Notes

Forum Non Conveniens and Foreign Policy: Time for Congressional Intervention?*

"As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side."[1]

I. Introduction

As Lord Denning's oft-quoted observation illustrates, American courts are often the forum of choice for foreign plaintiffs, who seek to take advantage of our liberal pretrial discovery rules; generous jury awards; and plaintiff-friendly liability laws, which allow both compensatory and punitive damages.[2] To alleviate concerns about hearing cases with only a tenuous connection to the chosen jurisdiction, American courts have primarily employed the common law doctrine of forum non conveniens.[3] Forum non

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1. Smith Kline & French Labs. Ltd. v. Bloch, [1983] 1 W.L.R. 730 at 733 (Eng.).

2. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 252 n.18 (1981) (explaining that American courts are attractive to foreign plaintiffs because of the availability of extensive discovery rules); Russell J. Weintraub, *International Litigation and Forum Non Conveniens*, 29 TEX. INT'L L.J. 321, 323–24 (1994) (asserting that favorable liability rules and the high probability that American juries will award large amounts in damages make litigation in the United States very appealing to foreign litigants).

3. Forum non conveniens is one of the most controversial common law doctrines, and the federal standard has been endlessly debated and criticized by academics. *See generally* 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 U. KAN. L. REV. 609 (2008) (discussing the efforts of other countries to preclude United States forum non conveniens dismissal of lawsuits by citizens of those countries); Elizabeth T. Lear, *Congress, the Federal Courts, and Forum Non Conveniens: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147 (2006) (arguing that the forum non conveniens doctrine intrudes on congressional power and is therefore unconstitutional); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353 (1994) (criticizing the doctrine as protectionist and arbitrary); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986) (arguing that forum non conveniens is unnecessary and that jurisdictional doctrines are adequate to protect defendants and courts); Jeffrey A. Van Detta, *Justice Restored: Using a Preservation-of-Court-Access Approach to Replace Forum Non Conveniens in Five International Product-Injury Case Studies*, 24 NW. J. INT'L L. & BUS. 53 (2003) (arguing that forum non conveniens is illegitimate and instead proposing a preservation-of-court-access statute); Weintraub, *supra* note 2 (discussing the question of whether federal courts sitting in diversity must apply state law to forum non conveniens motions). These articles are representative of the vast amount of literature discussing the doctrine.

conveniens allows a court, even though it has both personal jurisdiction over the parties and subject matter jurisdiction over the controversy, to decline to exercise this jurisdiction in favor of a more appropriate forum. In 1981, in *Piper Aircraft Co. v. Reyno*,[4] the United States Supreme Court held that "[b]ecause 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."[5] Many states quickly followed suit, modifying their own state law of forum non conveniens to reflect the federal courts' hostility to foreign plaintiffs' choice of forum; however, not all states have adopted the federal standard, and a considerable amount of variance exists in the forum non conveniens doctrines of the fifty states.[6] While federal courts sitting in diversity apply federal forum non conveniens law, not the law of the state in which the court sits,[7] the Supreme Court has expressly declined to rule on whether federal forum non conveniens law should preempt state law in cases involving foreign plaintiffs.

This Note proposes that Congress should enact a federal standard of forum non conveniens that would preempt state forum non conveniens law in transnational cases.[8] A legislative standard of forum non conveniens would clarify the federal doctrine and assist in resolving the myriad circuit splits surrounding forum non conveniens in federal court. Additionally, the federal standard would preempt state forum non conveniens law in transnational cases, creating uniformity between the state and federal courts. Not only would a uniform standard limit the endless forum jockeying of both plaintiffs and defendants in these cases,[9] it would also allow more federal control over cases that potentially implicate important foreign-relations issues.

This Note is divided into five parts. Part II outlines the evolution of the federal doctrine of forum non conveniens and analyzes the application of the current federal standard as it applies to lawsuits filed by foreign plaintiffs. Part III discusses the variance of forum non conveniens doctrine in the state courts and considers the evolution of forum non conveniens in three states that have followed divergent paths in developing their forum non conveniens doctrines: Florida, Texas, and Delaware. Part IV proposes that Congress pass a statute expressly preempting state forum non conveniens law with a

4. 454 U.S. 235 (1981).

5. *Id.* at 256.

6. *See infra* Part III.

7. *See infra* subpart II(A).

8. For the purposes of this Note, I will use the terms *transnational litigation* and *transnational motion to dismiss for forum non conveniens* to identify cases in which the defendant moves to dismiss for forum non conveniens and argues that the appropriate alternative forum is located outside of the United States.

9. *Cf.* RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 256 (6th ed. 2011) ("State courts in states with no or limited forum non conveniens doctrines become magnet forums for foreign plaintiffs injured abroad. . . . [F]ederal courts, even in diversity cases, apply a robust federal forum non conveniens doctrine. Thus plaintiffs use tactics designed to prevent removal to federal court.").

federal standard of forum non conveniens in transnational litigation. Part IV also analyzes the policy implications, both positive and negative, of federal preemption of state forum non conveniens doctrine. Part V concludes.

II. Forum Non Conveniens in Federal Court

A. State or Federal Law?

Because forum non conveniens is considered "procedural" under the *Erie* doctrine,[10] federal courts generally apply federal forum non conveniens law, rather than the forum non conveniens law of the state in which the federal court sits. "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[11] While the issue has not been definitively decided by the United States Supreme Court, many federal circuits have explicitly decided the *Erie* issue in favor of applying federal law.[12] Thus, despite the Supreme Court's silence on the topic, commentators and courts generally consider forum non conveniens "procedural" under the *Erie* doctrine and agree that courts should apply the federal standard to forum non conveniens motions.[13]

B. Modern Doctrine: Gulf Oil Corp. v. Gilbert

Modern federal forum non conveniens law originated in *Gulf Oil Corp. v. Gilbert*,[14] in which the Supreme Court announced, "[T]he principle of *forum non conveniens* is simply that a court may resist imposition upon its

10. The doctrine is named for *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

11. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

12. The First, Fifth, Ninth, and Eleventh Circuits have all explicitly addressed the question of whether the *Erie* doctrine requires federal district courts sitting in diversity to apply state forum non conveniens law and have determined that it does not. *See* Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 50 (1st Cir. 1990) (reviewing a district court's forum non conveniens dismissal under the federal standard and concluding that state forum non conveniens law should not be binding on federal courts in diversity cases); *In re* Air Crash Disaster near New Orleans, La., 821 F.2d 1147, 1159 (5th Cir. 1987) ("We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal *forum non conveniens* in diversity cases. . . . [A] federal court sitting in a diversity action is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum."); Ravelo Monegro v. Rosa, 211 F.3d 509, 511–12 (9th Cir. 2000) (holding that forum non conveniens is procedural rather than substantive but noting that the result would likely remain the same even applying state law); Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1219 (11th Cir. 1985) (holding that forum non conveniens is procedural rather than substantive under the *Erie* doctrine because forum non conveniens is "a rule of venue, not a rule of decision").

13. *See, e.g.*, 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3828, at 293–94 (2d ed. 1986) ("[I]t seems quite clear that . . . these are matters of the administration of the federal courts, not rules of decision, so . . . state rules cannot be controlling." (citing *Sibaja*, 757 F.2d 1215)).

14. 330 U.S. 501 (1947).

jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."[15]

In *Gilbert*, the issue was "whether the United States District Court has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*."[16] *Gilbert* originated as a domestic case in the Southern District of New York, where the court granted the defendant's motion to dismiss for forum non conveniens.[17] Emphasizing that the forum non conveniens doctrine "leaves much to the discretion of the court to which plaintiff resorts," the Supreme Court held that the district court did not abuse its discretion in dismissing the suit.[18]

In formulating a federal standard of forum non conveniens, the Court enumerated both private and public interest factors to be considered and noted that trial courts should have substantial discretion in deciding forum non conveniens motions.[19] The private interest factors include

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.[20]

The public interest factors include court congestion, the burden of jury duty on a community with no connection to the litigation, and difficulties in applying unfamiliar law.[21] Despite endorsing the use of forum non conveniens in appropriate cases, the Court cautioned that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[22]

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15. *Id.* at 507. United States courts allowed discretionary dismissal of cases unrelated to the forum as early as the nineteenth century. *See* Willendson v. Forsoket, 29 F. Cas. 1283, 1284 (C.C.D. Pa. 1801) (No. 17,682) (dismissing a suit for back wages by a Danish seaman against a Danish captain and concluding that the case should be decided by a Danish court). However, the term *forum non conveniens* was not widely disseminated in the United States until 1929 in a law review article by Paxton Blair that examined the history of the doctrine. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 21–22 (1929); *see also* RONALD A. BRAND & SCOTT R. JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS 37 (2007) (explaining that the term *forum non conveniens* first gained attention in the United States with the publication of Blair's article). The early precursor to federal forum non conveniens doctrine was most often invoked in admiralty cases, but the Supreme Court eventually extended it to other contexts as well. *Id.* at 39.

16. 330 U.S. at 502.

17. *Id.* at 502–03.

18. *Id.* at 508, 512.

19. *Id.* at 508.

20. *Id.*

21. *Id.* at 508–09.

22. *Id.* at 508. The Court expanded upon this deference to the plaintiff's choice of forum in *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), which was decided on the same

C. Modern Doctrine and the Foreign Plaintiff: Piper Aircraft Co. v. Reyno

The Supreme Court revisited the question of forum non conveniens—this time in the context of a lawsuit brought by a foreign plaintiff—in *Piper Aircraft Co. v. Reyno* in 1981.[23] The lawsuit was initiated by survivors of several Scottish citizens killed in a plane crash that occurred in Scotland.[24] The defendants—Piper Aircraft Company (the aircraft manufacturer) and Hartzell (the propeller manufacturer)—moved for a forum non conveniens dismissal, and the district court granted the motion, citing the *Gilbert* factors.[25] The district court reasoned that an alternative forum was available in Scotland, that the plaintiffs were foreign citizens seeking to take advantage of the United States' liberal tort rules, and that the connections with Scotland were "overwhelming."[26] The Third Circuit reversed the district court, determining that forum non conveniens dismissal was inappropriate where it resulted in an unfavorable change of applicable law for the plaintiff.[27]

The Supreme Court reversed the Third Circuit, holding that forum non conveniens dismissal was appropriate.[28] In its approval of the district court's *Gilbert* analysis, the Court found that the district court properly distinguished cases brought by resident or citizen plaintiffs from cases brought by foreign plaintiffs.[29] Noting that "the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient," the Court reasoned that when the plaintiff is foreign, the presumption that the plaintiff's choice of forum is convenient "applies with less force."[30]

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day as *Gilbert*. In *Koster*, the Court addressed the standard for a plaintiff who chooses to sue in his home forum, explaining that "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Id.* at 524. The Court again emphasized the significance of the plaintiff choosing the "home forum" in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981).

23. 454 U.S. at 238–46.

24. *Id.* at 238.

25. *Id.* at 241.

26. Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 731–32 (M.D. Pa. 1979).

27. *See* Reyno v. Piper Aircraft Co., 630 F.2d 149, 164 (3d Cir. 1980) ("But this Court has held that a dismissal for forum non conveniens, like a statutory transfer, should not, despite its convenience, result in a change in the applicable law. Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit of the claim to which she is entitled here, would dismissal be justified." (footnote omitted) (internal quotation marks omitted)).

28. *Piper Aircraft*, 454 U.S. at 238. The Court held that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247. It then noted that if an unfavorable change in law were given substantial weight in the forum non conveniens calculus, the doctrine would become "virtually useless" because the plaintiff will usually select the forum with the most favorable law, even if that forum is plainly an inconvenient location for the litigation. *Id.* at 250. On the other hand, the Court cautioned that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight." *Id.* at 254.

29. *Id.* at 255.

30. *Id.* at 255–56.

D. The Federal Forum Non Conveniens Standard Under Piper Aircraft

Piper Aircraft clarified the standard for federal forum non conveniens set forth in *Gilbert*, especially as applied to lawsuits brought by foreign plaintiffs. Under *Piper Aircraft*, the federal forum non conveniens inquiry begins with a determination of whether an adequate alternative forum exists.[31] If an appropriate alternative forum exists, the court must next use the *Gilbert* test and balance the public and private interest factors.[32] There is a presumption that the plaintiff's chosen forum is convenient; however, if the plaintiff is foreign, the court will apply this presumption with substantially less force.[33] District courts have substantial discretion in considering whether dismissal is appropriate under *Gilbert*, and the appellate court may reverse only when there has been "a clear abuse of discretion."[34]

Commentators have criticized the *Gilbert* test and *Piper Aircraft* for producing "arbitrary and inconsistent decisions"[35] and for often foreclosing litigation altogether by dismissing the suit in favor of a forum that is practically unavailable.[36] However, *Piper Aircraft* (and its endorsement of the *Gilbert* test) remains the primary source of guidance for federal courts making forum non conveniens determinations in cases involving foreign plaintiffs.[37] In applying *Piper Aircraft*'s standard, courts of appeals have been quick to affirm dismissals of lawsuits brought by foreign plaintiffs, often openly expressing concerns about "forum shopping."[38]

III. State Law of Forum Non Conveniens

Because federal courts sitting in diversity apply a federal forum non conveniens doctrine that often favors dismissal, state courts have become increasingly popular forums for foreign plaintiffs who are injured abroad.

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31. *Id.* at 254 n.22.

32. *Id.* at 257.

33. *Id.* at 255.

34. *Id.* at 257.

35. Lear, *supra* note 3, at 1152.

36. *See* Robertson, *supra* note 3, at 371 ("[E]veryone knows that international plaintiffs who suffer forum non conveniens dismissals in the United States are typically unable to go forward in the hypothesized foreign forum.").

37. *See* BRAND & JABLONSKI, *supra* note 15, at 4 (describing *Piper Aircraft* as the most recent foundational case of the forum non conveniens doctrine).

38. *See* Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64, 67, 71, 77 (2d Cir. 2003) (affirming the forum non conveniens dismissal of Liberian plaintiffs' lawsuit against Chase Bank and noting that it is likely that foreign plaintiffs' choice of a United States forum tends to be driven by "forum-shopping for a higher damage award or for some other litigation advantage" rather than by convenience); Iragorri v. United Techs. Corp., 274 F.3d 65, 72 (2d Cir. 2001) ("[T]he more it appears that the plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons—such as attempts to win a tactical advantage resulting from local laws that favor the plaintiff's case, the habitual generosity of juries in the United States or in the forum district, the plaintiff's popularity or the defendant's unpopularity in the region, or the inconvenience and expense to the defendant resulting from litigation in that forum—the less deference the plaintiff's choice commands . . . .").

While most states have recognized the doctrine of forum non conveniens, the states have varying standards for dismissal. Some states expressly follow the federal standard; other states follow a modified version of the federal standard; still others follow a different standard altogether. This part will examine the evolution of the forum non conveniens doctrines of three states that have taken drastically different paths in developing the doctrine. Florida will serve as an example of a state in which the state supreme court adopted the federal doctrine of forum non conveniens to address concerns about foreign plaintiffs filing lawsuits with little or no connection to the forum. Texas will serve as an example of a state in which the state supreme court abrogated the doctrine of forum non conveniens but the legislature reinstated it soon after, citing concerns about the state becoming a forum of last resort in the United States. Finally, Delaware will serve as an example of a state in which the forum non conveniens standard imposes an extremely high burden of proof upon defendants, making dismissals rare.

A. Florida

1. Kinney System, Inc. v. Continental Insurance Co.—In 1996, the Florida Supreme Court resolved uncertainty in the state's forum non conveniens doctrine, declaring in *Kinney System, Inc. v. Continental Insurance Co.*[39] that "the time has come for Florida to adopt the federal doctrine of forum non conveniens."[40] The court was concerned that its prior decision in *Houston v. Caldwell*[41] adopted a more rigorous standard for dismissal than the federal standard, which led to a large number of suits by foreign plaintiffs being litigated in Florida.[42]

Under the *Houston* standard of forum non conveniens, a lawsuit could not be dismissed for forum non conveniens if any of the parties was a Florida resident.[43] In overruling *Houston* and expressly adopting the federal standard of forum non conveniens, the *Kinney* court cited evidence that foreign plaintiffs' practice of filing lawsuits in the United States for injuries that occurred abroad was "growing to abusive levels in Florida"[44] and determined that the state's forum non conveniens doctrine needed to be revised.[45] The

39. 674 So. 2d 86 (Fla. 1996).

40. *Id.* at 93.

41. 359 So. 2d 858 (Fla. 1978).

42. *Kinney*, 674 So. 2d at 88.

43. *Houston*, 359 So. 2d at 861.

44. *Kinney*, 674 So. 2d at 88 (citing Michael J. Higer & Harris C. Siskind, *Florida Provides Safe Haven for Forum Shoppers*, FLA. B.J., Oct. 1995, at 20, 24–26; Linda L. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501 (1993); Jacques E. Soiret, *The Foreign Defendant: Overview of Principles Governing Jurisdiction, Venue, Extraterritorial Service of Process and Extraterritorial Discovery in U.S. Courts*, 28 TORT & INS. L.J. 533, 562 (1993)).

45. *Id.*

court noted that defendants in diversity actions cannot remove to federal court if they are residents of the state in which the lawsuit was filed;[46] thus, the court reasoned that Florida's rigorous standard for forum non conveniens dismissal was "disadvantaging some of its own residents—a result clearly not intended by *Houston*."[47] The court also cited the "additional burdens" imposed upon the state courts "over and above those caused by disputes with substantial connections to state interests."[48] Finally, the court questioned the state's interest in policing events that occur abroad,[49] concluding that this type of regulation "more properly is a concern of the federal government."[50]

2. Forum Non Conveniens in Florida After Kinney.—The *Kinney* standard for forum non conveniens dismissals is now codified in the Florida Rules of Civil Procedure.[51] After *Kinney*, Florida courts continued to expand the state's forum non conveniens doctrine to prevent forum shopping by foreign plaintiffs. Florida courts have used stronger language than is contained in *Piper Aircraft* to describe the lack of a presumption in favor of a foreign plaintiff's forum, holding that "no special weight should [be] given to a foreign plaintiff's choice of forum."[52]

Florida has also extended its forum non conveniens doctrine to allow dismissal of cases in which foreign countries have passed "blocking statutes," which preclude the foreign country's courts from exercising jurisdiction over cases that have been dismissed for forum non conveniens in the United States. In *Scotts Co. v. Hacienda Loma Linda*,[53] the plaintiff's lawsuit was dismissed for forum non conveniens in Florida state court.[54] A Panamanian court had already refused to take jurisdiction over the lawsuit pursuant to the country's recently enacted blocking statute.[55] Although the Panamanian forum was therefore practically unavailable to the plaintiffs, the Florida appellate court nevertheless reasoned that the plaintiff was not entitled to reinstatement of its claim in Florida:

> [A] plaintiff in a lawsuit dismissed here for forum non conveniens may not render an alternative foreign forum "unavailable" and thereby

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46. *Id.*; *see also* 28 U.S.C. § 1441(b) (2006) ("Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable *only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought*." (emphasis added)).

47. *Kinney*, 674 So. 2d at 88.

48. *Id.*

49. *See id.* at 89 ("Nor are we convinced that any individual state has an absolute obligation to police the foreign actions of American multinational corporations.").

50. *Id.*

51. FLA. R. CIV. P. 1.061(a).

52. Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1118 (Fla. Dist. Ct. App. 1997).

53. 2 So. 3d 1013 (Fla. Dist. Ct. App. 2008).

54. *Id.* at 1018.

55. *Id.* at 1015.

> obtain reinstatement here by (a) itself inducing the foreign court to dismiss the foreign action or (b) relying on foreign laws or decisions *plainly calculated to preclude dismissal* in Florida under *Kinney*.[56]

Additionally, Florida courts have expansively interpreted the definition of an "adequate alternative forum." In *Resorts International, Inc. v. Spinola*,[57] a Florida court determined that neither the unavailability of a jury trial nor the unavailability of lawyers who will work on a contingency-fee basis renders a forum inadequate for purposes of a forum non conveniens dismissal.[58] The Florida Supreme Court has also determined that dismissal of a suit may be appropriate under *Kinney* even if the dismissed suit will have to be adjudicated in *more than one* alternative forum, as long as "the case consists of distinct claims that could have been severed and adjudicated separately."[59]

Because of the advances the Florida courts made after *Kinney*, the Florida doctrine is somewhat *more hostile* to foreign plaintiffs than the federal doctrine; thus, federal preemption would likely result in fewer transnational lawsuits being dismissed for forum non conveniens. Federal preemption would also shift the burden to the federal government to address forum non conveniens issues with foreign relations implications—a task that the *Kinney* court pointed out was better suited to the federal government.[60]

B. Texas

In Texas, the legislature, rather than the courts, determined that a more robust doctrine of forum non conveniens was necessary to stop an influx of lawsuits with little or no connection to the state.

1. Dow Chemical Co. v. Castro Alfaro.—The legislative concerns about forum non conveniens arose after the Texas Supreme Court concluded that the legislature statutorily abrogated the forum non conveniens doctrine in Texas in 1990.[61] In *Dow Chemical Co. v. Castro Alfaro*,[62] Costa Rican employees of Standard Fruit Company sued the defendant companies,

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56. *Id.* at 1017–18 (emphasis added).

57. 705 So. 2d 629 (Fla. Dist. Ct. App. 1998).

58. *Id.* at 629–30.

59. Bacardi v. Lindzon, 845 So. 2d 33, 40 (Fla. 2002) (affirming forum non conveniens dismissal of the lawsuit even though the only alternative was for the plaintiff to adjudicate part of the lawsuit in the Cayman Islands and part of the lawsuit in Liechtenstein).

60. *See supra* notes 49–50 and accompanying text. Blocking statutes, like the one at issue in *Scotts Co. v. Hacienda Loma Linda*, are an example of the particular types of foreign relations issues that might arise when state courts dismiss lawsuits in favor of a foreign forum. Federal preemption of state forum non conveniens law in these cases would provide a uniform standard for states to follow. This would ensure that it is the federal government, and not the individual states, that formulates policies for addressing these foreign statutes. For further discussion of blocking statutes as they relate to federal preemption of forum non conveniens, see *infra* section IV(A)(1).

61. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 679 (Tex. 1990).

62. 786 S.W.2d 674 (Tex. 1990).

alleging that they were injured by pesticides manufactured by the defendants and sold to Standard Fruit.[63] The question before the Texas Supreme Court was whether the legislature had abolished the doctrine of forum non conveniens in Texas Civil Practices and Remedies Code § 71.031, a statute that allowed citizens of foreign countries to file lawsuits in Texas even if the death or injury occurred on foreign soil, as long as certain enumerated conditions were met.[64]

In abrogating the forum non conveniens doctrine in Texas, the plurality based its decision solely on statutory interpretation.[65] The concurring and dissenting justices, however, were much more concerned with the policy implications of abolishing forum non conveniens.[66]

In his concurrence, Justice Doggett was extremely critical of forum non conveniens, accusing Texas corporations of labeling a trial in Texas as "'inconvenient' when what is really involved is not convenience but connivance to avoid corporate accountability."[67] He argued that "a forum non conveniens dismissal is often outcome-determinative" and thus is often "in reality, a complete victory for the defendant."[68] Justice Doggett also argued that personal jurisdiction requirements sufficiently limited the number of cases brought in Texas,[69] that concerns about docket backlog were unwarranted,[70] and that foreign comity would be best served by preventing American multinational corporations (MNCs) from using developing countries as "'dumping grounds for products that had not been adequately tested.'"[71]

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63. *Id.* at 675.

64. *Id.* at 674; TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (West 1986) (amended 1997).

65. *Dow Chemical*, 786 S.W.2d at 674–79. The plurality reasoned that forum non conveniens existed in Texas long before the predecessor to § 71.031 was enacted; thus, because the statute provided an absolute right to bring a lawsuit and did not mention a forum non conveniens exception, the plurality concluded that forum non conveniens had been legislatively abolished in Texas. *Id.* at 676–79.

66. *Id.* at 680–89 (Doggett, J., concurring); *id.* at 689–90 (Phillips, C.J., dissenting); *id.* at 690–97 (Gonzalez, J., dissenting); *id.* at 697–702 (Cook, J., dissenting); *id.* at 702–08 (Hecht, J., dissenting). The exception is Justice Hightower, who emphasized in his concurrence that the plurality did *not* base its decision on policy: "The issue for this court, however, is not whether the doctrine is a good, fair and desirable one for the people of Texas; the issue is whether the doctrine is available because of legislative actions that have been taken." *Id.* at 679 (Hightower, J., concurring). Justice Hightower also explicitly invited the legislature to amend the statute "to clarify its intent" if it had not, in fact, intended to abrogate the doctrine of forum non conveniens in Texas. *Id.* at 680.

67. *Id.* at 680 (Doggett, J., concurring).

68. *Id.* at 682–83.

69. *See id.* at 685 ("[A] state's power to assert its jurisdiction is limited by the due process clause of the United States Constitution. . . . The personal jurisdiction–due process analysis will ensure that Texas has a sufficient interest in each case entertained in our state's courts." (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945))).

70. *Id.* at 686.

71. *Id.* at 687 (quoting Lairold M. Street, Comment, *U.S. Exports Banned for Domestic Use, But Exported to Third World Countries*, 6 INT'L TRADE L.J. 95, 98 (1980–1981) (quoting *U.S.*

The dissenters' opinions echoed the policy justifications for forum non conveniens generally. Justice Gonzalez predicted that the decision would have a devastating effect on the Texas judicial system and would "forc[e] our residents to wait in the corridors of our courthouse while foreign causes of actions are tried."[72] Justice Gonzalez also disagreed with the plurality's interpretation of legislative intent to abolish the doctrine, asserting that "there is *absolutely* no indication that the legislature sought to abolish the doctrine."[73] Justice Cook, who was primarily concerned with forum shopping by foreign plaintiffs, compared the plaintiffs to "turn-of-the-century wildcatters" who "searched all across the nation for a place to make their claims" and "hit pay dirt in Texas."[74] In his dissent, Justice Hecht concluded that "for this Court to give aliens injured outside Texas an absolute right to sue in this state inflicts a blow upon the people of Texas, its employers and taxpayers, that is *contrary to sound policy*."[75] Justice Hecht also disagreed with the statutory interpretation of the plurality, maintaining that the statute did not "create an absolute right to bring a personal injury action in Texas no matter how little it has to do with this state . . . and how burdensome it is to the courts and the people of Texas."[76]

2. Analysis of Dow Chemical.—The various opinions in *Dow Chemical* are illustrative of the forum non conveniens policy debate in the United States. While the plurality purported to base its decision solely on statutory interpretation and Justice Hightower attempted to emphasize this point in his concurring opinion, it is clear that a majority of the members of the court (Justice Doggett and the four dissenting justices) were heavily influenced by the policy implications of adopting the doctrine of forum non conveniens in Texas. Both Justice Doggett and the dissenting justices employed fiery rhetoric to describe the dire consequences of adopting the opposing side's view. The attitudes of both sides were characteristic of the nationwide debate over forum non conveniens; those in favor of a robust doctrine of forum non conveniens argued that vast judicial resources will be expended on cases with no connection to the forum, and those opposed to forum non conveniens labeled the doctrine a defense tactic for American MNCs to avoid liability for their tortious acts abroad.

Export of Banned Products: Hearings Before the Subcomm. on Commerce, Consumer, and Monetary Affairs of the H. Comm. on Gov't Operations, 95th Cong. 44 (1978) (statement of S. Jacob Scherr, Attorney, National Resources Defense Council))).

72. *Id.* at 690 (Gonzalez, J., dissenting).

73. *Id.* at 693.

74. *Id.* at 697 (Cook, J., dissenting).

75. *Id.* at 702 (Hecht, J., dissenting) (emphasis added).

76. *Id.* at 704. Chief Justice Phillips agreed with the policy arguments set forth in Justice Hecht's dissent but declined "to foretell whether dire consequences [would] follow" the decision. *Id.* at 689–90 (Phillips, C.J., dissenting).

3. Texas Legislature Supersedes Dow Chemical.—Less than three years after the Texas Supreme Court decided *Dow Chemical*, the Texas Legislature passed a statute implementing a doctrine of forum non conveniens in Texas.[77] The original version of the statute distinguished between plaintiffs who were not legal residents of the United States and plaintiffs who were legal residents of the United States.[78] For a plaintiff who was not a legal resident of the United States, the trial court could dismiss if it found that, "in the interest of justice," a lawsuit for wrongful death or personal injury "would be more properly heard in a forum outside this state."[79] On the other hand, if the plaintiff were a legal resident of the United States, the court could only dismiss for forum non conveniens if the party seeking the dismissal proved certain conditions pertaining to the existence of a suitable adequate alternative forum.[80] Thus, the original forum non conveniens statute drew a sharp distinction between residents and nonresidents, giving the trial court nearly absolute discretion to determine dismissal for nonresidents. The statute also favored Texas residents, providing that trial courts could not even consider motions to dismiss for forum non conveniens if any properly joined plaintiff was a Texas resident.[81]

In 2003, the legislature eliminated the distinction between resident and nonresident plaintiffs.[82] Under the current statute, if the trial court finds that "in the interest of justice and for the convenience of the parties" a wrongful death or personal injury claim would be more properly heard in another forum, the court "shall decline to exercise jurisdiction under the doctrine of forum non conveniens and shall stay or dismiss the claim or action."[83] In making this determination, the current version of the statute requires the trial court to "consider" six enumerated factors pertaining to the suitability of an alternative forum, irrespective of whether the plaintiff is a United States resident.[84] The Supreme Court of Texas has determined that in cases where the factors weigh in favor of dismissal (even if they do not "strongly" weigh

77. Act of Feb. 23, 1993, 73d Leg., R.S., ch. 4, § 1, 1993 Tex. Gen. Laws 10 (codified as amended at TEX. CIV. PRAC. & REM. CODE ANN. § 71.051), *repealed in part by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 3.09, sec. 71.051(a), 2003 Tex. Gen. Laws 847, 855. The statute was subsequently upheld against a constitutional challenge by the Texas Supreme Court. Owens Corning v. Carter, 997 S.W.2d 560, 571 (Tex. 1999). The plaintiffs contended that the statute violated the Privileges and Immunities Clause of the United States Constitution. *Id.* at 568. The court rejected this argument, citing United States Supreme Court precedent allowing states to discriminate on the basis of state residency, but not state citizenship. *Id.* at 570–71 (citing Douglas v. New Haven R.R. Co., 279 U.S. 377 (1929)). The court concluded that § 71.051 was constitutional because its distinctions were based on Texas *residency* only. *Id.*

78. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a)–(b) (West Supp. 1994).

79. *Id.* § 71.051(a).

80. *Id.* § 71.051(b).

81. *Id.* § 71.051(f)(1).

82. Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 3.04, .09, sec. 71.051(a)–(b), 2003 Tex. Gen. Laws 847, 854, 855.

83. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b), (i) (West 2008).

84. *Id.*; *see supra* note 80 and accompanying text.

in favor of dismissal), the trial court is required to dismiss the case.[85] Due to the limited discretion of the trial court in denying motions to dismiss, in practice, the Texas standard will often be harsher than the federal standard in cases brought by foreign plaintiffs.

C. Delaware

Unlike Texas and Florida, Delaware has yet to adopt a robust standard of forum non conveniens. While the Florida Supreme Court and the Texas Legislature both acted to implement a doctrine that would prevent an influx of lawsuits unrelated to the state, Delaware's forum non conveniens doctrine puts a very heavy burden of proof on defendants seeking forum non conveniens dismissal.

1. Delaware's Overwhelming-Hardship Standard.—In cases that are first filed in Delaware,[86] Delaware uses the *Cryo-Maid* factors[87] in determining whether forum non conveniens dismissal is appropriate. Under the modern formulation, the factors include

> (1) the relative ease of access to proof;
>
> (2) the availability of compulsory process for witnesses;
>
> (3) the possibility of the view of the premises;
>
> (4) whether the controversy is dependent upon the application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
>
> (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
>
> (6) all other practical problems that would make the trial of the case easy, expeditious, and inexpensive.[88]

Nevertheless, even if all of the *Cryo-Maid* factors favor adjudication in the alternative forum, the defendant must show overwhelming hardship for the court to dismiss the case: "It is not enough that all of the *Cryo-Maid* factors may favor [the] defendant. The trial court must consider the weight

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85. *In re* Ensco Offshore Int'l Co., 311 S.W.3d 921, 929 (Tex. 2010) ("The statute's language simply does not require that the Section 71.051(b) factors 'strongly' favor staying or dismissing the suit. Here, all the factors weigh in favor of [the] claim being heard in a forum outside Texas, and the statute *required* that the trial court grant the motion . . . ." (emphasis added)).

86. The overwhelming-hardship standard does not apply to cases that were not first filed in Delaware. Lisa, S.A. v. Mayorga, 993 A.2d 1042, 1047 (Del. 2010). Thus, only "[w]here the Delaware action is the first-filed, the plaintiff's choice of forum will be respected and rarely disturbed, even if there is a more convenient forum to litigate the claim." *Id.* This policy, according to the Delaware Supreme Court, operates to "discourage forum shopping and promote the orderly administration of justice." *Id.*

87. The factors take their name from *General Foods Corp. v. Cryo-Maid, Inc.*, 198 A.2d 681, 684 (Del. 1964).

88. Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 837–38 (Del. 1999).

of those factors in the particular case and determine whether any or all of them truly cause both inconvenience and hardship."[89]

Delaware's overwhelming-hardship standard has allowed cases to survive motions to dismiss for forum non conveniens where they likely would have been dismissed under the federal standard. For example, in *Ison v. E.I. DuPont de Nemours & Co.*,[90] the Delaware Supreme Court reversed the forum non conveniens dismissal of a lawsuit by foreign plaintiffs for injuries that occurred in England, Wales, Scotland, and New Zealand.[91] The court determined that the defendant had not sustained its overwhelming-hardship burden, "even though the plaintiffs [were] foreign and ha[d] no connection" to the Delaware forum.[92] The "key factors" in the court's decision included the fact that the defendant, which was incorporated in Delaware, maintained its principal place of business there and that "significant contacts" existed in Delaware with the allegedly defective product.[93] The court in *Ison* emphasized that there were connections to Delaware other than the defendant's place of incorporation: "This is not a case of weighing the foreign plaintiffs' choice of forum (whether it be 'forum shopping' or not) against a defendant whose only connection is that it is incorporated in Delaware. We need not express an opinion on such a case because it is not before us."[94]

Two years later, however, just such a case did come before the court in *Warburg, Pincus Ventures, L.P. v. Schrapper*.[95] In *Warburg*, the litigation's only connection to Delaware was the defendant's status as a Delaware limited partnership.[96] While the defendant argued that the overwhelming-hardship standard should not apply in cases where the only connection to Delaware was the defendant's status as a Delaware business entity, the court disagreed.[97] The defendant also argued that important foreign witnesses were beyond the reach of the compulsory process of a Delaware court, that evidentiary and discovery procedures of the Hague Convention would impede a trial under Delaware discovery rules, and that foreign law governed the dispute;[98] however, the court affirmed the denial of the defendant's motion to dismiss, deeming the motion to be "based on little more than generalized references to the garden-variety concerns and expenses that characterize transnational litigation."[99] Thus, Delaware courts have strictly

89. Chrysler First Bus. Credit Corp. v. 1500 Locust Ltd. P'ship, 669 A.2d 104, 105 (Del. 1995).
90. 729 A.2d 832 (Del. 1999).
91. *Id.* at 834–35.
92. *Id.* at 842.
93. *Id.* at 843.
94. *Id.* at 842–43.
95. 774 A.2d 264 (Del. 2001).
96. *Id.* at 267.
97. *Id.* at 268.
98. *Id.* at 269–71.
99. *Id.* at 272.

construed the overwhelming-hardship standard and have repeatedly denied motions to dismiss for forum non conveniens, even when the lawsuit is brought by a foreign plaintiff and has only a tenuous connection to Delaware.

2. Analysis of Forum Non Conveniens in Delaware.—Unlike Texas and Florida, which have self-corrected their doctrines of forum non conveniens to closely mirror the federal doctrine (albeit through different government branches), Delaware has remained an extremely friendly forum for foreign plaintiffs who wish to litigate claims in the United States arising from injuries that occurred abroad.

Although the Delaware Supreme Court expressly considered the federal standard set forth in *Piper Aircraft*, the court ultimately declined to adopt that standard, asserting that it "tends significantly to disfavor foreign plaintiffs."[100] Thus, the overwhelming-hardship standard—which will only be met in "*rare cases* where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in *manifest hardship* to the defendant"[101]—remains the standard that defendants must meet to secure forum non conveniens dismissal in Delaware.

Delaware is "the favored state of incorporation for U.S. businesses."[102] In fact, "[o]f the corporations that make up the Fortune 500, more than one-half are incorporated in Delaware[,]"[103] Delaware has credited "the Delaware courts and, in particular, Delaware's highly respected corporations court, the Court of Chancery" as being among the primary motivators for incorporation in Delaware.[104] In light of this corporation-friendly background, it is important to consider Delaware's policy reasons for its forum non conveniens doctrine, which appears to be detrimental to its own corporations. In the domestic context, commentators have suggested that the overwhelming-hardship standard is only one of the ways in which Delaware "attempt[s] to gain complete control over the adjudication of Delaware corporate law cases."[105] Others have proposed that Delaware's restrictive forum

100. Ison v. E.I. DuPont de Nemours & Co., 729 A.2d 832, 840, 842 (Del. 1999). The Delaware Supreme Court also explicitly acknowledged the existence of federal preemption in foreign relations: "State courts are not preempted by federal law in the context of international litigation between private parties unless a federal law, treaty or constitutional provision applies." *Id.* at 840 n.28. Thus, "[a]bsent federal statutory law preempting state [forum non conveniens] standards, many states have deviated from the standard set in *Piper Aircraft*." *Id.* at 840. The court concluded that federal preemption in the area of foreign relations "does not apply when the litigants are private foreign parties as distinct from sovereign entities." *Id.* at 840 n.28. However, this question remains undecided by the United States Supreme Court. *See infra* note 109 and accompanying text.

101. *Ison*, 729 A.2d at 835 (emphasis added).

102. LEWIS S. BLACK, JR., DEL. DEP'T OF STATE, DIV. OF CORPS., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

103. *Id.*

104. *Id.*

105. Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 104–07, 137 (2009). Interestingly, Delaware's forum non

non conveniens doctrine "takes as a starting point that publicly traded companies incorporate in Delaware (and pay its high franchise taxes) at least in part because of its high-quality and specialized courts and, as a general matter, want important and high-profile cases to be decided by Delaware judges."[106] These policy issues—as well as Delaware's inherent interest in managing its own judicial docket—must be considered in the preemption analysis.[107]

IV. Federal Preemption of Forum Non Conveniens: A Proposal

The time has come for Congress to enact a uniform standard of forum non conveniens that would be binding on both federal and state courts in transnational forum non conveniens motions.[108] As the Supreme Court has made it clear that it is unwilling to consider the question of whether federal law should preempt state law of forum non conveniens,[109] congressional action is necessary. A federal forum non conveniens statute would define the

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conveniens policy sweeps more broadly than is necessary to accomplish this goal, as "the Delaware Supreme Court has been no less inclined to keep forum merely because another state's corporate law governs the dispute." *Id.* at 106. It has been suggested that this approach is inconsistent with "the most elementary principles of comity." *Id.* at 107.

106. Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 748–49 (2009).

107. For a discussion of the federalism implications for federal preemption of forum non conveniens, see *infra* section IV(B)(1).

108. Federal preemption of forum non conveniens has been suggested before. *See* Mark D. Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Common Law*, 4 INT'L TAX & BUS. LAW. 155, 156 (1986) ("[This Article] suggests that under the national power over the foreign relations[,] Congress should enact a statute authorizing the federal courts to develop *forum non conveniens* rules serving U.S. foreign relations goals."). This Note proposes that, rather than authorizing the federal courts to preempt state law by creating federal common law, Congress itself should determine the substantive forum non conveniens standard to be applied in transnational cases. Due to the already uncertain nature of the common law doctrine that the federal courts have crafted, *see infra* notes 153–54 and accompanying text, and the sensitive foreign relations issues at stake, *see infra* section IV(A)(1), this Note suggests that Congress should legislatively mandate the forum non conveniens standard to be used in transnational cases.

109. For example, in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), the Court held that federal forum non conveniens law did not preempt state law in a domestic admiralty case, *id.* at 452–53, but it declined to reach the question of whether state law is preempted in a transnational admiralty case. *Id.* at 457 ("*Amicus* the Solicitor General has urged that we limit our holding, that *forum non conveniens* is not part of the uniform law of admiralty, to cases involving domestic entities. We think it unnecessary to do that. Since the parties to this suit are domestic entities, it is quite impossible for our holding to be any broader."). Similarly, in *Chick Kam Choo v. Exxon Corp.*, the Court declined to reach the argument that federal forum non conveniens law preempted state law:

> It may be that respondents' reading of the pre-emptive force of federal maritime *forum non conveniens* determinations is correct. This is a question we need not reach and on which we express no opinion. We simply hold that respondents must present their pre-emption argument to the . . . state courts, which are presumed competent to resolve federal issues."

486 U.S. 140, 150 (1988).

federal doctrine[110] and would explicitly preempt state law of forum non conveniens in transnational litigation. Thus, if the defendant moved to dismiss the lawsuit in favor of an alternative *foreign* forum, the federal standard would apply, whether the plaintiff were a foreign citizen or an American citizen.[111] While a federal statute would have the benefit of defining the contours of the federal forum non conveniens doctrine and perhaps resolving the circuit splits that predominate the doctrine in federal court,[112] this part will focus primarily on the preemption aspect of the statute.

There are three primary reasons that Congress should preempt forum non conveniens doctrine in transnational litigation. First, preemption would increase federal control over forum non conveniens determinations that implicate the United States' foreign relations, which is consistent with the plenary power of the federal government in this area. Second, preemption would make forum non conveniens determinations more consistent across jurisdictions, which would reduce forum shopping and eliminate the battle over removal to federal court. Third, forum non conveniens in transnational litigation is often the deciding factor in whether an American MNC may be held liable in a United States court for its actions abroad; the federal government, and not the states, is in the best position to strike a balance

110. While Congress could codify the *Gilbert* test, the actual forum non conveniens standard contained in any future federal statute is largely beyond the scope of this Note. Thus, while I will discuss the policy implications of the various possible approaches that Congress could take in a forum non conveniens statute, I will largely focus on the merits of the general argument for federal preemption of state forum non conveniens law, without proposing a particular federal standard to be adopted.

111. Much of the academic literature has focused on litigation brought by foreign plaintiffs; however, any motion to dismiss for forum non conveniens where the alternative forum is outside of the United States has both international comity and foreign relations implications. Thus, while cases brought by foreign plaintiffs will frequently be the most problematic in terms of finding an adequate connection to the American forum, I propose that federal preemption of state doctrine should not be limited to cases brought by foreign plaintiffs but should instead be applied to transnational litigation generally.

112. In the federal doctrine of forum non conveniens, "[c]ircuit splits abound." Lear, *supra* note 3, at 1148. For example, the amount of deference afforded a foreign plaintiff's choice of forum varies substantially depending on the circuit. *Compare, e.g.*, Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000) (requiring a defendant to make "'a clear showing of facts which . . . establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent'" (quoting Cheng v. Boeing Co., 708 F.2d 1406 (9th Cir. 1983))), *with* Iragorri v. United Techs. Corp., 274 F.3d 65, 71–72 (2d Cir. 2001) (en banc) (embracing a sliding scale of presumptions dependent upon the plaintiff's motives for choosing the U.S. forum). Additionally, choice-of-law analysis has varying weight depending on the circuit, with some circuits refusing to engage in the forum non conveniens analysis if American law governs the dispute and others allowing dismissal even if federal law exclusively governs the dispute. *Compare, e.g.*, Needham v. Phillips Petroleum Co. of Nor., 719 F.2d 1481, 1483 (10th Cir. 1983) ("If American law is applicable to the case, the *forum non conveniens* doctrine is inapplicable"), *with* Cruz v. Mar. Co. of Phil., 702 F.2d 47, 48 (2d Cir. 1983) (per curiam) (holding that the applicability of federal law does not preclude a district court from dismissing for forum non conveniens). These are only a few of the most prominent examples of the circuit splits that exist in forum non conveniens jurisprudence.

between protecting American corporations and ensuring that they are held accountable in appropriate cases.

On the other hand, federal preemption of forum non conveniens raises federalism concerns because it will decrease state control over cases filed in state courts. Preemption will impose the federal forum non conveniens doctrine on all fifty states, some of which have expressly declined to adopt the federal standard. Additionally, it may be argued that federal preemption of forum non conveniens will not produce uniformity in light of the discretionary nature of the doctrine. Ultimately, federal preemption's benefits outweigh its drawbacks; therefore, Congress should act swiftly to pass a forum non conveniens statute.

A. Why Preemption?

1. Federal Control over Foreign Relations.—In light of the federal government's plenary foreign-relations power, Congress should preempt state doctrine of forum non conveniens in transnational litigation because these cases often implicate international comity and the foreign relations of the United States.[113] Allowing each of the fifty states to use a different standard for forum non conveniens dismissal of transnational cases undermines the federal government's interest in maintaining control of all aspects of foreign relations.

a. Foreign Sovereigns' Interest in Forum Non Conveniens.—In the vast majority of transnational litigation, the foreign parties involved are private parties and not the foreign sovereigns themselves. However, foreign sovereigns nevertheless have demonstrated a significant interest in the fate of their citizens in American courts. For example, some nations have passed "blocking statutes,"[114] which are designed to prevent the existence of an

113. Due to various constitutional commitments of foreign affairs powers to the federal government, the Supreme Court has found that the Constitution reflects "a concern for uniformity in this country's dealings with foreign nations and indicat[es] a desire to give matters of international significance to the jurisdiction of federal institutions." Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964). Thus, "foreign affairs and international relations" are "matters which the Constitution entrusts solely to the Federal Government." Zschernig v. Miller, 389 U.S. 429, 436 (1968). The Court has also made it clear that the federal government need not look to state policies when exercising its foreign affairs powers: "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies." United States v. Belmont, 301 U.S. 324, 331 (1937). Commentators generally agree. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 150 (2d ed. 1996) ("At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'"); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621 (1997) ("In foreign affairs, the nation must speak with one voice, not fifty.").

114. Ecuador, Dominica, Nicaragua, Costa Rica, and Guatemala have all enacted some form of blocking statute. Henry Saint Dahl, *Forum Non Conveniens, Latin America and Blocking Statutes*, 35 U. MIAMI INTER-AM. L. REV. 21, 22 (2003–2004). For further discussion of blocking statutes and their effect on American forum non conveniens doctrine, see generally Heiser, *supra* note 3.

"adequate" foreign forum by withdrawing jurisdiction over cases by their citizens that have been previously dismissed in another country on the basis of forum non conveniens.[115] While courts have handled blocking statutes differently,[116] a uniform reaction to these statutes from the federal government is necessary to ensure consistent adjudication.

Additionally, foreign sovereigns have sought to intervene in lawsuits brought by their citizens in the United States, both in favor of and against the American court's taking jurisdiction.[117] The Eleventh Circuit has recognized the important foreign relations implications of foreign sovereign intervention:

> In some cases, . . . federal courts may have to address arguments presented by a foreign sovereign that has intervened or filed an amicus brief. In such cases, the sovereign may allege that the case will impair its national economic or policy interests if the case is allowed to proceed in the United States. [This is] but [one] of the ways in which issues of foreign relations arise in the *forum non conveniens* area.[118]

Both blocking statutes and foreign-sovereign intervention illustrate that foreign nations often have a vested interest in the outcome of lawsuits filed by their citizens in the United States. The federal government, rather than the state governments, should be responsible for formulating a cohesive policy for forum non conveniens dismissals in these cases; however, Congress must preempt state forum non conveniens doctrine to accomplish this goal.

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115. *See* Heiser, *supra* note 3, at 610 ("Although this legislation often refers generically to cases where the plaintiff resorts to his country's courts 'due to the declinature of foreign judges' who had jurisdiction, there is little doubt that these blocking statutes are intended specifically to prevent courts in the United States from finding that an alternative forum is 'available' to hear the plaintiff's lawsuit.").

116. A Florida court, for example, has held that an alternative forum's blocking statute does not preclude the court from dismissing a lawsuit for forum non conveniens. *See supra* notes 53–56 and accompanying text. However, other states have held that blocking statutes do preclude forum non conveniens dismissal. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., 190 F. Supp. 2d 1125, 1129–32 (S.D. Ind. 2002) (denying a motion to dismiss for forum non conveniens and concluding that Venezuela was not an adequate alternative forum because, under Venezuelan law, the plaintiffs could not submit to the jurisdiction of the Venezuelan court after a forum non conveniens dismissal in the United States).

117. *See, e.g.*, *In re* Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197–98 (2d Cir. 1987) (explaining that the Union of India brought suit in a United States court for the disaster in Bhopal, purporting to act on behalf of its citizens in the capacity of *parens patrie*). Foreign sovereigns have also intervened to urge American courts to dismiss suits brought by their own citizens, as the government of Ecuador did during the litigation against Chevron. *See Texaco Petroleum, Ecuador and the Lawsuit Against Chevron*, CHEVRON CORP. 4, http://www.chevron.com/documents/pdf/texacopetroleumecuadorlawsuit.pdf ("The government of Ecuador intervened . . . to inform the federal court that: 1) only the [Ecuador] government had authority over Ecuador's public lands; 2) the plaintiffs had no independent right to litigate over public lands; and 3) the Settlement and Release . . . disposed of the remediation issues raised by the . . . plaintiffs . . . .").

118. Esfeld v. Costa Crociere, S.P.A., 289 F.3d 1300, 1313 (11th Cir. 2002).

b. The Effect of Preemption of Foreign Relations.—While this Note does not propose a specific forum non conveniens standard to be adopted by Congress,[119] it should be noted that the foreign-relations implications of federal preemption will vary depending on the content of the standard adopted by Congress. Both within the United States and in the international community, commentators have been skeptical of forum non conveniens, criticizing the doctrine as protectionist and accusing American courts of discriminating against foreign plaintiffs.[120] This criticism will only increase if federal preemption results in more hostility to foreign plaintiffs. In those circumstances, federal preemption has the potential to damage foreign relations. On the other hand, many states—like Florida and Texas—have essentially adopted the federal standard, except that both Florida and Texas have modified the doctrine so that it is harsher toward foreign plaintiffs in some cases.[121] Thus, preemption—even under the relatively harsh *Gilbert* standard—might decrease the number of forum non conveniens dismissals in those states, placating foreign sovereigns that view forum non conveniens as protectionist (such as those that have passed blocking statutes).

While the effect of federal preemption using the *Gilbert* factors is somewhat uncertain, considering the vast amount of literature that has criticized the *Gilbert* factors and *Piper Aircraft*,[122] Congress would certainly be justified in making changes to the doctrine. To be truly effective, the forum non conveniens statute would have to definitively resolve contentious issues such as the effect of blocking statutes and foreign-sovereign intervention on the forum non conveniens analysis, the definition of a truly "adequate" alter-

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119. *See supra* note 110.

120. *See, e.g.*, Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 493 (2002) (asserting that the Hague Convention on Jurisdiction and Judgments "attempts to prevent a protectionist approach to the application of the convention rule on *forum non conveniens*" by prohibiting discrimination on the basis of nationality); Peter Prince, *Bhopal, Bougainville and Ok Tedi: Why Australia's Forum Non Conveniens Approach Is Better*, 47 INT'L & COMP. L.Q. 573, 574 (1998) ("Indeed, the US approach openly discriminates in favour of local litigants, placing unfair obstacles in the way of foreign plaintiffs wishing to sue US companies in the United States."); Hu Zhenjie, Forum Non Conveniens*: An Unjustified Doctrine*, 48 NETH. INT'L L. REV. 143, 159–60 (2001) (criticizing forum non conveniens as a mechanism that allows American jurisdictional rules to be "exorbitant" enough that American plaintiffs can nearly always get judicial relief while still ensuring that foreign plaintiffs' claims can be easily dismissed).

121. *See supra* notes 57–64 and accompanying text. Florida, in particular, has been extremely hostile to foreign plaintiffs and has refused to consider blocking statutes in its forum non conveniens calculus. This disregard of foreign law has the potential to anger foreign sovereigns and should be addressed by Congress.

122. *See supra* notes 35–36 and accompanying text; *see also* Emily J. Derr, Note, *Striking a Better Public–Private Balance in Forum Non Conveniens*, 93 CORNELL L. REV. 819, 821 (2008) ("Many scholars condemn the forum non conveniens doctrine as 'arbitrary,' 'incoherent,' abused, and even 'unconstitutional.'" (footnotes omitted)); John R. Wilson, Note, *Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation*, 65 OHIO ST. L.J. 659, 662 (2004) ("Critics of forum non conveniens . . . conclude that judicial economy and fairness are achieved not by analyzing the suitability of the American forum but by permitting foreign plaintiffs' claims to proceed.").

native forum, and the amount of deference merited by a foreign plaintiff's choice of forum—all issues that the *Gilbert* factors fail to adequately resolve. With its vast legislative resources,[123] Congress is in the best position to consider the competing policies and accompanying foreign-relations concerns and to determine an appropriate forum non conveniens standard.

2. The Value of Uniformity: Forum Shopping and the Battle for Removal.—Another important justification for preemption of state forum non conveniens doctrine is that it would create more uniformity in the adjudication of transnational disputes. Uniformity between the state and federal courts would (1) decrease incentives to engage in forum shopping, (2) decrease instances in which the parties battle over removal to federal court, and (3) increase the predictability of the outcome of forum non conveniens motions, thus decreasing the time and money required to litigate this issue.

While the definition of the term *forum shopping* has never been entirely clear, it is often characterized by courts as an unsavory litigation tactic employed by plaintiffs to inconvenience or harass the defendant:

> The concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit[,] . . . raising the fear that applying the law sought by a forum-shopping plaintiff will defeat the expectations of the defendant or will upset the policies of the state in which the defendant acted (or from which the defendant hails).[124]

However, other judges have characterized forum shopping as simply an exercise in good judgment by the plaintiff:

> "Forum-shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.[125]

Whatever the merits of the forum-shopping debate, federal courts have been especially willing to dismiss lawsuits by foreign plaintiffs when they

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123. Each piece of proposed legislation is referred to a committee, which considers the bill, holds hearings, and adopts any necessary changes. *The Legislative Process*, HOUSE.GOV, http://www.house.gov/content/learn/legislative_process/. Committees have the resources to consider the vast policy implications of federal preemption of forum non conveniens; they "are where Congress gathers information; compares and evaluates legislative alternatives; identifies policy problems and proposes solutions; selects, revises, and reports out measures for the full chamber to consider; monitors the executive branch's performance of its duties; and investigates allegations of wrongdoing." HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789–1994, H.R. DOC. NO. 103-324, at 143 (1994).

124. Sheldon v. PHH Corp., 135 F.3d 848, 855 (2d Cir. 1998) (quoting Olmstead v. Anderson, 400 N.W.2d 292, 303 (Mich. 1987)) (internal quotation marks omitted).

125. The Atlantic Star, [1974] A.C. 436 (H.L.) 471 (Lord Simon of Glaisdale) (appeal taken from the Court of Appeal).

believe that the plaintiff has engaged in forum shopping.[126] The current disparity in forum non conveniens doctrines in state and federal courts strongly encourages forum shopping.

Because forum non conveniens is generally considered procedural under the *Erie* doctrine, federal courts sitting in diversity apply federal forum non conveniens law.[127] In the forum non conveniens context, there is not only incentive for parties to forum-shop "horizontally" (among the courts of different states), but also to forum-shop "vertically" (between a state court and a federal court sitting in that state). Thus, "even when a foreign plaintiff sues a corporate defendant in a state with a relaxed forum non conveniens doctrine, if the defendant is able to remove the suit to federal court . . . it will be able to defeat the application of the state forum non conveniens rule."[128]

This anomaly often leads to a battle over removal, with the ultimate outcome of the litigation turning on whether the defendant is able to remove the lawsuit to federal court.[129] Under current federal law, if federal jurisdiction is based on diversity of citizenship, a defendant may remove the case to federal court only if none of the defendants in the case is a citizen of the state in which the litigation was originally filed.[130] If the plaintiff files the lawsuit in a state such as Delaware, which rarely dismisses on forum non conveniens grounds, the success of the lawsuit might depend on whether the defendant is able to remove the litigation to federal court.[131] In these cases, plaintiffs often manipulate their litigation strategy to prevent removal to federal court, using tactics such as joining a defendant who is domiciled, is incorporated, or has its principle place of business in the state of the plaintiff's chosen forum; or joining a defendant with the same citizenship as the plaintiff, thereby destroying federal diversity jurisdiction.[132] Additionally, at least one circuit has held that all alien parties are considered to have the same citizenship for

126. *See* Vivendi SA v. T-Mobile USA Inc., 586 F.3d 689, 695–96 (9th Cir. 2009) (affirming the dismissal of the plaintiff's claim because the plaintiff engaged in forum shopping and used "eleventh-hour" efforts to strengthen the connection of the case to the United States); *see also supra* note 38 and accompanying text.

127. *See supra* subpart II(A).

128. Brooke Clagett, Comment, *Forum Non Conveniens in International Environmental Tort Suits: Closing the Doors of U.S. Courts to Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513, 526 (1996).

129. *See id.* at 531–32 (discussing the frequently outcome-determinative nature of forum non conveniens dismissals).

130. 28 U.S.C. § 1441(b) (2006).

131. *See* Elizabeth T. Lear, *Federalism, Forum Shopping, and the Foreign Injury Paradox*, 51 WM. & MARY L. REV. 87, 101 (2009) ("Not only are the vast majority of forum non conveniens motions granted by the federal courts, the federal standard is often more aggressive, or more aggressively applied, than the standards in the state courts." (footnotes omitted)).

132. *See* 28 U.S.C. § 1332(a) (defining diversity jurisdiction); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (holding that for federal diversity jurisdiction to exist, complete diversity between all of the parties is required), *overruled on other grounds by* Louisville R.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844). For further discussion of tactics used by plaintiffs to prevent removal in transnational litigation, see WEINTRAUB, *supra* note 9, at 256–58.

purposes of diversity jurisdiction.[133] Thus, in order to prevent removal, a foreign plaintiff can simply join any other alien party as a defendant in the litigation.

Undoubtedly, federal preemption of forum non conveniens doctrine in transnational cases would reduce the amount of forum shopping, both vertical and horizontal, used by the parties in order to gain a forum non conveniens advantage. However, an important question must be addressed: why should Congress attempt to reduce forum shopping by preempting state forum non conveniens doctrine? There are two primary disadvantages to encouraging forum shopping: (1) it is time-consuming, and (2) it is taxing on resources—not only those of the parties but also those of the courts. Because the current system of forum non conveniens actually *encourages* plaintiffs to forum-shop, litigation over removal and forum non conveniens dismissals can often take years, with both parties expending millions of dollars before the court ever hears the merits of the case. For example, in *Piper Aircraft*, the lawsuit started out in a California state court in July 1977.[134] The defendants then removed the lawsuit to a federal district court in California and moved for transfer to a district court in Pennsylvania.[135] After the suit was transferred, the defendants moved to dismiss for forum non conveniens, and the district court granted the motions in October 1979.[136] Plaintiffs then appealed to the Third Circuit, where the case was reversed and remanded for trial.[137] However, the United States Supreme Court granted certiorari and eventually affirmed the district court's dismissal of the case for forum non conveniens on December 8, 1981.[138] Thus, the plaintiffs in *Piper Aircraft* went through five courts in four and one-half years, only to have their case dismissed in favor of a foreign forum.

Whatever the merits of the ultimate forum non conveniens determination in *Piper Aircraft*, both parties would likely have preferred to adjudicate this issue with less wrangling over removal and more certainty over what law would apply to the forum non conveniens motion. A uniform standard of forum non conveniens between the state and federal courts in transnational litigation, while insufficient to resolve the underlying forum dispute, would allow a more expedient forum non conveniens resolution. Because the parties will be certain at the outset of the litigation that federal law will apply to any forum non conveniens motion, regardless of whether the lawsuit is filed initially in state or federal court, plaintiffs will have no

133. *See* Chick Kam Choo v. Exxon Corp., 764 F.2d 1148, 1153 (5th Cir. 1985) (holding that because "the danger is remote that [an] alien plaintiff will benefit from local bias of state courts or juries" by suing another alien, the two alien parties are deemed to have the same citizenship and therefore diversity jurisdiction is not available).

134. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 239–40 (1981).

135. *Id.* at 240.

136. *Id.* at 241.

137. *Id.* at 244.

138. *Id.* at 235, 246, 261.

need to "shop" for the state forum with the least rigorous forum non conveniens doctrine. Additionally, plaintiffs will have no incentive to use litigation tactics to prevent removal, and defendants will have no (forum non conveniens-related) reason to advocate for removal.[139]

3. Liability of American Multinational Corporations: Striking a Balance.—A final argument in favor of federal preemption is the effect that forum non conveniens doctrine has on the overall liability of American MNCs. The debate over MNC liability has been stated as follows:

> [T]he apparent conflict in *forum non conveniens* [is] between a U.S. court's interest in preventing itself from becoming the "dumping ground" of international litigation, and the need to protect foreign plaintiffs from the tortious acts of U.S. MNCs. Presently, dismissal for *forum non conveniens* under the federal common law approach often is tantamount to finding for the MNC, as foreign plaintiffs are frequently without a remedy in their home forum.[140]

Thus, in considering forum non conveniens dismissals in cases involving acts committed by American MNCs abroad, there are two competing policy interests: (1) ensuring that American courts are not overwhelmed and that American MNCs are not singled out for excessive lawsuits by foreign plaintiffs for acts that occurred abroad, especially when foreign companies could not be sued in the United States for the same behavior; and (2) ensuring that American MNCs are held accountable for their behavior, especially if the acts that gave rise to the lawsuit are strongly connected to the MNCs' business activities within the United States.

While the exact balance that should be struck between these competing interests is beyond the scope of this Note,[141] the appropriate entity to strike the balance is undoubtedly the federal government, not the fifty governments of the states. Because the liability of MNCs for activities that occur abroad implicates not only the foreign relations of the United States but also the foreign-commerce power of Congress, Congress is the appropriate body to consider the policy arguments on both sides. A consistent statutory standard of forum non conveniens would also allow American MNCs to accurately assess their liability and adjust their actions accordingly. With the current

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139. Defendants may prefer a federal forum independent of any difference in the forum non conveniens doctrine applied; however, that aspect of the "battle for removal" is beyond the scope of this Note.

140. Peter J. Carney, Comment, *International Forum Non Conveniens: "Section 1404.5"—A Proposal in the Interest of Sovereignty, Comity, and Individual Justice*, 45 AM. U. L. REV. 415, 421 (1995) (footnotes omitted).

141. For further discussion on holding American MNCs accountable in American courts for their activities abroad, see generally Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 AM. J. COMP. L. 493 (2002) and Elliot J. Schrage, *Judging Corporate Accountability in the Global Economy*, 42 COLUM. J. TRANSNAT'L L. 153 (2003).

state of the forum non conveniens doctrine, whether a court grants a motion for forum non conveniens dismissal has little to do with the connections that the litigation has to the forum.[142] Instead, dismissal is controlled by the state in which the suit is filed and whether the defendant can secure removal to federal court.[143] While different substantive law may apply to the lawsuit depending on the forum in which it is filed, federal preemption of state forum non conveniens doctrine will, at the very least, allow defendant MNCs to better estimate whether they will be required to defend, on the merits, a lawsuit for activities that occur abroad.

B. Arguments Against Preemption

Though I ultimately conclude that the benefits of federal preemption outweigh the drawbacks, I will briefly discuss the primary arguments against congressional preemption of state forum non conveniens doctrine. The first—and most important—concern about federal preemption is whether it violates the principles of federalism. A secondary concern is whether federal preemption would actually accomplish uniformity and make forum non conveniens outcomes more predictable.

1. But What About Federalism?—In proposing to shift the balance of power from the states to the federal government, a principal concern must always be whether this shift is compatible with ideals of federalism. While federalism is difficult to define precisely, it encompasses the delicate balance of power between the state and federal governments: "Federalism refers to the multifaceted political power relationships between governments within the same geographic setting. . . . [It] is the organizational mechanism through which governments manage power."[144] Because federal preemption of state forum non conveniens doctrine effectively decreases state power and increases federal power, it raises federalism concerns.

The forum non conveniens doctrines of the three exemplary states discussed in Part III (Florida, Texas, and Delaware) are helpful in considering preemption's effect on federalism. Due to the defendant-friendly modifications that Florida and Texas have made to their doctrines,[145] a federal forum non conveniens statute is likely to result in fewer dismissals than the current doctrine of either state. In addition, it appears that both states' adoption of robust forum non conveniens doctrines were primarily motivated by fear of overburdening their court systems and driving businesses from the state.[146] These concerns would be alleviated by a federal standard because

142. *See supra* Part III.

143. *See supra* Part III; *supra* notes 129–33 and accompanying text.

144. LARRY N. GERSTON, AMERICAN FEDERALISM: A CONCISE INTRODUCTION 5 (2007).

145. *See supra* notes 57–64 and accompanying text.

146. The Florida Supreme Court explicitly noted these concerns when it adopted the federal rule in *Kinney*. *See supra* notes 46–48 and accompanying text. The Texas Legislature had similar

there would be no incentive to forum shop among different states—all states would apply the same standard in transnational disputes, relieving the pressure on individual states to protect their own businesses and court systems.

On the other hand, federal preemption would also affect states like Delaware, which has resisted adopting the federal standard of forum non conveniens.[147] Delaware's overwhelming-hardship standard appears to be rooted in a desire to keep cases involving Delaware law in Delaware courts and to allow Delaware corporations to benefit from the comparative expertise of Delaware courts like the Court of Chancery.[148] The limited nature of the federal preemption proposed here would not dramatically affect Delaware's ability to implement these policies. Delaware's interest in keeping cases in which Delaware law would apply is already somewhat addressed by the *Gilbert* factors, as one of the public interest factors examines whether a court will have to apply unfamiliar law.[149] If the application of unfamiliar law weighs in favor of dismissal, the application of the forum's own law certainly weighs in favor of keeping the case in that forum. Additionally, when drafting the preemption statute, Congress should consider a state's interest in applying and developing its own law and could insert an exception in the statute allowing a state to keep any case in which its own substantive law applies.[150] As for Delaware's interest in ensuring that its own corporations get the benefit of the state's specialized courts, in transnational litigation it is typically the defendant, a Delaware corporation, trying to remove the dispute from the Delaware court. If the Delaware corporation is the *plaintiff*, the strong presumption in favor of plaintiffs who choose their home forums should be sufficient to protect Delaware's interests, but Congress should nevertheless consider this policy concern when drafting the statute.

It should be noted that the three model states, though they are representative of the various attitudes that states have toward forum non

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concerns: "It appears that a primary concern of the legislature was the deterrent effect that *Alfaro* might have upon business in Texas." Carl Christopher Scherz, Comment, *Section 71.051 of the Texas Civil Practice and Remedies Code—The Texas Legislature's Answer to* Alfaro*: Forum Non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 109 n.47 (1994); *see also supra* section III(B)(3) (discussing the Texas Legislature's action to supersede *Dow Chemical Co. v. Alfaro*). The legislature reasoned that defendants incorporated in Texas would otherwise be disadvantaged because they would not be able to remove the lawsuit to federal court—where it could be dismissed for forum non conveniens—and thus businesses would have little incentive to incorporate or establish a principal place of business in Texas. Scherz, *supra*, at 109 n.47.

147. *See supra* note 100 and accompanying text.

148. *See supra* notes 101–07 and accompanying text.

149. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947) ("There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.").

150. Practically, the application of the forum's own law will be a rare occurrence in forum non conveniens motions in transnational litigation because the activities giving rise to the suit often occur in a foreign country and, typically, the law of that country will apply.

conveniens, are not illustrative of all of the federalism implications of preemption of forum non conveniens. Nevertheless, balancing the federalism issues with the importance of federal control over foreign relations, the benefits of federal preemption outweigh the burden on the states of applying a federal doctrine. Congress would be able to address adequately many of the states' concerns in the statute without sacrificing the necessary uniformity or the utility of the doctrine.

2. Uniformity: A Realistic Goal?—Another concern about federal preemption of state forum non conveniens doctrine is that it may actually fail to produce uniformity and predictability. This concern is highly dependent on the preemption statute codifying the *Gilbert* standard, as this standard has often been criticized as producing arbitrary and inconsistent decisions.[151]

The Supreme Court itself questioned the predictability of the *Gilbert* test in *American Dredging Co. v. Miller*,[152] noting that allowing states to apply their own forum non conveniens doctrine in domestic maritime cases would not violate the uniformity requirement of maritime law because forum non conveniens "is most unlikely to produce uniform results."[153] While the results in a factor-based test will never produce perfect uniformity, using a uniform standard to decide all motions to dismiss for forum non conveniens in transnational cases still has the inherent value of allowing litigants to be certain about the standard that will govern the motion. And, whether or not the final forum non conveniens determinations will be uniform, a uniform standard will decrease the unchecked forum shopping and the disputes over removal that are so common in contemporary transnational litigation in the United States.

Finally, although concerns about consistency under the *Gilbert* standard are well-founded, these concerns do not speak to whether or not the federal standard of forum non conveniens should preempt the state doctrine in certain transnational cases. Rather, these concerns speak to the *content* of the federal standard that Congress should codify in preempting state doctrine. Congress is not bound to the *Gilbert* standard; it is free to modify the judicial

151. *See supra* note 35 and accompanying text; *see also* Lear, *supra* note 3, at 1148 ("For many years the federal judiciary has treated forum non conveniens as a housekeeping rule for the federal court system. If indeed this is correct, the federal house is in need of a serious spring cleaning. Circuit splits abound, the standards used and the evidence required for forum non conveniens dismissals vary widely among the district courts, and reverse forum shopping through removal and transfer is commonplace." (footnotes omitted)); Robertson, *supra* note 3, at 378 ("We need to deal with the distant litigation problem by devising reliable rules rather than leaving it to trial judges' unbridled discretion." (internal quotation marks omitted)).

152. 510 U.S. 443 (1994).

153. *Id.* at 453. As to the uniformity aspect of forum non conveniens, the Court maintained that the multiple factors considered in conjunction with the discretionary nature of the doctrine make it "almost impossible" to predict the outcome of a motion to dismiss for forum non conveniens. *Id.* at 455. Thus, forcing state courts to apply the federal standard of forum non conveniens likely would not create uniformity of decisions.

doctrine of forum non conveniens as it chooses.[154] This criticism of preemption is thus better addressed when debating the question of the standard of forum non conveniens that Congress should adopt rather than when debating the question of whether Congress should preempt state doctrine at all.

V. Conclusion

Congress should codify a federal standard of forum non conveniens that would be binding on the states in cases where the defendant moves to dismiss for forum non conveniens in favor of an alternative foreign forum. The primary reasons for federal preemption in this area include (1) the need for federal control over transnational forum non conveniens, which has important foreign-relations implications, (2) the inherent value of uniformity in transnational forum non conveniens, which would reduce both forum shopping and the battle for removal, and (3) the necessity of striking a *national* balance regarding the liability of American MNCs. Among the arguments against federal preemption are that it would violate the principles of federalism and that it may not produce either uniformity or predictability. These criticisms, however, do not outweigh the benefits of federal preemption. If foreign litigants are indeed drawn to the United States "as a moth is drawn to the light," the volume of transnational forum non conveniens motions is only likely to increase over time; thus, Congress should act quickly to remedy the haphazard application of forum non conveniens across the states and implement a uniform federal standard in transnational litigation.

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154. Some commentators have even argued that the Supreme Court's doctrine of forum non conveniens is an unconstitutional usurpation of congressional power. *See* Lear, *supra* note 3, at 1148 (describing the federal courts as being in "congressionally occupied territory without constitutional support").