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Foreign Relations and Federal Questions: Resolving the Judicial Split on Federal Court Jurisdiction

Erin E. Terrell

Foreign Relations and Federal Questions: Resolving the Judicial Split on Federal Court Jurisdiction

ABSTRACT

The federal circuit courts have disagreed concerning a fundamental issue of federal court jurisdiction: whether cases that may implicate or involve the "foreign relations" of the United States, but do not otherwise raise a more traditional "federal question" under federal law, may be removed from state courts to federal courts. This Note examines the cases that have created the split, and proposes two potential resolutions to it, one judicial and the other legislative.

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I. INTRODUCTION

This Note examines a split among the federal circuits regarding the intersection of two frequently debated issues—one an aspect of U.S. law, the other an aspect of international relations. The U.S. legal matter is the concept of a "federal question," which is fundamental to the jurisdiction of federal courts.[1] The international matter is the concept of "foreign relations," which typically encompasses activities only conducted by the political branches of the federal government.[2] The question here is the relationship between the two: does "foreign relations" necessarily entail a "federal question," as three circuit courts have held,[3] so that litigation involving foreign policy will automatically be granted access to federal courts? Or are the two distinct, as one circuit court most recently held,[4] so that the foreign relations element of a case cannot by itself be a basis to establish federal court jurisdiction?

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1. 28 U.S.C. § 1331 (1948) (granting federal question jurisdiction to the federal judiciary).

2. *See* U.S. CONST. art. I, § 8, cl. 10 (Congress has the power "To define and punish . . . Offences against the Law of Nations"); U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America"); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1919) ("The conduct of foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments.").

3. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 133 F.3d 540 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986). In *Pacheco de Perez*, the Eleventh Circuit technically did not grant federal jurisdiction; however, because that court agreed with the Fifth Circuit's confused jurisdictional reasoning in *Torres*, it is included on this side of the split.

4. Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001). The U.S. Supreme Court granted certiorari for this case but limited the grant to the resolution of

To illustrate the implications of the issue, assume that ABC Corporation, a manufacturer of weapons systems of various kinds with its corporate headquarters in State A, has, with federal government approval, established a contract to sell an important military item to an important allied government—Country X—that is strategically critical to the foreign relations interests of the United States. Unfortunately, an accident occurs at an ABC plant in Country X, and workers are killed and injured. Plaintiffs sue ABC in the state courts of State A under the law of State A. If liability results, manufacturing of the item may cease, and relations with Country X may be jeopardized. The question this Note addresses is whether ABC should be able, for any number of strategic reasons, to remove this case to a federal district court in State A under the theory that, despite the fact that ABC may not remove the case to federal court under 28 U.S.C. § 1441(b), the foreign relations implications of the case are sufficient to establish federal question jurisdiction.[5]

As discussed in Part II of this Note, each case decided by one of the circuit courts of appeal involved an action originally filed by plaintiffs in a state court, based on state causes of action, that the defendants sought to remove to federal court.[6] In each of these four cases, the district courts ruled that removal was barred because at least one of the defendants was considered a resident of the state of filing.[7] Thus, for the defendants to remove the case to federal court, they had to argue that a federal question was present. To raise a federal question, the defendants had to plead that because U.S. foreign relations would be implicated by the resolution of the claim,

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two questions unrelated to the current circuit split. 122 S.Ct. 2657 (U.S. Jun. 28, 2002) (No. 01-593).

5. Federal jurisdiction based on this argument is often termed "protective jurisdiction," and it is distinct from federal question jurisdiction. Protective jurisdiction is granted when there is no federal question involved (the issue is one of state law only), but the courts might uphold a federal statute granting jurisdiction because a federal interest needs to be "protected" by the federal judiciary. *See* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS, 123-26 (2002); Paul J. Mishkin, *The Federal "Question" in District Courts*, 53 COLUMB. L. REV. 157, 184 (1953); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 L. & CONTEMP. PROBS. 216, 224-25 (1948). A modern day example of a federal statute granting exclusive federal jurisdiction over claims premised on state law is the Aviation Transportation and Security Act, which is part of the U.S.A. Patriot Act, 107 P.L. 71 (Nov. 19, 2001) (codified at 49 U.S.C. § 40,101). Under 49 U.S.C. § 40,101(408)(b), all lawsuits arising from events of September 11, 2001 must be filed in the Southern District of New York but are to be governed by state law. 49 U.S.C. § 40,101(408)(b) (2001).

6. *See Patrickson*, 251 F.3d 795; *Pacheco de Perez*, 139 F.3d 1368; *Torres*, 133 F.3d 540; *Marcos*, 806 F.2d 344.

7. *See Patrickson*, 251 F.3d 795; *Pacheco de Perez*, 139 F.3d 1368; *Torres*, 133 F.3d 540; *Marcos*, 806 F.2d 344.

and foreign relations are delegated to the federal government, a federal court should have original jurisdiction over the case.[8]

The three circuits that have held that foreign policy implications are sufficient to establish federal jurisdiction—the Second, Fifth, and Eleventh Circuits—relied heavily on the U.S. Supreme Court's holding in *Banco Nacional de Cuba v. Sabbatino*[9] and its acknowledgement of, as others later characterized it, the "federal common law of foreign relations."[10] These courts read the *Sabbatino* case broadly to stand for the proposition that any time the political relations between the United States and other nations are implicated, federal courts should have original jurisdiction over the action. Thus, because the plaintiffs' complaints implicated U.S. foreign relations, these three circuits held that federal question jurisdiction should attach.[11]

As discussed in Part III, however, these three circuits conflated federal question jurisdiction in its traditional form, with a separate judicial doctrine labeled "protective jurisdiction": the former attaches if *application* of federal law—here, the federal common law of foreign relations—is necessary to the plaintiff's well-pleaded complaint, while the latter is granted when a federal statute authorizes federal courts to exercise original jurisdiction over claims based on state law

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8. *See Patrickson*, 251 F.3d 795; *Pacheco de Perez*, 139 F.3d 1368; *Torres*, 133 F.3d 540; *Marcos*, 806 F.2d 344. The term "artful pleading" was first used by the Supreme Court in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 673 (1950). As used by the Court in that case, the term referred to the plaintiff's attempt to create federal question jurisdiction through the anticipation and inclusion of a federal defense on the face of the complaint. *See* Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783 (1998). The more common use of the term now refers to plaintiffs who try to plead a state cause of action to stay out of federal court. *See* Federal Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 n.2 (1981); Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968). *See also* Miller, *supra*, at 1721-1828.

9. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

10. *Pacheco de Perez*, 139 F.3d at 1377; *Torres*, 133 F.3d at 543; *Marcos*, 806 F.2d at 352-53. In *Sabbatino*, the U.S. Supreme Court stated that, "our relationships with other members of the international community must be treated exclusively as an aspect of federal law." *Sabbatino*, 376 U.S. at 425. The Second, Fifth, and Eleventh Circuits read the *Sabbatino* decision to state that the problems that arise when foreign policy matters come before the courts "are uniquely federal in nature." *Id.* at 424; *Marcos*, 806 F.2d at 352. Thus, these three Circuits read the *Sabbatino* case as authority for the federal common law of foreign relations and exclusive federal jurisdiction when this body of law must be applied. *See, e.g.*, *Marcos*, 806 F.2d at 352-53.

11. Under *Louisville & Nashville R.R. v. Mottley* and *Merrell Dow Pharmaceuticals Inc. v. Thompson*, in order for federal question jurisdiction to attach, the plaintiff's complaint must meet the well-pleaded complaint rule. *Mottley*, 211 U.S. 149 (1908); *Merrell Dow*, 478 U.S. 804 (1986). *Implication* of U.S. foreign relations concerns would not meet this test, though *application* of federal law to resolve the plaintiff's claim would meet the test. *See infra* Parts III and IV.

because an important federal interest needs to be protected.[12] The decisions by the Second, Fifth, and Eleventh Circuits, however, created a hybrid "quasi-protective jurisdiction" that can be invoked in the absence of any basis in federal law when the federal interest in foreign relations may be *implicated* by the plaintiff's case.[13] These decisions are even more unusual because nothing in the text of the statute defining federal court jurisdiction—28 U.S.C. § 1331—creates a foundation for such jurisdictional authority.

The Ninth Circuit, in contrast, refused to read the *Sabbatino* case so broadly, and concluded that foreign policy implications from a multinational lawsuit are irrelevant to a consideration of whether the plaintiff's complaint raised a substantial federal question.[14] To do so would unduly expand original federal question jurisdiction as established in 28 U.S.C. § 1331, which the court was unwilling to do.[15] Instead, the court called upon the political branches to confer federal jurisdiction explicitly on the federal courts for cases involving U.S. foreign relations.[16] Although the Ninth Circuit did not discuss protective jurisdiction, its invitation for congressional action implies that such jurisdiction would be constitutional.[17] But because the other circuits relied on their new form of "quasi-protective jurisdiction," the Ninth Circuit opinion did not directly clarify the confusion between its approach and the others.

Whatever the merits of the result in the Ninth Circuit, that court's analysis of the issues is the most useful because it presents most clearly the three choices—developed in Part IV below—available for determining the proper relationship between "federal questions" and "foreign relations." The first is to adopt the reasoning of the Ninth Circuit and decide that foreign policy implications are irrelevant to an analysis of federal question jurisdiction because Section 1331 cannot be interpreted to include cases in which no application of federal law is required.[18] In other words, litigants must establish federal jurisdiction independently of the foreign elements in the case and according to traditional bases. This option would preclude federal courts from exercising protective jurisdiction without congressional authorization.

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12. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 272-85 (3d ed. 1999).

13. WRIGHT & KANE, *supra* note 5, at 123. *See also supra* note 5; CHEMERINSKY, *supra* note 12, at 271-73 (discussing true protective jurisdiction).

14. Patrickson v. Dole Food Co., 251 F.3d 795, 800-04 (9th Cir. 2001).

15. *Id.* at 804.

16. *Id.* at 803-04.

17. *Id.* at 800-01.

18. *Id.* at 803.

The second is to endorse the notion of "quasi-protective jurisdiction" of the Second, Fifth, and Eleventh Circuits, creating automatic federal question jurisdiction any time litigation raises sufficient foreign policy implications as measured by the district court.[19] This option is based on the theory that, notwithstanding the political question doctrine, because U.S. foreign relations have been expressly and impliedly delegated to the Executive and Legislative Branches by Articles I and II of the U.S. Constitution, foreign policy considerations arising in litigation should likewise be directed consistently to the federal judiciary so that the nation can speak with "one voice."[20] The details of the different decisions on this issue, however, indicate that this type of purely judicial resolution to the situation, based on interpreting current statutes in light of very different forms of "foreign relations" elements that particular litigants claim in specific cases are implicated, is quite problematic.

The third option, alluded to by the Ninth Circuit, involves a middle ground response: When litigation raises foreign policy implications and litigants seek federal court jurisdiction, the federal courts could ask the Executive Branch whether those implications are sufficiently important to its conduct of foreign affairs to confer federal question jurisdiction. This option hinges on the reasoning that, because the U.S. Constitution expressly and impliedly delegates foreign relations power to the federal political branches, those political branches should decide when federal judicial authority should be exercised.[21] If Congress passed such legislation, the

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19. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344, 354 (2d Cir. 1986).

20. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621 (1997) ("[T]he nation must speak with one voice, not fifty . . . . [J]udge-made federal foreign relations law constitutes that voice until the federal political branches say otherwise.") [hereinafter *Federal Courts*]; Jack L. Goldsmith, *Separation of Powers in Foreign Affairs: The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1397 (1999) ("Conventional wisdom offers a functional justification for political branch hegemony in foreign relations.") [hereinafter *Separation of Powers*]; James J. Pascoe, *Time for a New Approach? Federalism and Foreign Affairs After* Crosby v. National Foreign Trade Council, 35 VAND. J. TRANSNAT'L L. 291, 303-14 (2002) ("The need for uniformity is so great, the argument runs, that it 'seems overwhelmingly to mitigate against a constitutional regime permitting innumerable local jurisdictions to chart their own cacophony of conflicting policies.'" (quoting Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 344 (1999))).

Proponents of the "one voice" jurisprudence also often cite James Madison's famous dictum on the subject: "If we are to be one nation in any respect, it clearly ought to be in respect to other nations." THE FEDERALIST NO. 42, at 273 (James Madison) (Isaac Kramnick ed., 1987).

21. *Federal Courts*, *supra* note 20, at 1621.

legislation would have to both expand Section 1331 and also define "foreign policy implications" sufficient to invoke the statute.[22]

II. THE PRINCIPLES UNDERLYING THE CIRCUIT SPLIT

The background principles analyzed by each court of appeals in the four cases discussed in this Note involved two parts: first, the nature of "federal question" jurisdiction, and second, the relationship of the rules of that form of jurisdiction to the federal common law of foreign relations.[23]

A. *Federal Question Jurisdiction*

Article III of the U.S. Constitution grants the federal judiciary "federal question" jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ."[24] Pursuant to these Article III authorizations, Congress enacted 28 U.S.C. § 1331—a statutory grant of subject matter jurisdiction to the lower federal courts for cases involving federal questions "arising under" the U.S. Constitution, statutes, and regulations.[25] Courts have long struggled to define what it means for a claim to "arise under" the laws of the United States.[26]

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22. Based on the theory of protective jurisdiction, Congress could, for example, enact a statute authorizing federal courts to hear cases in which the foreign relations of the United States would be sufficiently implicated. WRIGHT & KANE, *supra* note 5, at 123. Such a statute would not necessarily depend on Executive Branch input, but perhaps such input would better protect the interests of both political branches.

23. For purposes of this Note, the words "common law" in the phrase "the federal common law of foreign relations" are meant to refer to the process of common-law making—the application of general principles to particular facts to arrive at a legal result—as opposed to referring to a body of rules articulated by judges and written down by William Blackstone in his *Commentaries*.

24. U.S. CONST. art. III, § 2, cl. 1.

25. 28 U.S.C. § 1331 (1948).

26. Under Article III of the U.S. Constitution, the jurisdiction of the federal courts is defined:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority; [and] to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1. Pursuant to its Article I authority, Congress codified the constitutional requirements for federal court jurisdiction. 28 U.S.C. §§ 1331, 1332 (1948). Section 1331 echoes the language of the Constitution and states, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Section 1332 adds that the

Under *Louisville & Nashville Railroad v. Mottley*, a necessary federal question must appear on the face of the plaintiff's complaint for a litigant to invoke general federal question jurisdiction or for a defendant to attempt to remove a case to a federal court for the same reason.[27] Furthermore, under *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, a federal question that appears on the face of the plaintiff's complaint, but that is imbedded in a state cause of action, may nevertheless be deemed by a court to be "substantial" enough to confer original federal question jurisdiction.[28] As a matter of statutory interpretation, the meaning of the "arising under" concept is illustrated by the U.S. Supreme Court's observation in *Merrell Dow* that, "[u]nder our longstanding interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.'"[29] The "well-pleaded complaint" rule is the Court's interpretation that whether a complaint states a necessary issue that "arises under" federal law "must be determined from what necessarily

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district courts have original jurisdiction over claims in which the amount in controversy exceeds $75,000 and are between: "(1) citizens of different States; [and] (2) citizens of a State and citizens or subjects of a foreign state." 28 U.S.C. § 1332. Thus, 28 U.S.C. § 1331 defines "federal question" jurisdiction while § 1332 defines "diversity" jurisdiction, either of which will be sufficient to confer jurisdiction of the claim by a federal district court. 28 U.S.C. §§ 1331, 1332.

28 U.S.C. § 1441 discusses which actions may be removed to federal court by the defendant after the plaintiff has filed the action in state court. 28 U.S.C. § 1441 (1948). For purposes of this Note, subsection (b) of § 1441 is the most important. This subsection states that any claim upon which the plaintiff could have asserted federal question jurisdiction is removable to federal court by the defendant, regardless of whether the diversity of citizenship requirements of Section 1332 are satisfied. 28 U.S.C. § 1441(b). On the other hand, any claim upon which the plaintiff could have asserted merely diversity jurisdiction can be removed to federal court only if none of the defendants are citizens of the State in which the action was filed. *Id.* Thus, a claim filed by a plaintiff in state court against several multinational defendants, one of which is considered a resident of the state of filing, is removable to federal court by the defendants only if the plaintiff could have asserted federal question jurisdiction. *Id.*

27. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). *See also* Miller, *supra* note 8, at 1782-83.

28. Banco Nacional de Cuba v. Sabbatino, 478 U.S. 804, 805 (1963). In *Merrell Dow*, for example, the plaintiff's complaint raised a state cause of action based on a federal claim. Merrell Dow Pharm. Inc., v. Thompson, 478 U.S. 804, 805-06 (1986). Under the *Mottley* requirements, a necessary federal question was present in the plaintiff's complaint. *Id.* at 808. But the *Merrell Dow* Court went further, and stated that courts must determine whether the necessary federal question is "substantial." *Id.* at 812-14. In *Merrell Dow*, the Court held that resolution of the federal claim (namely, the FDA requirements for drug labels) was not "substantial" because Congress had not created a private cause of action for mislabeled drugs. *Id.* at 814. Thus, the *Merrell Dow* plaintiffs could not assert federal question, nor could the defendant drug company remove the case based on such jurisdiction. *Id.* at 808-10.

29. Patrickson v. Dole Food Co., 251 F.3d 795, 808 (2001) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9-10 (1983)).

appears in the plaintiff's statement of his own claim . . . unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose."[30] Thus, a right created by the U.S. Constitution or a federal law must be an essential element of the plaintiff's cause of action for the federal court to have original federal question jurisdiction, and a defendant cannot remove a case to a federal court unless the plaintiff's complaint passes the requisite test.[31]

Cases in which a plaintiff asserts federal question jurisdiction, or in which a defendant seeks to remove a case to federal court based on such jurisdiction, usually involve enacted federal laws.[32] In other cases, an issue emerges in international litigation that appears to implicate U.S. foreign relations but is not governed by an enacted federal law.[33] The federal judiciary has developed a body of federal common law[34] to deal with these cases, the development of which focuses attention on the role of federal courts in conducting U.S. foreign relations.[35]

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30. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 10 (quoting Taylor v. Anderson, 234 U.S. 74, 75-76 (1914)).

31. *Id.* at 10-11; *Merrell Dow*, 478 U.S. at 808. In *Merrell Dow*, the Court concluded that the plaintiff's complaint did not allege that federal law created any of the causes of action that they asserted. *Merrell Dow*, 478 U.S. at 810. The Court stated that the case involved "the presence of a federal issue in a state-created cause of action." *Id.* The Court concluded that the federal statute at issue in the case did not intend a private remedy and that it would flout congressional intent for the court to provide such a remedy. *Id.* at 811-12. Thus, the Court held that "the mere presence of a federal issue . . . does not automatically confer federal-question jurisdiction." *Id.* at 813-16. The *Merrell Dow* Court refined the well-pleaded complaint rule by concluding that, for a federal claim to be an essential part of the plaintiff's cause of action, Congress must have intended a private remedy. *Id.* at 816-17. Because no such remedy attached to the statute at issue in this case, the plaintiff's cause of action therefore did not "aris[e] under the Constitution, laws or treaties of the United States," as required by 28 U.S.C. § 1331. *Id.* at 817.

The U.S. Supreme Court previously held in *Franchise Tax Board* that the lower federal courts have "jurisdiction to hear, originally or by removal . . ., only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Bd.*, 463 U.S. at 27-28. *Merrell Dow* refined this holding when it decided that a "substantial question of federal law" is one in which Congress as intended a private cause of action. *Merrell Dow*, 478 U.S. at 808.

32. *Federal Courts*, *supra* note 20, at 1621.

33. *Id.* at 1620.

34. This Note uses Jack Goldsmith's definition: federal common law of foreign relations means judicial foreign relations lawmaking that occurs when there is political branch inaction. *Id.* at 1624. *See also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964).

35. *Federal* Courts, *supra* note 20, at 1620. To clarify, the issue of whether federal question jurisdiction should be present in a particular case is not decided based on whether the plaintiff's claim hinges on a federal statute or a rule of federal common law. *See, e.g.*, *Franchise Tax Board*, 463 U.S. at 8. What matters is whether there is a

Related to the concept of federal question jurisdiction is the theory of protective jurisdiction.[36] The federal courts sometimes exercise protective jurisdiction because, "where there is an articulated and active federal policy regulating a field, the 'arising under' clause of Article III apparently permits the conferring of jurisdiction on the national courts of all cases in the area—including those substantively governed by state law."[37] In other words, Congress seeks to "protect" a federal interest:

> [W]ith regard to subjects over which Congress has legislative power, it can pass a statute granting federal jurisdiction and [ ] the jurisdictional statute is itself a "law of the United States" within Article III, even though Congress has not enacted any substantive rule of decision and thus state law is to be applied.[38]

As this statement indicates, application of protective jurisdiction requires an enacted federal statute.

B. *Federal Common Law of Foreign Relations*

The federal common law of foreign relations traces its roots to the landmark U.S. Supreme Court case of *Banco Nacional de Cuba v. Sabbatino*,[39] though it can perhaps best be understood against the background of another landmark U.S. Supreme Court case, *Erie Railroad Co. v. Tompkins*.[40]

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sufficiently substantial federal question (of either type) necessary to the well-pleaded complaint. *See id.* at 8-9.

36. WRIGHT & KANE, *supra* note 5, at 123.

37. Mishkin, *supra* note 5, at 192.

38. WRIGHT & KANE, *supra* note 5, at 123. The only U.S. Supreme Court case to expressly discuss protective jurisdiction is *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 473 (1957). CHEMERINSKY, *supra* note 12, at 272. The case involved the section of the Taft-Hartley Act that, without creating substantive law, granted federal jurisdiction over breach of contract suits for violations of labor management agreements. *Lincoln Mills*, 353 U.S. at 450-51. The majority in *Lincoln Mills* "found that federal jurisdiction was appropriate because Congress intended for the federal courts to create a federal common law of labor-management contracts. As such, cases under the Act arose under federal common law and thus jurisdiction was permissible under Article III." *Id.* at 456-57; CHEMERINSKY, *supra* note 12, at 272.

The U.S.A. Patriot Act, 107 P.L. 71 (Nov. 19, 2001) (codified at 49 U.S.C. § 40,101), is a modern-day example of protective jurisdiction. Under 49 U.S.C. § 40,101(408)(b), all lawsuits arising from events of September 11, 2001 must be filed in the Southern District of New York but are to be governed by state law. 49 U.S.C. § 40,101(408)(b) (2001).

39. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); LOUIS HENKIN, FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 137-40 (1996) [hereinafter FOREIGN AFFAIRS]; *Federal Courts*, *supra* note 20, at 1625.

40. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); *Federal Courts*, *supra* note 20, at 1625.

Prior to *Erie*, the federal courts sitting in diversity applied a "general common law," articulated by the Court in *Swift v. Tyson*.[41] In *Erie*, however, the Court declared the practice by federal courts of using general common law to decide diversity cases to be an "unconstitutional assumption of powers."[42] The Court was emphatic: "There is no federal general common law."[43] The *Erie* Court held that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State," including both state statutory and common law.[44] Thus, the *Erie* decision stands for the proposition that, in local matters, state law will govern, and federal courts must follow the state's lead.[45] With regard to federal substantive matters, however, federal law is supreme, regardless of whether that law is derived from the U.S. Constitution or a statute, and the states are bound to follow it.[46]

After *Erie*, federal courts nevertheless continued to develop a common law "specialized" or focused on federal sources like the U.S. Constitution to deal with issues that the Framers or Congress had not directly contemplated.[47] The federal common law of foreign

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41. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842); *Federal Courts*, *supra* note 20, at 1625. *Swift* was brought in federal court based on diversity jurisdiction. *Swift*, 41 U.S. at 2. The main issue before the Court was whether the case should be governed by New York contract law or by the newly developing judge-made law of negotiable instruments. *Id.* The Court concluded that whether New York law applied or not turned upon the meaning of the phrase "laws of the several states" in the Judiciary Act of 1789. *Id.* If it encompassed both statutory and common law, then the New York rule had to be applied. *Id.* If it encompassed statutory law only, then the Court was free to assert the developing rule or any other that it thought best. *Id.* A unanimous Court strictly read the Act and concluded that the language encompassed only state statutory law. *Id.* Thus, federal courts could apply rules of decision, if no state statute controlled, without being bound by state court decisions. *Federal Courts*, *supra* note 20, at 1625.

The "general common law" referred to here is not referring to the process of common-law making, but is instead referring to a general body of federal law developed to apply in particular diversity cases. *See Federal Courts*, *supra* note 20; *Separation of Powers*, *supra* note 20.

42. *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & White Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

43. *Id.* at 79. The pronouncement that "there is no federal general common law" did not mean that the federal courts could no longer use the common-law method; it meant, instead, that the federal courts could no longer develop their own body of substantive law in diversity cases because state substantive law was held to be applicable. *Id.*

44. *Id.* at 78.

45. Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 814 (1964) [hereinafter *Foreign Affairs Power*].

46. *Id.*

47. *Federal Courts*, *supra* note 20, at 1626; Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-07 (1964).

relations is an example.[48] Unlike the pre-*Erie* general common law, this specialized federal common law is substantive and is part of the "Laws of the United States" binding on the states under the Supremacy Clause.[49] As the Supreme Court stated,

> a few areas, involving "uniquely federal interests" . . . are so committed by the Constitution and laws of the United States to federal control that state law is preempted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."[50]

Thus, most federal common law can be viewed as statutory gap-filling.[51] The authorization for federal common law-making is also derived from the text of the U.S. Constitution, either expressly or through structural inference.[52]

This structural inference forms the basis for the federal common law of foreign relations, first applied by the Court in *Sabbatino*.[53] In *Sabbatino*, a financial agent of the Cuban government sued in U.S. federal court to recover the proceeds from a sale of sugar.[54] The defendant denied the Cuban government's title to the sugar, alleging that it belonged to a company largely owned by U.S. citizens because the Cuban government expropriated the sugar plantation without compensation in violation of international law.[55] The bank, in turn, invoked the "act of state doctrine"[56] in an attempt to preclude judicial inquiry into the validity of the expropriation.[57] On review, the U.S. Supreme Court held that the act of state doctrine applied even to acts that violated international law.[58]

What is remarkable about this case is that, in reaching its conclusion, the Court determined that the act of state doctrine was not required by any of the standard legal doctrines or sources of law that one might imagine: notions of sovereignty, international law, the political question doctrine, or anything on the surface of the U.S.

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48. *Federal Courts*, *supra* note 20, at 1626.

49. U.S. CONST. art. VI, cl. 2; GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 15 (3d ed. 1996); *Federal Courts*, *supra* note 20, at 1626.

50. BORN, *supra* note 49, at 15 (quoting Boyle v. United Techs Corp., 487 U.S. 500, 504 (1988)).

51. *Federal Courts*, *supra* note 20, at 1626.

52. *Id.* at 1626-27.

53. *Id.* at 1627; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

54. *Sabbatino*, 376 U.S. at 400-08.

55. *Id.*

56. The act of state doctrine, a common-law doctrine, requires "the courts of one country . . . not to sit in judgment on the acts of the government of another done with its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

57. *Sabbatino*, 376 U.S. at 400-08.

58. *Id.* at 428.

Constitution.[59] Instead, the doctrine had the status of federal law because it had

> "constitutional" underpinnings. It arises out of the basic relationship between the branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.[60]

By analogizing to other areas of federal common law thought "necessary to protect uniquely federal interests,"[61] the Court explained that the act of state doctrine involved foreign relations problems that are "uniquely federal in nature"[62] and hence "must be treated exclusively as an aspect of federal law."[63] The Court thus based the need for the act of state doctrine on its own independent analysis of the foreign relations interests of the United States.[64]

Although the act of state doctrine seems to be an assertion of the judiciary's own power under the U.S. Constitution, ironically the doctrine is an assertion that the judiciary will *avoid* deciding a matter.[65] The Court appears to reason that because the treatment of foreign decrees involves the foreign relations of the United States, and because the nation's foreign relations are "intrinsically federal" and subject to regulation by the federal government, the federal judiciary may withdraw from the field through the act of state doctrine.[66]

At the same time, this retreat developed into a larger field of federal court jurisdiction. The U.S. Supreme Court's reasoning in *Sabbatino* has led other federal courts to conclude that because U.S. foreign relations are "intrinsically federal," the federal courts can assert original jurisdiction over claims that may affect those relations.[67] Other courts have read the decision more narrowly as a

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59. *Id.* at 421, 423-25; FOREIGN AFFAIRS, *supra* note 39, at 138.
60. *Sabbatino*, 376 U.S. at 423.
61. *Id.* at 426.
62. *Id.* at 424.
63. *Id.* at 425.
64. *Federal Courts*, *supra* note 20, at 1628.
65. *Foreign Affairs Power*, *supra* note 45, at 814.
66. *Id.* at 815. The federal judiciary could also withdraw from the action using the political question doctrine, discussed in Part IV.
67. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986). *See also* WRIGHT & KANE, *supra* note 5, at 123-25 (discussing "protective jurisdiction").

case only dealing with the act of state doctrine.[68] Thus, the question arises of how far the jurisdiction of the judiciary to make law in the area of foreign relations extends.

The precise breadth of the federal common law of foreign relations is unclear.[69] This uncertainty is due in part to the Court's infrequent application of the doctrine and in part to the indeterminacy of the Court's test for applying the doctrine.[70] For example, "[s]ometimes courts focus on a state law's effect on the political branches' ability to conduct foreign relations, while other times they focus on a state law's effect on U.S. foreign relations itself."[71] An additional uncertainty exists about the appropriate level of adverse foreign relations effects needed to warrant preemption of state law.[72]

The federal common law of foreign relations is important to the discussion of federal question jurisdiction because a case requiring its application to resolve the plaintiff's complaint would satisfy the *Merrell Dow* test and federal question jurisdiction would attach.[73] On the other hand, an assertion by the federal judiciary that foreign relations implications alone are sufficient to confer federal question jurisdiction without requiring application of any federal law to resolve the plaintiff's complaint would in fact be an assertion of "quasi-protective jurisdiction" rather than federal question jurisdiction.[74]

III. THE DETAILS OF THE CIRCUIT SPLIT

The current circuit split over whether "foreign policy implications" from multinational litigation is sufficient to confer federal question jurisdiction illustrates the uncertainty over the appropriate scope of federal jurisdiction.[75] Reading *Sabbatino*

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68. Patrickson v. Dole Food Co., 251 F.3d 795, 802 (9th Cir. 2001).

69. *Federal Courts*, *supra* note 20, at 1632.

70. *Id.*

71. *Id.* at 1632-33. *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (stating that federal common law includes areas "concerned with . . . international disputes implicating . . . our relations with foreign nations"); Zschernig v. Miller, 389 U.S. 429, 441 (1968) (noting that Oregon's probate statute "may well adversely affect the power of the central government to deal with foreign relations").

72. *Federal Courts*, *supra* note 20, at 1633.

73. CHEMERINSKY, *supra* note 12, at 282-85, 369-70.

74. WRIGHT & KANE, *supra* note 5, at 123.

75. *See* Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001); Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).

expansively, the Second, Fifth, and Eleventh Circuits allowed "foreign policy implications" to confer such jurisdiction,[76] while the Ninth Circuit, reading both *Sabbatino* and Section 1331 narrowly, declined to confer federal jurisdiction.[77]

A. *The Second Circuit:* Republic of the Philippines v. Marcos

The Republic of the Philippines originally filed the claim in *Marcos* in New York state court because it believed that the defendants, including the former Philippine President Ferdinand Marcos, were involved in fraudulent transfers of New York real estate.[78] After a grant of removal by the U.S. District Court for the Southern District of New York, the judge granted the Philippine government a preliminary injunction that prohibited the sale or transfer of the New York real estate allegedly owned by former President Marcos and his wife.[79]

The defendants then appealed to the Court of Appeals for the Second Circuit.[80] After a detailed analysis of the evidence presented to show that the Marcos' actually owned the disputed New York property,[81] the Second Circuit agreed with the district court that the standard for issuance of a preliminary injunction, where conclusive factual findings need not be made, had been satisfied.[82] Writing for the Second Circuit, Judge Oakes stated that the court's "task therefore [was] to determine whether there [was] federal jurisdiction."[83]

Relying on *Merrell Dow*, the Second Circuit began by analyzing the plaintiff's complaint to determine whether federal question jurisdiction was present.[84] Based on this test, the court concluded that federal jurisdiction should attach based on either of two reasons.[85] First, because the current Philippine President issued an Executive Order, the enforcement of which was at issue in this case, federal jurisdiction existed because the case required application of

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76. *Pacheco de Perez*, 139 F.3d at 1377; *Torres*, 113 F.3d at 543; *Marcos*, 806 F.2d at 352-53.

77. *Patrickson*, 251 F.3d at 804-05.

78. *Marcos*, 806 F.3d at 347.

79. *Id.* at 344.

80. *Id.* at 346.

81. *Id.* at 348-51.

82. *Id.* at 352.

83. *Id.*

84. *Id.* The *Merrell Dow* decision focused on when a federal question, as part of a well-pleaded complaint, was sufficient to confer federal question jurisdiction. Merrell Dow Pharm. v. Thompson, 478 U.S. 804 (1986).

85. *Marcos*, 806 F.3d at 354.

the federal common law of foreign relations.[86] Second, and most importantly for purposes of this Note, the Second Circuit relied on the *Sabbatino* language that "our relationships with other members of the international community must be treated exclusively as an aspect of federal law" to conclude that the plaintiff's claims asserted federal question jurisdiction because resolution of the claim required the Court to make "determinations that [would] directly and significantly affect American foreign relations."[87]

Furthermore, the court noted that *Merrell Dow* involved "the presence of a federal issue in a state created cause of action" and that satisfaction of the well-pleaded complaint rule in *Marcos* would depend on whether the federal common law of foreign relations could displace the state cause of action of constructive trust.[88] The Second Circuit ruled that it could: "[A]n action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations."[89]

The Second Circuit's position that, in granting the plaintiff's relief, application of federal common law confers federal question jurisdiction is neither controversial nor wrong.[90] After all, if the federal question imbedded in the plaintiff's complaint, though based on state causes of action, is substantial, federal jurisdiction may attach under *Merrell Dow*.[91] What is both interesting and confusing about *Marcos*, however, is the court's second basis for holding that federal jurisdiction should attach: namely, simply because the case could significantly affect the relationship between the United States and the Philippines.[92] The Second Circuit thus combined federal question jurisdiction with protective jurisdiction without discussing or developing the latter.[93] Unfortunately, it is this part of the court's holding on which the Fifth and Eleventh Circuits later relied.

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86. *Id.* Granting federal jurisdiction because the case requires application of the federal common law of foreign relations is neither controversial nor incorrect.

87. *Id.* This foundation for jurisdiction is based on a "quasi-protective jurisdiction" theory—the court held that federal jurisdiction should attach because the case might implicate U.S. foreign relations and no federal statute authorized such action. This basis for jurisdiction is important for purposes of this Note because it was later relied upon by the Fifth and Eleventh Circuits to grant jurisdiction.

88. *Id.* at 353 (quoting *Merrell Dow*, 478 U.S. at 814).

89. *Id.*

90. *See, e.g.*, CHEMERINSKY, *supra* note 12, at 273-85.

91. *Merrell Dow*, 478 U.S. at 814.

92. *Marcos*, 806 F.3d at 353-54.

93. *Id.*

B. *The Fifth Circuit:* Torres v. Southern Peru Copper Corporation

The Fifth Circuit's *Torres* decision contains little factual information.[94] The plaintiffs, citizens of Peru, sued the Southern Peru Copper Corporation (SPCC) for environmental damage caused in and around the defendant's copper mines in Ilo, Peru.[95] The plaintiffs alleged they had been harmed by sulfur dioxide emissions from smelting and refining operations.[96] The original claim was appropriately filed by the plaintiffs in Texas state court alleging state-law causes of action such as negligence and nuisance.[97] The defendants filed a motion to remove the case to federal court.[98] Because the district court held that SPCC was a citizen of both Peru and Delaware, there was a foreign national on both sides of the case; thus, diversity jurisdiction was destroyed and could not serve as the basis for removal.[99] Yet the defendant's motion to remove was nevertheless granted on the ground that federal question jurisdiction was present.[100] After granting jurisdiction, the district court then dismissed the case on the grounds of "forum non conveniens and comity among nations."[101] The plaintiffs appealed the district court's grant of federal question jurisdiction and argued that the case should be remanded to state court because only state-law tort claims were raised.[102]

Writing for the Fifth Circuit, Judge Politz agreed that federal question jurisdiction was present because the plaintiff's complaint

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94. The facts in *Torres* are not discussed in depth by the circuit court. *See* Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997). Additionally, because the district court issued only an order dismissing the case, there is no factual discussion to be found on the district court level either. *Id.* at 541. This lack of detailed factual information is common to all the circuit court cases discussed in this Note.

95. *Id.* at 541-42.

96. *Id.* at 541.

97. *Id.*

98. *Id.* at 540-41.

99. *Id.* at 543. The Fifth Circuit ruled that the district court erred in its determination that SPCC was a citizen of Peru. *Id.* at 544. The court held that SPCC should have been considered only as a citizen of Delaware, meaning that diversity of citizenship could have been granted. *Id.* While the court does not state this expressly, it appears that diversity jurisdiction could be an alternative for its somewhat weakly reasoned opinion that federal question jurisdiction was present. *Id.* at 542.

100. *Id.* at 540-41.

101. The doctrine of forum non conveniens states that "an appropriate forum—even though competent under law—may divest itself of jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought." BLACK'S LAW DICTIONARY 664 (7th ed. 1999). The principle of comity among nations is discussed in *Torres*. *Torres*, 113 F.3d at 542.

102. *Id.* at 542.

raised "substantial questions of federal common law by implicating important foreign policy concerns."[103] In reaching its holding, the court first analyzed whether federal question jurisdiction existed because, without it, the district court's substantive conclusions concerning forum non conveniens and comity among nations would not be relevant.[104]

In its discussion of federal question jurisdiction, the Fifth Circuit began by analyzing the plaintiff's complaint under the well-pleaded complaint rule.[105] The plaintiff's complaint relied on a Texas statute that required the state court to examine treaties between the United States and Peru to determine whether the plaintiffs had standing to sue in U.S. courts.[106] The court rejected treating this examining feature as sufficient to create federal jurisdiction under the standards articulated in *Merrell Dow*.[107]

After concluding that the plaintiff's complaint would not confer federal question jurisdiction on its face, the court next discussed whether the complaint nevertheless raised substantial questions of federal law by implicating the federal common law of foreign relations.[108] The core of the court's analysis on this point hinged on the fact that the Peruvian government asserted that the litigation implicated some of its most vital interests and would affect its relationship with the United States.[109] It is this part of the court's analysis that is most troubling.

The Fifth Circuit stated that the mere fact that Peru injected itself into the lawsuit did not, by itself, create federal question jurisdiction.[110] Instead, according to the court, it was Peru's "vigorousness" in opposing the action that "alerted . . . it to the foreign policy issues implicated by this case."[111] The court noted that the mining industry is fundamental to Peru's economic vitality and that the Peruvian government substantially participated in the activities for which SPCC was now being sued.[112] With a brief listing of the facts connecting the Peruvian government with SPCC's behavior and without any further legal analysis, the Fifth Circuit concluded, relying on the language of *Marcos*, that "plaintiffs' complaint raise[d] substantial questions of federal common law by

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103. *Id.* at 542-43.
104. *Id.* at 542.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 542-43.
111. *Id.* at 543.
112. *Id.*

implicating foreign policy concerns."[113] Therefore, because Peru's "vital economic and sovereign interests"[114] were raised by the plaintiff's complaint, the court asserted federal question jurisdiction.[115]

Thus, like the Second Circuit before it, the Fifth Circuit relied on this new "quasi-protective jurisdiction"—the notion that implication of important federal interests should confer federal jurisdiction despite the lack of federal statutory authority.[116] Although the court evidently believed that the concept of a "federal question" was broad enough to support this result, this reasoning, as we have seen, is problematic.[117]

C. *The Eleventh Circuit:* Pacheco de Perez v. AT&T Company

In two cases against the AT&T Company, plaintiffs injured in a 1993 gas pipeline explosion in Venezuela during the laying of fiber optic cable sued the company.[118] The plaintiffs alleged that the defendants participated in acts or omissions that caused the explosion.[119] The plaintiffs originally filed two separate actions in Georgia state court, and the defendants removed the cases to the U.S. District Court for the Northern District of Georgia, which consolidated the two actions and denied the plaintiffs' motion to remand.[120] This court, like the district court in *Torres*, then dismissed the actions under the doctrine of forum non conveniens.[121] The plaintiffs appealed to the Eleventh Circuit, arguing that the district court should have remanded the case back to Georgia state court for lack of federal jurisdiction.[122]

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113. *Id.* As factors, the court considered that the Peruvian government:

> (1) owns the land on which SPCC operates; (2) owns the minerals which SPCC extracts; (3) owned the Ilo refinery from 1975 until 1994, during which time pollution from the refinery may have contributed to the injuries complained of by plaintiffs' and (4) grants concessions that allow SPCC to operate in return for an annual fee.

Id. The court also mentioned that the Peruvian government extensively monitored the mining industry. *Id.*

114. *Id.* at 543 n.8.

115. *Id.* at 543.

116. *Id.* at 542.

117. *Id.* at 543.

118. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1371 (11th Cir. 1998).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* The Eleventh Circuit briefly mentioned that diversity jurisdiction was not a valid ground for removal because the defendants were Georgia citizens. *Id.*; 28 U.S.C. § 1441(b). The defendants argued that the Georgia defendants were joined in

The defendants asserted that federal question jurisdiction existed in the case under four alternative theories, only one of which is important for purposes of analyzing the current circuit split: the lawsuit involved the federal common law of foreign relations because the litigation implicated the national interests of Venezuela.[123]

In analyzing this claim for the Eleventh Circuit, Judge Barkett first established the expected basis in *Sabbatino*—"The Supreme Court has held that the area of international relations is governed exclusively by federal law"[124]—and *Marcos*—"Where a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present."[125] The court then noted, however, the limitations of both decisions: the disputes either involved a foreign government that was a named party to the lawsuit, or actions of a foreign government that were a direct focus of the litigation.[126]

The Eleventh Circuit, therefore, had to deal directly with the expansion of federal jurisdiction because the defendants in *Pacheco de Perez* argued that the claim implicated "the economic and sovereign interests of Venezuela."[127] The defendants construed the factors considered by the Fifth Circuit in *Torres* to include:

> [W]hether the injuries occurred on foreign soil, whether the foreign government's policy decisions or actions are brought into question by the suit, whether the foreign government was involved in the alleged wrongdoing, and whether the action strikes at the heart of the economic and sovereign interests of the foreign nation.[128]

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order to destroy complete diversity, but this is not a topic of concern in this Note. *Pacheco de Perez*, 139 F.3d at 1371.

123. *Id.* at 1372. The defendants argued (1) that plaintiffs' attempt to "artfully plead" their state-law complaint so as to avoid the preclusive effect of the voluntary dismissals of their prior federal lawsuits present a substantial federal question sufficient to support federal jurisdiction; (2) that the plaintiffs' complaint presents a substantial federal question because the plaintiffs must rely on a federal treaty to prove they have standing in the Georgia state courts; (3) that the lawsuit involves the federal common law of foreign relations because the litigation implicates the national interests of Venezuela; and (4) that the district court had authority to exercise supplemental jurisdiction over this case under the All Writs Act, 28 U.S.C. § 1651, to prevent frustration of orders made in related lawsuits pending before the same district court judge. *Id.* The Eleventh Circuit agreed with the Fifth Circuit holding in *Torres* that looking to a treaty to satisfy the Georgia code provision does not present a federal question substantial enough to place the plaintiffs' state law tort actions within the jurisdiction of the federal courts. *Id.* at 1375. It is only the third argument that is important for consideration in this Note.

124. *Id.* at 1377.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

The defendants then asserted facts that supported their contention that each of these factors was implicated in this case and that foreign policy considerations were therefore involved.[129] The Eleventh Circuit disagreed, not because it thought the Fifth Circuit's approach to the issue was wrong, but because "the federal common law of foreign relations will not support federal jurisdiction in this case."[130] Thus, while reaching the opposite result from the Fifth Circuit, the Eleventh Circuit nevertheless seems to have adopted the Fifth Circuit's theory of federal jurisdiction.[131]

The Eleventh Circuit denied jurisdiction on two grounds.[132] First, the court thought it significant that Venezuela had taken no position on whether the lawsuit should proceed in the United States or in Venezuela, which contrasted sharply with Peru's "vigorous opposition" to the litigation before the Fifth Circuit.[133] In the absence of expressed interest by a foreign nation, the court was reluctant to find a federal question implicating foreign policy issues.[134]

Second, and closely related to Venezuela's silence, the court found the defendant's evidence regarding Venezuela's alleged interests in the plaintiffs' action "too speculative and tenuous to confer federal jurisdiction over the case."[135] Contrary to the specific facts found by the court in *Torres*, this court ruled that any evidence of Venezuela's direct participation in the tortious action was weak and that "there [was] no evidence regarding the relative importance of the fiber-optic cable project, or the telecommunications industry in general, to the Venezuelan national economy."[136] The Eleventh Circuit further stated that, "it is not clear that the lawsuit threatens the economic vitality of Venezuela itself."[137] Based on its lack of factual evidence linking the Government of Venezuela to the allegations in the plaintiffs' claim, the court concluded "that the defendants have failed to show that the plaintiffs' complaints are so intertwined with the sovereign interests of Venezuela as to place this case within the purview of the federal courts."[138]

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129. *Id.* at 1378.
130. *Id.*
131. Because the Eleventh Circuit adopted the Fifth Circuit's reasoning behind federal question jurisdiction, it is considered, for purposes of this Note, as a circuit that would probably support federal question jurisdiction if the foreign relations implications had been more evident. *Id.* at 1377-78. Thus, it is likely that the Eleventh Circuit has also confused federal question jurisdiction with some notion of protective jurisdiction.
132. *Id.* at 1378.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

In both of its reasons for denying federal jurisdiction, the Eleventh Circuit focused on a foreign state's interest in the outcome of litigation.[139] Federal question jurisdiction, however, is not predicated on a showing of interest by a foreign state whose relations with the United States may be implicated.[140] And another problem associated with this developing "quasi-protective jurisdiction" now emerges: the usefulness of these decisions as precedent. Future litigants will have significant difficulty determining what sorts of facts to emphasize to establish initial or removal jurisdiction in federal court. Unfortunately, the next circuit to address these issues, while it disagreed with the new "quasi" form of federal jurisdiction, did not resolve them.

D. *The Ninth Circuit:* Patrickson v. Dole Food Company

In *Patrickson v. Dole Food Company*, the plaintiffs, a class of Latin-American banana workers, brought suit against multinational fruit and chemical companies alleged to have exposed the workers to a toxic pesticide.[141] Dow Chemical and Shell Oil originally manufactured the pesticide at issue and it was banned in the United States in 1979 by the Environmental Protection Agency.[142] Despite that ban, the chemical companies continued to distribute the pesticide to fruit companies in developing nations, such as Costa Rica, Ecuador, Guatemala, and Panama.[143]

The workers brought suit in Hawaii state court because Dole Food Company was considered a citizen of Hawaii.[144] As a result, the defendants could not remove the case to federal district court in Hawaii, and they had to rely instead on the presence of federal question jurisdiction.[145] The district court granted the defendants' removal motion, denied the plaintiffs' motion to remand the case back to Hawaii state court, and subsequently dismissed the case based on forum non conveniens.[146]

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139. *Id.*

140. *See, e.g.*, CHEMERINSKY, *supra* note 12, at 272-85.

141. Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001).

142. *Id.*

143. *Id.* These are the countries in which the banana workers are considered to be citizens.

144. *Id.* Dole impleaded two Israeli chemical companies that were alleged to have manufactured some of the DBCP used in the plaintiffs' home countries. *Id.* Because these Israeli companies were, until recently, indirectly owned by the Israeli government, they removed the case to federal court based on the Foreign Sovereign Immunities Act of 1976. *Id.* The Ninth Circuit's discussion of this Act is not discussed in this Note.

145. *Id.*

146. *Id.* Because no official opinion was issued, the district court's precise reasoning for granting federal question jurisdiction and then dismissing based on

The plaintiffs appealed to the Ninth Circuit, which, like the other circuits, had to decide whether the case was properly before the federal court in the first place.[147] Disagreeing with the previous three circuits, the court held that the case should not have been removed to federal court.[148]

The Ninth Circuit, in an opinion by Judge Kozinski, began by noting that federal courts are courts of limited jurisdiction, authorized to hear only those cases that Congress or the U.S. Constitution permits.[149] The court stated that, while "any federal ingredient may be sufficient to satisfy Article III, the statutory grant of jurisdiction under 28 U.S.C. § 1331 requires more."[150] This requirement encompassed the well-pleaded complaint rule, mandating that a federal right be an essential element in the plaintiff's cause of action for federal jurisdiction.[151] This rule, the court observed, "keeps us from becoming entangled in state law controversies on the conjecture that federal law may come into play at some point during the litigation."[152] The court concluded that none of the plaintiffs' claims were premised on any right created by Congress or the U.S. Constitution.[153] Thus, no federal question was present on the face of the plaintiff's complaint, and application of the common law of foreign relations, which could confer federal jurisdiction, was unnecessary.[154] Nevertheless, the court dealt with the defendants' argument that federal question jurisdiction should attach because the case "has implications for our nation's relations" with Costa Rica, Ecuador, Guatemala, and Panama.[155]

Rather than relying on the results or reasoning in the other circuit decisions, Judge Kozinski examined the foundations of this body of doctrine by reviewing the *Sabbatino* holding.[156] This case was narrower than other courts had viewed it.[157] The *Sabbatino* Court held that "there are enclaves of federal judge-made law which bind the states," one of which concerns the legal principles governing the relationship between the U.S. and other members of the

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forum non conveniens is not known, though it can be inferred from the Ninth Circuit opinion.

147. *Id.*
148. *Id.*
149. *Id.* at 799.
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 798, 800. Banana workers from the listed countries brought the class action against Dole; hence, relations with the United States and these countries could be impacted by the litigation.
156. *Id.* at 799.
157. *Id.* at 802.

international community.[158] *Sabbatino*, the Ninth Circuit concluded, was therefore a case about conflict of laws: federal law should be applied in cases that involve U.S. foreign relations.[159] As Judge Kozinski points out, however, this does not mean that federal jurisdiction automatically attaches to such cases.[160]

In analyzing the *Sabbatino* holding, the Ninth Circuit relied on the U.S. Supreme Court's reasoning that "because the Constitution gives the federal government exclusive authority to manage the nation's foreign affairs, the . . . 'rules of international law should not be left to divergent and perhaps parochial state interpretations.'"[161] Thus, the U.S. Supreme Court held that the federal common law of foreign relations fell outside the scope of *Erie*, and therefore survived as a body of binding law.[162] Hence, federal jurisdiction would attach if application of federal law were necessary to resolve a particular case.[163]

The Ninth Circuit concluded, however, that the *Sabbatino* holding was limited to its particular circumstances: a complaint that turned on the validity of an act of a foreign state.[164] The court noted that the complaint in *Patrickson* did not require the court to evaluate any act of state, apparently because the plaintiffs did not claim that any foreign government participated in the tortious activities or that the defendants acted under the authority of foreign law.[165] The court surmised that the common law of foreign relations would become an issue in the case only if it were raised as a defense—an unlikely prospect because the defendants were not connected to the foreign governments in Latin America in any conceivable manner.[166]

Not surprisingly, the defendants argued that the Ninth Circuit should nevertheless assert federal question jurisdiction because the case concerned "a vital sector of the economies of foreign countries and so has implications for our nation's relations with those countries."[167] Specifically, Dole argued that "by granting relief,

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158. *Id.* at 799 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1963)).

159. *Id.* at 802.

160. *Id.*

161. *Id.* (quoting *Sabbatino*, 376 U.S. at 425).

162. *Id.* at 800.

163. *Id.*

164. *Id.* at 802.

165. *Id.* at 800. These factors are similar to the factors considered by the Eleventh and Fifth Circuits in previous cases. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997). The Ninth Circuit does not expound whether such factors, if found in this case, would be sufficient to confer federal question jurisdiction as was found by the Fifth Circuit in *Torres*. *See Patrickson*, 251 F.3d 795.

166. *Patrickson*, 251 F.3d at 800.

167. *Id.*

American courts would damage the banana industry—one of the most important sectors of those countries' economies—and cast doubt on the balance those governments have struck between agricultural development and labor safety."[168] Thus, Dole argued that the case implicated the "uniquely federal" interest of U.S. foreign relations, and therefore it must be heard in a federal forum.[169] The Ninth Circuit characterized these contentions as efforts to create an exception to both *Erie* and the well-pleaded complaint rule, but declined to make such an exception.[170]

In reviewing the three prior circuit court decisions, the Ninth Circuit noted that both *Torres* and *Pacheco de Perez* relied principally on *Marcos*, which "seems to have been the first case to conclude that 'there is federal question jurisdiction over actions having important foreign policy implications.'"[171] The Ninth Circuit observed, however, that *Marcos* could have rested simply on the ground that it involved an act of state and was controlled directly by *Sabbatino*, rather than some larger sense of foreign relations.[172] Instead, *Marcos* went much further, broadly suggesting "that federal question jurisdiction could 'probably' be premised on the fact that a case may affect our nation's foreign relations, whether or not federal law is raised by the plaintiff's compliant."[173] The Ninth Circuit thought this went too far: *Sabbatino*'s acknowledgement that the law of foreign relations is an enclave of federal judge-made law binding the states "makes sense," Judge Kozinski asserted, "only if one assumes that state courts will be called upon to apply the law of foreign relations."[174]

The other circuits also unnecessarily expanded *Sabbatino*, according to the Ninth Circuit, by saying that only federal courts could apply the federal common law of foreign relations.[175] This certainly would not be so if *Sabbatino* were about choice of law rather than jurisdiction.[176] The *Patrickson* court noted that state courts apply federal law in a variety of cases and concluded that there was no reason to treat the federal common law of foreign relations any differently than other areas of federal law that are applied by the states in relevant cases.[177] In addition, the court concluded that having state courts apply federal law in relevant cases would not undermine the goal of nationwide uniformity in federal law because

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168. *Id.*
169. *Id.* at 801.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 802.
176. *Id.* at 801.
177. *Id.* at 802-03.

different federal courts are just as likely as state courts to apply federal law in a non-uniform manner.[178] After all, the U.S. Supreme Court has the final say on any question of federal law, whether it arises in federal or state court.[179]

The Ninth Circuit also declined to follow the previous circuit court cases "in so far as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome."[180] The court rejected the relevance of this fact on two bases, and thus impliedly rejected the notion of "quasi-protective jurisdiction" altogether. First, as a logical matter, the court found no inherent connection between an effect on foreign policy and the assertion of federal question jurisdiction.[181] In fact, the court stated, "[w]e consider it far more prudent to state clearly that the effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction."[182]

Second, as a substantive matter, the court found the insertion of a foreign government's perspective into the case politically inappropriate:

> If courts were to take the interests of the foreign government into account, they would be conducting foreign policy by deciding whether it serves our national interests to continue with the litigation . . . Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns.[183]

Thus, in the parlance of philosophy, the Ninth Circuit found that foreign government statements were neither necessary nor sufficient to establish federal court jurisdiction.

Based on all these difficulties, the Ninth Circuit concluded that because Congress has not extended federal question jurisdiction to all cases where the federal common law of foreign relations might be *implicated*, the court would not do so on its own accord.[184] Assertion of any protective jurisdiction, apparently, would be allowed only if Congress expanded jurisdiction beyond the current Section 1331 authority.[185] The court acknowledged that whether and how a particular case might affect the foreign interests of the United States

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178. *Id.* at 802.
179. *Id.*
180. *Id.* at 803, 804 nn. 8, 9.
181. *Id.* at 803.
182. *Id.* at 804.
183. *Id.*
184. *Id.* at 803.
185. *Id.* at 804.

was "an inherently political judgment, one that courts—whether state or federal—are not competent to make."[186] The court additionally stated, "If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving [federal courts] that jurisdiction."[187] The *Patrickson* court thus called on the political branches to respond to the circuit split "in whatever way they deem appropriate—up to and including passing legislation."[188]

IV. RESOLVING THE SPLIT

There are at least two ways that the current judicial split could be resolved, discussed in Parts A and B below: judicially, through a decision by the U.S. Supreme Court, or legislatively, through congressional action.

A. *Judicial Resolution by the Supreme Court*

The disagreement among the circuits over the appropriate role for the federal judiciary in cases relating to U.S. foreign relations is not surprising given the larger legal context: constitutional theories of separation of powers differ regarding the proper allocation of federal authority and the most suitable role for the courts on the subject of foreign affairs.[189] On its face, the U.S. Constitution does not explicitly assign sole responsibility for U.S. foreign relations to one particular branch of government, which means that the courts have no textual authority to conduct U.S. foreign relations.[190] At the same time, the text of the U.S. Constitution contains no language "excluding, limiting, or altering the role of the courts when the cases or controversies they are called upon to decide relate to U.S. foreign relations."[191] Constitutional history, however, does provide support for the argument that, of the three branches of government, the Executive should have the primary role in foreign affairs.[192] Strong

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186. *Id.*
187. *Id.*
188. *Id.* at 803-04.
189. Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM J. INT'L. L. 805, 805-06 (1989).
190. *Id.* at 806-07.
191. *Id.* at 806.
192. *Id.*; BORN, *supra* note 49, at 22 ("The central figure in U.S. foreign relations is the President. Despite fairly modest textual foundation in the Constitution, successive Presidents have wielded broad authority over the nation's foreign affairs.").

presidential foreign affairs authority may require courts to defer to Executive Branch expressions on matters of U.S. foreign relations.[193]

Taking this background into account, the U.S. Supreme Court could take two paths in its attempt to resolve the split. First, the Court could agree with the Second, Fifth, and Eleventh Circuits that mere implications for foreign relations should impart federal jurisdiction, not based on the doctrine of protective jurisdiction as discussed by the Court in *Textile Workers Union v. Lincoln Mills*[194] (because here no statute exists as authority), but instead based on "quasi-protective jurisdiction"—a separate notion of protecting important federal interests absent any congressional directive. Second, the Court could agree with the Ninth Circuit that there is no federal question jurisdiction from the mere fact of a foreign relations element in litigation, and that if implications for foreign relations create jurisdiction, that jurisdiction has to be conferred by Congress.[195] Such a congressional grant of jurisdiction may or may not be constitutional;[196] thus, each of these paths involves certain potential difficulties.

1. Federal Jurisdiction Attaches

The U.S. Supreme Court could resolve the current judicial split by agreeing with the majority of circuits holding that when a case could implicate U.S. foreign relations, federal jurisdiction should attach. Absent the application of federal law to the dispute implicating foreign relations, federal jurisdiction would be based on a theory of protecting an important federal interest—thus, "quasi-protective jurisdiction."[197] On the other hand, the Court could decide that federal jurisdiction should attach, but that the lower courts should nevertheless decline to hear the case. The reasoning behind this decision could be based on forum non conveniens or the political question doctrine, both of which have the effect of removing a case from federal courts despite the satisfaction of jurisdictional requirements.

193. Charney, *supra* note 189, at 807.
194. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 473 (1957).
195. A proposed legislative enactment of jurisdiction will be discussed in Part B.
196. CHEMERINSKY, *supra* note 12, at 271-73.
197. *Id.*

a. The Argument for "Quasi-Protective Jurisdiction"

Federal courts may validly exercise jurisdiction over any case where construction or enforcement of a national law is necessary.[198] Left unsettled, however, is the extent to which courts may rely on the Article III "federal question" clause in expanding their jurisdiction to protect a federal interest.[199] Protective jurisdiction is based on a congressional statute authorizing federal courts to exercise jurisdiction over cases that involve both substantive state law and important federal interests.[200]

The U.S. Supreme Court has rarely considered the concept of protective jurisdiction.[201] The first case to mention it was *Verlinden, B.V. v. Bank of Nigeria.*[202] The only U.S. Supreme Court case expressly discussing the concept is *Textile Workers Union v. Lincoln Mills.*[203] *Lincoln Mills* involved a section of the Taft-Hartley Act that, without creating substantive law, granted federal jurisdiction over breach of contract suits for violations of labor management agreements.[204] The majority in *Lincoln Mills* "found that federal jurisdiction was appropriate because Congress intended for the federal courts to create a federal common law of labor-management contracts. As such, cases under the Act arose under federal common law and thus jurisdiction was permissible under Article III."[205] Neither *Lincoln Mills* nor *Verlinden* addressed whether such Congressional authorization is constitutional, and a strong argument can be made that it is not.[206] Justice Frankfurter dissented in *Lincoln Mills* on the grounds that "'[p]rotective jurisdiction,' once the label is discarded, cannot be justified under any view of the allowable scope to be given to Article III. . . . The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law."[207]

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198. Mishkin, *supra* note 5, at 184.

199. *Id.*

200. *Id.* A recent example of a statute that could be viewed as creating protective jurisdiction is the U.S.A. Patriot Act, 49 U.S.C. § 40,101 (2001). Title IV, section 408(b) of this law dictates that any lawsuit arising out of the events of September 11, 2001 must be brought in the Southern District of New York even if state law is the only basis for the claim. 49 U.S.C. § 40,101(408)(b). Thus, while a plaintiff's complaint may not raise a federal question, the federal courts nevertheless have jurisdiction under congressional authority. *Id.*

201. CHEMERINSKY, *supra* note 12, at 271.

202. Verlinden B.V. v. Bank of Nigeria, 461 U.S. 480, 491 (1983).

203. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 460 (1957).

204. CHEMERINSKY, supra note 12, at 272.

205. *Id.*

206. *Id.*

207. *Id.* (quoting *Lincoln Mills*, 353 U.S. at 474-75) (Frankfurter, J., dissenting).

The significance of protective jurisdiction "remains disputed by scholars."[208] Those who argue that Congress should be able to create federal court jurisdiction over any area in which it possesses the power to legislate do so on the ground that, contrary to Justice Frankfurter's opinion, state courts cannot always be trusted, and that federal jurisdiction is therefore sometimes necessary to protect important federal interests.[209] The Article III jurisdictional requirements would be met because the case "arises under" the statute authorizing federal jurisdiction.[210] This position is arguably consistent with the Court's broad conception of "arising under" jurisdiction articulated in *Osborn v. Bank of the United States*.[211]

Those who oppose protective jurisdiction argue that Congress cannot expand federal jurisdiction beyond the language of Article III and that allowing Congress such broad powers would impermissibly expand federal subject matter jurisdiction.[212] The strongest support for this position, of course, lies in the text of Article III itself.

Aside from the difficulty and uncertainty regarding whether protective jurisdiction is itself constitutional, judicial efforts to expand federal jurisdiction without congressional authority is even more unlikely. The decisions by the Second, Fifth, and Eleventh Circuits that went beyond "ordinary" protective jurisdiction theory to create "quasi-protective jurisdiction" are arguably even further beyond the scope of Article III and of Section 1331, and thus well beyond what the U.S. Supreme Court should establish absent prior statutory work by Congress.

b. The Arguments Against "Quasi-Protective Jurisdiction"

Following the reasoning of three of the district court opinions underlying the circuit split, even if the U.S. Supreme Court allows judicial creation of jurisdiction in the absence of a statute, it could nevertheless ameliorate the difficulties by holding that federal courts should either refrain from hearing the case or dismiss it altogether. That is, the Court could decide either that the district court should (i) dismiss the case based on the doctrine of forum non conveniens, or (ii) refrain from hearing the case under the political question doctrine.

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208. *Id.*
209. *Id.* at 272-73.
210. *Id.* at 273.
211. *Id.* at 270, 273 (citing Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824)).
212. *Id.* at 273.

i. Forum Non Conveniens

Forum non conveniens is, perhaps, an easy way for the Court to avoid the suggestion that congressional legislation is required to solve the current judicial debate. As defined, forum non conveniens is a common law doctrine that allows a court "to decline to exercise judicial jurisdiction if an alternative forum would be substantially more convenient or appropriate."[213] The essence of the doctrine is that even if the plaintiff brings an action in a court that has jurisdiction, the court, in its discretion, may nevertheless decline to exercise jurisdiction by dismissing the action if another forum is available.[214] In 1948, Congress enacted 28 U.S.C. § 1404(a), codifying the forum non conveniens doctrine for transfers among federal district courts.[215] Section 1404(a) does not apply, however, to dismissals in favor of foreign forums, which are governed by the common law doctrine of forum non conveniens.[216]

The U.S. Supreme Court's decision in *Piper Aircraft Co. v. Reyno* is the leading modern statement of this doctrine.[217] The events in *Piper* arose out of an airplane crash that occurred in Scotland.[218] The plaintiffs brought suit in the Superior Court of California, claiming negligence and strict liability.[219] The defendants' motion to remove the case to the Central District of California was granted, and the case was later transferred to the Middle District of Pennsylvania under Section 1404(a).[220] The defendants then moved to dismiss the action on the ground of forum non conveniens.[221] The district court granted the motions, relying on prior U.S. Supreme Court precedent directing that

> [w]hen an alternative forum would "establish . . . oppressiveness and vexation to a defendant . . . out of proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems" the court may, in the exercise of its sound discretion, dismiss the case.[222]

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213. BORN, *supra* note 49, at 289.

214. C.P. Jhong, Annotation, *Application of Common-Law Doctrine of Forum Non Conveniens in Federal Courts After Enactment of 28 U.S.C. § 1404(a) Authorizing Transfer to Another District*, 10 A.L.R. FED. 352, 352 (1972). The definition of this doctrine, which applies to both state and federal courts, raises the question of why the defendants did not assert forum non conveniens at the state court level.

215. BORN, *supra* note 49, at 296.

216. *Id.* at 297.

217. *Id.* at 299.

218. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 235 (1981).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 241.

The U.S. Supreme Court further stated in *Piper* that the doctrine of forum non conveniens is designed "to help courts avoid conducting complex exercises in comparative law."[223]

Piper is relevant to the cases involved in the circuit split because *Piper* allows district courts to give less deference to a choice of forum made by foreign plaintiffs, regardless of the citizenship of the defendants.[224] The U.S. Supreme Court noted that,

> [W]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.[225]

In *Piper*, the district court declared that the connections with Scotland were "overwhelming."[226] The U.S. Supreme Court upheld the district court decision on the ground that it "did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland."[227] Furthermore, the U.S. Supreme Court upheld the forum non conveniens dismissal "because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview," based on potential problems with impleading, and based on the district court's lack of familiarity with Scottish law.[228] Relevant to the cases underlying the current split, the U.S. Supreme Court also stated that "Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish."[229] Thus, the Court concluded that "the American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here."[230]

Similarly, the injuries alleged to have occurred in the cases discussed in this Note, with the exception of *Marcos*, took place on foreign soil.[231] And in all the cases the allegedly injured plaintiffs

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223. *Id.* at 251.
224. *Id.* at 255-56.
225. *Id.*
226. *Id.* at 242.
227. *Id.* at 257-58.
228. *Id.* at 258.
229. *Id.* at 260.
230. *Id.* at 261.
231. Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001); Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1371 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540, 541 (5th Cir. 1997). *See* Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).

were citizens of foreign states.[232] As in *Piper*, deterring U.S. defendant-manufacturers from producing defective products was the only U.S. interest involved.[233] Because this interest was not enough for jurisdiction for the district court in *Piper*, presumably it should not be enough in *Torres*, *Pacheco de Perez*, or *Patrickson*. Furthermore, in *Torres*, Peru "vigorously opposed" the litigation proceeding in a U.S. court.[234] This factor weighed heavily in the Fifth Circuit's decision to affirm federal question jurisdiction, an affirmation that supported the district court's dismissal based on forum non conveniens.[235] Arguably, then, even if the U.S. Supreme Court decided that federal question jurisdiction should attach to all cases sufficiently affecting U.S. foreign relations, federal courts would still have the freedom to dismiss the lawsuit on the ground of forum non conveniens, and thereby avoid the need for congressional legislation to resolve this jurisdictional issue.

ii. Political Question Doctrine

The U.S. Supreme Court has held that despite the satisfaction of all jurisdictional and other justiciability requirements, the federal courts should not rule on certain allegations of unconstitutional government conduct.[236] According to the seminal case on this point, *Baker v. Carr*, a controversy is nonjusticiable, meaning it involves a political question, where there is a

> textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[237]

In particular with regard to cases involving foreign relations, Justice Brennan noted:

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232. *Patrickson*, 251 F.3d at 798; *Pacheco de Perez*, 139 F.3d at 1371; *Torres*, 113 F.3d at 541.

233. BORN, *supra* note 49, at 305. *See Patrickson*, 251 F.3d 795; *Pacheco de Perez*, 139 F.3d 1368; *Torres*, 113 F.3d 540.

234. *Torres*, 113 F.3d at 543.

235. *Id.* at 541, 543.

236. CHEMERINSKY, *supra* note 12, at 143. The scope of the political question doctrine and whether it is either constitutional or prudential, or both, is beyond the scope of this Note.

237. Baker v. Carr, 369 U.S. 186, 217 (1962).

> Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views.[238]

The non-justiciability of a political question is primarily a function of the separation of powers: the Court, in deciding that a particular issue is textually committed to another branch or is impossible to decide without an initial policy determination, is protecting the function of the other two branches of government.[239] In other words, the political question doctrine refers to subject matter that the Court deems inappropriate for judicial review.[240] Resolution of the constitutional question is then left to the political process.[241] Because "foreign relations are political relations conducted by the political branches of the federal government,"[242] perhaps the Court should decide that foreign relations is textually committed to the political branches, thus creating a non-justiciable political question.[243] In a case pre-dating *Baker*, the Court seemed to reach this conclusion:

> The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—"the political"—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.[244]

The Court has also stated, however, that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[245]

Based on the Court's own language, then, application of the political question doctrine to foreign policy issues is not a clearly defined area of jurisprudence.[246] Some scholars contend "that it is

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238. *Id.* at 211-12.
239. *Id.* at 210-11.
240. CHEMERINSKY, *supra* note 12, at 144.
241. *Id.*
242. FOREIGN AFFAIRS, *supra* note 39, at 131.
243. Goldwater v. Carter, 444 U.S. 996, 1004 (1979). *See generally Separation of Powers*, *supra* note 20, at 1402 (arguing that the political question doctrine could be asserted in cases affecting U.S. foreign relations, but lack of consistency in the application of the doctrine has led to "jurisprudential chaos"). *But c.f.*, Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976) (arguing against courts finding issues concerning foreign policy to be a political question).
244. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918). *But cf.*, FOREIGN AFFAIRS, *supra* note 39, at 145 (asserting that there are no foreign affairs cases "in which the Supreme Court ordained or approved such judicial abstention from constitutional review").
245. Baker v. Carr, 369 U.S. 186, 211-12 (1962).
246. *Separation of Powers*, *supra* note 20, at 1401-04.

appropriate for the judiciary to stay out of foreign policy because of the greater knowledge and expertise of the President and Congress in this area," while critics of the doctrine support the position that constitutional questions concerning foreign affairs issues should be adjudicated.[247] The dispute over the proper role for the political question doctrine in foreign relations cases arises for two reasons: (1) the term "foreign relations" is hard to define, and (2) textually Congress has the power to proscribe jurisdictional requirements on the lower federal courts.[248] Hence, perhaps cases like the ones described in this Note present appropriate circumstances for the Court to assert the political question doctrine, and thus force the political branches to resolve the current jurisdictional debate.

2. No Federal Jurisdiction

The U.S. Supreme Court could avoid federal court jurisdiction altogether in the kinds of cases in which "foreign relations" are involved in at least two ways: (a) by analogizing to the issue of "statehood," or (b) by agreeing with the Ninth Circuit result and strictly reading Section 1331.

a. Analogy to "Statehood"

Territories not recognized as sovereign, independent states by the Executive Branch, or persons alleging they are citizens of those territories, cannot participate in actions in U.S. federal courts.[249] The Executive Branch has sole discretion to determine which states are entitled to sue, and courts are bound by the status accorded a territory by the executive.[250] For that reason, permitting these entities or persons to claim diversity jurisdiction would contradict an Executive Branch policy determination.[251] In a recent case dealing with the status of Palestine, counsel for the defendants solicited the opinion of the U.S. State Department as to whether the United States recognized Palestine as a sovereign state.[252] The U.S. State Department responded that the United States did not so recognize

247. CHEMERINSKY, *supra* note 12, at 158-59.

248. U.S. CONST. art. III, § 2, cl. 2; U.S. CONST. art. I, § 8, cl. 9; BORN, *supra* note 49, at 10-11.

249. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 205(a) (1987).

250. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 320 (1978); Windert Watch Co. v. Remex Elecs. Ltd., 468 F. Supp. 1242, 1244 (S.D.N.Y. 1979).

251. *Pfizer*, 434 U.S. at 320; Klausner v. Levy, 83 F. Supp. 599, 600 (E.D. Va. 1949).

252. Abu-Zeineh v. Fed. Labs. Inc., 975 F. Supp. 775, 775-77 (W.D. Pa. 1994).

Palestine, and the court then dismissed the claims filed by plaintiffs asserting they were citizens of Palestine.[253]

A similar process could be followed when a federal court is unsure of whether federal question jurisdiction should be granted in a particular case. The judge could request that the Executive Branch, though perhaps not limited to an official from the U.S. State Department, assist in the determination of whether sufficient foreign policy considerations are raised to confer federal question jurisdiction. If the U.S. Supreme Court decision was worded broadly, the court could send its inquiry to the Executive Branch in general, and would then be bound by the determination made by any official in the branch who is authorized by the President to answer the judicial inquiry.

Allowing the Executive Branch to settle the federal question problem for the courts raises difficulties, however. For example, deciding whether litigation sufficiently affects "foreign relations," or has any effect at all, is not as objective as deciding whether the United States recognizes a particular territory as an independent, sovereign state. Four criteria exist for deciding whether a territory is an independent state: population, territory, government, and the capacity to enter into international relations.[254] A similar set of criteria for defining "foreign relations" does not exist, thus permitting much more subjective impressions and values to infect the efforts to add substance to the "foreign relations" inquiry.

b. Strictly Reading Section 1331

Perhaps the easiest way to deal with the current judicial debate is for the U.S. Supreme Court to read Section 1331 as it is written. Because the language of the statute does not mention the effect on "foreign relations" as a basis for federal jurisdiction,[255] the Court could conclude that the Ninth Circuit got it right, period. Such a decision, depending on its precise wording, would not necessarily preclude legislative action, but could potentially signal that the Court would question, based on the language of Article III,[256] an attempt to

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253. *Id.* at 777. The letter from the U.S. State Department was written by Conrad K. Harper on November 21, 1994. *Id.* Mr. Harper's title at the U.S. State Department is not mentioned in the court's opinion. *See id.*

254. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987).

255. U.S. CONST. art. III, § 1.

256. In *Verlinden B.V. v. Central Bank of Nigeria*, the Court resolved the issue of "whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns where the rule of decision to be applied may be provided by state law." *Verlinden*, 461 U.S. 480, 492 (1983). The Court held that Congress had not

expand the statute to include this amorphous concept of "foreign relations."[257] In addition, the Court is loath to interpret a statute in a manner that could raise difficult constitutional problems.[258] By deciding that any expansion of the federal question statute may create complicated federalism or separation of powers issues, the Court could resolve the current judicial split with a narrow reading of the existing statutory language. Such a narrow reading would prohibit jurisdiction based on any theory of "protecting" an important federal interest until Congress expanded the statute to combat the Court's narrow reading.

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exceeded its authority by providing for federal jurisdiction for claims brought under the Foreign Sovereign Immunities Act. *Id.* at 492-93. In reaching this conclusion, the Court stated in relevant part,

> Although the language of § 1331 parallels that of the "Arising Under" Clause of Art. III, this Court never has held that statutory "arising under" jurisdiction is identical to Art. III "arising under" jurisdiction. Quite the contrary is true. Section 1331, the general federal-question statute, although broadly phrased, "has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the statute's function as a provision in the mosaic of federal judiciary legislation."

Id. at 494-95 (quoting Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 379 (1959)).

Whether this precedent could serve as a foundation for congressional expansion of Section 1331 to include federal question jurisdiction by inserting amorphous and ambiguous language, such as the impact on U.S. "foreign relations," is a more difficult question. The issue in *Verlinden* was whether foreign plaintiffs could sue foreign sovereigns solely in federal courts based on the Foreign Sovereign Immunities Act. *Id.* Other language in this decision suggests that Congress would have authority to expand Section 1331, especially if the impact on U.S. economic policy were a consideration:

> By reason of its authority over foreign commerce and foreign relations, Congress has the undisputed power to decide, as a matter of federal law. Whether and under what circumstances foreign nations should be amenable to suit in the United States. Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident.

Id. at 493.

257. U.S. CONST. art. III, § 2, cl. 1.

258. *See, e.g.*, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001) (holding that "'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress'" (quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988))).

B. *Legislative Resolution: Implementing the Ninth Circuit Result and Reasoning*

The U.S. Supreme Court could agree with the Ninth Circuit opinion that federal question jurisdiction is narrow, does not include the "foreign relations" inquiry by itself, and, therefore, needs legislation if it is going to change.[259] This result is related to the result the U.S. Supreme Court would reach if it adopted a policy analogous to how courts currently deal with "statehood": on issues of what constitutes "foreign relations," the Court could pass responsibility to Congress.[260]

Congressional legislation attempting to resolve the current judicial split could be drafted at the behest of the U.S. Supreme Court or on Congress' own initiative. Section 1331 would be the logical starting point. An amendment to this section must consider the language of Article III,[261] and its foundation would be a "true" protective jurisdiction theory derived from implied constitutional authority delegating foreign relations and foreign affairs powers to the federal branches of government.[262] With this approach, Congress could potentially expand Section 1331 to include federal jurisdiction when litigation raises sufficient foreign policy implications because those interests are in need of protection.

The next challenge, of course, would then be defining in this legislation what any of these three key elements—"foreign policy," "implications," and when those implications are "sufficient"—might mean, and, finally, determining whether such legislation would even be constitutional. Concerning clarification, if Congress decides to expand 28 U.S.C. § 1331, it could do so in at least two ways—one requiring judicial deference to Executive Branch determinations of when foreign policy considerations are sufficient enough to confer federal question jurisdiction, and the other requiring no Executive Branch deference and instead attempting to define "foreign policy" and when it is "sufficiently" implicated in litigation. The latter method seems the most difficult and the least likely to be considered constitutional, as both political branches of government have foreign affairs power, not just the legislature.[263] The Executive Branch may

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259. Patrickson v. Dole Food Co., 251 F.3d 795, 804 (9th Cir. 2001).

260. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 320 (1978); Klausner v. Levy, 83 F. Supp. 599, 600 (E.D. Va. 1949).

261. *Pfizer*, 434 U.S. at 320; *Klausner*, 83 F. Supp. at 600; U.S. CONST. art. III, § 2, cl. 1; BORN, *supra* note 49, at 10-11.

262. *See generally* BORN, *supra* note 49, at 8-10 (discussing institutional limitations on all three branches of government).

263. *Id.* at 8-9.

not be satisfied with the Legislative Branch's definition of "foreign relations" or when it is "sufficiently" affected to confer federal question jurisdiction. Indeed, defining "foreign relations" may itself prove illusory. The best method of expanding Section 1331 would then most likely be to require a court to ask the Executive Branch whether sufficient foreign policy considerations are raised, just as the courts currently look to the U.S. State Department on whether a particular territory is considered by the United States to be a sovereign state.[264]

Amending Section 1331 to allow for judicial deference to the executive on issues of foreign policy is itself complicated.[265] Who from the Executive Branch should be authorized to determine that U.S. foreign relations are sufficiently implicated as to require federal question jurisdiction? Should it have to be the President himself, or could someone designated in the U.S. State Department also have the authority? The legislation should probably be drafted broadly, allowing the court to send its inquiry to the Executive Branch in general and then be bound by the determination made by any official in the Branch who is authorized by the President to answer the judicial inquiry. If, on the other hand, Congress attempts to dictate who in the Executive Branch should be so authorized, the Executive Branch would likely view such legislation as violating the separation of powers doctrine.

Similar separation of powers concerns would likely arise if the legislature attempts to resolve the jurisdictional issue by itself without any help from the Executive Branch. Expanding 28 U.S.C. § 1331 to allow for federal question jurisdiction any time sufficient foreign policy implications are raised without involving the deference to the Executive Branch would require Congress or the courts to define "foreign policy" and also define when "sufficient" foreign policy implications may arise from a particular case such that federal

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264. *See Pfizer*, 434 U.S. at 320; *Klausner*, 83 F. Supp. at 600.

265. It could be argued that this proposed amendment requiring federal judges to take time out of the litigation schedule to ask for an Executive Branch determination of whether U.S. foreign relations may be impacted will slow down the already tedious litigation process. This argument should fail on at least three grounds. First, this argument is without merit because the only way to constitutionally expand federal question jurisdiction is to amend Section 1331. And because both the Executive and Legislative Branches have foreign affairs power, both the Executive and the Judiciary would likely frown upon a statute denying any influence to the Executive Branch. Second, this argument should fail because the Judicial Branch already defers to the executive Branch on issues such as statehood, which is directly related to the Executive foreign affairs power. In an era of instant communication through e-mail it hardly seems likely that a query to the Executive Branch should halt the litigation process any more than other trial issues already do. Third, this argument should fail because federal courts already go through a similar process when asking state courts to certify questions of state law.

question jurisdiction should be granted. Defining "foreign policy" is itself a difficult enough task, but combining it with the job of defining the other two elements would probably be viewed as stepping on the toes of the Executive, since the U.S. Constitution designates the power to conduct foreign affairs to both the Legislative and Executive Branches.[266]

If Congress should attempt to amend Section 1331, what would such an attempt look like? One possibility might be this:

> The district courts shall have original federal question jurisdiction of all civil actions (1) arising under the Constitution, laws, or treaties of the United States; or (2) that sufficiently implicate U.S. foreign relations with one or more foreign nations. When one or more litigants allege that a factor (2) case exists, or when a judge believes that such a case exists, the federal judge who is asked to hear or to remove the case should defer to an Executive Branch determination, given by any authorized Executive Branch official, of whether U.S. foreign relations are or would be "sufficiently" implicated by the result of the litigation as to confer original federal question jurisdiction.[267]

On its face, the text of this proposed amendment might seem simplistic or overly broad. Because courts are charged with interpreting statutes, however, the courts could read the language more narrowly and could, for example, require litigants alleging that a factor (2) case exists to prove specific facts with particularity. Based on the text of the amendment, however, the judge could ask for an Executive Branch policy determination without waiting for one of the litigants to assert that federal question jurisdiction should be present. In this regard, perhaps creative litigants will have less influence on the direction of the law than will intuitive judges.

Concerning constitutionality, however, any attempt by Congress to expand federal question jurisdiction in Section 1331 by calling for deference to the Executive Branch could be viewed as futile because it is beyond the Article III definition of federal question.[268] This view is based on the argument that the only federal law that creates "arising under" jurisdiction is the law that created the cause of action: "To say that a case arises under federal law whenever a federal statute gives jurisdiction is to destroy all limitations on federal jurisdiction."[269]

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266. BORN, *supra* note 49, at 8-9; FOREIGN AFFAIRS, *supra* note 39, at 131-34.

267. An amendment to Section 1331 might also take into account the factors considered by the Eleventh Circuit in *Pacheco de Perez* listed in Part III.C. Considering, for example, where the injuries occurred and whether the foreign government asserted an opinion on U.S. jurisdiction would be helpful factors in construing whether "foreign policy" is implicated and whether those implications are "sufficient."

268. *See, e.g.*, Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001).

269. CHEMERINSKY, *supra* note 12, at 273 (quoting DAVID P. CURRIE, FEDERAL JURISDICTION IN A NUTSHELL 103 (3d ed. 1990)).

Other scholars similarly have argued that "Congress cannot expand federal jurisdiction beyond the bounds of the Constitution and that allowing protective jurisdiction would give Congress limitless power to enlarge federal subject matter jurisdiction."[270] Furthermore, if Section 1331 was intended to create clear delimitations on federal jurisdiction, expanding the statute to allow for "foreign policy implications" deemed sufficient by the Executive Branch to confer federal jurisdiction would potentially render Section 1331 even more ambiguous and difficult to interpret than it was prior to the amendment. This, of course, would lead to even more case law than already exists on the nature of defining federal question jurisdiction.

Should the U.S. Supreme Court choose to adopt the view that a "foreign policy" expansion of Section 1331 is unconstitutional, it will have agreed with the Ninth Circuit result that foreign relations does not necessarily impart federal question jurisdiction, but will have disagreed with that circuit's reasoning that federal legislation can solve the current debate. A potential counter-argument to this position would be to argue that the U.S. Constitution is a living document that should be flexibly interpreted with the changing times.[271] Because the Framers perhaps did not contemplate litigation with foreign relations issues, an amendment to Section 1331 could conceivably pass constitutional muster. On the other hand, perhaps the Framers did contemplate such litigation and intentionally limited Article III courts, and this limit should forever be respected.[272]

V. CONCLUSION

The relationship between "federal questions" and "foreign relations" is a challenging issue not easily resolved. The current circuit split aptly illustrates the judicial struggle to merge these two amorphous and ambiguous phrases. The debate is further complicated by constitutional history involving a more reserved role for the federal judiciary in cases relating to U.S. foreign relations. As the law currently stands, whether the fictitious ABC Corporation mentioned in Part I will succeed in removing its case to the federal district court of State A hinges on which court of appeals decision is binding on the lower federal court. This debate needs to be resolved.

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270. *Id.*

271. *See e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934).

272. *See* BORN, *supra* note 49, at 10-11 ("It is not coincidental that Article III contains several grants of federal subject matter jurisdiction specifically applicable in international contexts."). While this does not necessarily mean that Section 1331 should not be expanded, this language could support such an argument.

As this Note illustrates, the current dispute among the U.S. courts of appeal has no single right answer or easy resolution. One resolution involves the theory of protective jurisdiction, discussed in Parts II and III, that at least involves one of the political branches of government in establishing jurisdiction. Another, proposed by this Note, is an amendment to Section 1331 that allows for judicial deference to the Executive Branch when litigation raises sufficient foreign policy concerns. This solution, although not without difficulty, involves all three branches of government. And it is the only solution that allows both Congress and the Executive, the two branches of government charged with foreign affairs power, to participate in the decision to grant jurisdiction.

*Erin Elizabeth Terrell**

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* J.D. Candidate, May 2003, Vanderbilt University Law School; B.A., Emory University, 2000. I would like to thank my family and friends for their continued love and support throughout the writing of this Note and throughout my law school career. I also wish to thank Professors Suzanna Sherry and Hal Maier for their valuable assistance. Most importantly, I would like to give special thanks to my husband for always encouraging me and to my dad for always being willing to lend his writing expertise.