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## Federalism, Forum Shopping, and the Foreign Injury Paradox

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# FEDERALISM, FORUM SHOPPING, AND THE FOREIGN INJURY PARADOX

ELIZABETH T. LEAR\*

## ABSTRACT

*This Article explores the contours of state regulatory power in the foreign injury context. The Supreme Court has long declined to question forum choice in domestic cases, apparently concluding that any other response would be inconsistent with our federalism. But move the injury offshore and the judicial deference to state regulatory supremacy evaporates. Federal judges subject forum choice in transnational tort actions to exacting scrutiny, routinely dismissing such claims on forum non conveniens grounds with no examination of the state interests at stake. This Article first considers whether the offshore nature of a foreign injury diminishes or even extinguishes traditional state regulatory interests in a dispute. In fact, the states retain substantial deterrence interests in such personal injury claims. From a state's perspective, it is often irrelevant whether an out-of-state injury occurs in a sister state or a foreign state. This Article then demonstrates that neither the Constitution nor customary international law supports the federal courts' use of forum non conveniens in these international diversity actions. The federal forum non conveniens doctrine should thus be abandoned as inconsistent with American federalism.*

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## INTRODUCTION

Forum shopping in the United States is a “national legal pastime.”<sup>1</sup> It comes in various styles depending on whether the shopper is the plaintiff or the defendant. We offer horizontal forum shopping, allowing litigants to choose among the state courts or federal district courts if diversity jurisdiction exists. We offer vertical shopping, allowing eligible litigants to choose between state and federal court. Sometimes we even allow litigants to shop more than once in a single case. Consider *Piper Aircraft Co. v. Reyno*,<sup>2</sup> involving a plane crash in Scotland. The *Piper* plaintiffs engaged in some aggressive horizontal shopping—though the case could logically have been brought in Pennsylvania, Ohio, or even Scotland, the *Piper* plaintiffs settled on California state court.<sup>3</sup> Defendants then countered with a vertical-horizontal shopping stratagem, first removing the case to federal district court in California and then obtaining transfer “in the interest of justice” and “[f]or the convenience of parties and witnesses” to a federal court in Pennsylvania.<sup>4</sup> Shortly thereafter the defendants found that Pennsylvania was not so convenient after all and successfully moved to dismiss the case on forum non conveniens grounds.<sup>5</sup>

The judiciary is openly critical of forum shopping in general and plaintiff forum shopping in particular.<sup>6</sup> Like indulgent parents,

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1. J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967). Note that forum shopping is no idle pastime. Forum choice matters. Professors Kevin M. Clermont and Theodore Eisenberg found, for example, that plaintiffs' win rates in federal court decreased from 58 percent to 29 percent when a defendant successfully transferred the case to another federal district. Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511-14 (1995) (examining data from the Administrative Office of the United States Courts between fiscal years 1979-1991 of approximately 2.8 million closed federal civil cases).

2. 454 U.S. 235 (1981).

3. *Id.* at 240. The plaintiff in *Piper*, who was actually the legal secretary of the lawyer handling the case, was appointed the administratrix of the decedents' estates by the California state court prior to filing suit. *Id.* at 239.

4. *Id.* at 240 n.4. Transfer was obtained pursuant to 28 U.S.C. § 1404(a). *Id.* at 240-41.

5. *Id.* at 241.

6. See, e.g., *Coastal Corp. v. Tex. E. Corp.*, 869 F.2d 817, 821 (5th Cir. 1989) (denouncing forum shopping as “a ‘heads I win, tails you lose’ ... strategy”); *Posadas de P.R. Assocs., Inc. v. Asociacion de Empleados de Casino de P.R.*, 873 F.2d 479, 485 (1st Cir. 1989) (finding it

however, the federal courts turn a blind eye toward horizontal forum shopping by plaintiffs in domestic disputes.<sup>7</sup> This tolerance encompasses not simply shopping among the various state courts, but horizontal forum shopping in federal diversity actions as well.<sup>8</sup>

Vertical shopping, on the other hand, provokes overt hostility from the federal bench.<sup>9</sup> Fueled by decades of *Erie* indoctrination,<sup>10</sup> the federal courts have set about to eliminate incentives and opportunities for successful vertical shopping by domestic litigants.<sup>11</sup> *Erie Railroad Co. v. Tompkins*<sup>12</sup> was itself a case about vertical forum shopping. And the cases following in *Erie's* wake such as

"wise" to "discourage forum-shopping"); *Ojeda Rios v. Wigen*, 863 F.2d 196, 199 (2d Cir. 1988) (opining that "[f]orum-shopping is to be discouraged"); *Weight Watchers Int'l, Inc. v. Stouffer Corp.*, 11 U.S.P.Q.2d (BNA) 1544, 1547 (S.D.N.Y. 1989) (describing forum shopping as an "improper purpose"); *Reich v. Purcell*, 432 P.2d 727, 730 (Cal. 1967) ("[I]f the choice of law were made to turn on events happening after the accident, forum shopping would be encouraged."); *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 686-87 (N.Y. 1985) (discussing policies disallowing forum shopping); *Neumeier v. Keuhner*, 286 N.E.2d 454, 458 (N.Y. 1972) (refusing to "sanction[] forum shopping [which] allow[s] a party to select a forum which could give him a larger recovery than the court of his own domicile").

7. See Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 68 (1991) (asserting that the courts' jurisprudence has created a "forum shopping system" where plaintiffs can sue a defendant in any favorable jurisdiction, which has no obligation to defer to a more interested state's law, so long as there are "minimum contacts" or "general jurisdiction").

8. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516 (1990). The *Ferens* case involved Pennsylvania residents injured in Pennsylvania. *Id.* at 519. Barred by the Pennsylvania statute of limitations for tort actions, the plaintiffs filed their claim against John Deere in federal district court in Mississippi. *Id.* In a brilliant, though much maligned, display of tactical competence, the plaintiffs' lawyer used 28 U.S.C. § 1404 to transfer the case to the Western District of Pennsylvania. *Id.* at 520. The Supreme Court upheld the transfer. *Id.* at 532. Justice Scalia dissented, noting that the "file-and-transfer ploy" will "bring home to the desired state of litigation all sorts of favorable choice-of-law rules regarding substantive liability." *Id.* at 538 (Scalia, J., dissenting). For academic criticism of the decision, see Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims That Borrow State Limitations Periods*, 44 EMORY L.J. 501, 543-46 (1995) (commenting that *Ferens* "manipulates the judicial system," "has the appearance of impropriety," and "is deceitful and foreign to a system of fair play and substantial justice").

9. See *infra* notes 41-53 and accompanying text.

10. As Professor Boner observed over forty-five years ago, the *Erie* Doctrine "has continued to gain stature until it is practically a religion. To its critics, the religion may be wearing a little thin, but heresy is still promptly and mercilessly eradicated." Marian O. Boner, *Erie v. Tompkins: A Study in Judicial Precedent: II*, 40 TEX. L. REV. 619, 635 (1962).

11. George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 661-63, 720 (1993) (concluding that the federal courts have taken an "anti-forum shopping approach ... in [their] reading of *Erie's* application to private law federal-state forum shopping").

12. 304 U.S. 64 (1938).

*Guaranty Trust Co. v. York*<sup>13</sup> and *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>14</sup> closed down many of the most serious vertical shopping opportunities.<sup>15</sup>

The domestic forum shopping system dovetails nicely with the Supreme Court's commitment to federalism.<sup>16</sup> If "vigorous state regulation of private law matters is the goal,"<sup>17</sup> then such federalism values are well served in the state-to-state realm by letting the states fight it out, if you will. And because diversity jurisdiction under the prevailing *Erie* theory exists to replicate the state court experience (albeit with federal officials), the federalism critique explains the Court's permissive attitude toward horizontal forum shopping in federal diversity cases, as well as its hostility to vertical forum shopping in the diversity context.<sup>18</sup>

The Court's reaction to international forum shopping, however, defies the federalism paradigm. It seems that the Court is a fair weather federalist, abandoning its deference to the states at the drop of a foreign hat. As the federal forum non conveniens cases demonstrate, the federal courts subject horizontal shopping by diversity plaintiffs in transnational actions to intense oversight.<sup>19</sup> On the other hand, they tolerate, perhaps even encourage, substantial and predictable vertical forum shopping by defendants who clearly prefer the federal to the state courts in foreign injury disputes.<sup>20</sup>

13. 326 U.S. 99 (1945) (interpreting the Rules of Decision Act to require the use of forum statutes of limitations in diversity actions).

14. 313 U.S. 487 (1941) (interpreting the Rules of Decision Act to require the use of forum conflicts of law rules in diversity actions).

15. This is not to say that no vertical forum shopping incentives exist. In *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), for example, defense counsel's belief that the corporate defendants would fare better with a federal court jury than with a state jury pool motivated defendants to take their challenge to Oklahoma's exercise of jurisdiction to the Supreme Court. *Id.* at 291; see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (allowing a federal court sitting in diversity to consider a forum selection clause as part of transfer decision in spite of the fact that the state disfavored such clauses).

16. See *Brown*, *supra* note 11, at 708 (asserting that the "result of these [domestic forum shopping] cases is to leave matters in the hands of the states, and the Court's language makes it clear that is its intent").

17. *Id.* at 651.

18. *Id.*

19. See *infra* notes 54-65 and accompanying text.

20. See, e.g., *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 670 (5th Cir. 2003) (affirming defendant's removal from state court to federal court and subsequent dismissal on forum non conveniens grounds); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir.

This Article explores the relevance of American federalism to the federal supervision of transnational forum shopping.<sup>21</sup> The discussion focuses on the most controversial category of international cases: claims by foreign plaintiffs against American corporate defendants arising from personal injuries sustained abroad. These disputes, which typically involve global goods,<sup>22</sup> fall into two categories: classic, encompassing products like Ford Explorers or Mattel toys, and pharmaceutical.

Part I of this Article describes the American forum shopping scene and the federalism values that animate the Supreme Court's approach to forum choice in disputes arising from domestic injuries. Part II details the federal courts' sharply different response to forum shopping by foreign injury litigants. In contrast to the plaintiff forum shopping system available in domestic cases, the federal forum non conveniens decisions reveal a distinctly pro-defendant, anti-forum shopping bent.<sup>23</sup> From a federalism perspective, the divergent approach suggests that the federal courts either perceive no federalism interest in foreign injury claims or detect a superior federal interest at work.<sup>24</sup>

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1998) (affirming dismissal on the grounds of forum non conveniens of a case removed from state court to federal court in Ohio and subsequently transferred to federal court in Kansas); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985) (affirming dismissal on forum non conveniens grounds after removal from Florida state court).

21. Note that this is not an "*Erie*" article. The discussion here focuses on the initial federal decision to supervise international forum shopping rather than the differences between state and federal forum non conveniens practice. For an excellent discussion of the *Erie* problem in the forum non conveniens context, see generally Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991) (finding that the Rules of Decision Act requires the federal courts to use state forum non conveniens rules when use of the federal rule "unduly interfere[s] with the regulatory prerogatives of the states"); see also Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1195-1205 (2006) (discussing Rules of Decision Act problem) [hereinafter *Lear, Inherent Power*]; Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1387-89, 1392 (1991) (arguing that "federal diversity courts should, under *Erie*, apply state forum non conveniens rules").

22. I define global goods as products "produced for worldwide consumption without material country-specific modifications in design." Elizabeth T. Lear, *National Interests, Foreign Injuries, and Forum Non Conveniens*, 41 U.C. DAVIS L. REV. 559, 573 (2007) [hereinafter *Lear, National Interests*].

23. See *infra* notes 66-78 and accompanying text.

24. See *Brown, supra* note 11, at 709-10.

Part III explores these hypotheses in the context of state jurisdiction to prescribe. Variouslly described as "legislative," "prescriptive," or "regulatory" jurisdiction, jurisdiction to prescribe refers to the power of a sovereign to apply its substantive law to a particular event. An American state's desire to apply its own substantive law to a foreign injury dispute should represent the clearest indication of regulatory interest in a case.<sup>25</sup> Yet only the Tenth Circuit immunizes actions to which a domestic state's law applies from forum non conveniens scrutiny.<sup>26</sup> In fact, the Supreme Court in *Piper* upheld a forum non conveniens dismissal in the face of the lower court's finding that Pennsylvania and Ohio law governed the dispute.<sup>27</sup> The *Piper* Court wholly ignored the states' interests in the case, repeatedly referring to the national interest at stake.<sup>28</sup>

Part III first considers whether the international character of overseas accidents extinguishes a state's traditional regulatory interest in these personal injury actions. This section concludes that a state's interest in a foreign injury dispute does not differ meaningfully from its interest in a domestic claim arising from an out-of-state injury. With respect to global goods, the states have substantial deterrence interests in out-of-state accidents, especially when a product is widely used by domestic consumers.

Part III then examines whether the Constitution or customary international law limits the states' traditional regulatory power in the foreign injury realm or divests states of such power entirely. This discussion finds that customary international law, the federal foreign affairs powers, and the Due Process and Full Faith and Credit Clauses impose no material restrictions on state jurisdiction to prescribe in transnational torts cases.

This Article concludes that federal court oversight of international forum shopping is inconsistent with the central goals of American federalism. The federal judiciary has failed to recognize that the global nature of the twenty-first century economy magnifies rather than diminishes the states' interests in extraterritorial

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25. See Stein, *supra* note 21, at 1971.

26. See *Needham v. Phillips Petroleum Co. of Nor.*, 719 F.2d 1481, 1483 (10th Cir. 1983) (explaining that when domestic law applies, forum non conveniens is inapplicable).

27. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 245 n.10 (1981).

28. *Id.* at 260-61.



injuries. From the states' perspective, it is often irrelevant whether an out-of-state injury occurs in a sister state or a foreign state. States retain significant regulatory interests in foreign injury litigation. And although the Constitution and customary international law divest the states of prescriptive authority over a small subset of such claims, that fact alone hardly authorizes the federal judiciary to curtail state regulatory efforts in the foreign injury realm.

### I. THE DOMESTIC FORUM SHOPPING SCENE

The Supreme Court's personal jurisdiction, choice-of-law, and interstate preclusion decisions provide plaintiffs with extensive state-to-state forum shopping opportunities. *International Shoe Co. v. Washington*,<sup>29</sup> later decisions such as *Burger King Corp. v. Rudzewicz*,<sup>30</sup> and especially the advent of general jurisdiction,<sup>31</sup> empower plaintiffs to sue corporate defendants in many different states. Similarly, Supreme Court case law in the choice-of-law realm explicitly recognizes that more than one sovereign may constitutionally apply its own law to a multistate dispute.<sup>32</sup> The "modest restrictions" found in the Due Process and the Full Faith and Credit Clauses require only that a state seeking to apply forum law "have a significant contact or significant aggregation of contacts [with the dispute], creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."<sup>33</sup> States are free to apply local procedural rules, including forum statutes of limitations, without regard to the forum's relationship to the dispute.<sup>34</sup> And domestic interstate preclusion rules ensure that regardless of how

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29. 326 U.S. 310 (1945) (establishing the "minimum contacts" test for personal jurisdiction).

30. 471 U.S. 462 (1985).

31. *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 414 (1984).

32. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

33. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985).

34. See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722-23 (1988). It appears that there are some limits on a state's ability to categorize rules as "procedural." In *Home Insurance Co. v. Dick*, the Court declined to accept the Texas Supreme Court's attempt to categorize a contract provision as a foreign statute of limitations. 281 U.S. 397, 391 (1930). In that *Dick* came down during the heyday of *Lochner* and before *Erie*, one wonders whether such an attempt might succeed today.

extreme the forum choice or outrageous the choice-of-law decision, plaintiffs may enforce sister state judgments with ease.<sup>35</sup> Thus, a plaintiff suing an interstate entity need not concern itself with the location of assets so long as such assets are domestically held.

The seemingly pro-plaintiff, state-to-state shopping system for domestic disputes is equally available to federal diversity plaintiffs. Rule 4 of the Federal Rules of Civil Procedure incorporates the personal jurisdiction practices of the state in which a diversity action is filed;<sup>36</sup> federal diversity litigants thus experience personal jurisdiction constraints identical to those found in the forum state's courts.<sup>37</sup> On the choice-of-law front, *Klaxon v. Stentor*<sup>38</sup> requires federal courts sitting in diversity to use forum conflict of laws rules, thus preserving plaintiff's state choice-of-law bargains, while *Van Dusen v. Barrack*<sup>39</sup> prevents defendants from obtaining substantive choice-of-law advantages through transfer under 28 U.S.C. § 1404.<sup>40</sup>

Attempts by domestic litigants to shop vertically in the post-*Erie* environment, on the other hand, have met with overt hostility from

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35. Absent a personal or subject matter jurisdiction error on the part of the rendering court, a sister state must recognize the judgment. *See, e.g.,* *Fauntleroy v. Lum*, 210 U.S. 230, 238 (1908). Enforcement is a slightly different matter. The state recognizing the judgment need only enforce the judgment to the same extent that it enforces domestic judgments. *See, e.g.,* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *Bibace v. Schmickler*, No. CV990173767, 2001 WL 438857, at \*1 (Conn. Super. Ct. Apr. 16, 2001); *Tareco Props., Inc. v. Morriss*, No. M2002-02950-COA-R3-CV, 2004 WL 2636705, at \*12 (Tenn. Ct. App. Nov. 18, 2004); *see also* 50 C.J.S. *Judgments* § 782 (2008).

36. FED. R. CIV. P. 4(k)(1)(A).

37. Although plaintiffs filing in federal court as an original matter must comply with federal venue requirements, the federal venue scheme provides few real restrictions on plaintiff's forum choice, particularly with respect to claims against multinational corporations over whom general jurisdiction is readily available. *See* 28 U.S.C. § 1391(c) (2006) (defining corporate residence for purposes of § 1391(a) and (b) in terms of personal jurisdiction).

38. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

39. 376 U.S. 612 (1964) (holding that the conflicts rules of the transferor district follow the case, thus eliminating potential choice-of-law gains by the defendant through transfer). Shopping for procedural advantages is also protected in the federal system, as vividly illustrated in *Ferens v. John Deere Co.*, 494 U.S. 516, 532 (1990) (holding that the transferring forum's statute of limitations follows the case).

40. Section 1404(a) 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." 28 U.S.C. § 1404(a) (2006). Section 1404 authorizes transfer only to a district in which the action could originally have been filed by the plaintiff. *See Hoffman v. Blaski*, 363 U.S. 335, 343 (1960). In the context of a large multinational corporate defendant haled into court under a general jurisdiction approach, the limits in § 1404 are very minimal indeed.

the federal judiciary. *Erie v. Tompkins* was itself a case about forum shopping, at least to some degree. Although *Erie* and subsequent cases such as *Guaranty Trust Co. v. York*<sup>41</sup> and *Walker v. Armco Steel Corp.*<sup>42</sup> may not have been entirely successful in eliminating the differences between state and federal courts in diversity cases, it was not for lack of trying. *Gasperini v. Center for Humanities, Inc.*<sup>43</sup> is the latest installment in the *Erie* saga, focusing on the difference in review standards for new trial claims based upon excessiveness.<sup>44</sup> While *Gasperini* confirms that room exists for technical differences between federal and state court procedures, it reaffirms that uniformity of outcome remains the driving force behind the Court's *Erie* jurisprudence.<sup>45</sup>

At first glance, the Court's apparent support for a decidedly pro-plaintiff system<sup>46</sup> of forum shopping in domestic private law

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41. 326 U.S. 99 (1945).

42. 446 U.S. 740 (1980).

43. 518 U.S. 415 (1996).

44. *Id.* at 418-19.

45. The Reexamination Clause of the Seventh Amendment prevented the *Gasperini* Court from implementing the New York statutory scheme as it was written. *Id.* at 432-33. In an effort to achieve uniformity, however, Justice Ginsburg crafted a version of the New York system for use in the federal district courts in New York. *Id.* at 438-39.

Writing prior to *Gasperini*, Allan Stein acknowledged that the search for equality may be the "driving force" behind the current *Erie* doctrine. Stein, *supra* note 21, at 1941. He advocated a type of vertical interest analysis that focused on whether the goals supporting the state's law are undermined by federal nonconformity. *Id.* If not, he concluded that the Rules of Decision Act did not mandate the use of state law in federal court. *Id.* at 1956.

The Supreme Court has largely confined its *Erie* oversight to attempts by plaintiffs to gain litigation advantages by filing in federal rather than state court. Only *Van Dusen*, which applied *Klaxon* to the transfer scenario, directly addressed a defendant's attempts to obtain choice-of-law advantages in the federal system that could not be obtained in state court. *Van Dusen v. Barrack*, 376 U.S. 612, 628 (1964). *Van Dusen* is somewhat ambiguous about the offensiveness of defense shopping under the *Erie* regime because the decision concentrated more on congressional intent regarding § 1404 rather than the Rules of Decision Act.

Lower federal court cases arising in the removal context indicate, however, that defense efforts to obtain choice-of-law advantages through vertical forum shopping are equally at odds with *Erie*'s central goal of uniformity. See, e.g., *Frenette v. Vickery*, 522 F. Supp. 1098, 1100 (D. Conn. 1981) (applying Connecticut law on unreasonable settlement offers to avoid frustrating the aims of *Erie*). The international forum selection clause cases following *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), however, indicate that choice-of-law gains may still be had through removal. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509 (9th Cir. 1988) (holding that federal law governed the enforceability of an international forum selection clause even though § 1404 was inapplicable). These *Erie* loopholes seem to be centered on international choice of forum issues.

46. See Weinberg, *supra* note 7, at 68-69 (attributing this bias for the plaintiff to the

disputes appears surprising—especially given the generally “conservative” bent of the Rehnquist-Roberts Courts.<sup>47</sup> But as Professor George Brown has demonstrated, the Court’s commitment to federalism explains this seeming inconsistency. Defining federalism as “the importance of ensuring the states’ primary role over a broad sphere of domestic governance,” Brown explains that “in any clash between a defendant-oriented anti-forum-shopping principle on the one hand and the rights and prerogatives of the forum state on the other, the Court comes down firmly on the side of the state.”<sup>48</sup>

The horizontal forum shopping cases fall neatly into Brown’s federalism critique. The Court recognizes a “dominant federalism interest” in choice-of-law cases; the state in such disputes “wishes to regulate through adjudication of the dispute and application of its law.”<sup>49</sup> State-to-state forum shopping, therefore, “encourages the states to govern”—the very goal federalism is expected to further.<sup>50</sup> The federalism critique also explains the Court’s hostility to plaintiff and defense shopping in the state-to-federal realm. *Erie*, for example, is generally taken as a strong condemnation of forum shopping, yet, as Brown demonstrates, *Erie*’s seemingly pro-defendant rationale “advances [the Court’s] federalism goal: state governance in the face of federal authority.”<sup>51</sup> State-to-federal (or vertical) shopping impairs state governance; state-to-state (or horizontal) shopping, on the other hand, highlights “the differences [that] state governance fosters.”<sup>52</sup> “[W]hen federalism is out of the

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demands of a national market and a federalist mentality); see also Brown, *supra* note 11, at 672-76.

47. See Brown, *supra* note 11, at 675-79 (discussing factors indicating that the Court’s approach may be legitimately termed “conservative”). According to Brown, a conservative court is defined by values such as avoiding the “proliferation of lawsuits,” distrust of manipulating the system to achieve pro-plaintiff results, and a general pro-defendant inclination. *Id.* at 651. With reference to constitutional values, a conservative court is defined by themes such as a restrained judiciary, loyalty to original intent in constitutional construction, a strong emphasis on federalism and the separation of powers, and deference to majoritarian decision making. *Id.* at 677-78.

48. *Id.* at 708.

49. *Id.* at 710.

50. *Id.*

51. *Id.* at 708.

52. *Id.* at 710.

equation," however, Brown observes "a strong tendency toward a pro-defendant stance."<sup>53</sup>

## II. FORUM SHOPPING BY FOREIGN INJURY LITIGANTS

When the accident moves offshore, the federal courts' response to forum shopping transforms dramatically. The federal courts subject horizontal forum shopping by diversity plaintiffs to exacting scrutiny while encouraging significant vertical shopping by defendants seeking choice-of-law advantages through removal to a federal forum. Though the strongest anti-forum shopping rhetoric is reserved for foreign plaintiffs,<sup>54</sup> American residents find their choice of a domestic forum subject to intense scrutiny.<sup>55</sup> The experience of

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53. *Id.* at 709. Brown uses the summary judgment and implied rights of action cases to support this observation. *Id.* at 688-89. He uses the forum selection clause cases like *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Ricoh* to illustrate situations in which the Court may see no federalism interest. *Id.* at 688-90.

54. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981).

55. See, e.g., *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1284 (11th Cir. 2001) (affirming dismissal of complaint against an American corporation brought by American and Argentinean plaintiffs in favor of Argentinean forum); *Iragorri v. Int'l Elevator, Inc.*, 203 F.3d 8, 16-17 (1st Cir. 2000) (affirming forum non conveniens dismissal of American plaintiffs' complaint against an American elevator servicing company because Colombia was an alternate forum and public and private interest factors weighed in favor of dismissal); *Kryvicky v. Scandinavian Airlines Sys.*, 807 F.2d 514, 516, 518 (6th Cir. 1986) (affirming forum non conveniens dismissal of American resident's claim arising from plane crash in Spain allegedly caused by defects in a Boeing plane); *Cheng v. Boeing Co.*, 708 F.2d 1406, 1412 (9th Cir. 1983) (affirming forum non conveniens dismissal of claims by American residents against an American corporation because Taiwan was an adequate alternate forum and private and public interest factors favored dismissal); *Vlasic v. Wyndham Int'l, Inc.*, 451 F. Supp. 2d 1005, 1012 (C.D. Ill. 2006) (dismissing American resident plaintiffs' claim on forum non conveniens grounds because Aruba had greater interest in the case, was an available forum, and had most of the evidence); *Colantonio v. Hilton Int'l Co.*, No. CIV.A. 03-1833, 2004 WL 1810291, at \*11-12 (E.D. Pa. Aug. 13, 2004) (dismissing American plaintiffs' claim on forum non conveniens grounds because Italian co-defendant could not be joined, Italy had a greater interest in the case, and evidence was located in Italy); *Reers v. Deutsche Bahn AG*, 320 F. Supp. 2d 140, 162-63 (S.D.N.Y. 2004) (dismissing American plaintiffs' claims against a French rail company arising from accident in France); *Morse v. Sun Int'l Hotels, Ltd.*, No. 98-7451-Civ, 2001 WL 34874967, at \*7 (S.D. Fla. 2001) (dismissing American plaintiffs' claim against an American corporation arising from an offshore accident because certain parties could not be joined); *Potomac Capital Inv. Corp. v. Koninklijke Luchtvaart Maatschappij N.V.*, No. 97 Civ. 8141, 1998 WL 92416, at \*5 (S.D.N.Y. 1998) (granting Dutch defendant's forum non conveniens motion against American plaintiff); *Kristoff v. Otis Elevator Co.*, No. CIV.A.96-4123, 1997 WL 67797, at \*5 (E.D. Pa. 1997) (dismissing American plaintiffs' complaint on forum non conveniens grounds because the Bahamas had greater interest in

the resident plaintiff injured abroad will thus differ dramatically from that of her neighbor injured within the United States.

The key tool with which the federal courts regulate forum shopping by foreign injury plaintiffs is the *forum non conveniens* dismissal<sup>56</sup>—a discretionary power that allows the judiciary to independently evaluate a plaintiff's choice of forum. A federal *forum non conveniens* inquiry proceeds in two steps. First, the district court must determine that an "adequate alternative forum" exists for trial.<sup>57</sup> Second, the court evaluates and balances the private and public interests at stake in the particular dispute.<sup>58</sup>

When the Supreme Court originally embraced *forum non conveniens* for civil claims in *Gulf Oil Corp. v. Gilbert*,<sup>59</sup> it was in the context of domestic forum shopping.<sup>60</sup> The inquiry focused on defendant's hardship, emphasizing that "the plaintiff's choice of

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adjudicating the case, and more evidence was there); *McCarthy v. Canadian Nat'l Rys.*, 322 F. Supp. 1197, 1199 (D. Mass. 1971) (dismissing a case filed by an American resident against a Canadian corporation because the plaintiff was a Canadian resident when the accident occurred, the accident occurred in Canada, and Canada had a greater interest in the case).

56. The federal courts have also used international forum selection clauses as a means of regulating international forum shopping in the contract realm. I exempted contract cases from this analysis for two reasons: first, many states have adopted UCC provisions and the Second Restatement of Conflicts, both of which explicitly recognize forum selection clauses as binding, and second, the new Hague convention on international forum selection recognizes such clauses as binding.

57. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947) ("In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."). The alternative forum must be both adequate and available. The foreign forum will be deemed inadequate only if "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." *Piper*, 454 U.S. at 254. A defendant may waive many defenses including lack of personal jurisdiction, venue, and the statute of limitations, in order to make the alternative forum available. See *Johnston v. Multidata Sys. Int'l Corp.*, 523 F.3d 602, 606-07 (5th Cir. 2008); *Blanco v. Banco Indus. de Venezuela, S.A.*, 997 F.2d 974, 984 (2d Cir. 1993).

58. In a federal *forum non conveniens* analysis, the relevant private interests include the litigant's access to proof, ability to compel the attendance of witnesses, the cost of such attendance, the possibility of viewing any premises (if appropriate to the action), the enforceability of the judgment, the "relative advantages and obstacles to a fair trial," as well as any "practical problems that make trial of a case easy, expeditious and inexpensive." *Gulf Oil*, 330 U.S. at 508. The public interest inquiry encompasses factors such as docket congestion, the burden of jury service in a community having "no relation to the litigation," the desirability in diversity actions of having the trial in the forum whose law will apply, and the "local interest in having localized controversies decided at home." *Id.* at 508-09.

59. 330 U.S. 501 (1947).

60. *Id.* at 511-12.

forum should rarely be disturbed.”<sup>61</sup> In 1948, only one year after *Gulf Oil* was decided, Congress rendered federal forum non conveniens irrelevant to domestic claims by authorizing interdistrict transfers within the federal system under 28 U.S.C. § 1404.<sup>62</sup>

Some thirty years later, however, *Piper Aircraft Co. v. Reyno*<sup>63</sup> reconfigured the *Gulf Oil* formula for foreign injury claims and reinvigorated federal forum non conveniens practice. *Piper* focused on the plaintiff's motives for choosing the American forum. The Court explained:

When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, 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.<sup>64</sup>

Despite the Court's apparent interest in convenience, neither the plaintiff's convenience nor the defendant's hardship drives post-*Piper* outcomes in the federal courts. Modern forum non conveniens jurisprudence employs a “most suitable forum” standard<sup>65</sup> under which the federal courts actively second guess forum choice in international disputes.

Several aspects of the federal regime deserve comment. First, the intense hostility found in the vertical shopping cases virtually evaporates when the case takes on transnational attributes. The federal courts tolerate significant and predictable vertical forum shopping by foreign injury defendants. Second, the federal system richly rewards defendants for their vertical shopping behavior. The Supreme Court has never formally considered the *Erie* question

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61. *Id.* at 508.

62. See *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994) (stating that forum non conveniens dismissals should only be applied when the “alternate forum is abroad”); *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955) (explaining that Congress was revising as well as codifying the forum non conveniens doctrine when it created § 1404).

63. 454 U.S. 235 (1981).

64. *Id.* at 256.

65. David W. Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction,”* 103 L.Q. REV. 398, 404-05 (1987).

with respect to forum non conveniens,<sup>66</sup> but the courts of appeals have unanimously rejected such challenges.<sup>67</sup> Not only are the vast majority of forum non conveniens motions granted by the federal courts,<sup>68</sup> the federal standard is often more aggressive, or more aggressively applied, than the standards in the state courts.<sup>69</sup> Lastly, the availability of transfer provides its own incentive for vertical shopping in transnational claims. Forum non conveniens standards vary significantly across the circuits.<sup>70</sup> Corporate defendants routinely remove international disputes to federal court, then follow with a motion to transfer to another district that boasts more favorable forum non conveniens conditions.<sup>71</sup>

The federal courts' use of federal, as opposed to state, forum non conveniens standards in diversity actions has had a profound impact on the states' response to foreign injury litigation. Before *Piper*, states employed a variety of forum non conveniens formulae, many of which were significantly less draconian than those used in federal court.<sup>72</sup> After *Piper*, such states became "magnets" for international cases.<sup>73</sup> In many of the state supreme court decisions adopting the

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66. See *Piper*, 454 U.S. at 248 n.13 (reserving the *Erie* question).

67. See, e.g., *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511-12 (9th Cir. 2000); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993); *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda.*, 906 F.2d 45, 50 (1st Cir. 1990); *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1219 (11th Cir. 1985); *Miller v. Davis*, 507 F.2d 308, 316 (6th Cir. 1974).

68. See *Lear, National Interests*, *supra* note 22, at 568 nn.49 & 58 (2007).

69. See *Miller*, *supra* note 21, at 1369, 1373-76 (discussing the federal standard and state variances from that standard). Most of the states have now embraced the *Piper* standard, but several state standards, including those of Connecticut and Delaware, vary significantly from the federal formula.

70. Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 312 (2002); *Lear, Inherent Power*, *supra* note 21, at 1148.

71. See, e.g., *Piper*, 454 U.S. at 240-41 (dismissing case on the grounds of forum non conveniens after the case was removed to federal court and then transferred, both at the request of the defendants); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 605 (10th Cir. 1998) (affirming dismissal on the grounds of forum non conveniens of a case removed from state court to federal court in Ohio and subsequently transferred to federal court in Kansas).

72. See, e.g., *Seaboard Coast Line R.R. Co. v. Swain*, 362 So. 2d 17, 18 (Fla. 1978) (holding that a case could be dismissed on grounds of forum non conveniens in Florida only if none of the parties are Florida residents); *Burrington v. Ashland Oil Co.*, 356 A.2d 506, 510 (Vt. 1976) (holding that forum non conveniens dismissal is appropriate only when the plaintiff will not be inconvenienced and it is apparent that the plaintiff is just attempting to "vex, harass, or oppress the defendant").

73. See David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational*



harsher *Piper* standard, the courts discussed the state/federal differences in forum non conveniens standards and cited the resulting increase in state court case loads as the primary reason for using the federal approach.<sup>74</sup>

More interesting still is the federal courts' response to horizontal forum shopping in international cases. Gone is the good natured tolerance of forum choice found in domestic injury disputes. The federal judiciary subjects horizontal forum shopping by foreign injury plaintiffs to meticulous regulation. Under the private interest portion of the forum non conveniens inquiry, district courts thoroughly review the location of the evidence and the availability of witnesses.<sup>75</sup> Note that the defendant need not provide a list of specific information or witnesses overseas; it is enough that the defense allege that "crucial witnesses and evidence [are] beyond the reach of compulsory process."<sup>76</sup> Moreover, the ability of the defendant to implead potential third parties is one of the key factors supporting dismissal.<sup>77</sup> The district courts do not require the defendant to demonstrate any realistic expectation of recompense from such third parties, nor must the defendant prove that a post-judgment action for compensation or indemnification action will be prejudicial.<sup>78</sup>

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*Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 951-52 (1990).

74. See, e.g., *Stangvik v. Shiley, Inc.*, 819 P.2d 14, 21-23 (Cal. 1991); *Kinney Sys., Inc. v. Cont'l Ins. Co.*, 674 So. 2d 86, 89 (Fla. 1996).

75. See, e.g., *Snaza v. Howard Johnson Franchise Sys.*, No. 3:07-CV-0495-0, 2008 WL 5383155, at \*12-13 (N.D. Tex. Dec. 24, 2008) (dedicating two pages to discussion of availability of evidence and witnesses); *Niv v. Hilton Hotels Corp.*, No. 06 Civ. 7839 (PXL), 2008 WL 4849334, at \*9-12 (S.D.N.Y. Nov. 10, 2008) (devoting four pages to discussion of evidence and witnesses as a private interest factor); *LaSala v. Bank of Cyprus Pub. Co.*, 510 F. Supp. 2d 246, 259-61 (S.D.N.Y. 2007) (devoting three pages to the discussion of witnesses and evidence as a private interest factor).

76. *Piper*, 454 U.S. at 243; see also *Perez-Lang v. Corporacion De Hoteles, S.A.*, 575 F. Supp. 2d 1345, 1351 (S.D. Fla. 2008) (noting that the ability to compel witnesses to testify was the most crucial private interest factor and that depositions did not satisfy the need for live testimony).

77. See *Piper*, 454 U.S. at 259; *Perez-Lang*, 575 F. Supp. 2d at 1352 (finding that the inability to implead the Dominican automobile driver was a critical factor); *Webster v. Santa Fe Int'l Corp.*, No. 3:98-CV-1314-D, 1999 WL 20840, at \*6 (N.D. Tex. Jan. 12, 1999) (finding the inability to implead a third party to clearly support dismissal in order to settle everything in one trial).

78. See *Piper*, 454 U.S. at 259.

Even when the private interest factors are in equipoise, the public interest inquiry usually tips the balance in favor of dismissal.<sup>79</sup> The federal courts employ a situs presumption, which assumes that the accident forum has the greatest interest in the dispute.<sup>80</sup> In claims involving global goods, several of the public interest factors should favor trial in an American court. The *Gulf Oil* opinion expressed concern about the “burden” of jury service on a community having “no relation to the litigation,” for example.<sup>81</sup> In a global goods case, however, a local jury has a significant interest in determining the dangerousness of a product widely used by local citizens. *Gulf Oil* similarly highlighted the desirability of having diversity cases tried in the forum whose law will apply.<sup>82</sup> In global goods disputes, the product is usually designed and/or manufactured in the United States. In a case like *Piper*, in which a court finds that domestic law applies to the design or manufacturing defect claims, this factor should weigh strongly against dismissal. But under the public interest framework employed by *Piper*, the dispositive factor in the analysis is the “local interest in having localized controversies decided at home.”<sup>83</sup> What localizes the controversy for the federal courts is the location of the accident.<sup>84</sup>

*Iragorri v. United Technologies Corp.*<sup>85</sup> vividly illustrates the intensity of federal forum choice scrutiny and the strength of the federal courts’ situs presumption. In *Iragorri*, a Florida resident was

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79. See *Lear, National Interests*, *supra* note 22, at 568.

80. See *Lear, Inherent Power*, *supra* note 21, at 1176.

81. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

82. *Id.*

83. *Piper*, 454 U.S. at 241 n.6. I have explained elsewhere that *Piper* embraced a presumption that the U.S. interest in a foreign accident is minimal. See *Lear, National Interests*, *supra* note 22, at 590-94 (2007). The federal courts take that presumption one step further and assume that the accident forum has the greatest interest in the dispute. The district courts consistently measure the convenience of litigation against adjudication in the accident forum, and it is the sovereign interests of the accident state that the courts routinely find to be implicated. See, e.g., *Ford v. Brown*, 319 F.3d 1302, 1309-10 (11th Cir. 2003); *Gschwind v. Cessna Aircraft Co.*, 161 F.3d 602, 610 (10th Cir. 1998).

84. See *Piper*, 454 U.S. at 260-61 (1981). Some federal courts have treated manufacturing activity as localizing the controversy. See *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 782-83 (C.D. Cal. 2006) (discussing federal courts that have treated manufacturing activity as localizing the controversy, but ultimately rejecting it as contrary to *Piper*). However, *Piper* implicitly rejected this approach. See *Piper*, 454 U.S. at 260-61 (1981).

85. 274 F.3d 65 (2d Cir. 2001).

killed in an elevator accident in Colombia.<sup>86</sup> The elevator had been designed by United Technologies (Otis) in the United States and manufactured in Brazil by the defendant's wholly-owned subsidiary, Otis of Brazil.<sup>87</sup> The Iragorri family, all of whom were Florida residents, brought suit in federal district court in Connecticut against Otis, whose principal place of business was in Connecticut, and an American maintenance corporation that was similarly subject to personal jurisdiction there.<sup>88</sup> The complaint alleged that design defects and maintenance policy failures occurred at the American offices of both companies.<sup>89</sup>

The district judge first severed the action, sending the suit against the maintenance corporation to the district of Maine.<sup>90</sup> Both defendants made forum non conveniens motions, and both district courts dismissed the actions, concluding that in spite of the design evidence in the United States, the guerilla violence in Colombia, the extended backlog in the Colombian courts, and the fact that the compensation available under the Colombian system was wholly inadequate by Florida standards, Colombia was a more convenient forum.<sup>91</sup> The First Circuit upheld the dismissal.<sup>92</sup> After a rehearing en banc, the Second Circuit reversed and remanded the case against Otis for trial.<sup>93</sup> The Iragorris spent seven years defending their choice of forum before an American court addressed the merits of their claims.<sup>94</sup>

The situs presumption is interesting on several levels. First, the notion that the accident state has the greatest interest in a global goods dispute is usually dead wrong. Brainerd Currie observed fifty years ago that the traditional place of injury rule undermines the interests of the affected states more often than it furthers them.<sup>95</sup>

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86. *Id.* at 70.

87. *Id.*

88. *Id.*

89. *Id.* at 75.

90. *Id.* at 70.

91. *Id.*

92. *Iragorri v. Int'l Elevator Inc.*, 203 F.3d 8, 18 (1st Cir. 2000).

93. *Iragorri v. United Techs. Corp.*, 274 F.3d at 76.

94. *Id.* at 69-70, 76.

95. See Brainerd Currie, *Survival of Actions: Adjudication Versus Automation in the Conflict of Laws*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 161 (1963). This essay, which was the companion piece to *Married Women's Contracts: A Study in Conflict-of-Laws Method*, applied Currie's governmental interest analysis to a tort scenario using the facts of *Grant v.*

This insight is equally applicable to the foreign injury dispute. As I have demonstrated elsewhere, the American deterrence interest in foreign injuries caused by global goods routinely equals or exceeds those of the injury forum.<sup>96</sup> Litigation of such claims in the American courts is critical to the safety of American consumers.<sup>97</sup> The impact of the situs presumption on individual state's interests, though smaller in scale, is essentially the same. Moreover, the situs presumption obfuscates the potential state interests involved in such cases. Because the courts assume that the foreign forum's interest is paramount, federal forum non conveniens decisions seldom contain formal choice-of-law findings or any meaningful discussion of state interests.<sup>98</sup>

Lastly, it should be noted that the situs presumption is inconsistent with the central premises of the Supreme Court's domestic forum shopping system. Both the personal jurisdiction and choice-of-law decisions explicitly concede that more than one sovereign may have an interest in adjudicating or applying its law to an interstate dispute. Justice Brennan, for example, explained in *Burger King* that Michigan's "acknowledged interest" in the case did not render "jurisdiction in Florida *unconstitutional*."<sup>99</sup> In the choice-of-law realm, the Court abandoned its efforts under the Full Faith and Credit Clause to identify the state with the greatest interest in an interstate dispute.<sup>100</sup> A state need only have "a significant contact or significant aggregation of contacts" with the dispute to apply its law despite the fact that another state has a greater interest in regulating the dispute.<sup>101</sup> Yet when the injury occurs overseas, the federal courts vest the accident forum with the presumptive right to

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*McAuliffe*, 264 P.2d 944 (Cal. 1953).

96. See *Lear*, *National Interests*, *supra* note 22, at 590-99.

97. *Id.* at 573-78.

98. Only the Tenth Circuit appears to require a formal choice-of-law analysis as part of the forum non conveniens dismissal in diversity cases. See *Needham v. Phillips Petroleum Co. of Nor.*, 719 F.2d 1481, 1483 (10th Cir. 1983) (finding that when domestic law applies or when foreign forum is inadequate, forum non conveniens is inapplicable).

99. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483 (1995).

100. See *Pac. Employers Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 500-01, 505 (1939) (acknowledging that both California and Massachusetts had the right to regulate the event through application of their law and upholding the California court's decision to apply forum law).

101. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981).

apply its substantive and procedural laws as well as its conflict of laws rules.

In sum, the federal courts' response to forum shopping transforms when the accident occurs overseas. Gone is the relaxed attitude toward plaintiffs engaged in horizontal forum shopping. Similarly absent is the hostility toward litigants who seek choice-of-law advantages through vertical shopping. As currently styled, the federal international forum choice regime overtly favors defendants while subjecting the plaintiff's choice of forum to intense oversight, even when that plaintiff is an American citizen.<sup>102</sup>

### III. THE RELEVANCE OF FEDERALISM TO INTERNATIONAL FORUM CHOICE OVERSIGHT

As noted above, the federal courts' anti-forum shopping, pro-defendant stance in international disputes differs markedly from its pro-plaintiff attitude toward domestic shopping. Professor Brown's federalism critique suggests two potential explanations: (1) the federal courts perceive no federalism interests in these cases, and/or (2) they believe that a stronger national interest trumps those interests.<sup>103</sup>

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102. Although this Article does not consider the plight of the American resident injured abroad, I have always found shocking the number of cases in which American residents injured overseas are relegated to foreign forums. See *Lear, National Interests*, *supra* note 22, at 570 n.58. Technically, an American plaintiff's choice of forum is entitled to significant deference because she is suing at "home." See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981). Note that those American residents who succeed in their efforts to acquire an American forum in which to litigate their cases usually do so only after a long and expensive fight that often involves a trip to the court of appeals. See, e.g., *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300 (11th Cir. 2002); *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001) (en banc); see also *Guidi v. Inter-Cont'l Hotels Corp.*, 224 F.3d 142, 148-49 (2d Cir. 2000) (reversing district court's dismissal on forum non conveniens grounds of complaint brought by an American plaintiff against an American hotel chain for injury sustained in Egypt); *Mercier v. Sheraton Int'l, Inc.*, 935 F.2d 419, 430 (1st Cir. 1991) (finding district court erred in dismissing complaint brought by American citizens against a hotel owner because Turkey was not an adequate alternate forum); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1401 (8th Cir. 1991) (reversing district court's dismissal of case on forum non conveniens grounds because American plaintiff's choice of forum deserved greater deference); *Lehman v. Humphrey Cayman, Ltd.*, 713 F.2d 339, 347 (8th Cir. 1983) (reversing district court's dismissal on forum non conveniens grounds of a case brought by an American plaintiff against a foreign corporation because district court failed to properly weigh plaintiff's ability to litigate her claims in foreign court and give proper weight to her residence).

103. Brown, *supra* note 11, at 709-10.

Both explanations are plausible. Certainly an unstated assumption in the major federal forum non conveniens decisions is that foreign injury claims lie outside the normal sphere of state regulatory authority. Whether this is because state interest ends at our national borders or because federal power is supreme over all things international is unclear. In *Piper*, the Third Circuit concluded that Ohio and Pennsylvania law would apply to the dispute,<sup>104</sup> yet the Supreme Court discussed only the deterrence to be gained from trial in an *American* court<sup>105</sup> and concluded that “[t]he *American* interest in [the] accident” was insufficient to justify the commitment of judicial time and resources necessary to try the case in the United States.<sup>106</sup> Many of the courts of appeals decisions rejecting *Erie* challenges to the federal doctrine similarly treat state interests as irrelevant. In *Esfeld v. Costa Crociere, S.P.A.*,<sup>107</sup> for example, the Eleventh Circuit specifically relied on the national interests at stake.<sup>108</sup> And although lower court cases occasionally include an unfocused search for the forum state’s physical contacts as part of the public interest analysis,<sup>109</sup> none of these opinions considers the weight these contacts deserve or their relevance to the public interest inquiry.

A state’s desire to apply its own law ought to represent the strongest indication of state interest in a particular dispute.<sup>110</sup> When a state enacts extraterritorial legislation, it is fair to assume that the state legislature has evaluated potential litigation logistics and that the state’s elected lawmakers have concluded that the citizens of the state have sufficient interest and sufficient stake in the dispute to warrant its adjudication.<sup>111</sup> The state in such cases has already performed the balancing required by the federal forum non conveniens inquiry. From a federalism perspective then, a federal

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104. *Piper*, 454 U.S. at 245 n.10.

105. *Id.* at 260-61.

106. *Id.* at 261 (emphasis added).

107. 289 F.3d 1300 (11th Cir. 2002).

108. *Id.* at 1311-14.

109. See, e.g., *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 781-85 (C.D. Cal. 2006).

110. As Allan Stein points out, “[t]he most obvious reason a state might want to retain a case ... is that it perceives some regulatory stake in the underlying dispute.” Stein, *supra* note 21, at 1971.

111. Cf. *Lear, Inherent Power*, *supra* note 21, at 1177-79 (discussing the tension between forum non conveniens and congressional jurisdiction to prescribe).

forum non conveniens dismissal is antithetical to state regulatory supremacy in the private law arena.

The following sections test the relevance of federalism to international forum choice by examining the limits on state jurisdiction to prescribe. Part A considers whether the international character of foreign injury disputes divests the states of their traditional regulatory role in the torts arena. Part B then analyzes external limits on state jurisdiction to prescribe potentially supplied by customary international law and the Constitution.

### *A. Substantive State Interests in Foreign Injuries*

Personal injury torts are traditionally thought to implicate two types of state interests: compensation and deterrence. In the paradigm case of in-state injury and state resident plaintiff, both these interests are at their zenith. When the plaintiff is an outsider, whether a resident of a sister state or a foreign country, the state's compensation interest disappears. Move the accident out of state, and most judges assume that the state's deterrence interest is similarly extinguished.<sup>112</sup> This is where the analysis goes wrong, particularly in the global goods arena.

I have argued elsewhere that the federal courts routinely misapprehend the strength of the *national adjudicatory* interests in

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112. See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 260-61 (1981) (suggesting incremental deterrence value of a case is not enough to warrant trial in the United States); *Faat v. Honeywell Int'l Inc.*, No. Civ.A.04-4333, 2005 WL 2475701, at \*6 (D.N.J. Oct. 5, 2005) (contending that local interest was minimal because the majority of conduct occurred in Spain and the incremental deterrence that would be gained was insignificant); *Miller v. Boston Sci. Corp.*, 380 F. Supp. 2d 443, 455 (D.N.J. 2005) (noting that "citizens of New Jersey undoubtedly have an interest in ensuring that American manufacturers do not produce defective products," however, incremental deterrence to be gained was not compelling); *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 663 (S.D. Tex. 2003) (dismissing case filed by Mexican plaintiffs against American airplane manufacturer because, among other reasons, the incremental deterrence to be gained from trying case in United States was negligible); *Simcox v. McDermott Int'l, Inc.*, 152 F.R.D. 689, 699 (S.D. Tex. 1994) (stating that "[t]he incremental deterrence that might be gained if defendants were held liable in Texas ... is likely to be inconsequential[, and] [t]he American interest in this controversy is negligible and is insufficient to justify the commitment of judicial time and resources that would inevitably be required if the case were to be tried here"). But see *Jennings v. Boeing Co.*, 660 F. Supp. 796, 809 (E.D. Pa. 1987) (dismissing complaint filed by a British citizen against an American plane manufacturer "[a]lthough the incremental deterrence resulting from potential punitive damages cannot be termed insignificant").

global goods disputes.<sup>113</sup> The federal forum non conveniens cases reveal a similar failure to identify and protect the state substantive interests at stake. Depending upon the type of product, its distribution and use patterns within the state, and the defendant's in-state design or manufacturing conduct, a state often retains a significant regulatory interest despite its lack of contacts with a specific accident.<sup>114</sup>

Some of the best examples of "classic" foreign products cases involve overseas automobile injuries. The myriad claims against Ford and Bridgestone/Firestone arising from rollover accidents in South America are particularly enlightening. A number of states had traditional conduct-based contacts with the product. The Explorer itself was designed and tested in Michigan,<sup>115</sup> where Ford engineers first observed the vehicle's tendency to roll over during an accident.<sup>116</sup> The additional tendency of the tread on the Firestone Wilderness ATX and AT tires to separate exacerbated the rollover problem.<sup>117</sup> Bridgestone/Firestone engineers likely designed and tested the tire in either Tennessee, where Firestone has its corpo-

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113. See *Lear, National Interests*, *supra* note 22, at 568-79.

114. General jurisdiction presents a very difficult twist on the state interest problem, which is beyond the scope of this Article. To assess state interest in a foreign injury case over which a court has general jurisdiction, the court conducts a choice-of-law analysis using the forum state's choice-of-law rules. If the forum's conflicts rules point to the law of a sister state, does the sister state, by definition, have a regulatory interest in the dispute? Worse yet, what if the sister state uses the traditional place of injury rule, meaning that if the foreign injury claim had been filed in the sister state, that state's courts would not have applied its own law?

115. *Cervantes v. Bridgestone/Firestone N. Am. Tire Co.*, No. 07C-06-249 JRJ, 2008 WL 3522373, at \*1 (Del. Super. Ct. Aug. 14, 2008).

116. Recognizing the relationship of the rollover tendency and the tires, the engineers recommended lower tire pressures to avoid the problem. See *Firestone Tire Recall: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 84 (2000) (statement of Joan Claybrook, President, Public Citizen) (noting that reduced tire pressure was introduced to mitigate the rollover problem with no address to the suspension issue). This measure was adopted in place of suggestions by engineers to increase track width, lower height, and use smaller tires, all of which would have changed the overall look and marketing design of the product. See PUBLIC CITIZEN & SAFETYFORUM.COM, SPINNING THEIR WHEELS: HOW FORD AND FIRESTONE FAIL TO JUSTIFY THE LIMITED TIRE RECALL, 4-5 (2001), <http://www.citizen.org/documents/ACF266.pdf>.

117. See Brian Allen Warwick, *Reinventing the Wheel: Firestone and the Role of Ethics in the Corporation*, 54 ALA. L. REV. 1455, 1456 (2003) (positing that the problem was the result of a deadly combination of Firestone tread separation and Ford suspension issues).



rate offices,<sup>118</sup> or Ohio, where Firestone has its research facilities.<sup>119</sup> The defective tires were manufactured at Firestone plants in North Carolina, South Carolina, and Illinois,<sup>120</sup> although those from the Decatur, Illinois plant apparently had the greatest number of problems.<sup>121</sup> The American tires were then shipped to Ford plants in South America and mounted on the vehicle with “tire knockdown kits” from Florida.<sup>122</sup>

A number of states, thus, had conduct-based contacts with the Ford Explorers and Bridgestone/Firestone tires involved in the South American rollovers. According to the modern view, states have an interest in regulating injury-causing conduct that takes place within the state regardless of the place of injury.<sup>123</sup> But the bigger question asks whether states in which neither the design/manufacturing conduct nor the injury occurred had an interest in deterring Ford and Bridgestone/Firestone’s dangerous decisions. Ford’s decisions in Michigan, for example, exposed hundreds of thousands of Americans, as well as drivers worldwide, to identical risks. From a deterrence perspective, the Michigan decisions affected the states and countries where the Explorer was distributed as much as they did Michigan itself. In global goods cases, neither the location of design decisions nor the place of the accident has a dispositive impact on the deterrence interest of a particular state—the critical issue is how widely a product is used within that state. Michigan certainly had an interest in regulating Ford’s conduct, but

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118. *In re Bridgestone/Firestone Inc., Tires Prods. Liab. Litig.*, 155 F. Supp. 2d 1069, 1077 (S.D. Ind. 2001).

119. Bridgestone Americas, Inc. Subdivisions & Divisions, [http://bridgestone-firestone.com/divisions\\_index.asp?id=about/directory\\_divisions\\_bfnt](http://bridgestone-firestone.com/divisions_index.asp?id=about/directory_divisions_bfnt) (last visited Sept. 22, 2009).

120. See Safetyforum.com, Firestone Replacement Tires Already Have Record of Injury (Aug. 10, 2000), <http://www.safetyforum.com/tag/news/000810.html>.

121. PUBLIC CITIZEN & SAFETYFORUM.COM, *supra* note 116, at 15. The same tires were manufactured in the United States in Wilson, North Carolina, Decatur, Illinois and Aiken, South Carolina. See Safetyforum.com, *supra* note 120.

122. See *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1150 (S.D. Ind. 2002).

123. For example, the Restatement (Second) Conflict of Laws section 145 includes “the place where the conduct causing the injury occurred” as one of the contacts to be taken into account in applying the most significant relationship test. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2)(b) (1971).

Michigan's interest was not significantly greater than any other state in which defective Explorers were extensively distributed.<sup>124</sup>

*Gonzalez v. Chrysler Corp.*<sup>125</sup> vividly illustrates this phenomenon. In the *Gonzalez* case, a Mexican child was killed in Mexico by an airbag in a Chrysler LHS.<sup>126</sup> The child's father brought suit in federal court in Texas, but the case was dismissed on forum non conveniens grounds.<sup>127</sup> The Fifth Circuit affirmed the dismissal, reasoning that Texas had no connection to the accident because the Chrysler had not been designed or manufactured there.<sup>128</sup> Yet the Chrysler assembled in Mexico and the Chryslers sold in Texas were equipped with identical TRW airbag systems.<sup>129</sup> Texans were thus exposed to the same defect that allegedly caused the Mexican accident. Texas had an interest in regulating Chrysler and TRW's design and manufacturing decisions in order to protect Texas consumers from a dangerous product. This interest did not depend upon the location of the accident; it depended upon the dangerousness of a product used in Texas by Texas residents.<sup>130</sup>

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124. One of the difficulties in assessing state deterrence interests is whether states will assert them. A state can be reasonably sure that a domestic accident will be accounted for in a state or federal court somewhere in the United States. Thus, because global products are not differentially priced to reflect accident payouts state by state, a state can be fairly certain that a product's price reflects the cost of domestic accidents. But a state cannot be reasonably certain that the costs of foreign accidents have been adequately internalized by a multinational entity. Because multinationals routinely escape liability for foreign accidents, see *Lear, National Interests*, *supra* note 22, at 577-78, the price within the United States may be artificially depressed. *Id.* at 575. Yet an individual state may not recognize its responsibility to ensure that the price of the product reflects its dangerousness on a global level.

125. 301 F.3d 377 (5th Cir. 2002).

126. *Id.* at 379.

127. *Id.* at 378.

128. *Id.* at 379. The Chrysler was designed and manufactured in the United States, but not in Texas. *Id.* at 378-79.

129. See *id.* at 378-79 (noting that the Chrysler and its air bag system were designed and manufactured in America and that Gonzalez evaluated the Chrysler in Texas though he eventually purchased in Mexico).

130. Global markets allow global goods producers like Chrysler to spread the costs of accidents worldwide. See *Lear, National Interests*, *supra* note 22, at 574-77. Excluding out-of-country accidents from U.S. adjudication and/or regulation artificially depresses the price that American consumers pay for such products, thereby increasing the number of dangerous products sold domestically. *Id.* This analysis should differ somewhat when applied to state as opposed to national markets, but for a state the size of Texas this difference may be negligible.

Pharmaceutical injury claims follow the same pattern. Vioxx, for example, was developed by Merck, a major pharmaceutical company incorporated and headquartered in New Jersey.<sup>131</sup> Development of the drug, including the scientific research, safety presentations, and clinical studies, took place in New Jersey, as did the marketing decisions.<sup>132</sup> Merck ran strategic clinical studies in various states on the drug's stomach safety, which were later criticized as marketing in disguise, to persuade doctors to prescribe the drug to patients and recommend it to peers.<sup>133</sup> The FDA almost certainly approved the drug from its primary Maryland office.<sup>134</sup> Subsequently, a study linked Vioxx to heart attack and stroke.<sup>135</sup> Merck recalled the product from the market in 2004.<sup>136</sup> Internal memoranda revealed that Merck knew much more about the cardiovascular risks of Vioxx than it revealed to the FDA or the public.<sup>137</sup>

Like the Ford Explorer scenario, several states had traditional conduct-based contacts with the Vioxx injuries. There is no question that New Jersey could apply its substantive law to any Vioxx claim, regardless of the location of the accident. Between 1999 and 2004, however, 105 million prescriptions for Vioxx were filled in the United States.<sup>138</sup> The drug also was broadly prescribed around the world.<sup>139</sup> Any state in which large numbers of patients ingested Vioxx had an interest in deterring Merck's dangerous behavior,

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131. See *Int'l Union of Operating Eng'rs Local # 68 Welfare Fund v. Merck & Co.*, 894 A.2d 1136, 1148 (N.J. Super. Ct. App. 2006), *rev'd*, 894 A.2d 1136 (N.J. 2007).

132. *Id.*

133. See *Vioxx Study a Masquerade, Journal Says; Report Cites Merck Memos on Painkiller*, CHI. TRIB., Aug. 19, 2008, at C6 [hereinafter *Vioxx Study*].

134. See U.S. Food and Drug Administration, <http://www.fda.gov/default.htm> (last visited Sept. 22, 2009).

135. See *Vioxx Study*, *supra* note 133.

136. Kyung M. Song, *Vioxx Maker Withheld Risk Data, UW Study Says; Arthritis Drug - Death Rates Also Downplayed, Analysis Finds*, SEATTLE TIMES, Apr. 16, 2008, at A4.

137. See *id.* These internal memoranda used different methods for calculating mortality rates and listed more people as having participated than reported to the FDA. *Id.* Additionally, internal memoranda and emails discouraged comparative studies for fear of heart-related implications and encouraged employees to downplay or gloss over negative effects of the drug. See W. John Thomas, *The Vioxx Story: Would it Have Ended Differently in the European Union?*, 32 AM. J.L. & MED. 365, 368-71 (2006). The alleged fraud and misrepresentations occurred in New Jersey. See *Merck & Co.*, 894 A.2d at 1148-49.

138. See Thomas, *supra* note 137, at 365-66.

139. See *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 741, 744 (E.D. La. 2006) (dismissing class action complaints filed by citizens from Italy, France, England, Australia, South Africa, Canada, Germany, Israel, New Zealand, Poland, and the Netherlands).

regardless of whether Merck engaged in design, testing, or manufacturing conduct in that state.

The design and production of both classic and pharmaceutical products is often decentralized, giving numerous states conduct links with the product. But most importantly, from a deterrence perspective, the place of injury in a global goods case is virtually irrelevant. Any state in which the product is widely distributed has an interest in protecting resident consumers from the identical defects giving rise to the overseas accident.

### *B. External Limits on State Jurisdiction to Prescribe*

As the preceding section demonstrates, the states have significant substantive interests in global goods disputes arising from overseas accidents. This makes the federal courts' decision to ignore these interests all the more curious. The federal judiciary apparently perceives some external limit on the power of the states to regulate these international events. The following discussion, therefore, considers three potential constraints on state prescriptive jurisdiction in the foreign injury context: customary international law, the federal foreign relations powers, and the Due Process and Full Faith and Credit Clauses.

#### *1. Customary International Law*

Some years ago, Lea Brilmayer lamented the fact that so few cases consider the customary international law limits on state jurisdiction to prescribe.<sup>140</sup> Professor Brilmayer posited three reasons for this phenomenon: the passivity of the state courts, the need for authoritative adoption of customary international law norms to bind American courts, and the notion "that review for consistency with international law is unacceptably counter-majoritarian."<sup>141</sup> Allow me to suggest a fourth: the existence of an aggressive federal forum non conveniens doctrine that obviates the need for state courts and federal courts sitting in diversity to

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140. Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 296 (1994).

141. *Id.* at 327.

consider the limits on state legislative jurisdiction in international cases.

*a. State Jurisdiction to Prescribe Under the Restatement*

Most international law scholars treat customary international law as federal law applicable to the states under the Supremacy Clause.<sup>142</sup> The relevant limits on jurisdiction to prescribe are found in sections 402 and 403 of the Restatement (Third) of Foreign Relations.<sup>143</sup> The requirements in both sections apply equally to the United States and the constituent states of the United States.<sup>144</sup>

Section 402 details the legitimate bases for the exercise of legislative jurisdiction,<sup>145</sup> of which only territoriality and nationality are relevant to private tort actions.<sup>146</sup> Territoriality includes conduct

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142. See, e.g., *id.* at 322-26, 342. See generally Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). "Revisionist" scholars have recently mounted an attack on this position, contending that customary international law is, in fact, state law, if the state chooses to adopt it. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997). Note that the revisionist critique only becomes relevant to the problem here if customary international law in fact limits state jurisdiction to prescribe in some meaningful way.

143. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403 (1987). Though the Restatement is not without its critics, the Supreme Court has treated it as authoritative in two recent decisions involving the extraterritorial reach of federal antitrust statutes. See *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). For the purposes of discussion in this Article, the limits of customary international law and those described in the Restatement are presumed to be equivalent.

144. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 cmt. k (1987) ("[A]n exercise of jurisdiction by a State [of the United States] that contravenes the limitations of §§ 402-403 is invalid.").

145. Section 402(1) gives a state jurisdiction to prescribe over "conduct that, wholly or in substantial part, takes place within its territory," "the status of persons, or interests in things, present within its territory," and "conduct outside its territory that has or is intended to have substantial effect within its territory." *Id.* § 402(1). Additionally, the state may prescribe law regarding "the activities, interests, status, or relations of its nationals," whether inside or outside of its territory, and "certain conduct outside its territory by persons not its nationals" that affect state security or certain other state interests. *Id.* § 402(2)-(3).

146. Although section 402 authorizes the exercise of legislative jurisdiction based upon the territoriality, nationality, protective, and passive personality theories, both the protective principle, which relates to the "security of the state," and the passive personality theory, which extends jurisdiction to a defendant accused of harming a "national" abroad, are inapplicable to private tort actions. See *id.* § 402(2), (3) cmts. f, g.

within the state<sup>147</sup> as well as conduct outside the state that “has or is intended to have substantial effect[s]” in the state.<sup>148</sup> Nationality authorizes jurisdiction over “the activities, interests, status, or relations of [a state’s] nationals outside ... its territory.”<sup>149</sup>

Once a court determines that section 402 authorizes an American state connected by conduct and/or nationality to exercise legislative jurisdiction over a claim, the reasonableness of the jurisdictional assertion must be assessed under section 403.<sup>150</sup> The relevant factors include:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.<sup>151</sup>

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147. *Id.* § 402(1)(a) (authorizing state jurisdiction over “conduct that, wholly or in substantial part, takes place within its territory”).

148. *Id.* § 402(1)(c).

149. *Id.* § 402(2).

150. Section 403(1) prohibits a state from exercising jurisdiction “with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.” *Id.* § 403(1); *see also id.* § 403 cmt. a.

151. *Id.* § 403(2).

In cases in which "it would not be unreasonable" for more than one state to exercise jurisdiction "but the prescriptions by the two states are in conflict," section 403(3) requires the state with the weaker interest to defer to the state whose interest is "clearly greater."<sup>152</sup> Note that the concept of a conflict is defined quite narrowly. Section 403(3) mandates deference only when one state requires an act prohibited by the other or when compliance with both states' regulation is "otherwise impossible."<sup>153</sup> Section 403(3) does not encompass situations in which the regulated person or entity is able to comply with the requirements of both of the regulating states.<sup>154</sup> Moreover, a conflict does not arise simply because "one state has a strong policy to permit or encourage an activity which another state prohibits."<sup>155</sup>

*b. Applying the Restatement to Global Goods Litigation*

Classic and pharmaceutical products disputes fall easily within the scope of section 402's territoriality category. As previously explained, disputes arising from global product injuries can typically be connected to a number of states through design and/or manufacturing conduct.<sup>156</sup> More interesting, of course, is the extent to which U.S. states in which the dangerous product has been extensively marketed might assert prescriptive jurisdiction based upon "substantial effect[s]."<sup>157</sup> The language in the Restatement likely derives from the "effects doctrine" employed by U.S. courts in international antitrust cases.<sup>158</sup> Foreign injury claims asserting effects from product sales within an American state can be distinguished from the antitrust scenarios in which the effects and the injury coincide. It seems somewhat unlikely that effects jurisdiction can be supported solely on the basis of product distribution and exposure.<sup>159</sup>

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152. *Id.*

153. *Id.* § 403 cmt. e.

154. *Id.*

155. *Id.*

156. See *supra* notes 115-39 and accompanying text (describing Ford Explorer and Vioxx contacts with U.S. states).

157. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) (1987).

158. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

159. Application of the effects doctrine "is generally accepted with respect to liability for

Nationality provides the other basis through which states may assert legislative jurisdiction over foreign injury claims.<sup>160</sup> Although nationality is considered “an exceptional ... basis” for jurisdiction,<sup>161</sup> “[i]nternational law has increasingly recognized the right of a state to exercise jurisdiction on the basis of domicile or residence, rather than nationality, especially in regard to ‘private law’ matters such as ... liability for damages for injury.”<sup>162</sup> At a minimum, a corporation is a “national” of the state in which it is incorporated.<sup>163</sup> That state may arguably regulate corporate activities worldwide.

The section 403 reasonableness analysis is similarly straightforward in classic and pharmaceutical products disputes. Recall the Ford Explorer and Vioxx hypotheticals.<sup>164</sup> Under subsection (a), the Explorer claims had substantial territorial “links” with a number of states including, but not limited to, Michigan, Tennessee, Ohio, and North Carolina.<sup>165</sup> The Vioxx disputes were territorially connected to both New Jersey and Maryland.<sup>166</sup> Moreover, the sheer number of Explorers and affected tires on the roads, and the number of patients who ingested Vioxx in the conduct states and nationwide, arguably make the exercise of prescriptive jurisdiction all the more reasonable. Subsection (b) examines the connections “such as nationality, residence, or economic activity” between the state and defendant or plaintiff.<sup>167</sup> This section certainly adds Delaware to the list, as the state in which Ford is incorporated, and may support the

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injury in the state from products made outside the state and introduced into its stream of commerce.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402(1)(c) cmt. d. Of course, foreign injury claims involve injuries outside the state.

160. *Id.* § 402(2).

161. *Id.* § 402 cmt. b.

162. *Id.* § 402 cmt. e.

163. *See id.* (“The nationality principle is applicable to juridical as well as to natural persons. For the purposes of this section, the nationality of a corporation or comparable juridical entity is that of the state under whose law it is organized.”). In our Ford Explorer and Vioxx hypotheticals, Delaware and New Jersey, respectively, could exercise legislative jurisdiction over worldwide injuries caused by their corporations. *See* Ford Motor Company, Current Report (Form 8-K), at 1 (June 20, 2008), available at <http://www.secinfo.com/d12Pk6.tfzh.htm>; Merck & Co., Inc., Current Report (Form 8-K), at 1 (May 20, 2009), available at <http://www.secinfo.com/dsvr4.s8vs.htm>.

164. For a discussion of state conduct contacts with the South American rollover accidents and the international Vioxx claims, see *supra* notes 115-39 and accompanying text.

165. *See supra* notes 115-24 and accompanying text.

166. *See supra* notes 131-39 and accompanying text.

167. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987).



notion that nonconduct states in which the products were extensively marketed might reasonably exercise jurisdiction.

Subsection (c) considers the “character” and “importance” of the regulation and further inquires how common and desirable such regulation is around the world.<sup>168</sup> The importance of products liability and personal injury tort regulation in the United States cannot be overstated; American states rely on private adjudication to ensure both adequate compensation to residents and to deter the sale of dangerous products to consumers.<sup>169</sup> Moreover, products liability laws similar to our own are common among our trading partners.<sup>170</sup> Certainly a major source of international friction in the tort realm is the perceived excessiveness of American damage awards. But this friction is irrelevant to the problem we examine here—defendants in classic and pharmaceutical disputes are almost always American resident corporations rather than foreign multinationals.

Subsection (d) is arguably inapplicable. Numerous conflicts decisions have noted that “justified expectations” generally are irrelevant to the average personal injury action.<sup>171</sup> This is particularly true in global goods scenarios in which defendants distribute products worldwide and cannot predict where accidents will occur.<sup>172</sup> Subsections (e) and (f), focusing on the regulation’s importance and consistency with traditions of the international legal system, are arguably subsumed by the inquiry in subsection (c).

Subsection (g) considers the interests of other potential regulating states.<sup>173</sup> Foreign plaintiffs in both classic and pharmaceutical disputes usually are nationals of the foreign state in which the injury occurred.<sup>174</sup> In the Venezuelan Explorer cases, for example,

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168. *Id.* § 403(2)(c).

169. *See Lear, National Interests*, *supra* note 22, at 571-79.

170. *See, e.g.*, Convention on the Law Applicable to Products Liability, 1056 U.N.T.S. 187.

171. *See, e.g.*, *Phillips v. Gen. Motors Co.*, 995 P.2d 1002, 1013 (Mont. 2000) (explaining that tort cases generally do not involve justified expectations and further noting that with respect to automobiles, “the law of any state could potentially apply in a product liability action”).

172. *Id.* at 1013-14; *see also infra* notes 266-71 and accompanying text (discussing the “unfair surprise” notion in the Due Process jurisprudence).

173. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)(g) (1987).

174. Air disasters are the major exception to this rule. *See, e.g.*, *Van Schijndel v. Boeing Co.*, 434 F. Supp. 2d 766, 768-69 (C.D. Cal. 2006) (dismissing case to Singapore although crash occurred in Taiwan and plaintiff was Dutch). *Piper* was unusual in that the plaintiffs and the

the plaintiffs were Venezuelan, and the Explorers had been assembled at the Ford assembly plant in Venezuela.<sup>175</sup> In global goods cases, the accident state will have significant interests in both compensation and deterrence. Moreover, the pharmaceutical cases often implicate foreign interests beyond simple compensation and deterrence. Many foreign nations subject pharmaceutical products to FDA-like approval and oversight. In the *Vioxx* class action, for example, the district court relied heavily on the existence of the French and Italian regulatory schemes to support dismissal.<sup>176</sup>

Lastly, subsection (h) considers the “likelihood of conflict with regulation by another state.”<sup>177</sup> Classic products disputes seldom raise substantive conflicts with foreign nations. In the Venezuelan Explorer cases, for example, Venezuela’s interests were wholly consistent with those of the American states that might have exercised regulatory authority. Clearly, none of these states had an interest in compensating Venezuelan victims, but the states’ deterrence interests were dramatic. Not only were the Explorers and tires designed and manufactured in the United States, but in-state consumers driving Ford Explorers or using Wilderness AT tires were exposed to the very dangers experienced by the Venezuelan victims.<sup>178</sup> Moreover, the tort laws of the interested states validated Venezuela’s compensation interests.<sup>179</sup> Classic cases

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crash were both in Scotland. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 238-39 (1981).

175. Note that Ford Venezuela was not named as a defendant in these claims. Only Ford Motor Company, who was allegedly responsible for the defective design, was named. *See Rivas v. Ford Motor Co.*, No. 8:02 CV-676-T-17 EAJ, 2004 WL 1247018, at \*1 (M.D. Fla. Apr. 19, 2004) (explaining that the victim worked for Ford Venezuela but named only the parent, Ford Motor Company, as defendant in action); *Morales v. Ford Motor Co.*, 313 F. Supp. 2d 672 (S.D. Tex. 2004) (finding Venezuelan plaintiff named only Ford Motor Company as defendant in action).

176. *See In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 741, 748 (E.D. La. 2006).

177. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403(2)(h) (1987).

178. *See Warwick*, *supra* note 117, at 1461-64 (2003) (explaining that Firestone initiated a “voluntary” limited recall in August 2000 and that in May 2001, Ford, not Firestone, offered to replace thirteen million Wilderness AT tires that remained on Explorer models).

179. This can be inferred from two facts: first, Venezuelan plaintiffs would not file their cases in American courts if the available compensation was inadequate; and, second, Venezuela itself requested that the Southern District of Indiana, in which the multidistrict litigation regarding the Ford Explorer took place, retain jurisdiction over the Venezuelan claims. *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 190 F. Supp. 2d 1125, 1154 (S.D. Ind. 2002).

generally follow this pattern, thus rendering the potential for conflict under subsection (h) illusory.

In the pharmaceutical context, however, regulation by an American state may be at odds with foreign regulatory goals. When French and Italian citizens attempted to join a Vioxx class action, for example, the district court concluded that adjudicating plaintiffs' claims in the United States risked "disrupting the judgments of Italian and French regulatory bodies by imposing an American jury's view of the appropriate standards of safety and labeling on companies marketing and selling drugs" abroad.<sup>180</sup> Other pharmaceutical cases have reached similar conclusions.<sup>181</sup> Interestingly, however, neither the Vioxx court nor the other federal courts dismissing pharmaceutical injuries on forum non conveniens grounds analyzed the particulars of the foreign regulatory schemes at issue.<sup>182</sup>

From a conflicts perspective, the mere presence of a foreign regulatory scheme surely makes a conflict possible; it does not, however, make it likely. The American regulatory regime for pharmaceutical products has proceeded unimpaired for decades with concurrent state and federal regulation.<sup>183</sup> There is no real reason to assume that the application of state law to a foreign pharmaceutical injury necessarily undermines the regulatory goals of the foreign nation any more than it does the goals of the federal government. At a minimum, assessing "likelihood" must include an actual examination of the foreign regulatory scheme.

Balancing the section 403(2) reasonableness factors for classic and pharmaceutical cases yields the following conclusions: (1) it is highly unlikely that any state assertion of prescriptive jurisdiction in a classic case will be "unreasonable;" and (2) although pharmaceutical cases are more challenging, state regulatory jurisdiction in such cases should generally satisfy the Restatement's reasonableness requirement. Pharmaceutical disputes are more likely to

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180. *Vioxx*, 448 F. Supp. 2d at 748.

181. See, e.g., *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1129 (S.D.N.Y. 1992); *Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1, 4 (E.D. Pa. 1980).

182. See *Vioxx*, 448 F. Supp. 2d at 748; *Hyland Therapeutics*, 807 F. Supp. at 1129; *Harrison*, 510 F. Supp. at 4.

183. See *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009) (discussing the seventy-year history of concurrent state and federal regulation of pharmaceuticals).

produce a subsection (h) conflict than classic cases; however, this conclusion alone does not render a state's exercise of prescriptive jurisdiction "unreasonable" under customary international law. Section 403(2) is a multifactor balancing test. The typical pharmaceutical claim involves a product offered by an American multinational that has been designed and tested in the United States. The representations made by the defendant to the FDA for domestic approval may have had direct bearing on foreign approval.<sup>184</sup> American consumers have been exposed to the dangerous product. Moreover, these lawsuits are typically filed against only the American parent. While state assertions of prescriptive jurisdiction over foreign pharmaceutical injuries are more likely to raise conflicts than are classic products claims, this fact does not demonstrate that state regulation of pharmaceutical claims is generally or even often "unreasonable" as defined by the Restatement.

Once the reasonableness of jurisdiction is established, section 403(3) must be consulted. This section should rarely come into play in classic cases. Direct conflicts regarding classic products like toys or even automobiles are hard to imagine. But direct conflicts in the pharmaceutical realm are not so difficult to envision. We can imagine a situation in which a foreign government prescribes specific, unchangeable labels for a particular pharmaceutical product. Any additional requirements imposed by a state<sup>185</sup> would make compliance with both states' regulations "otherwise impossible."<sup>186</sup> At this juncture, the Restatement requires the state with the weaker interest to defer to the other nation.<sup>187</sup> It is at this point, and this point only, that a state exercising prescriptive jurisdiction over a pharmaceutical claim might cross the line drawn by customary international law. But the likelihood of a state reaching this point

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184. See, e.g., *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 909 (noting that Swedish approval of vaccine was based on information provided to FDA as well as actual FDA approval).

185. Note that the Supreme Court concluded that state common law causes of action qualified as "requirements" under the preemption provision in the Medical Device Act. *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1007-08 (2008). The Court explained that "while the common-law remedy is limited to damages, a liability award can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Id.* at 1008 (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992)) (internal quotations omitted).

186. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 cmt. e (1987).

187. *Id.* § 403(3).

is extremely remote. Although modern conflicts rules may be manipulated to support almost any choice-of-law decision,<sup>188</sup> the notion that an American state would apply forum law in the face of conflicting foreign labeling requirements to a claim arising from a foreign injury brought by a foreign plaintiff seems rather far fetched.

## 2. *The Foreign Affairs Powers*

The power of the federal government over foreign affairs is often described as plenary.<sup>189</sup> The Constitution contains a comprehensive catalogue of specific prohibitions and limitations of state power and affirmative provisions that vest control over matters concerning foreign relations in the federal government.<sup>190</sup> But the Supreme Court has routinely "gone beyond the specific constitutional language."<sup>191</sup> In *United States v. Belmont*,<sup>192</sup> for example, the Court explained that "[g]overnmental power over external affairs is not distributed, but is vested exclusively in the national government," and concluded that "the external powers of the United States are to be exercised

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188. Critics of governmental interest analysis, for example, complain that ascertaining state purpose is entirely too malleable, see, e.g., Willis L.M. Reese, *Chief Judge Fuld and Choice of Law*, 71 COLUM. L. REV. 548, 559-60 (1971), and perhaps even fictitious and unrealistic. See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 402 (1980); Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 219-20 (1991).

189. See *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (finding that state laws are unconstitutional if they have more than an incidental or indirect effect on foreign relations, even when no federal law or policy exists in that area); *United States v. Pink*, 315 U.S. 203, 233 (1942) (explaining that the limits on state sovereignty include the exclusive power of the national government over external affairs); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (stating that "complete power over international affairs is in the national government"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936) (analyzing the "investment of the federal government with the powers of external sovereignty"); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 573-74 (1840) (interpreting the Framers' constitutional intent to cut off all negotiations, communications, and intercourse between foreign governments and the states).

190. U.S. CONST. art. I, § 10; see also Daniel C.K. Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165, 182 (1988) (discussing the constitutional prohibitions on state power as manifestations of the Framers' intent to vest the national government with exclusive external power).

191. Chow, *supra* note 190, at 182.

192. 301 U.S. 324 (1937).

without regard to state laws or policies.”<sup>193</sup> The Court reiterated this notion in *United States v. Pink*,<sup>194</sup> stating: “Power over external affairs is not shared by the States; it is vested in the national government exclusively.”<sup>195</sup> Numerous commentators have expressed similar sentiments.<sup>196</sup>

The federal foreign affairs powers limit state regulatory authority in several different contexts. Field preemption, exemplified by *Zschernig v. Miller*,<sup>197</sup> prohibits “state action with more than incidental effect on foreign affairs ... even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict.”<sup>198</sup> Other Supreme Court cases have invalidated state legislation on the basis of “conflict” preemption. In *Crosby v. National Foreign Trade Council*,<sup>199</sup> for example, the Court struck down the Massachusetts Burma law as an interference with congressional legislation on the subject.<sup>200</sup> *American Insurance Association v. Garamendi*,<sup>201</sup> the most recent of the Court’s foreign affairs decisions, is arguably a hybrid of field and conflict preemption because the majority relied on an implied conflict with presi-

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193. *Id.* at 330-31.

194. 315 U.S. 203 (1942).

195. *Id.* at 233.

196. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 139, 149-50 (2d ed. 1996) (stating that the states “do not exist” for the purposes of foreign relations); Ronald A. Brand, *Enforcement for Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 257 (1991) (suggesting that a national approach to enforcing foreign money-judgments would be consistent with the federal authority in other areas of foreign affairs); Chow, *supra* note 190, at 181-83 (discussing legal and historical evidence that external power is intended to be vested solely in the national government); Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT’L L. 121, 136-38 (1997) (urging that national standards for forum non conveniens should be observed when a foreign party is involved in litigation in the state courts because it is more “a national issue”); Donald T. Trautman, *Toward Federalizing Choice of Law*, 70 TEX. L. REV. 1715, 1735-36 (1992) (asserting a need for “a more national approach to choice of law when persons or interests having relations with foreign nations are involved”); Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT’L L.J. 101, 123 (1993) (suggesting that a different result is necessary in transnational litigation for the forum non conveniens arena).

197. 389 U.S. 429 (1968).

198. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 418 (2003) (citing *Zschernig*, 389 U.S. at 432).

199. 530 U.S. 363 (2001).

200. *Id.* at 388.

201. 539 U.S. 396 (2003).

dential policy to invalidate a California insurance statute.<sup>202</sup> Although *Zschernig* remains good law, *Garamendi* and *Crosby* arguably express a preference for conflict preemption over the dormant preemption doctrines.<sup>203</sup> As the *Garamendi* majority explained, "Where ... a State has acted within ... its 'traditional competence,' but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted."<sup>204</sup>

The Court has also relied on the dormant Foreign Commerce Clause to invalidate state legislation. These cases employ traditional Commerce Clause principles but additionally inquire whether the state activity "prevent[s] the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'"<sup>205</sup> As Professor Tribe explains, "If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce."<sup>206</sup> Note that the Supreme Court has not usually mirrored dormant Commerce Clause analysis in the foreign commerce decisions.<sup>207</sup> Professors Kysar and Meyler point out that it is the "states' practice of sitting in judgment upon the internal affairs of foreign jurisdictions—and even attempting to influence those affairs through financial incentives—[that] has been seen by the Court as the chief concern of dormant Foreign Commerce Clause analysis."<sup>208</sup>

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202. President Clinton approved two measures, essentially agreeing that all Holocaust-era claims against German companies would be directed to a voluntary compensation fund to the best of the national government's efforts. *Id.* at 406. California also enacted legislation to ensure compensation of Holocaust victims, but that legislation was in conflict with the executive agreements. *Id.* at 408-11. Due to the President's authority over foreign policy and national security, in the absence of Congress's explicit disapproval in the form of law, that authority is binding on the states. *Id.* at 429.

203. See Leanne M. Wilson, Note, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 746 (2007).

204. *Garamendi*, 539 U.S. at 419 n.11 (internal citations omitted).

205. *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979).

206. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-21 (2d ed. 1988).

207. Douglas A. Kysar & Bernadette A. Meyler, *Like a Nation State*, 55 UCLA L. REV. 1621, 1655 (2008).

208. *Id.*

Lastly, the federal courts have themselves created federal common law in the foreign affairs arena.<sup>209</sup> *Banco Nacional de Cuba v. Sabbatino*,<sup>210</sup> in which the Supreme Court adopted the act of state doctrine,<sup>211</sup> is the most famous of these cases.<sup>212</sup> More recently, the Fifth and Eleventh Circuits relied on *Sabbatino* for the notion that the federal common law of foreign relations applies to private personal injury actions against defendants with ties to foreign governments.<sup>213</sup> In *Torres v. Southern Peru Copper Corp.*,<sup>214</sup> for example, the Fifth Circuit found that a complaint lodged by Peruvian miners against American corporations for injuries sustained in Peru raised a federal question.<sup>215</sup> According to the *Torres* court, the complaint involved Peru's sovereign interests, thus "implicating important foreign policy concerns."<sup>216</sup> Other courts of appeals have similarly applied the federal common law of foreign relations to state law claims that "significantly affect American foreign relations."<sup>217</sup>

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209. Although revisionist scholars have recently challenged the validity of the federal common law of foreign relations, see Bradley & Goldsmith, *supra* note 142, at 849-70; Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1622-25 (1997), courts and commentators overwhelmingly approve its existence. See *id.* at 1634-41. According to Professor Goldsmith, the scope of the federal courts' lawmaking power in the foreign affairs arena is significantly less settled than its legitimacy. *Id.* at 1632.

210. 376 U.S. 398 (1964).

211. The act of state doctrine states that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250 (1897)).

212. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (explaining that federal common law exists in the "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").

213. See *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 542-43 (5th Cir. 1997) (holding that the plaintiffs' complaint of harm from Peruvian copper smelting raised issues under federal common law by "implicating important foreign policy concerns"); *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218-19 (11th Cir. 1985) (applying federal law to a case in which Costa Rican agricultural workers claimed sterilization as a result of exposure to pesticides manufactured by international corporations).

214. 113 F.3d 540 (5th Cir. 1997).

215. *Id.* at 543.

216. *Id.* Note that the Peruvian government submitted amicus briefs in the action and filed a protest with the State Department. *Id.* at 542. The Fifth Circuit explained, however, that Peru's interjection into the suit was not itself sufficient to confer federal question jurisdiction. *Id.* at 542-43.

217. See, e.g., *Republic of the Phil. v. Marcos*, 806 F.2d 344, 352 (2d Cir. 1986).



The run-of-the-mill foreign products injury claim seldom presents an overt foreign affairs problem. The myriad state statutory and common law actions for design defect, negligence, breach of warranty, negligent hiring, and other personal injury torts typically make no reference to foreign governments or foreign nationals. Nor do these claims require state courts to sit in judgment of foreign regimes. The vast majority of foreign injury claims, thus, raise none of the structural or political competence problems giving rise to preemption in *Zschernig*, *Crosby*, or *Garamendi*.

On the other hand, substantive state regulation of classic and pharmaceutical product injuries overlaps significantly with a number of important federal regulatory schemes. The Consumer Product Safety Commission (CPSC), created by the federal Consumer Product Safety Act (CPSA),<sup>218</sup> promulgates rules and standards regarding consumer products ranging from children's toys to all-terrain vehicles.<sup>219</sup> The Food, Drug, and Cosmetic Act (FDCA)<sup>220</sup> similarly vests the Food and Drug Administration with vast authority over prescription and over-the-counter drug approvals and labeling, as well as food safety.<sup>221</sup> Federal statutes regulate

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218. Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (2006). This Act specifically creates and provides the details for the CPSC. 15 U.S.C. § 2053 (2006).

219. See 15 U.S.C.A. § 2056b (West 2009) (detailing mandatory safety standards for toys); 15 U.S.C.A. § 2089 (West 2009) (including all-terrain vehicles within the scope of the Act and describing standards of safety). The Act defines a "consumer product" as:

[A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.

15 U.S.C.A. § 2052(a)(5) (West 2009). But the Act excludes products such as tobacco and motor vehicles that are more specifically covered by other acts. *Id.*

The Act also contains reporting requirements. 15 U.S.C. § 2064 (2006). A manufacturer must immediately notify the Commission when a product creates a "substantial product hazard." *Id.* § 2064(b). A majority of federal court decisions have held that there is no private cause of action for failure to comply with the Act's reporting requirements. See *Kehr v. Yamaha Motor Corp., U.S.A.*, 596 F. Supp. 2d 821, 830 (S.D.N.Y. 2008) (agreeing with the Eighth Circuit that allowing a private action for violation of the Commission's reporting rules would "effectively frustrate Congress's clear intention not to provide a private cause of action to those injured from a violation of the statute itself").

220. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-399 (2006).

221. See 21 U.S.C. § 393 (2006) (establishing the Food and Drug Administration and detailing the inner workings of the Administration); 21 U.S.C. § 371 (2006) (conferring authority to regulate the food and drug industry to the Secretary). The Secretary subsequently delegated this authority to the Commissioner of the FDA. Patricia I. Carter,

everything from cigarette labeling and advertising,<sup>222</sup> the use of hazardous substances,<sup>223</sup> automobile safety standards,<sup>224</sup> and pesticide labeling,<sup>225</sup> to the design of medical devices.<sup>226</sup>

Some of these federal enactments preempt state regulation.<sup>227</sup> For example, the Supreme Court recently concluded that the premarket approval portions of the Medical Device Act (MDA) preempted all state-created causes of action in the area.<sup>228</sup> Most of these federal statutes, however, operate in conjunction with nonconflicting state regulation.<sup>229</sup> With limited exceptions, Congress has preferred decentralized enforcement in the torts arena.<sup>230</sup> The CPSA, for example, creates a private cause of action for violations of rules or

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*Federal Regulation of Pharmaceuticals in the United States and Canada*, 21 LOY. L.A. INT'L & COMP. L.J. 215, 225 (1999).

222. See Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341 (2006).

223. Federal Hazardous Substance Act, 15 U.S.C. §§ 1261-1278 (2006).

224. National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-30170 (2006).

225. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2006).

226. Safe Medical Device Act, 21 U.S.C. § 360c (2006) (vesting the FDA with power to monitor medical device safety and effectiveness).

227. A number of federal statutes have provisions that preempt state regulation. For example, the Federal Cigarette Labeling and Advertising Act preemption statute, 15 U.S.C. § 1334(b) (2006), states, "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." *But cf.* *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 551 (2008) (holding that state claims based on the "duty not to deceive" were not preempted). On the other hand, the Court found that the Medical Device Act preempts all state regulation for devices that are pre-approved by the FDA. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1011 (2008) (holding that, under 21 U.S.C. § 360k(a), a state statute may parallel federal regulation but may not differ from or add to it). The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) preemption statute restricts states from "impos[ing] or continu[ing] in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (2006); see also *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 454 (2005) (holding that a state statute must be genuinely equivalent to the FIFRA requirements in order to support liability).

228. See *Medtronic*, 128 S. Ct. at 1011. The MDA provides:

No state ... may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under [federal law] to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a). The *Medtronic* Court found that common law actions for damages qualify as "requirements" for purposes of the MDA preemption clause. 128 S. Ct. at 1008 ("Absent other indication, reference to a State's 'requirements' includes its common-law duties.")

229. See *Medtronic*, 128 S. Ct. at 1011.

230. See *id.* at 1014-20 (Ginsburg, J., dissenting) (discussing areas in which state regulation has been tolerated alongside federal regulation).

standards created by the CPSC.<sup>231</sup> Yet the Act is clear that state tort actions are not preempted as long as they do not conflict with the federal requirements.<sup>232</sup> And just last term, the Supreme Court in *Wyeth v. Levine*<sup>233</sup> rejected the notion that the FDCA preempts state tort remedies for traditional pharmaceutical injuries.<sup>234</sup> The Court emphasized that the legislation revealed no intent to preempt and that the states have concurrently regulated the pharmaceutical industry through common law and statutorily-created causes of action for at least the past seventy years.<sup>235</sup>

Despite extensive federal regulation in the field, then, the states play an active and expansive regulatory role in domestic-injury claims involving consumer products. The question is whether this calculus changes when the accident moves offshore. The Supreme Court has not determined the extraterritorial reach of statutes like the FDCA or the CPSA. And the Court in *Equal Employment Opportunity Commission v. Arabian American Oil Co.*<sup>236</sup> emphasized

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231. There is no private cause of action for a violation of the CPSA itself, however. Section 2072(a) provides in pertinent part:

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States.

15 U.S.C. § 2072(a) (2006).

232. *Id.* § 2072(c). Courts have uniformly found that the presence of an action under § 2072 does not preempt additional state remedies. *See, e.g.,* *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063, 1067 (9th Cir. 2000) (referring to § 2072(c) as a "saving clause" that allows state action despite 2072(a) action).

233. 129 S. Ct. 1187 (2009).

234. Justice Stevens explained in the majority opinion:

The most glaring problem with [defendant's preemption] argument is that all evidence of Congress' purposes is to the contrary. Building on its 1906 Act, Congress enacted the FDCA to bolster consumer protection against harmful products. Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938 statute or in any subsequent amendment. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings.

*Id.* at 1199-2000 (internal citations omitted).

235. *Id.*; *see also Medtronic*, 128 S. Ct. at 1017 (noting that the FDCA started requiring preclearance approval from the FDA for new drugs in 1938 without eliminating the possibility of state suit and that the state regulation continued despite the presence of federal regulation).

236. 499 U.S. 244 (1991).

that "Congress legislates against the backdrop of the presumption against extraterritoriality."<sup>237</sup> Unless Congress uses clear language demonstrating its "affirmative intention" to regulate foreign actions, the Court will assume that legislation is "primarily concerned with domestic conditions."<sup>238</sup> Thus, absent language indicating that Congress intended for the CPSC and FDA decisions to apply extraterritorially, there is a good argument that these regulatory standards apply only to domestic scenarios. State causes of action that incorporate or mirror federal safety standards similarly should be unavailable to foreign plaintiffs.

Left open for debate, however, is the relevance of the federal decision *not* to regulate extraterritorially to traditional state tort actions like negligence or breach of warranty. Intuitively, it seems odd that a state could apply its substantive law to an overseas product injury when Congress has restricted the scope of federal power to domestic accidents. But that intuition is probably wrong. Congress legislates against a backdrop of state regulation, particularly in the personal injury arena.<sup>239</sup> In the domestic preemption context, Congress must be very clear regarding its intent to displace traditional state remedies.<sup>240</sup> As *Garamendi* explained, a similar level of clarity is required for foreign affairs preemption.<sup>241</sup> Given that the Constitution does not generally debar the states from remedying overseas injuries and that the personal injury realm is one over which the states have traditionally exercised extensive authority, *Garamendi* requires some indication of congressional intent to displace state authority.<sup>242</sup> A congressional decision to limit

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237. *Id.* at 248.

238. *Id.* (internal quotation marks omitted).

239. As the Third Circuit recently explained, "it is hard to imagine a field more squarely within the realm of traditional state regulation than a state tort-like action seeking damages for an alleged failure to warn consumers of dangers arising from the use of a product." *Fellner v. Tri-Union Seafoods, LLC*, 539 F.3d 237, 248 (3d Cir. 2008).

240. The Supreme Court noted in *Medtronic, Inc. v. Lohr*:

In all pre-emption cases, and particularly in those in which Congress has "legislated ... in a field which the States have traditionally occupied," we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

518 U.S. 470, 485 (1996) (citations omitted).

241. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2002).

242. *Id.*

the reach of a federal regulatory program, without more, arguably says nothing about state regulatory power in the foreign injury context.

Still, foreign injury complaints raising traditional state tort claims seem as though they should implicate the federal foreign commerce power. They have little in common, however, with the cases in which the federal courts have found Foreign Commerce Clause violations. In *Japan Line, Ltd. v. County of Los Angeles*,<sup>243</sup> for example, California sought to apply an *ad valorem* property tax to Japanese containers used exclusively in international commerce.<sup>244</sup> The Court concluded that California's tax "prevent[ed] th[e] Nation from 'speaking with one voice' in regulating foreign trade."<sup>245</sup> This was particularly apparent because an international agreement already existed regarding containers used exclusively in foreign commerce.<sup>246</sup> The *Japan Line* opinion emphasized that the risk of retaliation was "acute" and that such retaliation would be felt by the "Nation as a whole" rather than simply California.<sup>247</sup>

In the foreign injury cases, there is no risk of retaliation; there are no international agreements; and the need for the nation to speak with one voice regarding safety standards for American products is not immediately apparent. These are private tort suits seeking damages for personal injuries from American defendants. A state's application of state safety standards to a product designed and/or manufactured in the United States seems quite removed from the issues typically found in the Foreign Commerce Clause cases.

Lastly, let us consider whether foreign injury claims "affect," "implicate," or have a direct or incidental impact on the foreign affairs of the United States, supporting the creation of federal common law. Note that federal and state courts decide hundreds of cases involving international transactions and events each year. In order to justify the creation of federal common law, however, a dispute must boast more than international attributes; it must

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<sup>243</sup>. 441 U.S. 434 (1979).

<sup>244</sup>. *Id.* at 437.

<sup>245</sup>. *Id.* at 452.

<sup>246</sup>. *Id.* at 453.

<sup>247</sup>. *Id.*

“implicat[e] ... our relations with foreign nations.”<sup>248</sup> Personal injury actions between parties who are in no way connected with foreign governments are analytically distinct from *Sabbatino*, *Marcos*, and other cases in which the federal courts have relied on the federal common law to avoid international embarrassment or to insulate the actions of a foreign political regime from judicial scrutiny.

“Classic” products injuries, in particular, are unlikely to implicate the sovereign interests of foreign nations. Classic actions typically involve American resident defendants and are usually predicated upon the domestic design and/or manufacturing conduct of an American corporation. Moreover, state regulation of such injuries rarely conflicts with the regulatory goals of the accident forum.<sup>249</sup> Certainly, foreign substantive law may differ from that of an American state—one may favor liability only upon a showing of negligence, for example, while the other may employ a strict liability formula—but both seek to compensate the victim and/or deter injury-causing activity. And though damages awards are routinely larger in the United States than they are abroad,<sup>250</sup> ordering a domestic corporate defendant to “overcompensate” a foreign plaintiff surely has no impact on the ability of the United States government to conduct foreign policy.

The pharmaceutical cases present a more complex federal common law problem because many nations employ their own governmental frameworks to regulate pharmaceutical products.<sup>251</sup> Most forum non conveniens decisions dismissing foreign pharmaceutical claims rely heavily on the existence of foreign regulatory schemes. But as previously mentioned, very few of these decisions make any effort to assess the degree of conflict.<sup>252</sup> The federal judiciary

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248. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

249. See *supra* notes 150-63 and accompanying text (discussing potential conflict in the Restatement reasonableness analysis).

250. See Russell J. Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 ARK. L. REV. 157, 162 (1999).

251. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 448 F. Supp. 2d 741, 748 (E.D. La. 2006) (mentioning regulatory structure in Italy and France); *Carlenstolpe v. Merck & Co.*, 638 F. Supp. 901, 903 (S.D.N.Y. 1986) (Sweden); *Harrison v. Wyeth Labs. Div. of Am. Home Prods. Corp.*, 510 F. Supp. 1, 4 (E.D. Pa. 1980) (Great Britain).

252. See, e.g., *Vioxx*, 448 F. Supp. 2d at 748 (assuming that U.S. litigation risked “disrupting the judgments of Italian and French regulatory bodies,” but never discussing any aspects of the regulatory regimes); *Doe v. Hyland Therapeutics Div.*, 807 F. Supp. 1117, 1129 (S.D.N.Y. 1992) (same with respect to Irish system); *Harrison*, 510 F. Supp. at 4 (same with

assumes that state regulation would interfere with the regulatory goals of the foreign nation, thus raising a foreign affairs problem. This assumption is probably inaccurate.

Let us suppose that a foreign government prescribes specific, unchangeable labels for a particular pharmaceutical product. It surely does not undermine the federal government's ability to conduct international relations for a state or federal district court to ascertain whether a regulatory compliance defense available under foreign law bars a state cause of action. The larger question, of course, is whether the federal government's powers are compromised in the unlikely event a court gets it wrong, so to speak. What if a district court hearing a French Vioxx case applied New Jersey law and held that Merck failed to warn even though the French labeling satisfied French standards? The outcome would not provoke an international incident; technically, the French government would be completely unaffected by the federal court judgment. Clearly, Merck would be unhappy. But Merck could pursue traditional appellate remedies, arguing that New Jersey is prohibited by international law from applying its own law in such a situation.<sup>253</sup> Merck could also lobby the French government for an exception or lobby Congress for a preemption provision in the FDCA covering state failure to warn claims in the foreign injury context. But unless the French government lodged an official protest or at least filed an amicus brief, the likelihood of a foreign relations problem between the two nations seems remote.<sup>254</sup>

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respect to British system).

253. See *supra* notes 180-88 and accompanying text (discussing pharmaceutical conflicts under the Restatement).

254. Note that I am not suggesting that an American state has a greater interest in these pharmaceutical cases. As the *Doe v. Hyland Therapeutics Division* court explained:

[T]he foreign forum's interest in this type of pharmaceutical products liability action ... stems, not from the mere manufacture of products, but from their sale to the forum's market, and their use by its citizens. The forum whose market consumes the product must make its own determination as to the levels of safety and care required. That forum has a distinctive interest in explicating the controlling standards of behavior, and in enforcing its regulatory scheme. The standards of conduct implemented, and the level of damages assessed, will reflect the unique balance struck between the benefit each market derives from the product's use and the risks associated with that use; between the community's particular need for the product and its desire to protect its citizens from what it deems unreasonable risk. The forum's assessment will affect not merely the quality of the product, but also the price, quantity, and availability

The point here is not that conflict is unforeseeable in the pharmaceutical context. Certainly, if the American states routinely add requirements to foreign regulatory schemes, foreign governments may be moved to protest. But as things stand, there is no demonstrated need for a prophylactic dismissal rule to avoid rather unlikely problems. The types of conflicts potentially involved in the pharmaceutical injury claims are endemic to many international cases. Consider, for example, the recognition and enforcement of foreign judgments in the federal and state courts. The federal courts of appeals have consistently concluded that state law governs the enforceability of a foreign judgment in the United States.<sup>255</sup> States thus evaluate the fairness of a foreign judicial system and determine whether fraud or other irregularities in a foreign nation's judicial process render a judgment unenforceable.<sup>256</sup> Such cases present a much more direct foreign relations problem than do foreign injury claims, yet calls to apply the federal common law of foreign affairs to the judgment cases have fallen on deaf ears.<sup>257</sup>

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to its public. Such an assessment must remain the prerogative of the forum in which the product is used; each community faces distinct demands, and has unique concerns that make it peculiarly suited to make this judgment.

807 F. Supp. at 1129. The court is no doubt correct. But the question I address here is not whether it is a good idea to remedy foreign pharmaceutical injuries but whether a state exercising regulatory authority in such a case creates a foreign affairs problem. Moreover, the *Doe* court's next sentences highlight the very issue this Article considers. Judge Conner went on to explain:

We are ill-equipped to enunciate the optimal standards of safety or care for products sold in distant markets, and thus choose to refrain from imposing our determination of what constitutes appropriate behavior to circumstances with which we are not familiar. While imposing our presumably more stringent standards to deter tortious conduct within our borders could afford a higher degree of protection to the world community, such an approach would also ignore the unique significance of the foreign forum's interest in implementing its own risk-benefit analysis, informed by its knowledge of its community's competing needs, values, and concerns.

*Id.* at 1129-30. The district court judge has divested the forum state of its right to apply its "stringent standards." I question the source of the district court's authority to make that substantive judgment. Judge Conner cites no constitutional or international law limit on the state's regulatory authority in the pharmaceutical sphere. Undoubtedly, New York should decline to regulate the foreign event, but that is arguably New York's decision, not the federal court's.

255. Brand, *supra* note 196, at 262.

256. *Id.* at 267 (comparing the various grounds for nonrecognition under the Restatement (Third) of Foreign Relations and the Uniform Foreign Money-Judgments Recognition Act).

257. Cases involving foreign currency controls evoke similar problems. These claims are



Even assuming that some state will apply its own law to a foreign injury dispute that goes to the heart of a foreign regulatory scheme, there should be an indication that the sovereign interests of the foreign country are negatively affected before the state is divested of its power to regulate the dispute. Something more than a federal judge's intuition that international cases require federal oversight should be required.<sup>258</sup>

### 3. *Due Process and Full Faith and Credit*

The relationship between state regulatory jurisdiction in foreign injury disputes and the Full Faith and Credit<sup>259</sup> and Due Process Clauses<sup>260</sup> is more straightforward. The Full Faith and Credit Clause is often irrelevant to international actions since the choice-of-law analysis involves the law of a foreign nation rather than that of a sister state.<sup>261</sup> Modern choice-of-law jurisprudence, however, conflates the Due Process and Full Faith and Credit limitations on state jurisdiction to prescribe.<sup>262</sup> The current interstate formula requires that a state seeking to exercise prescriptive jurisdiction have a "significant contact or significant aggregation of contacts,

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subject to state choice-of-law rules and may or may not result in the application of state law. See, e.g., *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 37 N.Y.2d 220, 220 (1975) (applying New York law). Pharmaceutical cases implicate none of the evaluative issues found in the currency control decisions. For an excellent discussion of the use of state choice-of-law rules for international cases, see Chow, *supra* note 190.

258. Ironically, it is the existence of the federal forum non conveniens regime itself, rather than the substantive state regulation of foreign injury disputes, that provokes international relations problems. The federal doctrine requires district judges to sit in judgment of foreign regimes as they evaluate foreign judicial systems. Note further that foreign nations have responded officially and negatively, not to state assertions of prescriptive jurisdiction over foreign injury claims, but to the American use of the forum non conveniens doctrine. See Walter W. Heiser, *Forum Non Conveniens and Retaliatory Legislation: The Impact on the Available Alternative Forum Inquiry and on the Desirability of Forum Non Conveniens as a Defense Tactic*, 56 KAN. L. REV. 609, 610 (2008) (discussing statutes in several South American nations designed to counter forum non conveniens dismissals in the United States).

259. U.S. CONST. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

260. U.S. CONST. amend. XIV, § 1.

261. The Full Faith and Credit Clause becomes relevant only when a sister state, as opposed to a foreign state, is involved. On the other hand, Full Faith and Credit may be relevant to foreign products claims because a number of different states may have a regulatory interest in a single global product.

262. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 & n.10 (1981).

creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>263</sup>

Professor Brilmayer divides the standard into three parts: (1) “contacts with the forum;” (2) “interests arising from these contacts;” and (3) “fairness to the defendant.”<sup>264</sup> Contacts include “events leading up to the litigation” or perhaps the state residence of the litigants.<sup>265</sup> These contacts must create interests, but as Brilmayer notes, “courts have offered no satisfactory formulation for what kinds of interests suffice.”<sup>266</sup> The fairness concept has proven similarly “elusive.”<sup>267</sup> Dean Larry Kramer defines it in terms of “avoiding unfair surprise,”<sup>268</sup> while another approach inquires whether the defendant has “voluntarily affiliated him or herself” with the regulating state.<sup>269</sup>

A close examination of the classic and pharmaceutical disputes suggests that few such cases exceed the Due Process limits<sup>270</sup> on state jurisdiction to prescribe. Depending upon the exact scope of the cause of action, traditional conduct-based contacts in classic products cases include design, manufacture, location of corporate decision making, particular advertising decisions, and perhaps even the sale of global products with identical defects.<sup>271</sup> In the pharma-

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263. *Id.* at 312-13. The Court was badly fractured in *Allstate*, but all the justices agreed on the formula set forth by the plurality opinion. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-19 (1985) (applying the same formula). Whether the territorial emphasis in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), modifies the existing approach is an open question. I suspect *State Farm* can be distinguished on punishment grounds, although punitive damages rules are considered “substantive” tort law designed specifically to deter. The Court repeatedly stressed that the out-of-state conduct introduced during the trial was “unrelated.” *Id.* at 414-15. The relevance of the case is unclear to global products cases in which the design or manufacturing conduct that caused the out-of-state injury is identical to that potentially causing in-state injuries.

264. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1242 (1992) (internal quotations omitted).

265. *Id.*

266. *Id.*

267. *Id.* at 1243.

268. See LARRY KRAMER, *TEACHER'S MANUAL TO ACCOMPANY CONFLICT OF LAWS* 123 (7th ed. 2006). Dean Kramer suggests that “quid pro quo” is the other dimension of Due Process. He notes that “both elements are found in ... *Home Ins. v. Dick*.” *Id.*

269. Brilmayer & Norchi, *supra* note 264, at 1243.

270. For ease of analysis, I refer to the conflated Due Process/Full Faith and Credit analysis as simply the Due Process analysis for the remainder of this section.

271. In the Venezuelan rollover example, we find a number of states with constitutionally cognizable contacts. See *supra* notes 115-24 and accompanying text.

ceutical cases, states in which clinical trials were held or where the defendant made representations to the FDA may be added to the list.<sup>272</sup> And in both the classic and pharmaceutical categories, states in which large numbers of the allegedly defective product were sold also have contacts with the dispute.<sup>273</sup>

Whether the contacts in classic and pharmaceutical products claims create sufficient state interests is a trickier problem. The traditional purposes of products liability laws are to protect state citizens from injury and to compensate state residents injured by dangerous products.<sup>274</sup> A state with conduct contacts could assert a deterrence interest regardless of the place of injury. A manufacturing and design state might additionally enact products liability legislation to protect the state's reputation for the manufacture or design of safe products thereby protecting state employment from crushing liability.

It is unclear whether contacts based on product sales within a state, without more, are sufficient to create cognizable state interests. Language in *Allstate Insurance Co. v. Hague* suggests the state may need sufficient contacts with the "occurrence,"<sup>275</sup> that is, the specific accident, to pass constitutional muster. And *State Farm Mutual Automobile Insurance Co. v. Campbell*<sup>276</sup> concluded that lawful, dissimilar out-of-state conduct cannot be the basis for a punitive damages award. Although *State Farm* noted that punitive damages have both deterrent and retributive purposes,<sup>277</sup> the Court treated punitive damages as almost completely retributive throughout the opinion.<sup>278</sup> Applying state law to an out-of-state accident in an

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272. The *Vioxx* example reveals that several U.S. states had significant contacts. See *supra* notes 131-39 and accompanying text (describing Merck contacts for purposes of analysis under Restatement).

273. Whether such contacts create constitutionally cognizable interests is a separate question.

274. For example, in *Phillips v. General Motors Corp.*, which involved an accident in Kansas that killed Montana residents, the Montana Supreme Court canvassed the purposes of the various states' products liability laws finding in each state that the law was designed to prevent injuries to state residents and ensure compensation. 995 P.2d 1002, 1009 (Mont. 2000).

275. 449 U.S. 302, 313 (1981) (noting that Minnesota had "three contacts with the parties and occurrence giving rise to the litigation").

276. 538 U.S. 408, 423 (2003).

277. *Id.* at 416.

278. The Court used the word "punish" repeatedly in the opinion. See, e.g., *id.* at 420-23.

attempt to protect in-state residents from the identical product defect arguably falls outside the concerns extant in *State Farm*. By compensating the foreign-injury victim, the state seeks simultaneously to deter the out-of-state defendant. No desire to punish the defendant for noninjurious conduct is evident. Clearly, however, applying state law to an out-of-state injury simply on the basis of product contacts is not frequently observed in the choice-of-law realm.<sup>279</sup>

Lastly, the Due Process analysis considers whether it would be arbitrary or unfair to apply the contact states' law to defendant's conduct. Foreign injury defendants may seek support from *Home Insurance Co. v. Dick*,<sup>280</sup> which involved a Texas plaintiff who entered into a contract in Mexico to insure a vessel operating exclusively in Mexican waters.<sup>281</sup> Although Texas had a clear interest in the compensation of one of its citizens,<sup>282</sup> the Supreme Court held that the Due Process Clause prohibited Texas from applying forum law to the dispute.<sup>283</sup> The holding hinged on a combination of unfair surprise and lack of voluntary affiliation.<sup>284</sup> According to the Court, the American defendant could not have anticipated that Texas law might apply to the transaction when it contracted to insure the property. Moreover, the Court stressed that the defendant had not asked for anything from Texas; it had only asked to be "let alone."<sup>285</sup> *Phillips Petroleum Co. v. Shutts*, decided some seventy years later, employed a similar reliance rationale, holding that Kansas could

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279. Interestingly, in the personal jurisdiction arena, the "volume" of contacts with or products used within the state is one of the classic factors to which early opinions refer. See, e.g., *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). Moreover, volume may be relevant to a finding of "continuous and systematic ... business contacts" within the forum state under general jurisdiction analysis. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). On the other hand, the Fourth Circuit in *Ratliff v. Cooper Laboratories, Inc.*, 444 F.2d 745, 745 (4th Cir. 1971), declined to exercise general jurisdiction over a pharmaceutical defendant despite widespread distribution of the drug within the state.

280. 281 U.S. 397 (1930).

281. *Id.* at 403.

282. *Dick* was a permanent resident of Texas, although he resided in Mexico at the time of contract formation and at the time of the loss of his boat. *Id.* at 403-04.

283. *Id.* at 407.

284. *Id.* at 408, 410.

285. *Id.* at 410.

not apply its law to out-of-state lease agreements with residents of other states.<sup>286</sup>

Global goods claims bear only a superficial resemblance to *Dick* and *Shutts*, however. Both *Dick* and *Shutts* involved distinct property (either insured or leased) in a specific geographic location. In the Ford Explorer accidents, for example, neither the cars nor the tires were designed or manufactured for particular geographic markets. Similarly, Vioxx was distributed worldwide without material modifications for specific markets. By marketing and distributing identical products to every state in the United States as well as numerous countries overseas, Ford and Merck, like other global goods manufacturers, voluntarily affiliated themselves with political units worldwide.

Global goods cases more closely resemble *Allstate* and *Watson v. Employers Liability Assurance Corp.*,<sup>287</sup> both of which involved insurance contracts covering nationwide losses. According to the Supreme Court, neither insurer could rely on the application of a specific state's law because there was no way to predict where the loss might occur.<sup>288</sup> Similarly, a global goods manufacturer cannot predict where its product will cause injury. And although the Restatement (Second) of Conflicts "presumes" that the accident state has the greatest interest in a torts dispute,<sup>289</sup> a design or manufacturing state's law is certainly a legitimate choice in a product defect case under the Second Restatement rubric.<sup>290</sup> Given that a large number of U.S. states apply the Second Restatement,<sup>291</sup> Ford could not claim to be surprised by the application of Michigan law to any Explorer accident occurring outside of Michigan; nor could Merck claim surprise by the application of New Jersey law to

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286. 472 U.S. 797, 822 (1985).

287. 348 U.S. 66 (1954).

288. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 315-16 (1981); *Watson*, 348 U.S. at 71-72.

289. RESTATEMENT (SECOND) OF CONFLICTS §§ 145, 146 (1971) (stating that for torts the presumptive place of most significant relationship is the place of the accident).

290. "[T]he place where the conduct causing the injury occurred," the place of residence of the parties, and the place of the center of the parties' relationship are all relevant to the decision regarding which state has the most significant relationship. *Id.* § 145(2)(b)-(d). In a products liability case, the place of design or manufacture might well have a more significant relationship than the place where the injury occurs.

291. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2004: Eighteenth Annual Survey*, 52 AM. J. COMP. L. 919, 942-44 (2004) (reporting that twenty-two states use the Second Restatement for torts cases).

an out-of-state death allegedly caused by Vioxx. From an anticipation standpoint, the location of the accident in a global goods case is functionally irrelevant.

Finally, it should be noted that the defendant's state citizenship alone may provide sufficient basis for state regulation of out-of-state conduct under the Due Process Clause. In *Skiriotes v. Florida*,<sup>292</sup> the Supreme Court rejected a Due Process challenge by a Florida citizen to the application of Florida law prohibiting the gathering of sponges in international waters.<sup>293</sup> The Court held that Florida could regulate its citizens' conduct, whether in international waters or in foreign countries, so long as such regulation did not conflict with that of a foreign nation.<sup>294</sup> Thus, foreign injury defendants' states of incorporation arguably may regulate their conduct worldwide, provided such regulation is not unreasonable under international law.

### CONCLUSION

In the name of federalism, the federal courts encourage substantial horizontal forum shopping by domestically injured plaintiffs and ruthlessly thwart vertical shopping activity in domestic actions. Yet move the accident offshore and the federal courts' commitment to federalism evaporates. Federal judges actively regulate forum shopping in international torts disputes. Foreign injury plaintiffs find their forum choices the subject of meticulous oversight, while foreign injury defendants enjoy unlimited and rewarding vertical shopping opportunities in the federal courts.

Two themes found in the federal forum non conveniens decisions may explain the courts' divergent approach to international forum choice. First, the federal courts presume that foreign injuries implicate no substantive state interests. Second, the federal judiciary appears to assume that some greater federal interest overrides state concerns when the accident occurs overseas. Both assumptions are wrong.

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292. 313 U.S. 69 (1941).

293. *Id.* at 79.

294. *Id.* at 73 ("[T]he United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.").

From a deterrence perspective, it is irrelevant whether an out-of-state injury occurs in a sister state or a foreign state. The states retain significant, identifiable interests in global goods litigation. Defective products injuries have gone global. Consumers in South Carolina and South America routinely face identical risks posed by identical products.

Moreover, neither the Constitution nor customary international law materially restricts the states' jurisdiction to prescribe in global goods disputes. An analysis of the relevant portions of the Restatement (Third) of Foreign Relations reveals that customary international law imposes only minor limitations on state regulatory power. Whereas classic claims are unproblematic, some pharmaceutical claims may exceed the Restatement's limits. As a general matter, state assertions of jurisdiction in pharmaceutical disputes are "reasonable" as defined by the Restatement. But the occasional case may generate an irreconcilable conflict with a foreign regulatory scheme. In this limited subset of pharmaceutical claims, therefore, customary international law may divest the states of substantive regulatory authority.

Similarly, the federal foreign affairs powers only marginally constrain state legislative authority in the global goods context. State common law and statutory causes of action applicable to foreign products injuries seldom, if ever, encroach upon or relate to the United States government's ability to conduct foreign policy. Because the federal consumer product and pharmaceutical regulatory schemes likely extend only to domestic injuries, state claims that incorporate federal statutory standards may be preempted with respect to foreign injury disputes. The states, however, retain extensive substantive regulatory power over foreign pharmaceutical product injuries in the form of traditional state remedies.

Lastly, the Due Process and Full Faith and Credit Clauses impose virtually no relevant restrictions on state regulatory authority in transnational tort claims. In global goods cases, a number of states typically boast design, manufacturing, or other conduct-based contacts with the product at issue. Because these products are extensively distributed domestically and abroad, a foreign injury defendant can hardly be surprised by the application of a particular state's law.

As this Article has demonstrated, federal judicial oversight of international forum shopping is incompatible with the critical goals of American federalism. Simply put, the *forum non conveniens* regime interferes with the states' ability to govern. The time has come for the federal judiciary to abandon the *forum non conveniens* doctrine as an unauthorized usurpation of state regulatory authority.