial authority in such matters." *The Supreme Court 1963 Term*, 78 HARV. L. REV. 143, 304 (1964) (footnote omitted). "The use of judicial techniques for international purposes is an attribute of sovereignty, and the question is whether there should be attributed to the framers of the Constitution an intention to deny this attribute to our own national government." Hill, *supra* note 152, at 1054; see also Note, *supra* note 123, at 1086 (lack of direct delegation of authority to Congress supports the application of federal common law to admiralty and interstate disputes).

210. See Hill, *supra* note 152, at 1046-56.

211. See *id.* at 1049-50; Mishkin, *supra* note 123, at 800. Treaties suffer from the same lack of flexibility. See Hill, *supra* note 152, at 1049.

212. See Hill, *supra* note 152, at 1049-54.

213. Some issues cannot be avoided, such as *forum non conveniens* and sovereign immunity issues, since a court refusal to decide such an issue is a decision in favor of one party to the litigation. Moreover, although it is possible to avoid judicial decision of some issues, effective intervention by the political branches often will not be a realistic possibility. When such is the case, judicial avoidance will defeat the purposes of the national power over foreign affairs. See *id.* at 1049-56, 1067.

need for uniformity in matters affecting foreign affairs²¹⁴ is also a factor in overcoming separation of powers considerations. It is a "fundamental requirement of a federal union . . . that it be able to act in a unified fashion, as a nation, when it faces abroad."²¹⁵ This requirement cannot always be fulfilled without federal judicial law-making competence over matters affecting foreign affairs because, as discussed above, deference to the political branches will often destroy uniformity by allowing state law to govern.

Of course, aside from judge-made rules that are constitutional interpretations, federal judge-made law in the area of foreign relations may be superseded by Congress or the President acting within constitutional limits.²¹⁶

III FEDERAL COMMON LAW FOR INTERNATIONAL *FORUM NON CONVENIENS* ISSUES

The Supreme Court has never decided the question whether federal courts must apply state *forum non conveniens* law when the underlying cause of action is based on state law.²¹⁷ The Court has asserted in each case that it was unnecessary to decide the *Erie* question because the *forum non conveniens* law of the relevant state would produce the same result as the federal *forum non conveniens* law.²¹⁸ The Court has then proceeded to develop and

214. See *Sabbatino*, 376 U.S. at 427 n.25.

215. Note, *supra* note 127, at 1520.

216. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 314-15, 315 n.8 (1981); *New Jersey v. New York*, 283 U.S. 336, 348 (1931); Hill, *supra* note 152, at 1056, 1068.

217. *Piper*, 454 U.S. at 248 n.13; see *Reyno*, 630 F.2d at 157, 157 n.17. The few federal courts that have faced the question have decided that *Erie* does not require the application of state law. *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985). An action was brought in Florida by Costa Rican workers against two U.S. manufacturers for injuries caused in Costa Rica by pesticides. *Id.* at 1216. The Eleventh Circuit upheld the district court's application of federal *forum non conveniens* law to dismiss the action. *Id.* at 1219. Florida *forum non conveniens* law would have precluded a *forum non conveniens* dismissal. *Id.* at 1217. The Eleventh Circuit characterized the *forum non conveniens* doctrine as "a rule of venue, not a rule of decision." *Id.* at 1219. Because "a trial court only reaches a state rule of decision . . . once it has decided to try the case," the *forum non conveniens* decision occurs "before, and completely apart from, any application of state substantive law." *Id.* at 1219. The Court concluded that *Erie* did not require the application of state *forum non conveniens* law in *Sibaja*. The Court's reasoning is more conclusory than explanatory. Perhaps a foreign relations rationale would provide a clearer ground for decision. See *Reyno*, 630 F.2d at 158 n.19; see also *Lapides v. Doner*, 248 F. Supp. 883, 885-94 (1965) (calling the *forum non conveniens* decision preliminary to the application of substantive law and therefore part of the procedural rules of federal courts).

218. *Piper*, 454 U.S. at 248 n.13. The Supreme Court relied on the conclusion of the Third Circuit that Pennsylvania and California *forum non conveniens* law were virtually identical to federal law. 454 U.S. at 248 n.13, citing *Reyno* 630 F.2d at 158. Then the Supreme Court reversed the Third Circuit's pronouncements of federal *forum non conveniens* law on both crucial points. *Piper*, 454 U.S. at 261. If the Supreme Court thought that the Third Circuit was incorrect as to the federal law, then it is difficult to understand how the Supreme Court could rely on the Third Circuit's finding that federal and state law were identical.

The Supreme Court had previously avoided this *Erie* question. *Gilbert*, 330 U.S. at 509; *Koster*, 330 U.S. at 529; *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 551, 558-59 (1946). For criticism of the Court's avoidance of the *Erie* question in *Gilbert* and *Koster*, see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 928 (1947).

apply federal *forum non conveniens* law, ignoring state case and statutory law.²¹⁹ Most lower federal courts have followed federal *forum non conveniens* cases without attempting to decide the *Erie* question.²²⁰ Cases in federal court in which the alternative forum is another federal court are now controlled by Section 1404(a).²²¹ In international cases, ones in which the alternative forum presupposed by the *forum non conveniens* doctrine is in a foreign nation,²²² the question of the proper source of *forum non conveniens* law must be decided.

A. *The Effect of Forum Non Conveniens Decisions on Foreign Relations*

The decision to grant or deny a motion to dismiss on the ground of *forum non conveniens* in an international case will often affect the relations of the United States with foreign nations. Interests of foreign nations, as well as of the United States, may be promoted or harmed by that decision. Various sovereign interests may be implicated, depending on such factors as the citizenship or residence of the parties and others affected by the outcome, the location of the conduct and the resulting damage leading to the litigation, and the nature of the substantive issues.

1. *Potential Foreign Affairs Interests in Specific Factual Situations*

The effect on foreign relations obviously will vary greatly in different situations involving different nations at different times. The following discussion examines the interests of foreign nations and the United States that may be present in four factual variations of international litigation: (a) all parties are foreign; (b) the plaintiff is foreign, and the defendant is a U.S. citizen; (c) the plaintiff is a U.S. citizen, and the defendant is foreign; and (d) the transaction or occurrence took place in a foreign nation. In each setting, the discussion considers why it may be in the interest of the United States because of foreign relations considerations to provide or deny a U.S. forum. The case for creating a federal common law of *forum non conveniens* may depend on the nature of the interests involved in a particular situation.

219. See, e.g., *Piper*, 454 U.S. 235; *Gilbert*, 330 U.S. 501.

220. *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 434 n.13 (D.C. Cir. 1976); see, e.g., *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608 (6th Cir. 1984); *In re Union Carbide Gas Plant Disaster at Bhopal, India* in December 1984, MDL No. 626, Misc. No. 21-38 (S.D.N.Y. May 12, 1986); *In re Disaster at Riyadh Airport, Saudi Arabia* on August 19, 1980, 540 F. Supp. 1141 (D.D.C. 1982).

221. The question whether section 1404(a) should be applied to a suit based on a state law cause of action is not difficult to decide. Congress has enacted a statutory *forum non conveniens* rule for the federal courts based on the federal interest in uniform, convenient venue rules for all federal courts; thus, when applicable, section 1404(a) preempts *forum non conveniens* law, federal or state, in *all* suits in federal courts. See *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958).

222. This will be the definition of an international case throughout the discussion. The possibility of an alternative forum in a foreign nation arises when one or more parties are residents or citizens of foreign nations or when the incident or transaction on which the suit is based took place in a foreign nation.

a. *All Parties Foreign.*

Where both the plaintiff and the defendant are citizens or residents of foreign nations,²²³ good relations with these nations may in some circumstances be achieved by providing a U.S. forum to (1) uphold the interests of the nations in a neutral U.S. forum; (2) honor informal agreements of the United States to provide access to U.S. courts;²²⁴ or (3) uphold the interest of one foreign nation in having U.S. law applied to its citizen's dispute with the citizen of another nation.

In other circumstances, foreign relations may best be promoted by denying a forum in order to uphold the interests of a foreign nation²²⁵ in (1) "having localized controversies decided at home";²²⁶ (2) preventing a damage recovery in an amount or form²²⁷ repugnant to its laws; (3) preventing the

223. For the sake of simplicity, the discussion will treat each case as though there were only one plaintiff and one defendant. The analysis of the sovereign interests involved would be the same in cases with multiple parties.

The forum's inability to obtain jurisdiction over potential third party defendants may be an important factor in a *forum non conveniens* decision. See, e.g., *Piper*, 454 U.S. at 260. The discussion does not include the potential third party defendant factor because that aspect of *forum non conveniens* law involves considerations of complete justice among the parties and potential parties, as well as considerations of judicial economy, rather than considerations particular to international relations.

224. If there is a treaty obligation to provide access to U.S. courts, it binds the states under the Supremacy Clause even if federal *forum non conveniens* law is not binding on the states.

225. See *The Belgenland*, 114 U.S. 355 (1885). There the Supreme Court said:

For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies [sic] between foreigners in cases not arising in the country of the forum; . . . and the consent of [foreign seamen's] counsel or minister is frequently required before the court will proceed to entertain jurisdiction — not on the ground that it has not jurisdiction, but that, from motives of convenience, or international comity, it will use its discretion whether to exercise jurisdiction or not . . .

Id. at 364.

226. *Piper*, 454 U.S. at 260 (quoting *Gilbert*, 330 U.S. at 509); see, e.g., *Lauritzen v. Larsen*, 345 U.S. 571 (1953). In *Lauritzen*, the Supreme Court refused to allow a Jones Act suit by a Danish seaman injured in a Cuban harbor aboard a Danish ship. *Id.* at 573. The issue was treated as one of statutory construction of the Jones Act. See 46 U.S.C. § 688 (1976). The Court reasoned that the "allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law." 345 U.S. at 575. The Court also relied on a rule of international law that "one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory." *Id.* at 578 (quoting *The Queen v. Jameson*, 2 Q.B. 425, 430 (1896)). Finally, in response to the plaintiff-respondent's arguments that service of process on the defendant was enough to justify the application of American law, the Court drew an analogy to *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934), and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930): "We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a foreign state." *Lauritzen*, 345 U.S. at 590-91.

227. The traditional U.S. practice in personal injury cases of granting lump sum damage awards, not subject to later modification, may be contrary to the public policy of other nations. For example, in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120 (1903), the applicable Mexican law provided for a remedy of "periodical payments . . . subject to modification from time to time as the circumstances change." *Id.* at 128. The Supreme Court assumed, without explanation, that a common law court had no power to grant such a remedy. *Id.* Instead of upholding the lump

evasion of its laws by its citizens or residents;²²⁸ or (4) deterring its manufacturers from producing unsafe products.

b. Foreign Plaintiff, U.S. Defendant.

Where a foreign plaintiff is suing a U.S. defendant, good foreign relations may be fostered by respecting the interest of a foreign nation in its citizens' being able to sue, in a U.S. forum, U.S. manufacturers whose products have caused injury. Providing a forum may also help deter U.S. manufacturers from producing unsafe products. Since the substantive U.S. product liability law is state law, it could be argued that deterrence is a state rather than a federal interest. It should be recognized, however, that a strong federal interest exists in maintaining a favorable international reputation for U.S. exports. Denying a forum to foreign citizens injured by U.S. products could tarnish the reputation of the United States and impair U.S. trade relations.²²⁹

Conversely, considerations of foreign relations may favor denying a U.S. forum. First, foreign nations have an interest in hearing controversies involving local issues at home.²³⁰ It may be unwise foreign policy to take substantive legal decisions away from the courts of a foreign nation. Second, the foreign nation may have an interest in applying its own law to matters of local concern. Even if a U.S. court would apply the law of the foreign nation, that nation may have an interest in not having a U.S. court decide how its law should be interpreted. A related foreign policy concern is that U.S. courts risk harming relations with foreign nations by deciding the adequacy of foreign laws. Thus, in some circumstances, it may be best for foreign relations to grant a *forum non conveniens* motion rather than judge the adequacy of foreign law.

The foreign nation may have a far greater interest in the outcome of the litigation than does the United States. Even if the decision of the case in the

sum recovery awarded in the trial court, however, the Supreme Court affirmed the order of the circuit court of appeals that the action be dismissed. *Id.* at 131. Rather than grant a lump sum recovery contrary to the policy of Mexico, the Supreme Court preferred to dismiss the case. *Id.* at 127-29. The Court did not explicitly rely on a foreign affairs policy of respect for the policy of foreign nations; the holding was grounded on the traditional choice of law rule that the law that is the source of the obligation must determine its extent as well. A federal foreign relations policy could provide a modern rationale for a decision to deny a U.S. forum in a case where a U.S. court is incapable of providing the style of remedy required by the policy of a foreign nation.

228. *See, e.g.,* *Hutchison v. Ross*, 262 N.Y. 381, 187 N.E. 65 (1933).

229. *But see In re Union Carbide Corp. Disaster at Bhopal, India* in December 1984, MDL No. 626, Misc. No. 21-38 (S.D.N.Y. May 12, 1986) (rejecting a U.S. interest in deterring multinationals from exporting allegedly dangerous technology in favor of an Indian interest in creating standards of care and protecting its citizens).

230. The Supreme Court reached this result in *Piper*. *See also* the discussion of *Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960), *infra* notes 301-305 and accompanying text. Although the Union of India in the *Bhopal* case argued that its interest was identical to the plaintiffs' interest, the U.S. court disagreed. *See infra* note 301. *In re Union Carbide Gas Plant Disaster At Bhopal, India* in December 1984, MDL No. 626, Misc. No. 21-38 (S.D.N.Y. May 12, 1986).

courts of the foreign nation will likely result in a lesser recovery for the foreign plaintiff, the foreign nation still may have a strong interest in deciding its own controversy at home. The interests of a foreign plaintiff and those of his nation are not always the same.²³¹ Moreover, it is not always clear before trial which nation's law will be more to the plaintiff's benefit. A nation's law includes its choice of law rules, and, before trial, it may difficult to determine what substantive law will be applied to the issues in the case by the courts of each nation. Also, the law of the United States may be more favorable to one side on some issues and to the other side on others. It is too simplistic to assume that it is always in the best interest of a foreign nation for a plaintiff from that nation to be permitted to sue in a U.S. court (which he has chosen presumably because he thinks his chances of recovery are better there than in the alternative forum).

c. U.S. Plaintiff, Foreign Defendant.

There is an obvious U.S. interest in providing a U.S. plaintiff with a forum in his home country, even when the defendant is foreign. State law is not likely to deny a forum in this situation, and, if it does so, it is more a general problem of federal-state relations than a foreign relations problem.

A federal-state conflict is more likely to arise when it is best for foreign relations to deny the plaintiff a U.S. forum, for example, to uphold the interests of a foreign nation in deciding local controversies at home and in giving its citizen or resident defendants the protection of its laws.

d. Foreign Locus.

If the case arises out of a foreign transaction or occurrence and the parties are U.S. citizens, providing a home forum may benefit relations with foreign nations by deterring U.S. citizens from engaging in harm-causing behavior abroad, by demonstrating U.S. disapproval of such behavior and willingness to uphold foreign laws, and by relieving a foreign nation of the burden of providing a forum for a controversy solely between U.S. litigants. It is rare, however, for state law to deny a forum to a suit between U.S.

231. Government interests are used herein in a broader sense than that used by Brainerd Currie in his interest analysis theory of choice of law. See, eg., Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). In a discussion of *forum non conveniens* law, any way in which the relations of a foreign nation with the United States may be affected is appropriately considered an interest of that nation. Laws express policies of the nation that enacts them. Whenever the policies underlying a nation's laws are applicable, that nation has interests in enforcing those laws, deciding cases under them, preventing avoidance of them, having them applied by its own courts rather than the courts of other nations, and not having other nations make judgments on the adequacy of its laws. Under the present analysis, those policies are applicable in many situations notwithstanding the fact that no party who is a resident or citizen of the nation will be directly benefited by the application of the nation's laws. The notion of government interests thus embraces the sensitivities and dignity of a nation. Currie's restatement of his view of government interests is closer to this notion than his original use of the term. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

litigants. As in the case involving a U.S. plaintiff and a foreign defendant, such a denial is not a problem unique to the area of foreign relations.

Conversely, deciding a foreign-based controversy in a U.S. court may offend a foreign nation's dignity because of its notions of territoriality. The best foreign relations policy may be to honor a foreign nation's desire to determine controversies and control behavior occurring within its borders. If a U.S. court enforces an agreement made in a foreign nation that is illegal under that nation's laws, those laws have been evaded. It is a valid foreign relations goal to prevent this infringement of a foreign nation's sovereignty by denying a U.S. forum in such cases.²³²

2. *The Need for Federal Control Over State Court Forum Non Conveniens Decisions in International Cases*

These potential foreign affairs interests in diverse factual situations serve to illustrate that foreign relations may be affected by international *forum non conveniens* decisions regardless of whether the forum is a state or federal court. Therefore, federal control over state court *forum non conveniens* decisions is necessary in some international cases.

When U.S. relations with foreign nations would be benefited by the denial of a U.S. forum, the purpose of granting a *forum non conveniens* motion in federal courts can be defeated if state courts are free to provide a forum. For example, the federal government might decide that foreign relations would be best served by a situs choice of forum rule for international aircraft disasters, i.e., by requiring all lawsuits arising out of a crash to be filed in the jurisdiction where the crash had occurred. If state courts were free to entertain such suits, ignoring the situs rule, the federal policy would be undermined.

The same is true when the U.S. foreign policy is to provide a U.S. forum, although the risk is less because diversity of citizenship jurisdiction in the federal courts is often available even if a state court grants a *forum non conveniens* motion.²³³ Even when diversity jurisdiction is available, however, the state court's *forum non conveniens* dismissal may still harm foreign relations. First, the grounds for dismissal may include the state court's judgment that the foreign nation's legal system or substantive law is inadequate.²³⁴ Second, a dismissal of a suit by a foreign citizen will result in expense, inconvenience, and delay, and a subsequent suit in federal court may be less advantageous to the foreign plaintiff. Finally, from a foreign nation's perspective, distinctions between federal and state courts are not relevant; the decision of any U.S.

232. See *Perez*, 356 U.S. at 57.

233. 28 U.S.C. § 1332 (1964) "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds \$10,000 . . . and is between — . . . (2) citizens of a State, and foreign states or subjects thereof; . . ."

234. In *Piper*, the court observed: "[t]he District Court . . . reasoned that . . . any deficiency in the foreign law was a 'matter to be dealt with in the foreign forum.'" *Piper*, 454 U.S. at 244 (quoting *Piper*, 479 F. Supp. at 738).

court, federal or state, is likely to be regarded as representative of the policies of the United States. Thus, even if federal *forum non conveniens* rules designed to promote foreign relations policies govern in all suits in federal courts, state courts will be able to undermine those policies by diverging from the federal rules.

Unless federal *forum non conveniens* rules are made binding on state courts, it is likely the states' *forum non conveniens* rules will depart from the federal rules. Many state courts do not follow the federal *forum non conveniens* cases.²³⁵ While state *forum non conveniens* rules have been developed primarily in domestic cases, these rules tend to be mechanically applied in international cases.²³⁶ Moreover, most state courts will probably not develop special rules for international cases for the simple reason that few international cases will be heard in those courts. First, in many international cases, diversity jurisdiction makes the federal courts available if either side prefers them to state courts.²³⁷ Second, those international cases that are heard in state courts are spread among fifty state jurisdictions, with a few states receiving the bulk of the cases. State judges are unaccustomed to taking foreign relations into account since that area is not normally implicated by state laws. State judges are also less likely to be familiar with federal policies than are federal judges.²³⁸ Finally, state *forum non conveniens* rules may advance state policies at the expense of foreign relations.²³⁹

The United States must be able to speak with one voice on matters affecting foreign affairs. A consistent and effective federal foreign affairs regime therefore necessitates federal power to control the *forum non conveniens* decisions of state courts whenever foreign relations may be affected.²⁴⁰

235. See *supra* notes 84–118 and accompanying text.

236. An example is the rule giving the plaintiff's choice of forum great weight. This rule has been applied in California in cases where the plaintiff is a foreign resident. See *Holmes v. Syntex Laboratories, Inc.*, 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984). See also *supra* notes 84–105 and accompanying text.

237. See *supra* note 233.

238. Note, *supra* note 127, at 1528 (citing AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 40–41, 43 (Tent. Draft No. 4 (1966))).

239. *Sabbatino*, 376 U.S. at 425: “[Jessup] cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.” See also HART & WECHSLER, *supra* note 120, at 15–17.

240. In *Sabbatino*, the Supreme Court said:

If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

376 U.S. at 424.

B. Congressional Regulation of Forum Non Conveniens

1. Congressional Power to Regulate Forum Non Conveniens in State Courts

Congress could, by statute, regulate federal and state court *forum non conveniens* decisions affecting foreign relations. The national power in the realm of foreign relations is plenary. As the Supreme Court said in *Perez v. Brownell*: "The [federal] Government must be able not only to deal affirmatively with foreign nations . . . it must also be able to reduce to a minimum the frictions that are unavoidable in a world of sovereigns sensitive in matters touching on their dignity and interests."²⁴¹ State constitutional, statutory, or judge-made *forum non conveniens* law that violated a federal statute enacted under the foreign affairs power of the national government would be invalid under the Supremacy Clause.²⁴²

A detailed *forum non conveniens* statute governing international cases would be undesirable, however. The effect of a *forum non conveniens* decision on foreign relations strongly depends on the particular facts of the case, and Congress lacks the foresight to decide foreign policy for the myriad of factual variations that could arise.²⁴³ Moreover, if rigid rules were established the *forum non conveniens* doctrine would lose much of its valuable flexibility.²⁴⁴ Also, an international consensus on forum selection rules promoting convenience and justice would be a welcome development. Court decisions have the potential to contribute to a consensus through comity and reciprocity. Freezing U.S. *forum non conveniens* rules in a detailed statute would prevent the development of such an international consensus.²⁴⁵

2. Statutory Authorization and Policy Guidance for Federal Common Law Rules: A Proposed Solution

A better solution to the need for federal control over international *forum non conveniens* decisions would be statutory authorization and guidance for federal and state courts. Such a federal statute would provide that federal and state courts may dismiss (or stay) international cases "for the convenience of parties and witnesses, in the interests of justice and U.S. foreign relations"²⁴⁶ and would authorize the federal courts to fashion *forum non conveniens* rules binding in federal and state courts for cases having a significant effect on foreign relations.²⁴⁷ The statute, with input from the executive

241. *Perez v. Brownell*, 356 U.S. 44, 57 (1958).

242. U.S. CONST. art. VI, § 2.

243. *Mishkin*, *supra* note 123, at 800.

244. *Piper*, 454 U.S. at 249-50. *Cf.* Comment, *International Choice of Law: A Proposal for a New "Enclave" of Federal Common Law*, 5 FORDHAM INT'L L.J. 319, 357 (1982) (flexibility needed for conflicts rules so statutory codification not desirable).

245. *See Hill*, *supra* note 152, at 1049.

246. This language is adapted from 28 U.S.C. § 1404(a), which authorizes transfer of venue between federal courts. *See supra* notes 23-34 and accompanying text.

247. *See Comment*, *supra* note 244, at 357; *Hill*, *supra* note 152, at 1049.

branch, should also establish general foreign relations goals for *forum non conveniens* rules to give the federal courts guidance.

Such a statute is certainly within the national government's power over matters affecting foreign relations. The statute would remove any doubt as to the power of the federal courts to establish federal *forum non conveniens* rules binding on state courts in cases affecting foreign relations.

C. *Federal Common Law Forum Non Conveniens Rules for International Cases*

Since a federal *forum non conveniens* statute has not been enacted, the power of the federal courts to act without congressional authorization must be addressed.

1. *Power of Federal Courts to Act in the Absence of Statutory Authorization*

A strong argument can be made that under *Sabbatino* the federal courts may fashion rules binding in state and federal courts for matters affecting foreign relations.²⁴⁸ Rules governing *forum non conveniens* decisions affecting foreign affairs would accordingly be within the power of the federal courts. However, as the extent of the federal courts' power to create federal common law in the area of foreign affairs is unclear, the arguments for and against federal common law rules must be examined as they apply specifically to *forum non conveniens* rules for international cases.

The *Erie* doctrine should not be interpreted to require federal courts to decide *forum non conveniens* issues potentially affecting foreign relations under state law. Strong federal interests exist in deciding who should have access to the federal courts, maintaining uniform rules of access to those courts, and protecting foreign relations. Furthermore, it is hard to conceive of any state policies that would require state law to govern *forum non conveniens* decisions in federal court. Thus, *forum non conveniens* issues affecting foreign relations should be governed by federal law in federal courts under the line of cases²⁴⁹ defining when *Erie* does not require the application of state law in actions based on state law claims.²⁵⁰

The more difficult question is whether federal courts are competent to impose federal common law rules on state courts for *forum non conveniens* decisions affecting foreign relations. The analysis that follows therefore concentrates primarily on this question. Of course, the arguments for the power of the federal courts to create federal *forum non conveniens* rules binding on

248. See *supra* notes 187-207 and accompanying text.

249. See, e.g., *Hanna v. Plumer*, 380 U.S. 460 (1965); *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525 (1958); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Sibbach v. Wilson & Co.*, 312 U.S. 1, *modified*, 312 U.S. 655 (1941).

250. See *Byrd*, 356 U.S. 525.

state courts support, even more strongly, the power to create such rules for the federal courts themselves.

Considerations of federal-state relations and of the separation of powers normally combine to demand congressional authorization for law-making by the federal courts. Such considerations must be analyzed as they apply to *forum non conveniens* decisions in international cases.

Considerations of federal-state relations involve the question of how far federal rules will intrude upon state provinces. If federal rules would cause great intrusion in an important or traditional area of state regulation, then Congress, rather than the federal judiciary, should make the decision to impose such rules, because of Congress's greater political responsibility.

The inner logic of federalism strongly favors state law as the source of rules governing *forum non conveniens* decisions in state courts, a matter close to the jurisdiction of the state courts. On the other hand, state control over the jurisdiction of state courts has always been exercised within federally imposed limits. The Due Process Clause of the Fourteenth Amendment²⁵¹ serves as the maximum limit on the reach of the personal jurisdiction of state courts.²⁵² State courts also have been held to have a federal constitutional duty to provide a forum in certain circumstances.²⁵³

An even closer analogy is the Supreme Court's use of the Commerce Clause to invalidate seriously inconvenient exercises of state court jurisdiction over interstate carriers.²⁵⁴ The Supreme Court has in effect required *forum non conveniens* dismissals without congressional authorization because the exercise of jurisdiction would interfere with a federal policy, as defined by the Supreme Court based on a constitutional grant of power to the national government.²⁵⁵ Similarly, the grants of power to the national government in the realm of foreign affairs could be interpreted to allow the federal courts to control state court jurisdiction in order to prevent interference with foreign affairs.²⁵⁶

In another traditional area of state regulation, the descent and distribution of estates, the Supreme Court has held that "those regulations must give

251. U.S. CONST. art. XIV, § 1.

252. See, e.g., *Pennoyer v. Neff*, 95 U.S. 714 (1877); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

253. See, e.g., *Hughes v. Fetter*, 341 U.S. 609 (1951); *Broderick v. Rosner*, 294 U.S. 629 (1935).

254. See, e.g., *Davis Farmers' Co-operative Co.*, 262 U.S. 312 (1923); *Atchison, T. & S.F. Ry. v. Wells*, 265 U.S. 101 (1924).

255. *Davis Farmers'*, 262 U.S. at 315-18. See also *International Milling Co. v. Columbia Transp. Co.*, 292 U.S. 511 (1934).

256. For a discussion of the analogy between interstate commerce and foreign affairs, see *Edwards*, *supra* note 153, at 690. See *supra* note 203.

Professor Mishkin's theory of federal court competence "in an area comprising issues substantially related to an established program of government operation" would perhaps support a power of the federal courts to declare the rules for *forum non conveniens* decisions having a significant effect on any of the many established government programs in the area of foreign relations. See *Mishkin*, *supra* note 123, at 800-01.

way if they impair the effective exercise of the Nation's foreign policy."²⁵⁷ The Supreme Court thus has recognized that state laws and policies, even within areas of state governance, cannot interfere with the exercise of the foreign relations power of the United States. If a *forum non conveniens* decision would so interfere, then it should similarly be decided under federal law.

Not all state court *forum non conveniens* decisions in international cases have a significant potential to interfere with U.S. foreign relations. When this potential is not significant, the federal system demands that state law govern. Thus, a rule that would give appropriate scope to the competing authorities of state and federal law would be that federal law governs when a *forum non conveniens* decision could significantly affect foreign relations. This rule, while not providing a clean line, is of a kind that courts are accustomed to applying. The cases preempted by federal *forum non conveniens* law will constitute a very small and undeveloped area of state *forum non conveniens* law. In fact, since state *forum non conveniens* law was designed for domestic cases, the application of federal law to cases having a significant effect on foreign relations would still allow state law to apply of its own force to the cases it was created to govern.

One reason that the federal courts cannot normally make law without congressional authorization is that Congress should make the decision to displace state law when there are practical advantages of allowing state law to govern. These practical advantages, however, do not exist in *forum non conveniens* law.

Local solutions and experiments, often advantageous in other areas, are particularly undesirable for problems of foreign relations.²⁵⁸ State policies and local conditions are not relevant to U.S. relations with other nations.²⁵⁹ In addition, most state courts do not have enough opportunity to engage in experimentation in international cases for it to be productive.²⁶⁰

One practical advantage in allowing state law to govern exists when state law is well-developed in a certain area, and the creation of new, untried federal rules would create much uncertainty.²⁶¹ Also, the intrusion of federal rules into an area dominated by state law may create a bad fit with surrounding state law that supplies, for example, the source and scope of rights regulated by the federal rules.²⁶²

In *forum non conveniens* law, however, the federal rules are well-established and have influenced many states. The federal *forum non conveniens* case-law is especially more developed than the state law in international

257. *Zschernig v. Miller*, 389 U.S. 429, 440 (1968).

258. *See Note, supra* note 127, at 1521.

259. *See United States v. Pink*, 315 U.S. 203, 233-34 (1942); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937).

260. *See supra* text accompanying note 238. State solutions and experiments would be given full scope outside matters having a significant effect on foreign relations.

261. *See Note, supra* note 127, at 1519.

262. *Id.* at 1517-19.

cases. Conversely, state *forum non conveniens* law is not part of an extensive, carefully structured network of state regulations; it is better described as an ad hoc body of court-made rules (often with subsequent legislative authorization). Thus, there is no danger of federal *forum non conveniens* rules failing to integrate with a surrounding body of state law.²⁶³

In sum, considerations of federal-state relations do not prevent the imposition of federal rules for state court *forum non conveniens* decisions with a potentially significant effect on the exercise of the national powers over foreign affairs. However, in order for the federal judiciary to impose federal rules based on foreign relations, the Supreme Court must define U.S. foreign policy to the extent necessary to decide whether granting or denying a *forum non conveniens* motion will interfere with such policy. It is therefore crucial to consider whether the U.S. system of the separation of powers allows the Supreme Court to define national foreign relations policy to this extent.

Congress has power to control the jurisdiction of the state and federal courts to the extent proposed. However, it has been argued that a statutory codification would be unsatisfactory chiefly because flexible, case-by-case, discretionary decisions are needed. Congress lacks the institutional competence to make case-by-case determinations, and human foresight is not capable of providing for all possible factual variations in advance. It was suggested above that the best solution would be a statute authorizing the federal courts to make rules and providing general guidance on policy questions.

The executive branch is even more clearly unable to solve the problems of *forum non conveniens* rules for international cases.²⁶⁴ A codification of rules in a treaty or executive agreement would suffer from the same shortcomings as a statutory codification. The extent of the President's competence in foreign affairs is unclear²⁶⁵ and would seem to be at a low ebb on an issue of whether courts should decline jurisdiction. It would be a strange view of the separation of powers that would allow the President, but not the federal courts, to make case-by-case discretionary determinations whether to decline jurisdiction.²⁶⁶

Since Congress and the President may be unable to deal appropriately with *forum non conveniens* decisions affecting foreign relations and certainly have not even attempted to do so, the obvious question becomes what should be done when decisions with potentially significant effects on foreign relations arise in cases in state and federal courts. *Forum non conveniens* decisions cannot be separated from court proceedings and cannot be avoided. If a court refuses to decide a *forum non conveniens* motion, the court has in effect denied the motion. If a court refuses to hear a case involving such a motion,

263. See Note, *supra* note 127, at 1518.

264. See Hill, *supra* note 152, at 1049-54.

265. *Id.* at 1054-55 & n.161.

266. *Cf. id.* at 1055 ("It would be a strange view of the Constitution that would require . . . [the use of federal military force by the President] in default of a judicial solution.").

the court has in effect granted the motion. The only alternative to applying a federal rule is allowing state law to govern, which will in effect allow state legislatures and courts to affect foreign relations and haphazardly "define" an aspect of national foreign policy, possibly without considering foreign relations at all. It seems far more reasonable to interpret the separation of powers as allowing the federal courts, led by the Supreme Court, to determine foreign policy with the goal of benefiting U.S. foreign relations.

The federal courts need not base *forum non conveniens* rules on determinations of foreign relations policies made in a vacuum. On the contrary, there are many sources in which the courts can find indications of national foreign relations policies. Statutes, treaties, and executive agreements are obvious examples. In *Sabbatino*, the executive branch filed in the Supreme Court a memorandum supporting the petition for certiorari and an amicus curiae brief and obtained leave to appear in oral argument;²⁶⁷ similarly, the court of appeals in that case had relied upon letters from the State Department.²⁶⁸ Treaties, statutes, and executive agreements as well as executive participation in court proceedings will, in many cases, provide evidence of congressional and executive policies in the area.

An important purpose of the national power over foreign relations is the achievement of uniform national foreign policy,²⁶⁹ and the separation of powers should not be interpreted to defeat a purpose so basic to the constitutional scheme. To the extent that federal court-made rules for *forum non conveniens* decisions affecting foreign relations would produce greater uniformity than the only currently available alternative, state *forum non conveniens* rules,²⁷⁰ it is suggested that the separation of powers does not prevent the federal courts from establishing such rules.

If, in some circumstances, deference to the political branches is required by the separation of powers and no reliable indications of congressional or executive policies can be gleaned from available sources, federal judge-made rules will be more likely to provide for that deference than state law. Since *forum non conveniens* decisions cannot be avoided, deference in the normal sense of not making a decision so that it can be made by another is impossible. In this context, deference can only mean making the decision in the way the court believes is least likely to effectively deny the political branches a subsequent opportunity to override the court decision.²⁷¹ For example, the Supreme Court decided in the *Sabbatino* case not to allow U.S. courts to examine foreign nationalization decrees.²⁷² To that extent, the Supreme

267. *Sabbatino*, 376 U.S. at 400.

268. 307 F.2d 845, 858-59 (2d Cir. 1962), *rev'd on other grounds*, 376 U.S. 398 (1964).

269. See *supra* notes 180-186 and accompanying text.

270. See *supra* notes 11-22, 35-118, 233-240, and 261-263 and accompanying text; see also Mishkin, *supra* note 123, at 821-22.

271. Court decisions may in practical effect be irreversible, for example, if they exacerbate tensions in foreign relations.

272. See *supra* notes 187-202 and accompanying text.

Court defined national policy rather than risking harm to foreign relations caused by a state court decision that the foreign decree violated international law.²⁷³ Congress eventually did override the Court's policy decision.²⁷⁴ In the absence of a congressional enactment, the Supreme Court cautioned deference to the federal political branches, but not to state law.²⁷⁵

As noted above, the Supreme Court, absent congressional authorization, has regulated the exercise of state court jurisdiction, as well as other state action, affecting interstate commerce based on the Supreme Court's own definition of national policy in that area. The Supreme Court defined national policy in an area given to the national government by the Constitution rather than allow state law to govern. The national power over foreign relations is implicit in the constitutional scheme.²⁷⁶ When the only alternative is to allow state law to govern, the Supreme Court should define national foreign policy to the extent necessary to impose federal rules on state and federal courts for those *forum non conveniens* decisions that have a potentially significant effect on foreign relations.²⁷⁷

Congress (and the executive branch within its powers) can override the *forum non conveniens* rules laid down by the federal courts. Until the political branches of the federal government act, however, the question remains whether *forum non conveniens* decisions affecting foreign relations should be left to the varying laws of the fifty states, laws that will likely ignore foreign relations or subordinate them to state interests. Congress and the executive branch have not dealt with the problem and, it has been argued, cannot satisfactorily do so. The best solution would be congressional authorization to the federal courts to develop law, with statutory guidance as to the foreign policies to be advanced. In the meantime, when cases arise, there is a strong argument that the Supreme Court is competent to define national policy with reference to executive and legislative pronouncements.

273. Another issue in the *Sabbatino* case, Cuba's standing to sue in U.S. courts, is analogous to a *forum non conveniens* issue in an international case. Both issues require decisions whether to allow actions in U.S. courts, and those decisions may affect foreign relations. Neither issue can be avoided. The Court decided to allow Cuba standing to sue without discussing the federal courts' authority to make law on this question. While discussing whether Cuba's standing to sue could be raised for the first time in the litigation in the Supreme Court, the Court recognized that the decision whether to deny standing turned on a question of national policy. Nevertheless, the Court believed that it was competent to give effect to that policy, although it did not indicate whether the policy was under judicial or executive control. Professor Hill concludes: "Probably the summary treatment of the point supports the view that the Court is prepared generally to define 'national policy' in international matters, subject, as previously noted, to the paramount control of the political branches when duly exercised." Hill, *supra* note 152, at 1068.

274. See HART & WECHSLER, *supra* note 127, at 808 n.4.

275. See *supra* notes 199-202 and accompanying text.

276. See *supra* notes 180-186 and accompanying text.

277. In fact, the argument for congressional exclusivity might be regarded as stronger in the case of the Commerce Clause, a specific grant of legislative power to Congress, than in the case of the national power over foreign relations, which is not explicitly given to any branch of the national government exclusively.

2. Piper Aircraft Co. v. Reyno: *Absence of Explicit Foreign Relations Grounds*

In *Piper*,²⁷⁸ the Supreme Court did not address questions of the appropriate sources of *forum non conveniens* law for international cases in state and federal courts. The court avoided deciding whether state law should govern actions in federal court based on state law claims.²⁷⁹ Because the case originated in a federal district court, the Court was not presented with the question whether federal rules for *forum non conveniens* decisions affecting foreign relations should be binding in state courts.

The Supreme Court made important new law in *Piper*,²⁸⁰ resolving a conflict between federal circuits,²⁸¹ without deciding whether it had the authority to do so. The circumstances of the Court's avoidance of the *Erie* question suggest that the Court actually considered itself to have the authority to create federal *forum non conveniens* rules even in cases based on state law claims. The Court treated the *Erie* question summarily in a footnote, relying entirely on the lower courts' conclusions that state and federal law were "virtually identical."²⁸² Ironically, however, the Supreme Court disagreed with the court of appeals as to the state of the federal law.²⁸³ In California, one of the two states involved, *forum non conveniens* law is far from clear;²⁸⁴ a California court has recently maintained that California law is directly opposed to the Supreme Court's decision in *Piper* on crucial issues.²⁸⁵ Moreover, the Court in *Piper* cited only federal cases.

The Court certainly did not intend *Piper* to be binding on state courts; the issue was not presented or discussed. The Court did discuss concerns that involve foreign relations in *Piper* and, apparently, based its holding in part on these concerns. The Court's *forum non conveniens* analysis concluded that Scotland's interest in the litigation, the "local interest in having localized controversies decided at home," was much stronger than the U.S. interest in increasing deterrence of faulty manufacturing by holding the trial in the United States.²⁸⁶ Thus, the Court held that the district court properly respected Scotland's stronger interest by dismissing the suit. However, an additional

278. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982).

279. *Id.* at 248 n.13. See *supra* notes 217-222 and accompanying text.

280. See *supra* notes 35-71 and accompanying text.

281. *Piper*, 454 U.S. at 250-51.

282. *Id.* at 248 n.13.

283. See *supra* note 218.

284. See *supra* notes 84-105 and accompanying text.

285. Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 202 Cal. Rptr. 773 (1984). See *supra* notes 96-102 and accompanying text.

286. The Court stated:

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert*, there is "a local interest in having localized controversies decided at home . . . [T]he incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident

factor in the Court's decision was the "enormous commitment of judicial time and resources" that trying the case in the United States would involve.²⁸⁷ It is thus unclear to what extent the Court based its decision on considerations of foreign relations.

There may be foreign relations concerns implicated in *Piper* that the Court did not discuss. Scotland has an interest in not having its law applied by a court unfamiliar with Scottish law.²⁸⁸ Perhaps, as the district court argued, any deficiency in Scottish law should be dealt with in Scotland, not by a U.S. court passing judgment on the adequacy of Scottish law.²⁸⁹

Many cases will implicate foreign relations to a far greater extent than *Piper*. When the Supreme Court makes a decision in *forum non conveniens* law in order to advance or protect important federal interests in foreign relations, the Court should consider to what extent that decision is binding on state courts.

3. *The Functioning of a Federal Common Law of Forum Non Conveniens in the Federal System*

Forum non conveniens decisions should be based on a case-by-case analysis because, as discussed above, flexibility is vital to *forum non conveniens* law and the particular facts of each case will determine the extent of the effect on foreign relations. Under a federal common law of *forum non conveniens* for cases having a significant effect on foreign relations, when a *forum non conveniens* issue arises in an international case, the court will have to analyze what interests of foreign nations and the United States are involved by the particular facts of the case.²⁹⁰ When foreign relations may be significantly affected, federal law will control.

Many international cases will be within the diversity jurisdiction of the federal courts, thus giving the lower federal courts an opportunity to develop federal *forum non conveniens* rules. However, when the forum is a state court, in order for federal *forum non conveniens* rules to be binding, the Supreme Court will need to have jurisdiction to review the state court's decision.²⁹¹

is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

Piper, 454 U.S. at 260-61.

287. *Id.* at 261.

288. The district court had concluded that Scottish law would apply to defendant Hartzell and had admitted that it was unfamiliar with Scottish law. *Piper*, 454 U.S. at 243.

289. *Piper* at 244. The Court has argued that the choice of law question should not be reached since it is logically subsequent to the question of retaining jurisdiction. "If justice would as well be done by remitting the parties to their home forum," then we do not have occasion to ask "by what law the rights of the parties are governed." *Id.* at 247-48 (quoting *Canada Malting Co., Ltd. v. Paterson Steamship Co., Ltd.*, 285 U.S. 413, 419-420 (1932)).

290. See *supra* notes 223-233 and accompanying text.

291. See Comment, *supra* note 123, at 330, 330 n.44.

As discussed above, federal *forum non conveniens* law could be imposed by interpreting the constitutional grants of power over foreign relations to prohibit states from interfering with foreign relations by exercising or refusing to exercise court jurisdiction.²⁹² Federal *forum non conveniens* rules would then fall within the Article III jurisdiction of the federal courts because they would arise under the Constitution.²⁹³ As constitutionally mandated, such rules would, of course, also be binding on the states under the Supremacy Clause.²⁹⁴

Even if the federal *forum non conveniens* rules do not rise to constitutional dimensions, cases not within the diversity jurisdiction of the federal courts could still fall within the Article III jurisdiction as arising under the laws of the United States.²⁹⁵ The Supreme Court may have implicitly decided in *Sabbatino* that federal common law rules do arise under the "laws of the United States" for purposes of Article III jurisdiction and the Supremacy Clause.²⁹⁶ This is necessary if the Court's decision in *Sabbatino* is to be binding on state courts and enforceable through review of non-conforming state cases.²⁹⁷ Under both the Supremacy Clause and Article III, historical evidence is inconclusive as to whether federal common law rules are laws of the United States.²⁹⁸ If such rules are to be binding on the states, however, as the Supreme Court certainly intends, it must be through the Supremacy Clause.²⁹⁹

This approach does not mean that state courts are disabled from deciding *forum non conveniens* questions when they arise. If there is no authoritative pronouncement of federal *forum non conveniens* law on the precise issue before the state court, the court must resolve the issue itself. As in any area of federal law, however, the state court would be interpreting federal law. As federal *forum non conveniens* law develops, the number of occasions on which a state court would be without a guiding federal precedent would diminish. State court cases having a significant effect on foreign relations will likely be

292. See *supra* notes 254–256 and accompanying text, and notes 197, 203.

293. U.S. CONST. art. III, § 2. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ."

294. U.S. CONST. art. VI, § 2. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

295. See Comment, *supra* note 123, at 330–37; Note, *supra* note 127, at 1513–14.

296. See Comment, *supra* note 123, at 330–31, 330 n.47, 331 n.52, 336; Note, *supra* note 127, at 1514–15, 1514 n.23.

297. The Court apparently thought it would be. See *Sabbatino*, 376 U.S. at 424–26.

298. Note, *supra* note 127, at 1512–15. One commentator argues that a broad notion of the law of nations, including perhaps *forum non conveniens* rules for cases affecting foreign relations, are included within Article III's phrase "the laws of the United States." Comment, *supra* note 123, at 329–37.

299. See Comment, *supra* note 123, at 330, 330 n.47; Note, *supra* note 127, at 1514–15.

few.³⁰⁰ State courts would be free to depart from federal *forum non conveniens* law to the extent that the issue would not have a significant effect on foreign relations. For example, a rule of federal *forum non conveniens* law aimed at reducing the administrative burden on federal courts would be inapplicable to state courts.

In order for a federal common law of *forum non conveniens* to function smoothly, the federal courts must articulate the extent to which the federal *forum non conveniens* law is based on the federal interest in foreign relations and is thereby binding on the states. Then, state courts would not have to determine on their own when foreign relations were sufficiently implicated by a *forum non conveniens* issue to remove the issue from the province of state law.

4. Prack v. Weissinger: An Example of Federal Forum Non Conveniens Application

*Prack v. Weissinger*³⁰¹ is an example of a case where the federal interest in foreign relations could have been appropriately used to prevent a state court from making a *forum non conveniens* decision possibly harming U.S. foreign relations. *Prack* involved a suit by a German citizen against a U.S. citizen in federal court for injuries resulting from an automobile accident in Germany.³⁰² The district court granted a *forum non conveniens* motion and ordered dismissal of the action "with prejudice to the reinstatement of this action, or the prosecution of the cause of action set forth in said complaint, in any court, State or Federal, within the United States of America."³⁰³ This order was directed at an irremovable suit already pending in a state court.³⁰⁴ The Fourth Circuit held that the granting of the *forum non conveniens* motion was proper but that the district court's order "improperly invaded the prerogative of the state court . . . to determine its own jurisdiction."³⁰⁵ Neither court discussed foreign relations.

300. See *supra* note 237 and accompanying text.

301. 276 F.2d 446 (4th Cir. 1960). In the *Bhopal* case, the court granted the motion to dismiss on the grounds of *forum non conveniens* based on the analysis set forth in *Gilbert and Piper*. The court's concluding paragraphs cited foreign relations as an important factor in the decision. "In the Court's view, to retain the litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation. This Court declines to play such a role. The Union of India is a world power in 1986, and its courts have the proven capacity to mete out fair and equal justice. To deprive the Indian judiciary of this opportunity to stand tall before the world and to pass judgment on behalf of its own people would be to revive a history of subservience and subjugation from which India has emerged." *In re Union Carbide Corp. Gas Plant Disaster as Bhopal, India* in December 1984, MDL No. 626, Misc. No. 21-38 (S.D.N.Y. May 12, 1986).

302. *Prack*, 276 F.2d at 447.

303. *Id.* at 449.

304. *Id.* at 448.

305. *Id.* at 451.

The district court's decision to grant the *forum non conveniens* motion could have been based, at least in part, on considerations of foreign relations. Since the accident took place in Germany, one reason for the dismissal may have been respect for Germany's interest in deciding local controversies at home and thus in enforcing its standards for conduct within its borders.

If the *forum non conveniens* dismissal in *Prack* was based on foreign relations, then the Fourth Circuit's holding that the state courts are free to entertain the same cause of action will prevent the implementation of the federal foreign relations policy. When foreign affairs are the basis for a dismissal in federal court, then the question of the jurisdiction of a state court is a matter of federal concern and is not within the state court's prerogative. The jurisdiction of any U.S. court, state or federal, may become a matter of federal concern when the decision whether to exercise that jurisdiction affects the federal interest in foreign affairs.

CONCLUSION

Forum non conveniens issues in international cases affect in varying degrees the foreign relations of the United States. Congress has the power to enact *forum non conveniens* rules for state and federal courts in such cases. Congressional codification of detailed *forum non conveniens* rules is undesirable, however, both because flexibility is crucial in *forum non conveniens* law and because the consequences for foreign affairs vary according to the particular facts of each case. A general statute authorizing the development of federal common law rules and providing foreign policy guidance would be preferable and would remove any doubt as to the power of the federal courts to fashion the necessary rules. Such a statute would also make the resulting court-made rules more effective at advancing and protecting U.S. foreign relations.

Even absent congressional authorization, the federal courts may have the authority to impose federal common law rules on state courts for *forum non conveniens* issues having a potentially significant effect on foreign relations. Certainly, the federal courts need not look to state *forum non conveniens* law on such issues arising in federal courts in cases based on state law claims. Perhaps a federal *forum non conveniens* rule for state courts is needed only for *forum non conveniens* decisions that have a particularly important foreign affairs aspect. If federal common law rules are found desirable, the federal courts should articulate, as a matter of federal law, what part of the federal *forum non conveniens* law is based on foreign affairs and is thereby binding on state courts.