A NEW APPROACH TO JURISDICTIONAL QUESTIONS IN TRANSNATIONAL LITIGATION IN U.S. COURTS

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A feature of the modern global economy is an ever-increasing amount of transnational litigation. If a stable, harmonious system of international legal order is to be nurtured, the courts that entertain these lawsuits must consider a range of foreign policy factors not present in purely domestic litigation. The state and federal judiciary in the United States, however, has not been sufficiently sensitive to the international implications of cases involving foreign transactions, incidents, or litigants. First, varying judicial approaches to dealing with such cases have prevented the United States from speaking with a single, consistent voice on the issues raised in transnational litigation. Second, the United States has been guilty of serious breaches of the comity of nations when its courts have engaged in ad hoc decisionmaking in international cases that unnecessarily frustrates the policies, offends the sovereignty, and disparages the legal systems of other nations.

In response to these problems, this article proposes a coherent, principled approach to handling the important jurisdictional issues that arise in transnational cases. Part 1 looks at the current state of the law of jurisdiction in international litigation. Part 2 examines the flaws in current law, focusing on its adverse impact on the foreign policy of the United States. Finally, Part 3 suggests a new approach to resolving jurisdictional questions in transnational cases, outlining a framework based on explicit judicial consideration of the foreign policy implications of alternative jurisdictional decisions.

1. JURISDICTIONAL ISSUES IN INTERNATIONAL CASES: CURRENT LAW

Currently, state and federal courts generally have wide latitude to decide jurisdictional questions in international cases, subject only to

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1 This article defines "international" or "transnational" cases as all lawsuits involving foreign transactions, incidents, or litigants. If no foreign nation has significant

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the same minimum standards of due process that apply in purely domestic cases. The following sections explore the prevailing law with respect to four important jurisdictional issues: personal jurisdiction, forum non conveniens, choice of law, and enforcement of judgments.

1.1. Personal Jurisdiction

In the domestic context, both state and federal courts assert personal jurisdiction over defendants subject to the constraints of the due process clause. As interpreted by the Supreme Court, due process requires that a defendant have "purposefully established 'minimum contacts' in the forum State," "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The focus of the due process inquiry is on "the relationship among the defendant, the forum, and the litigation."

The Court's interpretation of the due process clause permits the states wide latitude in setting the outer boundaries of the jurisdictional reach of their courts. Taking advantage of the Court's framework, states have adopted "long-arm statutes," which provide for expansive assertions of personal jurisdiction. A federal court sitting in diversity is required to apply the long-arm statute of the state in which it sits.

In international cases, the Supreme Court until recently treated foreign non-resident defendants exactly like domestic ones. Nonetheless...
less, lower courts have evolved various approaches to jurisdictional challenges by foreign defendants. In state law cases, while most state and federal courts have applied domestic due process standards to jurisdictional challenges by foreigners, some have exercised jurisdiction only when contacts between the alien defendant and the forum were greater than those needed in domestic cases have expressly or in fact subjected foreigners to personal jurisdiction on the basis of contacts below the minimum required for U.S. defendants.\(^\text{10}\)

In its 1987 decision in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*,\(^\text{11}\) however, the Supreme Court hinted that its perspective may be changing. Although the *Asahi* Court applied the standard minimum contacts test to the foreign defendant, the Court indicated that "the international context" of the case was one factor in its decision to hold a California court's exercise of personal jurisdiction "unreasonable and unfair."\(^\text{12}\) Justice O'Connor, in a section of the opinion joined by seven other justices, wrote that in international cases, courts must

consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction. . . . [T]hose interests, as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."\(^\text{13}\)

*Asahi* is a step in the direction of abandonment by the Court of the notion that the minimum contacts standard is as suitable for foreign as for U.S. defendants. However, rather than formulating a new test for use in litigation involving alien defendants, *Asahi* viewed the foreign aspect of a case as only one factor in a personal jurisdiction calculus that is otherwise the same as that employed in purely domestic litigation. Moreover, the Court provided no guidelines for the lower courts as to how much weight to afford the fact that a defendant is foreign

\(^{10}\) Born, *supra* note 8, at 6-9.

\(^{11}\) 480 U.S. 102 (1987).

\(^{12}\) *Id.* at 116.

\(^{13}\) *Id.* at 115 (emphasis in original) (quoting United States v. First Nat'l City Bank, 379 U.S. 398, 404 (1965) (Harlan, J., dissenting)).
when applying the minimum contacts standard.

In federal question cases, a different problem has divided courts on the issue of personal jurisdiction over alien defendants. While the majority of federal courts consider a defendant's contacts with the state in which the court sits, others expand their jurisdictional reach over foreign defendants by aggregating a defendant's contacts with the United States as a whole. In *Asahi*, the Supreme Court expressly declined to consider the question of "whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of national contacts."  

1.2. Forum Non Conveniens

Under the forum non conveniens doctrine, a court may dismiss a case of which it has jurisdiction upon a finding that a more convenient forum exists elsewhere. The leading decision on forum non conveniens is *Gulf Oil Corp. v. Gilbert*.  
The *Gilbert* Court outlined two sets of factors to be balanced by trial judges in deciding whether to grant a motion for forum non conveniens. The factors affecting the private interests of the litigants include the

relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility [sic] of a judgment if one is obtained.

The public interest factors include administrative difficulties due to court congestion; the "local interest in having localized controversies decided at home", the unfairness of burdening residents of an unrelated forum with jury duty; and the avoidance of unnecessary problems in

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14 Born, *supra* note 8, at 9-10. The federal courts generally agree that such aggregation is appropriate in actions where Congress has provided for nationwide service of process, on the rationale that aggregation treats aliens equivalently to U.S. defendants, who under the statutes are amenable to personal jurisdiction in all federal courts regardless of their contacts. L. Brilmayer, *supra* note 7, at 293.
15 480 U.S. at 113 n.* (emphasis in original).
17 Id. at 508.
18 Id. at 509.

https://scholarship.law.upenn.edu/jil/vol10/iss4/4
the conflict of laws or in the application of foreign law.\textsuperscript{19}

In federal courts, when transfer of a case to another federal court is sought, common law forum non conveniens analysis has been superseded by the Federal Transfer Statute.\textsuperscript{20} The Gilbert factors still apply, however, when a defendant claims that a state or foreign court would be a more convenient forum for a lawsuit. In addition, many states have adopted forum non conveniens as a matter of common law, and a few have codified the doctrine in statutes.\textsuperscript{21}

In \textit{Piper Aircraft Co. v. Reyno},\textsuperscript{22} the Supreme Court revisited the subject of forum non conveniens. Reversing a lower court ruling that plaintiffs may defeat forum non conveniens motions by showing that the law which would be applied in the alternate forum is less favorable to the plaintiffs than that of the chosen forum, the Court, in an opinion by Justice Marshall, held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the \textit{forum non conveniens} inquiry."\textsuperscript{23} Only "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, [may] the unfavorable change in law . . . be given substantial weight."\textsuperscript{24} Justice Marshall explained that the rule adopted by the court of appeals would mandate trials in plainly inconvenient forums, was inflexible, would often require complex choice of law analysis, and would result in a flood of litigation into U.S. courts by foreign plaintiffs suing U.S. manufacturers.\textsuperscript{25}

\textsuperscript{19} Id. at 508-09.

\textsuperscript{20} 28 U.S.C. § 1404(a) (1982) (permitting transfers to other venues for the convenience of the parties and witnesses and in the interest of justice).

\textsuperscript{21} See, e.g., CAL. CIV. PROC. CODE § 410.30 (West 1973); FLA. STAT. ANN. § 47.122 (West Supp. 1988); MASS. GEN. LAWS ANN. ch. 223A, § 5 (West 1986).

\textsuperscript{22} 454 U.S. 235 (1981). \textit{Reyno} involved an airplane crash in Scotland; the decedents and their heirs and next of kin were all Scottish residents. The plane had been manufactured by a Pennsylvania corporation and the propellers by an Ohio corporation. A California probate court appointed the plaintiff, Reyno, administratrix of the estates of the five passengers, and she brought wrongful death actions against the two corporations in California. After the case had been removed to federal court and then transferred to a Pennsylvania district court, both defendants moved for forum non conveniens dismissals. The district court granted the motions, and the Court of Appeals for the Third Circuit reversed. \textit{Id.}

\textsuperscript{23} Id. at 247. Only seven justices participated in the \textit{Reyno} decision. Of these, five joined this section of the Court’s opinion.

\textsuperscript{24} Id. at 254. The court cites as an example of a situation in which dismissal would be inappropriate a case in which the foreign forum does not allow litigation of the subject matter of the dispute. \textit{Id.} at 254 n.22.

\textsuperscript{25} Id. at 247-52. The Court noted that U.S. courts “are already extremely attractive to foreign plaintiffs,” because of the strict liability rules offered in most states; the potential choice among 50 jurisdictions, each with “its own set of malleable choice-of-law rules”; the availability of jury trials in the United States; the U.S. fee system, in which courts allow defendants to recover fees; and the tax loss parties with their opponents’
The Court also ruled that the district court correctly afforded reduced deference to the plaintiff's choice of forum because the real parties in interest were foreign. When the home forum has been chosen, the Court held, it is reasonable to assume that the choice is convenient; when a plaintiff chooses a foreign forum, however, this assumption is much less reasonable: "Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference."28 Since the trial court did not commit a clear abuse of discretion, the Court concluded, it should not have been reversed.27

In Reyno, the Supreme Court left undecided the question of whether under Erie Railroad Co. v. Tompkins28 a federal district court should apply state or federal forum non conveniens law in a diversity case,29 noting that the lower courts in the litigation had concluded that state forum non conveniens law was virtually identical to federal law.30 Many other lower federal courts have likewise avoided the Erie question by finding no significant difference between state and federal forum non conveniens law.31

Some federal courts, however, have been forced to deal with the Erie problem in forum non conveniens diversity cases;32 nearly una-

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26 See infra note 39 and accompanying text, federal law and the forum non conveniens law of that state have unquestionably diverged. Finally, in Reyno, the Supreme Court noted that the lower courts in the litigation had concluded that Pennsylvania and California forum non conveniens law was virtually identical to federal law. 454 U.S. at 248 n.13. Since the

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26 Id. at 255-56 (footnote omitted).
27 Id. at 257-60. Four of the seven participating justices joined this section of the majority opinion.
28 304 U.S. 64 (1938).
29 The Gilbert Court had also avoided this issue, asserting that the result in the case would be the same under state or federal law. See 330 U.S. at 509; see also Williams v. Green Bay & W. R.R., 326 U.S. 549, 558-59 (1946).
30 454 U.S. at 248 n.13.
32 This occurs when state forum non conveniens law diverges from federal law. Florida law, for example, precludes a forum non conveniens dismissal of an action when one of the parties is a resident. See Sibaja v. Dow Chemical Co., 757 F.2d 1215, 1217 (11th Cir. 1985). In New York, state forum non conveniens law appears to have diverged from federal law in that the New York State Court of Appeals, in Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474, 481, 478 N.Y.S.2d 597, 601, 467 N.E.2d 245, 249 (1984), cert. denied, 469 U.S. 1108 (1985), held that the availability of an alternative forum is not a prerequisite to forum non conveniens dismissal. See Agyenkwa v. American Motors Corp., 622 F. Supp. 242, 244 n.4 (E.D.N.Y. 1985). Moreover, now that California courts have declined to follow Reyno, see infra note 39 and accompanying text, federal law and the forum non conveniens law of that state have unquestionably diverged. Finally, in Reyno, the Supreme Court noted that the lower courts in the litigation had concluded that Pennsylvania and California forum non conveniens law was virtually identical to federal law. 454 U.S. at 248 n.13.
mously, they have concluded that federal courts ought to follow federal forum non conveniens law, not the laws of the states in which they sit.\textsuperscript{33} Still other courts have implicitly indicated their determination that federal law is applicable by considering only federal precedents and thus ignoring the question of whether the forum non conveniens laws of their states are identical to federal law.\textsuperscript{34} There are no cases in which a federal court has applied state forum non conveniens law that conflicted with Supreme Court precedent.

In many states, forum non conveniens law is very similar to the federal doctrine as described in \textit{Gilbert} .\textsuperscript{35} Likewise, in international cases, most state courts that have ruled on forum non conveniens motions have applied the holdings of \textit{Reyno} , although without necessarily accepting the case as binding federal common law.\textsuperscript{36} One state, Minnesota, has explicitly adopted \textit{Reyno}'s precepts into state law.\textsuperscript{37} However, a court in Connecticut refused to order a forum non conveniens dismissal in a case in which \textit{Reyno} would seem to have required it,\textsuperscript{38} and

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Supreme Court reversed the Third Circuit on the content of federal forum non conveniens law, however, state law could not possibly have been identical both to the Third Circuit version of federal law and to the Supreme Court version. \textit{See} Holmes v. Syntex Laboratories, Inc., 156 Cal. App. 3d 372, 380, 202 Cal. Rptr. 773, 777-78 (1984).


\textsuperscript{35} \textit{See} L. Brilmayer, \textit{supra} note 7, at 150.


\textsuperscript{37} \textit{See} Bergquist v. Medtronic, Inc., 379 N.W.2d 508, 512-13 (Minn. 1986).

\textsuperscript{38} In Miller v. United Technologies Corp., 40 Conn. Supp. 457, 515 A.2d 390 (Super. Ct. 1986), the estates of two members of the Egyptian Air Force who were killed in a lighter plane crash in Egypt brought a products liability suit against the
courts in California have explicitly rejected the Reyno doctrine.39

1.3. Choice of Law

States use a variety of methods to settle choice of law questions, which arise when a court must choose the rule of decision on a point at issue from among the laws of two or more jurisdictions. One scholar has counted approximately ten different methods used by state courts.40 This article will sketch only the most common approaches.

The traditional theory, still followed by approximately twenty states,41 is the “vested rights” approach of the First Restatement.42 According to the Restatement, courts must apply the law of the state in which the rights of the parties have vested, which is the state in which the last act necessary to create a legal obligation occurred.43 For each substantive area of law (e.g., torts, property, or contracts), the Restatement offers a set of rules to determine, in any case that may arise, which state is entitled to have its law applied. The Restatement has been subject to much criticism, on the grounds that its rules are arbitrary in derivation, rigid in application, and short-sighted in result.44

The most radical critics of the Restatement, led by Professor Bra-inerd Currie, proposed an entirely different solution to conflicts problems, a policy-oriented approach known as “interest analysis.”45 Under interest analysis, courts first examine the substantive policies underlying each competing jurisdiction’s law; if only one jurisdiction is

U.S. plane manufacturers. The Connecticut trial court found that Egypt was an adequate alternative forum, that Egyptian law would apply regardless of the forum, and that the public interest factors weighed in favor of an Egyptian forum. Id. at 463-67, 515 A.2d at 394-96. Nevertheless, based on a close balancing of private interest factors, including “a dispute as to how dangerous it would be for Americans to be in Egypt on a trial of this nature,” id. at 465, 515 A.2d at 395, the court ruled that the presumption in favor of the plaintiff’s choice of forum had not been overcome and denied the defendants’ motion for forum non conveniens dismissal. Id. at 467, 515 A.2d at 396. The opinion never refers to the Reyno holding that a foreign plaintiff’s forum choice deserves less deference. This is so despite the court’s having cited and followed another holding from Reyno, that a court should not be swayed by a showing that the law of the alternative forum is less favorable to the plaintiffs than that of their chosen forum. Id. at 461, 515 A.2d at 393.


40 See Kay, Theory Into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 585 (1983).

41 Id. at 582.

42 RESTATEMENT OF CONFLICT OF LAWS (1934).

43 See L. BRILMAYER, supra note 7, at 220.

44 See id. at 223-26.

45 See generally B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963) (outlining interest analysis).
found to have a legitimate interest in the application of its law—a case of "false conflict"—then that jurisdiction's law is applied. In a "true conflict" situation, when each of two or more states has a genuine interest in the application of its own law, one of a variety of methods of resolution that have been proposed is used to select the law to be applied. Like the vested rights approach, interest analysis has been heavily criticized, most significantly because of its implicit assumption that the primary policy goal of states is to advance the short-term interests of their residents. Interest analysis in one of its many varieties is used by the courts of about ten states.

The final major approach to choice of law problems, that of the Second Restatement, represents a synthesis of the other approaches. In some areas of law, the Second Restatement sets out a large number of easily applied narrow rules; in other areas, including torts and contracts, it offers flexible guidelines for choosing the jurisdiction with

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46 See E. Scoles & P. Hay, Conflict of Laws 17 (1982). The authors call the notion of false conflicts "an analytic concept which is one of Currie's most important contributions and which has found widespread acceptance in [U.S.] conflicts law since Currie." Id.

47 Numerous scholars have suggested solutions to the problem presented by true conflicts; among the most prominent proposed methods are those of Currie, Robert A. Leflar, and William F. Baxter. Professor Currie advocated that courts faced with true conflicts apply forum law; he believed that "assessment of the respective values of the competing legitimate interests of two sovereign states...is a political function of a very high order...which should not be committed to courts in a democracy." Currie, Notes on Methods and Objectives in the Conflict of Laws, 1959 Duke L.J. 171, 176. Professor Baxter disagreed with this view of the role of the judiciary, and suggested that Currie's approach be rejected in favor of a "comparative impairment" test: courts weigh the competing interests and apply the law of the jurisdiction whose policies would be most impaired if its law were not applied. See Baxter, Choice of Law and the Federal System, 16 Stan. L. Rev. 1 (1963); Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (adopting and applying the comparative impairment test). Finally, Professor Leflar proposed a more explicitly value-oriented approach, under which courts are guided by five "choice-influencing" considerations: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests, and, most controversially, application of the better rule of law. See R. Leflar, American Conflicts Law 193-95, 205-19 (3d ed. 1977); Clark v. Clark, 107 N.H. 351, 222 A.2d 205 (1966) (adopting and applying the better law approach). See generally E. Scoles & P. Hay, supra note 46, at 16-34; L. Brilmayer, supra note 7, at 236-39.

48 See L. Brilmayer, supra note 7, at 239-43.

49 See Kay, supra note 40, at 544, 573.

50 Restatement (Second) of Conflict of Laws (1971).

51 Seven factors are set out:

(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the
the "most significant relationship" to a given case. The chief critique of the Second Restatement has been that in the difficult cases, where two or more states have equally significant relationships to an issue in the case, it allows courts to choose either policy or rules to break the deadlock. Approximately fourteen states have adopted the approach of the Second Restatement.

Regardless of the choice of law method chosen, there are constitutional limits on a state's power to apply local law to cases in which another jurisdiction has an interest. Under the due process and full faith and credit clauses, a state may assert jurisdiction over only those cases with which it has a "significant contact or significant aggregation of contacts, creating state interests." In practice, however, the modern Court is "[unwilling] to nullify the choice of forum law unless that choice is completely without a rational basis." In international cases, the due process clause has afforded the Court a basis for performing a constitutional analysis equivalent to that employed in purely domestic cases.

Similarly, "[b]y and large, [U.S.] courts and writers have not distinguished between international and interstate conflicts for choice-of-law purposes. Indeed some of the leading choice-of-law cases in this country involved international conflicts, and, so far as appears, this fact had no effect upon the ultimate decision." Thus, in deciding choice of law questions, U.S. courts have generally paid little or no attention to the foreign relations implications of international cases.

As for the federal courts, when sitting in a diversity case, a federal court is required to employ the choice of law rules of the state in which it sits, even in an international case. In contrast, if jurisdiction of an international case is founded on a basis other than diversity, a federal court must apply federal law; a finding that the law of another nation should apply mandates dismissal of the case for lack of subject matter law to be applied.

Id. § 6(2). This list of factors reflects the values of both the vested rights and interest analysis approaches. See L. Brilmayer, supra note 7, at 244.

See L. Brilmayer, supra note 7, at 243-45.

See id. at 245-46.

Kay, supra note 40, at 556.


L. Brilmayer, supra note 7, at 288.

See id. at 294-95; Home Insurance Co. v. Dick, 281 U.S. 397 (1930).

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 reporter's note (1971).

The reporter notes that there are occasionally cases in which the international context may lead the court to a different result. Id.

jurisdiction. In deciding whether federal law is applicable to a particular case, however, the courts enjoy a great deal of discretion; although the Constitution theoretically would not allow the federal judiciary to apply U.S. law to cases with no nexus to this country, "no court has ever held the application of [U.S.] law to an international controversy violative of due process." Even when a controversy is litigated abroad, the successful litigant seeking to collect the fruits of victory may have to rely on the judiciary of this country. This is so because the enforcement officers of a sovereign jurisdiction will not enforce a judgment of a foreign state until it has been judicially converted into a local judgment. Like the jurisdictional issues discussed above, enforcement of judgment questions arise in U.S. courts in both domestic and international contexts.

Domestically, the law of enforcement of judgments is controlled by the full faith and credit clause of the U.S. Constitution. Basically, the clause requires "every [U.S.] court to recognize every judgment duly rendered by every other [U.S.] court." The chief exceptions are that the second jurisdiction need not enforce a non-final judgment, a judgment issued by a court that lacked jurisdiction, a judgment superseded by a contrary later judgment in another jurisdiction, and a judgment on grounds other than the merits.

With regard to the enforcement of judgments of foreign nations in either state or federal court, there appears to be no applicable constitutional provision. Moreover, despite the fact that "recognition of foreign judgments has long been a subject of international concern, and

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62 L. Brilmayer, supra note 7, at 297. Expansive extraterritorial applications of U.S. federal law, however, have generated a great deal of controversy. See Restatement (Third) of Foreign Relations Law § 403 reporters' note 1 (1986) and sources cited therein.
63 D. Siegel, Conflicts in a Nutshell 360 (1982).
64 U.S. Const. art. IV, § 1.
65 D. Siegel, supra note 63, at 363; cf. L. Brilmayer, supra note 7, at 178 ("The requirement of full faith and credit not only extends to relations between courts in sister states, but also requires both federal and state courts to give full faith and credit to the other's proceedings.") (footnotes omitted).
66 See L. Brilmayer, supra note 7, at 179.
67 See id. at 180-83.
68 See id. at 179-80.
69 See D. Siegel, supra note 63, at 374-75.
there is a wide network of bilateral and multilateral agreements concerning reciprocal enforcement of civil judgments," there is a wide network of bilateral and multilateral agreements concerning reciprocal enforcement of civil judgments," the United States is not a party to any such treaty. Instead, U.S. courts generally are guided by the principles of comity when deciding whether to enforce judgments of foreign courts. In *Hilton v. Guyot*, Justice Gray wrote:

[W]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice . . ., and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh . . . 74

In *Hilton*, the Court’s comity analysis resulted in its adoption of the rule of reciprocity, which, with some exceptions, grants conclusive effect in U.S. courts to the judgments of a foreign nation only if that nation grants reciprocal effect to analogous U.S. judgments. However, "[t]hough that holding has not been formally overruled, it is no longer followed in the great majority of State and federal courts in the United States."77

Foreign judgments law, as it emerges from the decisions of U.S.

71 Restatement (Third) of Foreign Relations Law § 481 reporters’ note 6 at 601 (1986).
72 Id. ch. 8 introductory note at 592.
73 L. Brilmayer, supra note 7, at 315. The Supreme Court has said that comity "is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). Professor Henkin views this passage as rendering uncertain the constitutional status of international comity, L. Henkin, Foreign Affairs and the Constitution 454 & n.37 (1972), but the Court has never held that there is a constitutional requirement of judicial adherence to even a minimum standard of international comity.
74 159 U.S. at 202-03.
75 See id. at 166-71.
76 Id. at 227-28.
77 Restatement (Third) of Foreign Relations Law § 481 comment d (1986); see also id. reporters’ note 1; D. Siegel, supra note 63, at 362 ("With the advent of the Erie rule . . ., there is little left of Hilton."). But see Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 263 ("[A] number of states have followed the Hilton rule, regarding it as a Supreme Court determination on a foreign relations question.") (citing Traders Trust Co. v. Davidson, 146 Minn. 224, 178 N.W. 735 (1920); Banco Minero v. Ross, 106 Tex. 522, 172 S.W. 711 (1915)).
courts, has recently been summarized in the *Restatement (Third) of Foreign Relations Law*. In general, "a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States. However, foreign judgments should not be recognized if the foreign court lacked personal jurisdiction or the foreign state lacked fair tribunals and procedures, and need not be recognized if the foreign court lacked subject matter jurisdiction or failed to provide sufficient notice, or if the judgment was fraudulent, repugnant to U.S. or state public policy, superseded by a conflicting later judgment, or violative of a forum selection clause.

2. **The Adverse Impact of Current Law on U.S. Foreign Relations**

The current state of the law of jurisdiction in international cases, as Part 1 demonstrates, is disarray. Instead of a uniform federal standard to guide courts in deciding cases with transnational implications, there exists a variety of doctrines that possess a coherent relationship neither to each other nor to the advancement of U.S. foreign policy. Part 2.1 examines the adverse impact on U.S. foreign relations of allowing jurisdictional issues in international cases to be subject to divergent judicial approaches. Part 2.2 then looks at some of the defects of current jurisdictional rules.

2.1. **The Need for One Voice**

One of the principal defects of the jumble of jurisdictional rules that state and federal courts apply in transnational cases is that they prevent the United States from having a single national position in an important area of foreign affairs. As the Supreme Court has noted, it

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78 There is no federal common law of enforcement of foreign judgments. *See Restatement (Third) of Foreign Relations Law* § 481 comment a (1986).
80 *Id.* § 481(1).
81 *Id.* § 482(1).
82 *Id.* § 482(2). The *Restatement* affords separate treatment to tax and penal judgments, divorce decrees, and custody and support orders. *See id.* §§ 483-486.
83 This problem has prompted various commentators to argue that each of the jurisdictional issues discussed in this article should be treated in international cases as areas of federal common law binding on the states. *See, e.g.*, Born, *supra* note 8, at 27-34; Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law*, 4 INT'L TAX & BUS. LAW. 155, 179-85 (1986); *Note, Application by Federal Courts of State Rule Law in Cases of Forum Non Conveniens*, 63 U. COLUM. L. REV. 1403, 1405-09 (1943).
is essential that the nation "speak with one voice when regulating commercial relations with foreign governments." 84

The "one voice" standard was most recently discussed by the Supreme Court in Japan Line, Ltd. v. County of Los Angeles. 86 Japan Line concerned a California tax that was levied on foreign shipping containers used exclusively in international commerce. The Court, after noting that state burdens on foreign commerce require "a more extensive constitutional inquiry" than comparable burdens on interstate commerce, 86 ruled the tax unconstitutional, finding that it violated the Commerce Clause by "impair[ing] federal uniformity in an area where federal uniformity is essential. Foreign commerce is preeminently a matter of national concern." 87

The Court deemed federal uniformity essential for several reasons that are as applicable to rules of jurisdiction as to foreign commerce clause doctrines. First, and most basically, the United States is but one state in the global community. If the country is to be a responsible—and effective—member of that family of nations, it must comply with international law and practice and afford comity to other states. Only through national laws can these duties be fulfilled. "[R]egulation 'must of necessity be national in its character' when it affects 'a subject which concerns our international relations, in regard to which foreign nations ought to be considered and their rights respected.'" 88 In the first instance, it is for Congress and the President to fashion these national laws. When they have failed to act, however, it is incumbent upon the federal judiciary to fill the void 89 by creating federal rules of

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86 Id. at 446.
87 Id. at 448; cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964) ("Various constitutional and statutory provisions indirectly support [the determination that the scope of the act of state doctrine is a matter of federal common law] 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.") (citations omitted); Her Majesty the Queen in Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161, 1163 (9th Cir. 1979) (noting that the issue of whether U.S. courts should honor foreign tax judgments "carries foreign relations overtones" which may mandate that federal law be applied).
88 Japan Line, 441 U.S. at 449 n.13 (quoting Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876)).
89 The separation of powers argument that the judiciary should take no position in foreign affairs matters is not tenable when applied to issues of legislative and adjudicative jurisdiction. When lawsuits are filed, courts must act; refusals to assert jurisdic-
jurisdiction.90

A second problem associated with the lack of national uniformity on transnational jurisdiction issues is hinderance of U.S. international trade. For example, as long as each state is allowed to apply its own choice of law rules to international cases, foreign litigants are unable to predict what substantive law will be applied if they are parties to lawsuits in U.S. courts. Similarly, the varying state approaches to the minimum content of "minimum contacts" with regard to foreign litigants, and the split in federal courts on the "national contacts" test, leave non-U.S. businesspersons uncertain about where in this country they can be sued and where they cannot. As one commentator has noted with regard to personal jurisdiction:

[T]here is a special need for uniform treatment of jurisdictional issues. Foreigners often will come from legal, cultural, and economic environments that differ significantly from their United States counterparts. As a result, clear, uniform jurisdictional rules in United States courts are necessary to prevent surprise and permit effective business planning.91

The likely result of the uncertainty that currently prevails on these issues is that some deals do not get done, while others include concessions—such as forum selection clauses mandating that any litigation be tried abroad—made by the U.S. party in order to reassure its nervous foreign counterpart.

Third, state freedom to take an independent line on jurisdictional questions in international matters can undercut the negotiating strength of the United States. For example, in Hilton v. Guyot,92 the Supreme Court held that a foreign nation's judgments would be enforceable in this country only to the extent that U.S. judgments were enforceable in that nation.93 A number of state courts, however, rejected the Court's position.94 According to Professor Moore, the position taken by the
states "to some extent undermined the international bargaining power of the United States with respect to this problem." His conclusion was that "the independent state positions regarding the problem, although perhaps more enlightened on the merits, failed to achieve the foreign relations goal sought, namely the recognition of United States judgments abroad by reciprocity nations. Thus, the lesson of Hilton reaffirms that the voice of foreign relations must be a federal voice."  

Finally, lack of national uniformity on transnational issues exacerbates the dangers of retaliatory practices by foreign governments angered by rules of jurisdiction applied by U.S. states. In Japan Line, the Court noted that "California's tax . . . creates an asymmetry in international maritime taxation operating to Japan's disadvantage. The risk of retaliation by Japan, under these circumstances, is acute, and such retaliation of necessity would be felt by the Nation as a whole." The risks are the same in the law of jurisdiction. In the area of personal jurisdiction, in fact, some nations practice automatic retaliation, having enacted statutes which authorize their courts to exercise jurisdiction over a foreign defendant whenever the defendant's nation would do the same in analogous circumstances. It is quite conceivable that expansive exercises of jurisdiction by even one U.S. state could result in all U.S. citizens being subject to such jurisdiction in the courts of the affronted nation. A uniform federal policy, on the other hand, would prevent the effects of one state's sins from being visited on the heads of the entire nation.

2.2. The Need for Comity

Part 2.1 argues that the goal of having the nation speak with one voice in regulating commercial relations with foreign governments is defeated by the bewildering variety of state and federal jurisdictional rules that apply to international cases. In this section, the article contends that specific rules adopted by some U.S. jurisdictions and opinions issued by some U.S. courts impact adversely on U.S. foreign relations by needlessly antagonizing other countries. These judicial lapses of comity frustrate the policies, offend the sovereignty, and disparage the legal systems of foreign nations.

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95 Moore, supra note 77, at 255.
96 Id. at 265.
97 441 U.S. at 453. In an omitted footnote, the Court noted that automatic retaliation by some nations might result from the California tax.
98 Belgium, Italy, Austria, and Portugal are examples. See Born, supra note 8, at 15.
99 See id. at 33 & n.139.
2.2.1. Frustration of Foreign States’ Policies

State courts sometimes assert local policy interests to justify retention of international cases or application of state law instead of foreign law. The unhappy result, however, may be a foreign nation angered by the frustration of its policies.

For example, Corrigan v. Bjork Shiley Corp.\(^\text{100}\) was a wrongful death suit against the manufacturer of a heart valve that allegedly fragmented and caused the death of an Australian citizen in whom the device had been implanted by Australian doctors in an Australian hospital. The California Court of Appeal found that, were the case to be tried in Australia, the courts there would apply Australian law,\(^\text{101}\) under which discovery would be less liberal than under California law, and causes of action for strict liability and breach of warranty “would be circumscribed, as would certain elements of damage.”\(^\text{102}\) Nonetheless, the court decided that Australia had little interest in preventing its citizens from taking advantage of the more generous provisions of California law,\(^\text{103}\) whereas California had an “important interest in regulating products manufactured in California.”\(^\text{104}\)

What the court failed to realize, however, was that these Australian rules that make tort recovery more difficult can be viewed as elements of a coherent Australian trade policy, aimed at encouraging foreign manufacturers to export high technology products to Australia. Heart valves, for example, are meant for seriously ill patients; whatever their dangers, Australians dying of heart disease are better off with them than without them. By imposing a negligence standard of liability on their design and manufacture, and by enacting other rules limiting tort recoveries for its citizens, Australia has pegged the balance between benefits and risks at the particular level that it has determined is best.\(^\text{105}\) This decision is frustrated, however, if U.S. manufacturers withhold products such as heart valves from the Australian market because of a fear of being held to a strict liability standard in tort actions in U.S. courts.

\(^{100}\) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247 (1986).
\(^{101}\) Id. at 179, 227 Cal. Rptr. at 254.
\(^{102}\) Id.
\(^{103}\) Id. at 180, 227 Cal. Rptr. at 255.
\(^{104}\) Id.
\(^{105}\) The Corrigan court did not recognize this Australian interest, but rather asserted that California has an important interest in regulating products manufactured there. Id. The Supreme Court responded to a similar assertion in Reyno, however, by pointing out that “the incremental deterrence [of U.S. manufacturers from producing defective products] that would be gained if this trial were held in [a U.S.] court is likely to be insignificant.” 434 U.S. at 260–61.
Similarly, the *Reyno* holding that the forum choice of foreign plaintiffs deserves reduced deference\(^{108}\) is consistent with the interest of foreign nations in deciding in local courts suits arising locally.\(^{107}\) In *Reyno*, Scottish citizens were injured at home; Scotland had the right to resolve disputes arising from the accident by applying its own law in its own courts.\(^{108}\) When a U.S. court provides an alternate forum for a foreign citizen injured in his home nation, it undercuts the policies of that nation. This is so because nations balance many factors in deciding on a trade policy, and the results of this balancing are reflected in the rules of decision that they adopt to govern tort recoveries in their courts.

Many lower federal courts have more explicitly recognized that it is improper to hamper the trade policies of foreign nations by allowing their residents to take advantage of generous U.S. tort liability rules.\(^{109}\) In *Harrison v. Wyeth Laboratories*,\(^{110}\) for example, residents of the United Kingdom brought products liability suits in federal district court against U.S. companies that manufactured oral contraceptives. The court dismissed the suits as more appropriately heard in the United Kingdom:

> [B]alancing of the overall benefits to be derived from a product's use with the risk of harm associated with that use is peculiarly suited to a forum of the country in which the product is to be used. Each country has its own legitimate concerns and its own unique needs which must be factored into its process of weighing the drug's merits, and which will tip the balance for it one way or the other. . . . [I]t is manifestly unfair to the defendant, as well as an inappropriate usurpation of a foreign court's proper authority to decide a

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\(^{108}\) 454 U.S. at 255-56.

\(^{107}\) "[T]here is a local interest in having localized controversies decided at home." *Id.* at 260 (quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947)).

\(^{108}\) As the *Reyno* Court noted, "Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish." *Id.*

\(^{109}\) See, e.g., Ledingham v. Parke-Davis Div. of Warner-Lambert Co., 628 F. Supp. 1447, 1451 (E.D.N.Y. 1986) ("[W]hen a regulated industry, such as the pharmaceutical industry, is involved in an action, the country where the injury occurs has a particularly strong interest in the litigation."); Fraizer v. St. Jude Medical, Inc., 609 F. Supp. 1129, 1131-32 (D. Minn. 1985) ("Denmark has a significant interest in setting the standards that a foreign manufacturer must meet to sell products there."); cf. Laurantzen v. Larsen, 345 U.S. 571, 575 (1953) (holding that granting a U.S. remedy to an injured Danish seaman "would sharply conflict with the policy and letter of Danish law"). But see Carlenstolpe v. Merck & Co., 638 F. Supp. 901, 909 (S.D.N.Y. 1986) (holding that the interest of the U.S. forum where the drug has been manufactured "is at least equal to that of the foreign citizen's home forum").
mild: of local interest, for a court in this country to set a
higher standard of care than is required by the government
of the country in which the product is sold and used.111

In an analogous line of cases involving forum selection clauses, the
Supreme Court has considered the foreign policy implications of U.S.
courts’ retaining jurisdiction of cases more properly decided elsewhere,
and ruled that such cases should be dismissed. In M/S Bremen v.
Zapata Off-Shore Co.,112 for example, putting aside the disfavor in
which forum selection clauses have traditionally been held by U.S.
courts,113 the Court held that dismissal of the case in compliance with
the clause was appropriate:

The expansion of [U.S.] business and industry will hardly be
encouraged if, notwithstanding solemn contracts, we insist on
a parochial concept that all disputes must be resolved under
our laws and in our courts. . . . We cannot have trade and
commerce in world markets and international waters exclu-
sively on our terms, governed by our laws and resolved in
our courts.114

In the same way, U.S. trade with foreign nations will suffer if busi-
nesses fear that U.S. courts will ignore the policy determinations of the
United States’ trading partners by applying U.S. law to foreign citizens
injured abroad.115

111 Id. at 4-5. The court pointed out that were the alternate forum a country less
similar to the United States than is the United Kingdom—if it were India, for ex-
ample—there would be even greater impropriety in affording the foreign plaintiffs a for-
num in the United States:

Faced with different needs, problems and resources . . . India may, in
balancing the pros and cons of a drug’s use, give different weight to vari-
sous factors than would our society, and more easily conclude that any risks
associated with the use of a particular oral contraceptive are far out-
weighed by its overall benefits to India and its people. Should we impose
our standards upon them in spite of such differences? We think not.

Id.; cf. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec. 1984,
634 F. Supp. 842, 865 (S.D.N.Y. 1986) (finding that public interests of India in adju-
dicating claims stemming from gas leak there far outweigh those of the United States).


113 See L. Brilmayer, supra note 7, at 33.

114 407 U.S. at 9; see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,
respect for the capacities of foreign and transnational tribunals,” inter alia, mandated
enforcement of international arbitration clause, “even assuming that a contrary result
would be forthcoming in a domestic context”); Scherk v. Alberto-Culver Co., 417 U.S.

115 See also Note, Foreign Plaintiffs and Forum Non Conveniens: Going Beyond
Repetto, 104 Yale L. J. 273, at 273 (1994), 104 urging that “the application of [a U.S.]
forum’s law to controversies in which other countries have a vital interest is likely to
2.2.2. Offenses to Foreign Sovereignty

Foreign states justifiably resent overly expansive U.S. assertions of personal jurisdiction and unduly jingoistic U.S. choice of law determinations. In the area of jurisdiction, the aggressive practices of U.S. courts\(^\text{116}\) have had tangible negative effects on foreign policy. In the 1970s, the United States and the United Kingdom negotiated on a proposed bilateral convention\(^\text{117}\) liberalizing the laws of enforcement of judgments between the two countries.\(^\text{118}\) However, the United Kingdom withdrew from the negotiations after British industry claimed that the Convention would require recognition by British courts of exorbitant jurisdictional claims by U.S. courts.\(^\text{119}\) Thus, a treaty beneficial to the nation was lost because of the federal failure to check the jurisdictional excesses of some U.S. courts.

In the area of choice of law, similarly, the interest analysis technique employed by some U.S. courts is often criticized for its tendency to select the law of the forum, based on its assumption that local laws are designed to benefit local residents.\(^\text{120}\) This approach does not pay sufficient attention to the special problems of transnational litigation. The international order relies on the comity of nations; the United States violates this comity whenever it applies its own law to a case in which another country has a stronger interest. In the words of one foreign commentator:

\[ \text{[T]he problem ... is whether a state member of the international community can rightly respond to the quest [for] applicable law in international conflicts cases by adopting a methodology which consists, by definition, of an aggressive unilateralist approach and can virtually produce solutions that are inherently indifferent to considerations dictated by an actually growing and politically desirable social, economic, and cultural intercourse among the nations.} \]

\(^{116}\) See supra text accompanying note 10.


\(^{118}\) Born, supra note 8, at 29 n.122.

\(^{119}\) Id. (citing North, The Draft U.K./U.S. Judgments Convention: A British Viewpoint, 1 Nw. J. Int'l L. & Bus. 219, 233-38 (1979)). Born notes that foreign protests are especially likely when U.S. courts assert jurisdiction in order to apply "public-policy based statutes like the antitrust laws." Id. at 19 n.86; see, e.g., In re Uranium Antitrust Litigation, 617 F.2d 1248, 1253-56 (7th Cir. 1980) (applying the Sherman Act to antitrust activity outside of the United States).

\(^{120}\) See L. BRILMAYER, supra note 7, at 241-42.

\(^{121}\) Evtigelli, Interest Analysis: A Continental Perspective, 46 Ohio St. L.J.
It is not surprising that foreign sovereigns are offended by U.S. courts’ use of a choice of law approach that ignores or gives little attention to international harmony but places great emphasis on local policy interests.

2.2.3. Disparagement of Foreign Legal Systems

In Zschernig v. Miller, the Supreme Court invalidated an Oregon statute that, as applied, prevented citizens of certain countries from inheriting personal property in Oregon. The chief basis for the decision was the Court’s concern that under the challenged Oregon law and under similar laws in other states, state courts had “launched inquiries into the type of governments that obtain[ed] in particular foreign nations.” The Court ruled that this type of inquiry was an impermissible “state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government.”

In applying jurisdictional rules, some state courts have engaged in similar criticisms of foreign nations. In Holmes v. Syntex Laboratories, for example, a products liability suit by British citizens against three U.S. companies for damages allegedly caused by an oral contraceptive, an appeals court ruled that California law (1) affords substantial deference to the choice of forum of all plaintiffs, foreign and resident, and (2) attaches great significance to the possibility that a forum non conveniens dismissal will result in a change in applicable law that disfavors the plaintiff by depriving him of a “suitable” alternative forum. The court then held that “a review of Britain’s conflict of law rules and its current substantive law of products liability demonstrates that the British courts are not a suitable alternative.” After examining the applicable British law at length, the court concluded that

123 The statute provided for escheat unless there existed (1) a reciprocal right of U.S. citizens to inherit property on the same terms as citizens of the heir’s home nation; (2) a right of U.S. citizens to receive payments here of funds from estates in the foreign country; and (3) a right of the foreign heirs to receive the proceeds of Oregon estates without confiscation by the foreign government. OR. REV. STAT. § 111.070 (1957) (repealed 1969).
124 389 U.S. at 434.
125 Id. at 436.
127 Id. at 380-81, 202 Cal. Rptr. at 778.
128 Id. at 381, 202 Cal. Rptr. at 778-79. “To the extent [Reyno] departs from California law,” the court concluded, “it is inapposite.” Id. at 382, 202 Cal. Rptr. at 780 (emphases in original).
"the British themselves have condemned as inadequate [British law] in the field of defective products."\(^{130}\)

What the court failed to see, however, is that it is for the British Parliament, not the California courts, to decide what kind of products liability law is appropriately applied to cases involving British citizens injured in Britain. The judicial condemnation of British law indulged in by the Holmes court is precisely the sort of offensive state behavior that the Scherrig decision aimed to prevent.

Courts sometimes also criticize foreign legal systems when considering whether to enforce foreign judgments. For example, in cases in which jurisdiction was litigated in the foreign court or the right to litigate jurisdiction was waived, while most U.S. courts will not reexamine the issue, some will independently reexamine the bases of jurisdiction of the foreign court.\(^{131}\) This procedure gives the unsuccessful litigant a free second chance, implying that the domestic court views the foreign court’s disposition of the issue as somehow not sufficiently reliable to be recognized in this country. Another example would be a case in which a state court refused to enforce a foreign judgment on the grounds that the rendering nation did not possess impartial tribunals.\(^{132}\)

3. JURISDICTIONAL ISSUES IN INTERNATIONAL CASES: A NEW APPROACH

Part 2 of this article demonstrates that the ad hoc approach of current law to the special problems presented by transnational litigation has resulted in a national cacophony of voices, some of them euphonious but some of them strident, in an area of foreign policy. In Part 3, after demonstrating that the Supreme Court has embraced the promulgation of federal common law in the foreign relations domain, the article proposes an integrated approach to jurisdictional issues in international cases.

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130 Id. at 387, 202 Cal. Rptr. at 782.
131 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 reporters’ note 3 at 600 (1986) (citing Hunt v. BP Exploration Co. (Libya), 492 F. Supp. 885 (N.D. Tex. 1980)).
132 As long as jurisdictional issues in international cases are a matter of state law, the Supreme Court has no jurisdictional basis for reviewing state court decisions that refuse to grant appropriate deference to foreign interests or that offensively criticize foreign legal systems. If state courts must apply federal law in international cases, however, then the federal judicial oversight that is needed will be possible. See L. HENKIN, supra note 73, at 219 & n.48.
3.1. Federal Common Law

3.1.1. Introduction

In *Erie Railroad Co. v. Tompkins*, the Supreme Court announced that "[t]here is no federal general common law." Since that time, however, numerous cases have made clear that in some areas of the law, there is indeed a federal common law, binding on state courts and lower federal courts alike.

There are two types of post-*Erie* federal common law. One type evolves when either the Constitution or a federal statute supplies a basis for federal jurisdiction over a certain area of law and implicitly authorizes judicial development of substantive federal law to govern cases that arise. Admiralty is the foremost example under the Constitution, while cases involving disputes between labor and management over contract violations constitute one area of federal statutory common law. State courts are likewise required to apply federal common law when deciding cases that arise under federal statutes so that "the federal Act [is] given that uniform application throughout the country essential to effectuate its purposes."

The other type of federal common law is made by courts "in cases raising issues of uniquely federal concern." In a companion case decided on the same day as *Erie*, the Supreme Court established a federal common law of interstate water rights. Similarly, in a case involving commercial paper issued by the federal government, the Court held that the rights and duties of the United States are defined by federal common law. It has been suggested that the same logic mandates that international law, too, be applied in U.S. courts as federal common

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133 304 U.S. 64 (1938).
134 Id. at 78.
139 *Northwest Airlines*, 451 U.S. at 95.
140 See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); see also *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . . ") (footnote omitted).
141 See *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943); see also *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947) (holding that the question of federal law vis-à-vis the law of the government losses stemming from injuries to a soldier is governed by federal common law).
Finally, the Court has indicated that federal common law is suitable in the area of "international disputes implicating . . . our relations with foreign nations."\footnote{See Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 AM. J. INT’L L. 740, 743 (1939); see also Filartiga v. Pena-Irala, 630 F.2d 876, 886-87 (2d Cir. 1980) (holding that the law of nations is part of the common law of the United States); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (dictum) (citing Jessup’s argument approvingly).
\footnote{Cf. The Federalist No. 42, at 302 (J. Madison) (B. Wright ed. 1961) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”).}
\footnote{United States v. Belmont, 301 U.S. 324, 331 (1937); see also L. Henkin, supra note 73, at 227 & nn.1-2 (listing a number of similar quotations).
\footnote{376 U.S. 398 (1964). In Sabbatino, a U.S. commodity broker contracted to buy sugar from a Cuban corporation largely owned by U.S. residents. The Cuban government expropriated the corporation, however, and after taking delivery of the sugar, the broker refused to pay for it. Banco Nacional, a Cuban instrumentality to which the bills of lading had been assigned, sued in federal district court. The court granted summary judgment for the defendants, however, ruling that the act of state doctrine did not protect the Cuban action from judicial inquiry in this country because the expropriation had violated international law. The court of appeals affirmed, and the Supreme Court reversed, holding that the act of state doctrine was applicable despite the alleged violation of international law.
\footnote{The act of state doctrine provides that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” Underhill v. Hernandez, 168 U.S. 250, 252 (1897).}}

3.1.2. Foreign Relations and Federal Common Law

It has long been recognized by the Supreme Court that foreign relations is the quintessential matter that must be subject to federal control.\footnote{376 U.S. 398 (1964). In Sabbatino, a U.S. commodity broker contracted to buy sugar from a Cuban corporation largely owned by U.S. residents. The Cuban government expropriated the corporation, however, and after taking delivery of the sugar, the broker refused to pay for it. Banco Nacional, a Cuban instrumentality to which the bills of lading had been assigned, sued in federal district court. The court granted summary judgment for the defendants, however, ruling that the act of state doctrine did not protect the Cuban action from judicial inquiry in this country because the expropriation had violated international law. The court of appeals affirmed, and the Supreme Court reversed, holding that the act of state doctrine was applicable despite the alleged violation of international law.
\footnote{The act of state doctrine provides that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” Underhill v. Hernandez, 168 U.S. 250, 252 (1897).}} To offer just one famous quotation: “[I]n respect of our foreign relations generally, state lines disappear. As to such purpose the State of New York does not exist.”\footnote{Texas Indus. v. Radcliff Materials, 451 U.S. 630, 641 (1981).} One means used by the judicial branch to exercise federal control over foreign relations is to establish federal common law.

The leading case on foreign relations and federal common law is Banco Nacional de Cuba v. Sabbatino,\footnote{Cf. The Federalist No. 42, at 302 (J. Madison) (B. Wright ed. 1961) (“If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”).} involving the act of state doctrine.\footnote{United States v. Belmont, 301 U.S. 324, 331 (1937); see also L. Henkin, supra note 73, at 227 & nn.1-2 (listing a number of similar quotations).} In Sabbatino, the Court held that the act of state doctrine is not binding international law, but rather has “underpinnings” in the constitutional system of separation of powers.\footnote{376 U.S. 398 (1964). In Sabbatino, a U.S. commodity broker contracted to buy sugar from a Cuban corporation largely owned by U.S. residents. The Cuban government expropriated the corporation, however, and after taking delivery of the sugar, the broker refused to pay for it. Banco Nacional, a Cuban instrumentality to which the bills of lading had been assigned, sued in federal district court. The court granted summary judgment for the defendants, however, ruling that the act of state doctrine did not protect the Cuban action from judicial inquiry in this country because the expropriation had violated international law. The court of appeals affirmed, and the Supreme Court reversed, holding that the act of state doctrine was applicable despite the alleged violation of international law.
\footnote{The act of state doctrine provides that “the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.” Underhill v. Hernandez, 168 U.S. 250, 252 (1897).}} The Court stressed that the doctrine is exclusively federal common law:

[I]t is plain that the problems involved are uniquely federal in nature. 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. . . . [W]e 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.\textsuperscript{149}

The Court was concerned that "legal problems affecting international relations . . . not be left to divergent and perhaps parochial state interpretations."\textsuperscript{150}

Professor Henkin has pointed out the far-reaching implications of the Court's decision in \textit{Sabbatino}:

\textit{Sabbatino} establishes foreign affairs as a domain in which federal courts can make law with supremacy. There ought to be little doubt, then, that in the established areas of judicial lawmaking, law that is substantially related to foreign affairs—the determination of customary international law and comity for judicial purposes; . . . the principles of (international) conflicts of laws; rules as to . . . the treatment of foreign judgments—the federal courts can make law for their own guidance and can decide also whether federal interests require that the states conform to them.\textsuperscript{161}

Thus, \textit{Sabbatino} firmly established that in the area of foreign relations, the Supreme Court has the power to make law binding on state and federal courts alike as federal common law.

\section*{3.2. A Proposed Solution}

In response to the shortcomings of the current approach to juris-

\textsuperscript{149} \textit{Id.} at 424. In an omitted footnote, the Court noted that it was unnecessary to consider whether a state court could permissibly adhere to a more restrictive view than that required by the Supreme Court concerning the scope of examinations of foreign acts.

\textsuperscript{150} \textit{Id.; cf.} Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (lauding wisdom of first Congress in vesting jurisdiction in federal courts over suits by aliens relating to torts committed in violation of international law, since questions of forum non conveniens and other issues in such cases "are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states").

\textsuperscript{161} L. HENKIN, supra note 73, at 219 (footnotes omitted) (emphasis added).
dictional issues in transnational cases in U.S. courts, this article proposes an alternative framework. Courts considering these issues currently use a variety of analytical methods, all of which share the fault of giving only cursory attention—if indeed any attention at all—to the foreign policy implications of the results to which they lead. In contrast, this article advocates a basic, general approach to jurisdictional issues that explicitly factors in the foreign relations effects of judicial decisions in international cases. The proposed method has two goals: (1) to treat individual litigants fairly and (2) to promote international harmony and the smooth functioning of the multinational system by affording respect to foreign states and by carefully considering their interests.

The suggested approach is as follows: in international cases, courts should decide jurisdictional issues by analyzing not only the connections among the litigants, the litigation, and the forum, but also the relevant policies of the United States and the interested foreign state. The inclusion of foreign policy concerns in the jurisdictional calculus distinguishes the proposed method from that used by many courts under present law. Currently, most courts decide whether or not to assert personal jurisdiction over a foreign litigant by looking only at the contacts between the defendant and the forum; in ruling on forum non conveniens motions and deciding choice of law questions, some courts regard as important the policies of only the forum state; and courts sometimes refuse enforcement to foreign judgments on the sole ground that local public policy is contrary.

In contrast, the proposed approach will ensure that courts take into account the international context of a case in deciding jurisdictional issues. Thus, if an alien defendant challenges a U.S. court’s assertion of personal jurisdiction, the court should first look at minimum contacts, as in a purely domestic case; if they are not present, then assertion of jurisdiction is forbidden by the due process clause. If minimum contacts are found to exist, however, so that the defendant cannot complain of having been denied “fair play and substantial justice,” the inquiry should not end; the next question is, will the policies of other nations be adversely affected by the court’s exercise of jurisdiction? If the an-

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swear is no, then the court may exercise jurisdiction. Otherwise, however, the court must find that the assertion of jurisdiction is unreasonable unless a strong policy interest of the United States argues in favor of retention of the case.\textsuperscript{167}

If personal jurisdiction is not at issue, or if the court has found that exercising jurisdiction is reasonable under the circumstances of the case, the court may have to consider a motion for dismissal on the grounds of forum non conveniens. Again, the question it must ask is, will the policies of other nations be adversely affected if the case is tried in the United States? If the answer is no, then the court should decide the motion on the basis of the traditional forum non conveniens factors.\textsuperscript{168} If, however, the court finds that another nation would be offended or its policies frustrated by trial of the litigation in the United States, then the case should be dismissed, unless (1) the traditional forum non conveniens factors strongly suggest retention or (2) a strong policy interest of the United States requires that a domestic forum hear the case.

The same framework of analysis should govern choice of law questions. Whenever a court decides to preside over an international case, the next question it will face is what law to apply. If the court finds that no other nation has a significant interest in having its law selected, then it should choose U.S. law. If, on the other hand, the court determines that another nation does have important policies at stake, and the United States does not, then the law of that other country should be employed. If significant policies of more than one nation clash, then the court should balance the competing interests and choose the weightiest.\textsuperscript{169}

Finally, when the issue presented is whether or not to enforce a

\textsuperscript{102} (1987), the Court for the first time suggested that state courts look at the policies of other nations before exercising personal jurisdiction over alien defendants. \textit{Id.} at 115. The Court recommended "a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state." \textit{Id.} at 116. However, the Court did not move beyond the facts of the case to decide how much weight lower courts in future cases should give to transnational factors, nor did it provide guidance for disputes involving alien defendants in which two or more states have legitimate interests.

\textsuperscript{167} Purely local policy interests should be insufficient to support the assertion of jurisdiction in cases in which the policies of other nations, and hence the foreign policy of the United States, will be adversely impacted.

\textsuperscript{168} See \textit{supra} text accompanying notes 16-19.

\textsuperscript{169} This balancing approach is similar to Professor Baxter's comparative impairment test, see Baxter, \textit{supra} note 47, at 8-9, 17-22, and to the \textit{Second Restatement's} consideration of the relative strengths of the interests of the forum and other interested states, see \textit{RESTATEMENT (SECOND) OF CONFLICT OF LAWS} \S 6 (1971).
foreign judgment, there should be a presumption that the judgment is to be enforced. A harmonious international system requires each nation's courts to enforce valid judgments issued by the courts of sister nations, and the United States should take a leading role in promoting worldwide respect for law. Only a strong, contrary policy interest of the United States should permit a court to refuse to enforce a foreign judgment.

Figure I illustrates the decision process of a judge applying the proposed approach to questions of personal jurisdiction, forum non conveniens, and choice of law in an international case.
INTERNATIONAL CASE

Are there minimum contacts?

No

Yes

Dismiss

Will U.S. court's assertion of PJ adversely affect X's interests?

Yes

No

Does U.S. have strong policy interest in retaining the case?

No

Yes

Dismiss

Will U.S. trial adversely affect X's interests?

Yes

No

Do FNC factors strongly suggest retention?

No

Yes

Do FNC factors suggest dismissal?

No

Yes

Dismiss

Does U.S. have strong policy interest in retaining the case?

No

Yes

Dismiss

RETAIN

Does X have significant interest in having its law applied?

Yes

No

Does U.S. have significant interest in having its law applied?

No

Yes

Is X's interest stronger than that of the U.S.?

Yes

No

FOREIGN LAW

U.S. LAW

Abbreviations
U.S. = United States
X = foreign nation
PJ = personal jurisdiction
FNC = forum non conveniens

FIGURE I
3.3. The Proposed Solution in Operation

In order to convey a more concrete understanding of the approach suggested by this article, and to explore more fully some of its ramifications, it is useful to posit a hypothetical case. Thus, suppose that TanksLoads, a French subsidiary of the U.S. munitions corporation ArmsAgeddon, operates a plant in the small town of Revolvé, thirty kilometers west of Paris. The plant supplies tanks to the armies of France, the United States, Italy, and the Benelux nations. In May 1988, factory employees of North African descent file a class action suit against the two companies in a state court in Delaware, where ArmsAgeddon is incorporated, charging that TanksLoads is denying promotions to workers at the French plant on the basis of race, in violation of the laws of both France and Delaware, and seeking injunctive and monetary relief. The complaint alleges that the hiring practices at the Revolvé plant are mandated by ArmsAgeddon's top management as part of a racially discriminatory policy in place throughout all branches of the corporation.

In dealing with the jurisdictional questions raised by this case, the typical trial court would examine such issues as the contacts between the French company and Delaware, the location of pertinent documents, and the intentions of the state legislature regarding application of Delaware's civil rights law to foreign subsidiaries of local corporations. Only the exceptional state or federal judge might look beyond these concerns and recognize that a case such as this one raises delicate international issues, requiring analysis of both French policies and U.S. foreign affairs interests. Using this article's suggested approach, however, the trial court hearing this suit would have a framework within which to address these critical foreign policy questions.

When the case is called, TanksLoads might begin defense of the suit by filing a special appearance challenging the assertion of jurisdiction over it by the Delaware court. Assuming that minimum contacts are found—based perhaps on the sale of tanks by the French subsidiary to the U.S. army and/or the parent company's incorporation in Delaware—the court must then consider whether any French policies would be adversely affected by a U.S. court's exercise of jurisdiction over TanksLoads. It is easy to see that France might well have quite significant objections to having an important French armsmaker hauled before a U.S. tribunal. If the trial court were to so find, then it would not exercise jurisdiction over Tanks Loads unless a strong policy interest of the United States argues for retention of the case. If the court were to find that the United States has such an interest, for example in preventing its businesses from forcing subsidiaries to engage in racially
discriminatory behavior abroad, then it would exercise personal juris-
diction over both defendants.

It is worthwhile to pause at this point to consider how a court
should ascertain the pertinent policies of interested foreign states and of
the United States. Sometimes, this task will be easy, as when a govern-
ment files an amicus curiae brief or otherwise communicates its position to the court, or when debates in the legislature or pronounce-
ments by the executive branch make government policy clear. In
difficult cases, in fact, a court would be acting well within its discretion
if it requested guidance from the relevant government, much as a fed-
eral court will sometimes certify a question to the highest court of a
state. Otherwise, the court must balance a variety of factors and reach
the best answer it can. Some of these factors may be statements by
legislators and government officials, inferences that can be drawn from
the purposes of the particular law at issue or from the general pattern
of a nation’s laws, precepts of international law, and common sense
assessment of the goals and values of nations and their citizens.

To illustrate, suppose that the Delaware court in the hypothetical
case asserts jurisdiction over both defendants and moves on to determine
which nation’s law to select. The first issue for consideration under the
proposed approach is whether or not France has a significant interest
in having its law applied. If the two competing jurisdictions have simi-
lar laws on this issue, but French law provides double damages and
Delaware law treble, it would seem clear that France does not have a
strong interest in the application of its law. On the other hand, if
French law exempts munitions companies from civil rights require-
ments for national security reasons, it would seem readily apparent that
France does have important interests at stake. If the French policy is
less clear, the court might look at whether or not France is a party to
international conventions barring racial discrimination, whether the
French have in the past objected to a foreign nation’s applying its law
to activities of a French subsidiary of a parent company located in that
nation, and whether the French government has taken any position on

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160 However, at least in the act of state context, the Supreme Court appears to
have overruled the so-called Bernstein exception and held that the judiciary is not
bound by U.S. Executive Branch statements to the courts about what is or is not in the
nation’s foreign policy interest. See First Nat’l City Bank v. Banco Nacional de Cuba,
406 U.S. 759, 776 (1972) (Brennan, J., dissenting) (calculating that six members of the
Court were voting to overturn Bernstein).

161 Cf. Restatement (Third) of Foreign Relations Law § 403 reporters’
ote 6 (1986) (discussing how courts can determine state interests when judging the
reasonableness of an exercise of jurisdiction to prescribe law with respect to foreign
persons or activities).
attempts by the North African workers to pursue domestic remedies, to name a few of the possible avenues the court could pursue. Obviously, the parties litigating the issue can be expected to assist the court by putting forward the best possible arguments for either side.

If the court were to determine that French policy would demand the application of French law, it would turn to an examination of U.S. policy. Soliciting guidance from the Justice Department would be one effective means of obtaining information. Another might be to look at the policies that inspired the federal civil rights laws and to analyze whether those policies would support application of those laws to a case involving a U.S. company directing a foreign subsidiary to implement racially discriminatory hiring practices. Also pertinent would be the law with respect to regulation of foreign subsidiaries generally.\textsuperscript{162} Once it had examined these factors and assessed their applicability and weight, the court could determine the significance of the U.S. policy interests at stake in the litigation.

To take the hypothetical case one step further, suppose the court were to find that both nations have significant interests in having their law applied. The judge would then balance the competing interests and determine which of the conflicting policies would be more damaged if the other prevailed in this instance. If, for example, the strongly worded French civil rights law makes no mention of exemptions on national security grounds but another French law prohibits courts from issuing any injunction that would "disrupt operations" at an arms plant, the court might conclude that enforcing civil rights at Tanks-Loads would be less disruptive than a strike by the North African workers, and that therefore, the choice of U.S. law would be superior. Such a result would advance the anti-discrimination policies of both countries and would be minimally disruptive of operations at the French tank’factory. Moreover, it bears noting that the approach advocated here does not involve U.S. courts in evaluating the legitimacy of foreign states’ policies, an exercise likely to give offense to governments abroad. Rather, the court wrestling with these issues seeks to identify the relevant policies of the foreign state and assess their significance to that state, in order to ensure that it frustrates these policies as little as possible, if at all.\textsuperscript{163}

As a final illustration of the suggested approach to jurisdictional issues in international cases, assume that the Delaware judge dismisses the lawsuit in the hypothetical case on the grounds of forum non con-

\textsuperscript{162} See id. § 414.

\textsuperscript{163} See Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 615 n.34 (9th Cir. 1976).
veniens. Trial proceeds in France, and ultimately, a court finds that ArmsAgeddon’s top managers have developed a policy of systematic racial discrimination which they have imposed throughout the company’s operations, and orders appropriate relief for the workers in Revolvé. Subsequently, the plaintiffs return to court in Delaware to collect the damages awarded by the judgment against ArmsAgeddon, and the company asserts that the French court lacked jurisdiction over it. Under the present proposal, the Delaware judge would proceed by presuming that the French decree was valid; the burden would be on ArmsAgeddon to prove that the issuing court lacked jurisdiction.

4. CONCLUSION

If the international system is to thrive, nations must respect each other’s interests. For too long, however, the U.S. approach to jurisdictional issues in international cases has been at best to ignore their international implications, at worst to wield them as weapons on the battlefield of power politics. Now, it is time for the United States to commit itself to becoming a responsible, responsive member of the world community.

Obviously, this article’s proposal—that the United States adopt a federal common law of jurisdiction in transnational cases which explicitly considers the international implications of U.S. court decisions—is but a beginning. However, adoption by the courts of this country of the suggested approach would indicate that the United States takes seriously its role as a global citizen, and as such would be an important step towards a more harmonious international order of law.