Vanderbilt Journal of Transnational Law

Volume 16
Issue 4 *Fall 1983*

Article 4

1983

Back to Square One: Estoppel Against the Government after Immigration and Naturalization Service v. Miranda

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RECENT DEVELOPMENTS

BACK TO SQUARE ONE: ESTOPPEL AGAINST THE GOVERNMENT AFTER IMMIGRATION AND NATURALIZATION SERVICE v. MIRANDA

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I. INTRODUCTION

In this nation of immigrants, few matters of public policy arouse more intense or divisive public debate than the subject of change in our immigration and naturalization laws. Presently, our system of immigration laws, which is grounded upon antiquated procedure,[1] is being tested by new problems. For example, the increase in political asylum cases and the influx of aliens from the third world have posed new challenges for these outdated procedures.[2] The 97th Congress considered adopting the Simpson-Mazzoli bill in 1982 to alleviate the problems.[3]

The Senate passed the Simpson-Mazzoli bill on August 17, 1982,[4] but the House did not act on the bill before the close of the second session.[5] Had Congress enacted the Simpson-Mazzoli bill, the legislation would have instituted a new system for determining the legality of an alien's presence in the United States and for nondiscriminatory verification of employment eligibility.[6] Because the bill placed responsibility for these functions on the Immigration and Naturalization Service (INS) and other agencies within the executive branch,[7] government officials would be charged with

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1. *See* Helbrush, *INS Violations of its Own Regulations: Relief for the Alien*, 12 GOLDEN GATE U.L. REV. 217, 225 (1982).

2. For a discussion of some of the difficulties facing the Immigration and Naturalization Service (INS) in its efforts to enforce the statute, see Galvez v. Howerton, 503 F. Supp. 35, 39 (C.D. Cal. 1980).

3. The bill was originally introduced by Senator Simpson and Representative Mazzoli on March 17, 1982, as S. 2222, 97th Cong., 2d Sess. (1982), and the House counterpart as H.R. 5872, 97th Cong., 2d Sess. (1982). The House version was later renumbered H.R. 6514 after being reported out by the House Subcommittee on Immigration, Refugees, and International Law.

4. S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. 10,609-19 (daily ed. Aug. 17, 1982).

5. 2 CONG. INDEX (CCH) 34,527 (Jan. 20, 1983).

6. *See* Simpson, *Foreword*, 20 SAN DIEGO L. REV. 1, 3-4 (1982).

7. H.R. 5872, 97th Cong., 2d Sess. §§ 101-122, *reprinted in Immigration Reform and Control Act of 1982: Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*

deciding when an alien was privileged to secure employment or to apply for United States citizenship. Errors by those government officials could have devastating consequences for aliens.

Aliens injured by these errors could sue the government officials for redress. Also, aliens benefitted by justified reliance on an official's error could sue to prevent correction of the error. In both instances the theory of equitable estoppel would be a logical basis for recovery.[8] Although courts readily may determine the applicability of estoppel in a suit between private parties, the law of estoppel against the government is unsettled. This Recent Development will analyze the use of equitable estoppel against the government in immigration suits, emphasizing the Supreme Court's most recent decision in that area,[9] *Immigration and Naturalization Service v. Miranda*, 103 S. Ct. 281 (1982).

II. Legal Background

Many courts have wrestled with the issues of whether and to what extent the government may be estopped.[10] Unfortunately, the Supreme Court's treatment of the subject has been haphazard.[11]

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and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 6-25, 51 (1982).

8. "Equitable estoppel is a judicial remedy by which a party to a legal controversy is precluded, because of some improper action on his part, from asserting a claim or defense, regardless of its objective validity." Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 552 (1979). For an excellent discussion of when estoppel might be used against the federal government, see Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 Colum. L. Rev. 374 (1953). *See also* Santiago v. INS, 526 F.2d 488, 493-96 (9th Cir. 1975) (Choy, J., dissenting), *cert. denied*, 425 U.S. 971 (1976); Comment, *Never Trust a Bureaucrat: Estoppel Against the Government*, 42 S. Cal. L. Rev. 391, 391 (1969) (pressing the case for allowing estoppel to be invoked more easily against the government).

9. It is beyond the scope of this Recent Development to treat the full development of this doctrine in the lower courts. For a good discussion of the more important federal court cases, see Note, *supra* note 8, at 552-58.

10. *See* Comment, *supra* note 8, at 391. For a discussion of case law addressing the issue of estoppel in immigration and naturalization matters, see Asimow, *Estoppel Against the Government: The Immigration and Naturalization Service*, 2 Chicano L. Rev. 4, 24 (1975).

11. *See, e.g.*, Gordon, *Finality of Immigration and Nationality Determinations—Can the Government Be Estopped?*, 31 U. Chi. L. Rev. 433 (1964); Note, *Estopping the Government in Immigration Cases: The Immigration Estoppel Light Remains Cautionary Yellow*, 56 Notre Dame Law. 731 (1981).

A. The Traditional Rule—No Estoppel Against the Government

1. *The Rationale*

From the beginning of the Republic, the Supreme Court refused to apply estoppel against the government.[12] The Court feared that using estoppel against the government would result in (1) inappropriate interference with governmental functions, (2) collusion between government officials and private parties, (3) stagnant governmental policy, and (4) legislative activity by governmental agencies.[13] The Court was most concerned with the potential for draining the public treasury[14] and for compromising the separation of powers in the national government.[15] The latter concern would arise, for example, if an agency of the executive branch mistakenly granted an alien a benefit contrary to the express legislative intent of Congress, and the judicial branch then estopped that agency from correcting the error.[16]

2. *The Early Cases*

The Court drew upon the doctrine of sovereign immunity in its first decisions concerning estoppel of the government.[17] As use of the sovereign immunity doctrine waned,[18] the Court applied the principles of agency law[19] to deny estoppel on the ground that government officials act outside the bounds of their authority when they make mistakes.[20] The two most significant cases in this

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12. For an excellent discussion of the early Supreme Court treatment of equitable estoppel against the government, see Asimow, *supra* note 10, at 5-10. *See also* Note, *supra* note 8, at 552-55.

13. Comment, *supra* note 8, at 406.

14. *See infra* text accompanying notes 44, 151-52, & 157.

15. Note, *supra* note 8, at 565.

16. *See id.*

17. *See generally* Asimow, *supra* note 10, at 7-10.

18. *See* Note, *supra* note 8, at 554.

19. *See* Asimow, *supra* note 10, at 5-10.

20. As one commentator notes: "[I]t is axiomatic that a government official has no authority to give unlawful or incorrect advice, make misrepresentations, or other misconduct." Comment, *Estoppel and Government*, 14 GONZ. L. REV. 597, 606 (1979). *See also* Asimow, *supra* note 10, at 11 (government contract cases have not conferred authority to make errors concerning statutes or regulations); Parcel, *Making the Government Fight Fairly: Estopping the United States*, 27 ROCKY MTN. MIN. L. INST. 41, 54 (1982).

area are *Lee v. Munroe*[21] and *Utah Power & Light Co. v. United States*.[22]

a. The government is not bound by actions of its agents outside the scope of their authority

The plaintiff in *Lee v. Munroe*, an 1813 case, sued the Public Commissioners of Washington, D.C., seeking to deduct a sum equal to a debt owed him by a third party from a lien judgment he owed the United States. The plaintiff lent money to that third party in reliance upon misinformation given him by the Public Commissioners.[23] Because the defendants gratuitously gave the information to the plaintiff,[24] and because the communication was outside the scope of the Commissioners' official duties, the Court would not allow the United States to suffer from the error.[25] Because a government lien on land was at issue, the Supreme Court found that the use of estoppel might establish a dangerous precedent whereby valuable tracts of public lands could be alienated without the payment of debts owed to the public treasury.[26] Moreover, the Court was concerned about the possibility of collusion inherent in a rule that allows an alleged mistake to be the grounds for recovery against the government.[27] Thus, in *Lee v. Munroe* the Supreme Court initiated the rule that flatly denies the use of government estoppel.[28]

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21. 11 U.S. (7 Cranch) 366 (1813).

22. 243 U.S. 389 (1917).

23. 11 U.S. at 366.

24. *Id.* at 369.

25. *Id.*

26. *Id.*

27. *Id.*

28. Language in the syllabus to the Court's opinion suggests that estoppel may be applied against the government. *Id.* at 366 ("the United States are not bound by the declaration of their agent, founded upon a mistake of fact, unless it clearly appear[s] that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such declaration"). Syllabi, however, are not part of the opinion, and thus the language has no legal effect.

b. The government may not be estopped by actions that the law does not sanction or permit

More than a century after deciding *Lee v. Munroe*, the Supreme Court decided *Utah Power & Light*.[29] The defendants in that case operated electrical power generating facilities in Utah on land adjacent to federal forest reservations. Defendants contended that their predecessors and agents or officers of the United States government came to an understanding when the reservations were created that the presence of the reservations would not inhibit the construction and operation of the generating facilities.[30] The government later sued to enjoin defendants' occupancy and use of the federal lands on the grounds that the defendants had not secured the statutorily required grant or license to use the land.[31] Defendants countered that the government should be estopped from asserting this complaint because of the agreement made by the government's agents and because the government had failed to object to the usage.[32] The Court dismissed the estoppel argument with a single sentence: "Of this it is enough to say that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit."[33] The Court also rejected defendants' argument that the failure of government agents to object to defendants' use of the land could give rise to estoppel. According to the Court, the government is entitled to enforce a public right or protect a public interest, regardless of actions taken by government

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29. 243 U.S. 389 (1917).

30. *Id.* at 408.

31. *Id.* at 405-09.

32. 243 U.S. at 396. The power company also asserted that estoppel was appropriate because the government's interest in the land was proprietary. *Id.*

Counsel for the United States in *Utah Power* argued that the government "may be deprived of rights or interests in land under the principles of equitable estoppel." *Id.* In support of its proposition, counsel cited the following cases: Broder v. Water Co., 101 U.S. 274 (1879); Jennison v. Kirk, 98 U.S. 453 (1878). *Utah Power & Light*, 243 U.S. at 396. Counsel for plaintiff also advanced authority for the proposition that the government "is with respect to its property or proprietary interests subject to the principles of equitable estoppel in the same manner and under the same circumstances as a private individual or corporation." *Id.*

33. 243 U.S. at 408-09.

agents.[34]

3. *Federal Crop Insurance Corp. v. Merrill*[35]

The Federal Crop Insurance Corporation,[36] created to insure wheat farmers against unavoidable loss in yields,[37] published certain regulations in the Federal Register on February 7, 1945.[38] Those regulations made certain classes of wheat ineligible for insurance coverage.[39] Respondent Merrill applied for crop insurance on March 26, 1945. He was informed that his entire crop was insurable when, in fact, 400 of his 460 acres were ineligble for coverage under the new regulations. The Federal Crop Insurance Corporation mistakenly accepted Merrill's application for insurance on May 28, 1945, almost two months after the new regulations were promulgated and published. In July 1945, Merrill's crop was largely destroyed by drought. Upon notification of the loss, the Corporation discovered the mistake and refused to compensate Merrill for the loss.[40] Merrill took the issue before a jury and won. The Idaho Supreme Court affirmed the verdict.[41] On appeal to the United States Supreme Court the case was reversed.[42]

The Supreme Court affirmed the scope of authority rule found in *Lee v. Munroe* and *Utah Power & Light*,[43] reiterating the concern that estoppel would imperil the public fisc.[44] The Court also expressly rejected any distinction, for purposes of estoppel, between the sovereign and proprietary activities of the federal government.[45] Justice Jackson filed a vigorous dissent in the split decision,[46] attacking the presumption that all citizens know the

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34. *Id.* at 409.

35. 332 U.S. 380 (1947).

36. Federal Crop Insurance Act, ch. 70, 52 Stat. 72 (1938) (codified as amended at 7 U.S.C. §§ 1501-1520 (1982)).

37. 332 U.S. at 381-82.

38. 10 Fed. Reg. 1586.

39. *Id.*

40. 332 U.S. at 382.

41. 67 Idaho 196, 174 P.2d 834 (1946).

42. 332 U.S. at 386.

43. *See id.* at 384.

44. *See id.* at 385.

45. *See id.* at 383-84. Nevertheless, the distinction has been used by many courts when analyzing Selective Service and tax cases. Asimow, *supra* note 10, at 16-23.

46. *See, e.g.*, 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20:3, at 7 (2d ed. 1983) ("Something is wrong when the citizen can recover for a dented fender

substance of federal regulations.

Both the view that there is no difference between sovereign and proprietary governmental activities and the view that estoppel threatens the public fisc have been strongly criticized,[47] rendering the precedential value of the case doubtful.[48] Critics have called for a reconsideration of the principles underlying the government estoppel rules.[49] One court complained that it was "without the power to invoke principles of equity" in actions against the government.[50] Professor Davis articulated the courts' dilemma: "Our main function is to do justice, but we don't have any authority to be fair."[51] This increasing judicial pressure from the lower courts stemmed largely from the harshness of the result in *Merrill* and threatened to shatter the Supreme Court's insistence on governmental immunity from the application of equitable estoppel. Nevertheless, *Merrill* is the Supreme Court decision cited most often for the proposition that the government may not be estopped.[52]

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caused by a postal employee at the wheel of a government truck and one cannot when he is booby-trapped by an employee of Federal Crop Insurance") (quoting McFarlin v. Federal Crop Ins. Corp., 438 F.2d 1237 (9th Cir. 1971)); Comment, *supra* note 8, at 394 (citing Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962)).

47. "[T]he Supreme Court stated no reason for the decision [in *Merrill*], other than that 'It is too late in the day to urge that the Government is just another private litigant,' and other than that 'Men must turn square corners when they deal with the Government.' " 4 K. DAVIS, *supra* note 46, § 20:3, at 7.

48. Comment, *supra* note 20, at 601. "The lower courts commonly regard the Merrill case as wrong, even though it is authoritative." 4 K. DAVIS, *supra* note 46, § 20:3, at 7. Because "the idea is an appealing one that estoppel law should apply to the government when it engages in a business of the kind that is ordinarily conducted by private corporations," and because the Court completely rejected that position, *Merrill* is "an especially *strong* authority against estopping the government." *Id.*, § 20:3, at 6 (emphasis in original).

49. "Criticism of the traditional approaches to estoppel against the government has been voluminous." Case Comment, *Emergence of An Equitable Doctrine of Estoppel Against the Government—The Oil Shale Cases*, 46 U. COLO. L. REV. 433, 445 (1975). *See also* Asimow, *supra* note 10, at 37-39; Case Comment, *supra*, at 445 n.62; Note, *supra* note 8, at 559.

50. Kalter v. United States, 130 F. Supp. 79, 82 (E.D.N.Y. 1955).

51. Kenneth C. Davis, who is the John P. Wilson Professor Emeritus at the University of Chicago, is the author of K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1983).

52. K. DAVIS, ADMINISTRATIVE LAW § 17.04 (1st ed. 1959).

B. *Moser v. United States*—The Government Is "Estopped"

The strict rule against government estoppel began to erode[53] in 1950. In *Podea v. Acheson*,[54] the Second Circuit held that misinformation obtained from government agents, which caused the plaintiff to lose his nationality, negated the state of mind necessary for expatriation.[55] Although the court did not expressly hold the government estopped, the result conforms with an estoppel analysis. After a century of Supreme Court decisions espousing the strong rule against estoppel, *Podea* was "a rather surprising departure."[56] One year later an even more startling development occurred.

In 1951 the Supreme Court decided *Moser v. United States*,[57] which presented an unusual claim for estoppel. In 1938 Paul Moser, a Swiss national residing in the United States, filed a declaration of intent to become a United States citizen. In 1940 he registered under the Selective Service Act and, as a dependent, was classified III-A.[58] At that time, the Treaty of 1850[59] between the United States and Switzerland provided an exemption from military duty for nationals of one country residing in the other.[60] Accordingly, the United States Selective Service and Training Act[61] gave foreign nationals the right to claim exemption from service in the United States military, but the Act disqualified those claiming the exemption from later becoming United States citizens. The Swiss Government objected to the statute because it believed that the statute was inconsistent with the treaty. To mollify the Swiss, the United States Department of State altered

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53. The development of estoppel against the government in the Selective Service and tax cases is not treated here. *See supra* note 45. The Supreme Court has not addressed the issue in such cases.

54. 179 F.2d 306 (2d Cir. 1950).

55. *Id.* at 309. *Cf.* United States v. Fox Lake State Bank, 366 F.2d 962, 965 (7th Cir. 1966) (analogous case involving the Federal False Claims Act).

56. Asimow, *supra* note 10, at 26.

57. 341 U.S. 41 (1951).

58. *Id.* at 42.

59. Convention with the Swiss Confederation, Nov. 25, 1850, United States-Switzerland, 11 Stat. 587, T.S. No. 353.

60. Article II of the treaty provides that: "The citizens of one of the two countries, residing or established in the other, shall be free from personal military service . . . ." *Id.*, art. II, 11 Stat. 587, 589.

61. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (1940), *amended by* Act of Dec. 19, 1941, ch. 598, 55 Stat. 844.

the military service exemption form. On the new form the State Department deleted the express notice that the applicant was disqualifying himself from citizenship[62] and instead set out the text of the governing statute in a footnote.

In January 1944, Moser was reclassified I-A, "available for service."[63] He subsequently contacted the Swiss Legation for assistance in securing a deferment pursuant to the treaty. The Legation sent him the revised forms and a letter incorrectly asking him to "[p]lease note that, through filing of DSS Form 301, revised, you will not waive your right to apply for American citizenship papers. The final decision regarding your naturalization will remain solely with the competent Naturalization Courts."[64] Moser relied upon this statement, signed the revised DSS form in February 1944, and was reclassified IV-C.[65] In July 1949, he was admitted to citizenship by a United States district court,[66] but because of his military exemption the Second Circuit reversed his admission.[67]

The Supreme Court granted certiorari[68] and reversed the court of appeals,[69] holding that "elementary fairness" required nothing less than an intelligent waiver of Moser's rights to citizenship. Because of the "misleading circumstances" of the case, Moser did not have the opportunity "to make an intelligent election between the diametrically opposed courses required as a matter of strict law."[70] The Court thus implicitly adopted the *Podea* holding and incorporated it into the waiver theory upon which it grounded its holding.[71] Although this result appears to estop the government,[72]

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62. "Above the signature line on this form there appeared the statement, in obvious reference to the proviso of § 3(a): 'I understand that the making of this application to be relieved from such liability will debar me from becoming a citizen of the United States.' " 341 U.S. at 44.

63. *Id.* at 42.

64. *Id.* at 44.

65. *Id.* at 45.

66. *In re* Petition of Moser, 85 F. Supp. 683 (E.D.N.Y. 1949).

67. 182 F.2d 734 (2d Cir. 1950).

68. 340 U.S. 910 (1951).

69. 341 U.S. at 47.

70. *Id.*

71. *See* Note, *supra* note 11, at 732; *see also supra* text accompanying notes 51-56.

72. *See* R.H. Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934) (Cardozo, J.); Comment, *supra* note 20, at 603; Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?*, 56 ST. JOHN'S

Justice Minton denied that this decision either estopped the United States Government or recognized the ability of the Swiss Legation to bind the United States Government.[73]

The *Moser* decision is surprising for three reasons. First, it is a radical departure from *Federal Crop Insurance Corp. v. Merrill*, which was decided only four years earlier. The Court in *Merrill* refused relief when the government acted in a proprietary capacity, but the Court in *Moser* applied an estoppel-like remedy when the government acted in a sovereign capacity.[74] Second, Moser's claim for binding the government was based upon weak facts. Moser signed a form which explicitly stated the statutory provision that denied Moser the privilege of United States citizenship.[75] Furthermore, Moser relied on the advice of Swiss officials. He never pursued the issue with the United States Government.[76] Nevertheless, the Court unanimously held that he had not lost his nationality by expatriation.[77] Finally, despite Justice Minton's statement that it was unnecessary to determine the binding effect of the Swiss Legation's advice to Moser, it appears that the Court's waiver theory could result only from that advice.[78]

After *Moser* the federal courts began to give relief in immigration cases without using the terms "estoppel" or "apparent authority."[79] Although *Moser* is not a clear case of estoppel against the government, the Court's reasoning in *Moser* is useful in analyzing government estoppel problems in other areas.[80] It is surprising, therefore, that for the next fifteen years the case rarely was relied upon outside the immigration field.[81]

L. REV. 114, 122 n.44 (1981).

73. 341 U.S. at 47.

74. 4 K. DAVIS, *supra* note 46, § 20:1, at 2.

75. Asimow, *supra* note 10, at 25.

76. *Id.*

77. 341 U.S. 41, 47 (1950).

78. It is not unreasonable to wonder whether "[t]he Swiss Legation by writing a letter to a Swiss citizen changed the effect of a statute enacted by Congress." 4 K. DAVIS, *supra* note 46, § 20:4, at 8.

79. Asimow, *supra* note 10, at 26-27. *See* Hetzer v. INS, 420 F.2d 357 (9th Cir. 1970); Tejeda v. INS, 346 F.2d 389 (9th Cir. 1965); McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960).

80. 4 K. DAVIS, *supra* note 46, § 20:4, at 9.

81. *See* Asimow, *supra* note 10, at 25. Nevertheless, in 1973 the Ninth Circuit relied on *Moser* when it expressly held the government estopped in a nonimmigration case. *See* United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir. 1973).

C. Estoppel in Immigration Cases and the Debut of "Affirmative Misconduct"

Because most immigration cases concern the rights of a single alien and do not blatantly threaten the public fisc, it is understandable that in immigration cases the federal courts are more willing to grant estoppel-like remedies against the government.[82] Even after *Moser*, however, the Supreme Court, apparently concerned about the erosion of its rule against estoppel, refused to estop the government in two major immigration cases.

1. *Montana v. Kennedy*[83]

The plaintiff, Mauro John Montana, was born in Italy in 1906 while his mother, Maddelena, a native United States citizen, and his father, Giuseppe, an Italian national, were residing there temporarily. Later that year, his mother brought him to the United States, where he resided continuously until the time of suit.

Prior to Montana's birth, Maddelena attempted to leave Italy for the United States, but a United States Consular Officer told her, "I am sorry, Mrs., you cannot go in that condition . . . . You come back after you get your baby."[84] Many years later Montana sued for a declaration of United States citizenship. He rested his claim upon grounds of estoppel and certain statutory provisions, arguing that the Consular Officer essentially refused to issue his mother a passport. That refusal prevented his birth on United States soil and thereby precluded him from inheriting his mother's citizenship. Both the district court and the court of appeals denied him citizenship.[85] The Supreme Court granted certiorari[86] "in view of the apparent harshness of the result,"[87] but upheld the decision of the lower courts.[88] The Court disposed of the estoppel claim by finding that Maddelena's reliance on the Consular Officer's statement was unreasonable or that she was not prevented *in fact* from returning to the United States. Surprisingly, Justice Harlan addressed the estoppel question by stat-

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82. *See* Note, *supra* note 11, at 737 n.61 (citing *In re* LaVoie, 349 F. Supp. 68, 74 (D.V.I. 1972)).

83. 366 U.S. 308 (1961).

84. Montana v. Rogers, 278 F.2d 68, 70 (1960).

85. *Id.* at 68-69 (syllabus).

86. 364 U.S. 861.

87. 366 U.S. at 309 (1961).

88. *Id.* at 308.

ing: "In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials."[89] This language prompted the comment that *Montana v. Kennedy* is "hard to interpret."[90] The Court did not estop the government, but declined to comment upon the lower court cases that had permitted government estoppel.[91] A dozen years later, the Court reexamined *Montana* to establish "affirmative misconduct"[92] as an elusive standard for government estoppel analysis.

2. *Immigration and Naturalization Service v. Hibi*[93]

Hibi was a Philippino who enlisted and served throughout the Second World War in the Philippine Scouts, a unit of the United States Army.[94] While on active duty with the Scouts, Hibi and other members of the Philippine Scouts were eligible for naturalization under sections 701 and 702 of the Nationality Act of 1940.[95] After the Philippines were liberated in 1945, Philippine government officials expressed concern that many of the Philippine soldiers eligible for naturalization would go to the United States.[96] In response, the United States Government withdrew nationalization authority from its consul in the Philippines, only to return the authority and nationalize a number of Philippine Scouts after Hibi had left the service.[97]

In April 1964 Hibi first entered the United States. Although the period for claiming naturalization pursuant to the Nationality Act had expired seventeen years earlier,[98] Hibi petitioned for nat-

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89. *Id.* at 315 (citing Lee You Fee v. Dulles, 236 F.2d 885, 887 (7th Cir. 1956); Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950)).

90. 4 K. DAVIS, *supra* note 46, § 20:2, at 4.

91. *See* Note, *supra* note 72, at 123 n.48.

92. The development of the affirmative misconduct "standard" is ably treated in Akbarin v. INS, 669 F.2d 839, 843 (1st Cir. 1982). An attempt to describe affirmative misconduct can be found in Note, *supra* note 8, at 559-60.

93. 414 U.S. 5 (1973) (per curiam).

94. Hibi was captured by the Japanese and interned for six months. *Id.* at 5.

95. 8 U.S.C. §§ 1001-1002, 1005 (Supp. V 1940) (current version at 8 U.S.C. § 1440 (1982)), *repealed by* Act of June 27, 1952, ch. 477, § 403(a)(42), 66 Stat. 280.

96. *See* Asimow, *supra* note 10, at 30.

97. *Id.* at 31.

98. 414 U.S. at 7. By amendment it was required that all petitions under §

uralization. Hibi argued that the government should be estopped from relying on the expired time limit to deny naturalization because the government did not advise him of his rights or provide a naturalization representative in the Philippines. The lack of advice prevented him from meeting the requirements of the Nationality Act.[99] Both the district court and the court of appeals agreed with Hibi.[100] The Supreme Court, however, in a per curiam opinion with three justices dissenting,[101] granted certiorari and reversed.[102]

The majority rejected the distinction between the sovereign and proprietary functions of government.[103] In the most important passage of the opinion, however, the Court reads *Montana* as leaving open the possibility of estoppel against the government when "affirmative misconduct" by government agents is shown.[104] The Court refused to use estoppel in *Hibi* because the inaction complained of did not constitute affirmative misconduct.[105]

Justice Douglas' dissent criticized the majority's summary disposition of the estoppel issue.[106] His characterization of the majority's reasoning suggests that affirmative misconduct is a threshold requirement for any estoppel of the government.[107] Although Douglas apparently admitted that inaction constituting affirmative misconduct may be excused,[108] he rejected the majority's im-

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701 be filed no later than December 31, 1946. Act of December 28, 1945, ch. 390, § 1(c)(i), 59 Stat. 658.

99. 414 U.S. at 7-8.

100. *Id.* at 8. The court of appeals opinion is reported at 475 F.2d 7 (9th Cir. 1973).

101. Justices Douglas, Brennan, and Marshall dissented.

102. 414 U.S. at 9.

103. *Id.* at 8.

104. *Id.* The Court stated that "the issue of whether 'affirmative misconduct' on the part of Government might estop it from denying citizenship was left open in *Montana v. Kennedy* . . . ." *Id.* The words "affirmative misconduct" appear nowhere in the *Montana* opinion.

105. *See* Note, *supra* note 72, at 124.

106. 414 U.S. at 9-11 (Douglas, J., dissenting).

107. *See id.* at 9.

108. *See id.* at 9-11. The same commentator who read the Court's rationale in *Hibi* as "inaction is not affirmative," *see infra* text accompanying note 111, characterized that reasoning as "erroneous": "Estoppel can certainly arise from silence or other conscious inaction, where there is a duty to speak or act, when that silence or inaction prompts detrimental reliance. Although there may be a distinction between action and inaction in other contexts, it matters little in estoppel cases." Asimow, *supra* note 10, at 31-32.

plicit position that inaction of government agents cannot be affirmative misconduct.[109] Finally, Douglas argued that the absence of the naturalization officer constituted affirmative misconduct because the absence resulted from the direct and intended act of the United States Attorney General, upon advice of the Commissioner of Immigration.[110]

Courts and commentators have differed over the importance of the *Hibi* opinion.[111] Many have noted that the facts of *Hibi* do not present a strong claim for invoking estoppel[112] and that the majority's summary discussion limits its precedential value.[113] Significantly, the Supreme Court did not define affirmative misconduct[114] or provide the lower courts with guidelines for determining its presence.[115] Because the *Hibi* Court did not explicitly reject the no-estoppel rule[116] and because the Court intimated that it would consider an estoppel claim if plaintiff proved sufficiently egregious government conduct, *Hibi* was "a modest step" toward providing relief to victims of governmental error.[117] Except for those cases concerning government inaction,[118] the step was to prove effective. If *Moser* suggested that the door to government estoppel could be opened, *Hibi* provided the key.[119]

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109. 414 U.S. at 9 (Douglas, J., dissenting).

110. *Id.* at 9-11.

111. *See, e.g.*, Sun Il Yoo v. INS, 534 F.2d 1325, 1329 (9th Cir. 1976) (The Ninth Circuit said a delay in processing immigration papers may be affirmative misconduct). This has led one commentator to suggest that *Hibi* "requires the existence of a duty in order for government action to be considered misconduct." Note, *supra* note 93, at 134 n.104 (citing Santiago v. INS, 526 F.2d 488, 493 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)).

112. Portmann v. United States, 674 F.2d 1155, 1164 (7th Cir. 1982).

113. *See* Asimow, *supra* note 10, at 31; Note, *supra* note 11, at 736.

114. *See* Note, *supra* note 11, at 737. Indeed, the court in Community Health Services v. Califano, 698 F.2d 615, 620 (3rd Cir. 1983) (quoting Schweiker v. Hansen, 450 U.S. 785 (1981)), stated that the Supreme Court "has never decided what type of conduct by a Government employee will estop the Government from insisting on compliance with valid regulations governing the distribution of welfare benefits." *Id.*

115. *See* Hing, *Estoppel in Immigration Proceedings—New Life from Akbarin and Miranda*, 20 SAN DIEGO L. REV. 11, 14 (1982); Note, *supra* note 11, at 738.

116. *See* Asimow, *supra* note 10, at 36-37.

117. *See* Note, *supra* note 8, at 560.

118. *See* Asimow, *supra* note 10, at 36-37.

119. *See* Note, *supra* note 11, at 732.

3. *Santiago v. Immigration and Naturalization Service—The Ninth Circuit's Response to Hibi*

Relying on *Hibi*, lower courts began to define an affirmative misconduct standard[120] and use estoppel against the federal government.[121] The affirmative misconduct standard was particularly difficult to define.[122] Prior to *Hibi*, the Ninth Circuit had taken the lead in developing ways to bind the government without calling it estoppel and had developed the two-part balancing approach. The test, first enunciated in *United States v. Lazy FC Ranch*,[123] required a court to determine whether all of the traditional requirements for equitable estoppel were present and then to balance the potential harm to the public interest against the severity of the injury facing the individual.[124] Although the Ninth

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120. *See id.* at 732-33 (citing the following cases: Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979); United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); Yang v. INS, 574 F.2d 171, 175 (3d Cir. 1978) (dictum); Corniel-Rodriguez v. INS, 532 F.2d 301, 306-07 (2d Cir. 1976); Santiago v. INS, 526 F.2d 488, 492-93 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976)). *See also* Note, *supra* note 72, at 134 n.104.

At least two commentators have taken the position that lower court reliance upon or use of the *Hibi* affirmative misconduct language was improper. *See* Comment, Santiago v. Immigration and Naturalization Service—*The Ninth Circuit Retreats from its Modern Approach to Estoppel Against the Government.* 1976 UTAH L. REV. 371, 380-83; Note, *supra* note 11, at 736-39.

121. *See* Note, *supra* note 72, at 125-26. The author of this Note claimed that, as of 1981, "[a]t least eight circuits have allowed equitable estoppel to be applied to the federal government." *Id.* at 126 n.67. She listed the following cases to support that proposition: Yang v. INS, 574 F.2d 171, 174-75 (3d Cir. 1978); Enfant Plaza Prop., Inc. v. District of Columbia Redev. Land Agency, 564 F.2d 515, 524 (D.C. Cir. 1977); United States v. Lucienne D'Hotelle de Benitez Rexach, 558 F.2d 37, 43 (1st Cir. 1977); Corniel-Rodriguez v. INS, 532 F.2d 301, 306-07 (2d Cir. 1976); United States v. Wharton, 514 F.2d 406, 409-12 (9th Cir. 1975); C.F. Lytle Co. v. Clark, 491 F.2d 834, 838 (10th Cir. 1974); United States v. Florida, 482 F.2d 205, 209 (5th Cir. 1973) (dictum); United States v. Fox Lake State Bank, 366 F.2d 962, 965-66 (7th Cir. 1966). *But see* United States v. One 1973 Buick Riviera Auto., 560 F.2d 897, 899 (8th Cir. 1977) (per curiam); United States v. Ulvedal, 372 F.2d 31, 35 (8th Cir. 1967); Note, *supra* note 72, at 126 n.67.

122. *See* Note, *supra* note 72, at 133. The Ninth Circuit even split up the phrase in Oki v. INS, 598 F.2d 1160, 1162 (9th Cir. 1979), holding that affirmative government conduct was a prerequisite to a finding of misconduct. *But see* Sun Il Yoo v. INS, 534 F.2d 1325, 1328-29 (9th Cir. 1976).

123. 481 F.2d 985, 989-90 (9th Cir. 1973).

124. *Id.* at 988-90. *See* Hing, *supra* note 115, at 14 n.19; Note, *supra* note 72, at 128.

Circuit maintained that this analysis applied to all government activities, even those characterized as sovereign, the court admitted its reluctance to estop the government when it acted as sovereign.[125] The *Hibi* decision forced the Ninth Circuit to retreat somewhat from this progressive development of the estoppel doctrine,[126] and in *Santiago v. Immigration and Naturalization Service*[127] the Ninth Circuit first dealt with immigration estoppel after *Hibi*.[128]

In *Santiago* four aliens claimed that the government should be estopped from asserting their excludability at entry into the United States because they were "unfairly misled into the belief that [their] entry was lawful."[129] The Ninth Circuit found that neither *Hibi* nor *Montana* had disturbed *Moser*[130] and, citing *Hibi*, held that affirmative misconduct was necessary for estoppel.[131] Finding no affirmative misconduct,[132] the court affirmed the Board of Immigration Appeals' determination that the aliens were excludable at entry.[133]

The *Santiago* decision is significant because of the method used by the court to find an absence of affirmative misconduct. The *Santiago* court simply weighed the actions complained of—the failure to inform the aliens about the requirements or inquire about their status—against the actions complained of in *Hibi*. Only if the actions were "more blameworthy" than those in

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125. United States v. Lazy FC Ranch, 481 F.2d 985, 989 (9th Cir. 1973). *See also* Comment, *supra* note 20, at 604.

126. *See* Hing, *supra* note 115, at 14; Note, *supra* note 11, at 734. Professor Davis lists the following cases as evidence that the Ninth Circuit is "less liberal than it once was in estopping the government": TRW, Inc. v. FTC, 647 F.2d 942, 951 (9th Cir. 1981) (more than negligence required to show affirmative misconduct); Simon v. Califano, 593 F.2d 121, 123 (9th Cir. 1979) ("Mere neglect of duty is not enough"); Saulque v. United States, 663 F.2d 968 (9th Cir. 1981) (a land developer who relied upon a letter from the Bureau of Indian Affairs (BIA) stating that a parcel of land was available was denied estoppel when BIA decided land was not available); 4 K. DAVIS, *supra* note 46, at 19.

127. 526 F.2d 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

128. Note, *supra* note 11, at 734. For excellent discussions of the Ninth Circuit's treatment of *Santiago*, see *id.* at 734-35; Comment, *supra* note 120, *passim*.

129. 526 F.2d at 491.

130. *Id.* at 492.

131. *See* Note, *supra* note 11, at 734.

132. *See* 526 F.2d at 492-93.

133. *Id.* at 493.

Hibi would the Ninth Circuit find affirmative misconduct and consider applying estoppel.[134] The court found the failures in *Santiago* to be less blameworthy than those in *Hibi*. Thus, the Ninth Circuit determined there was no affirmative misconduct in *Santiago*.[135] This analysis has been dubbed the "compare with *Hibi*" test or simply the Ninth Circuit comparative test.[136] The Supreme Court denied certiorari in this case.[137]

Other federal courts accepted the proposition that affirmative misconduct is a precondition to using estoppel against the government,[138] and a number of courts held that unreasonable or excessive delay in processing immigration documents could constitute affirmative misconduct.[139] By the close of the decade, courts and commentators agreed that, in the right circumstances, estoppel should be allowed even when the government conduct took the form of silence, inaction, or delay.[140] Two recent Supreme Court cases, however, have rejected that construction and added more confusion to an already muddled field.

III. THE RECENT CASES

A. *Schweiker v. Hansen*

While the Ninth Circuit was refining its comparative test, the Second Circuit was developing a new analysis for determining whether government estoppel was appropriate. This test, first

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134. *Id.*

135. *Id.*

136. Hing, *supra* note 115, at 15.

137. 425 U.S. 971 (1976).

138. *See* Note, *supra* note 11, at 736; Recent Development, *Schweiker v. Hansen: Equitable Estoppel Against the Government*, 67 CORNELL L. REV. 609, 613 (1982). *See id.* at 613 n.35 (list of cases). *See also* Note, *supra* note 72, at 117 & nn.11-12.

139. *See* Mendoza-Hernandez v. INS, 664 F.2d 635, 639 (7th Cir. 1981); Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc); Sun Il Yoo v. INS, 534 F.2d 1325, 1328 (9th Cir. 1976); Galvez v. Howerton, 503 F. Supp. 35, 40 (C.D. Cal. 1980). *See also* Hing, *supra* note 115, at 19-21, 32. In *Sun Il Yoo*, a one year delay in processing a change in status application was held to be affirmative misconduct. 534 F.2d at 1328. INS officials are under a "duty" to act within a reasonable time. *Id.* at 1328-29.

140. *See* Note, *supra* note 8, at 560; *see also* United States v. Hanna Nickel Smelting Co., 253 F. Supp. 784, 793 (D. Or. 1966), *aff'd on other grounds*, 400 F.2d 944 (9th Cir. 1968); United States v. Certain Parcels of Land, 131 F. Supp. 65, 74 (S.D. Cal. 1955); United States v. Brabham, 122 F. Supp. 570, 572 (E.D.S.C. 1954).

used in *Hansen v. Harris*,[141] examined the nature of the legal requirement misrepresented by the government agent, distinguishing between substantive requirements, for which estoppel was allowed, and procedural requirements, for which it was not allowed.[142] In *Hansen v. Harris* the Second Circuit applied this new test and estopped the government from denying retroactive benefits to a social security recipient.

The new approach was criticized as a "departure from traditional notions of affirmative misconduct."[143] Judge Friendly dissented. He criticized the majority for not only breaking with authority but also for blurring the distinction between substance and procedure.[144] According to Judge Friendly the regulation at issue in *Hansen v. Harris* was neither clearly substantive nor clearly procedural.[145]

The government petitioned for certiorari[146] and the Supreme Court reversed the court of appeals.[147] Although the Court did not apply the Second Circuit's procedural and substantive distinction, neither did the Court reject the distinction.[148] The Court

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141. *See* Hansen v. Harris, 619 F.2d 942, 948 (2d Cir. 1980), *rev'd sub nom.* Schweiker v. Hansen, 450 U.S. 785 (1981) (per curiam).

142. *Id.*

143. Recent Development, *supra* note 138, at 610. *See also* Note, *supra* note 72, at 130-31.

144. Judge Friendly specifically stated:

> The majority is simply disregarding the Supreme Court's decisions in *Merrill, Montana* and *Hibi*, and placing ourselves in square conflict with the decisions of most, indeed probably all other courts of appeals in similar cases—and all of this on an exceedingly weak set of facts and a newly found jurisprudential distinction which cannot survive analysis. There are some rules of federal law that had best [be] left unchanged until Congress decides to alter them even when the result is much harsher than here. This is one of them.

619 F.2d at 958 (Friendly, J., dissenting).

145. *Compare id.* at 948-49, *with* Leimbach v. Califano, 596 F.2d 300, 303-05 (8th Cir. 1979).

146. 450 U.S. 785 (1981).

147. *Id.* at 791.

148. *Id.* at 790. *But see* Recent Development, *supra* note 138, at 621:

> The Court rejected the Second Circuit's approach to estoppel against the government on three grounds. First, it did not believe that the SSA agent's conduct was serious because the agent's conduct "did not cause [Mrs. Hansen] to take action . . . or fail to take action . . . that [she] could not correct any time." Second, the Court agreed with dissenting Judge Friendly that a breach of the claims manual is insufficient to estop

did not criticize the lower court opinions granting estoppel, but distinguished them because those opinions either involved a writing or did not threaten the public treasury.[149] The Court never specifically stated that the government could be estopped, but it implied that this was possible by focusing on the kind of conduct that could justify use of estoppel.[150] The Court also resurrected the *Merrill* language that urged courts to protect the public treasury.[151] That language implies that the government's fiscal integrity is normally a sufficiently serious concern to require denying estoppel.[152] Once again, however, the Court avoided deciding whether affirmative misconduct would permit estoppel, stating only that the facts of *Schweiker* fell "far short" of affirmative misconduct.[153] The decision thus reopened the question of what constitutes affirmative misconduct.

Schweiker v. Hansen has been characterized as both a significant setback in the lower courts' use of estoppel against the government[154] and as a policing action whereby the Supreme Court sought to rein in the lower courts and reinstate its leadership in the controversy.[155] Whatever its role, *Schweiker* failed to remove

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the agency from asserting the written application requirement. Finally, the Court found the Second Circuit's distinction between substantive eligibility and procedural requirements an inadequate basis for estoppel in this case because Congress expressly provided that only one who "has filed application" for benefits may receive them.

Id. at 621 (footnotes omitted) (quoting Gressley v. Califano, 609 F.2d 1265, 1266 (7th Cir. 1979)).

149. 450 U.S. at 788-89 n.4. *See also* Recent Development, *supra* note 138, at 620.

150. Specifically the Court stated:

This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits. In two cases involving denial of citizenship, the Court has declined to decide whether even "affirmative misconduct" would estop the Government from denying citizenship, for in neither case was "affirmative misconduct" involved.

450 U.S. at 788.

151. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 385 (1947).

152. *See* 450 U.S. at 788-89.

153. *Id.* at 790 (citing Montana v. Kennedy, 366 U.S. 308, 314 (1961)). *See also* 450 U.S. at 789-90.

154. 4 K. DAVIS, *supra* note 46, § 20:5, at 9.

155. *See id.* § 20:5, at 11-12. Professor Davis further commented that:

The Court sensed that the lower courts have gone beyond the Supreme

the ambiguity from the standard for government estoppel.[156] The Court refused to hear arguments on this issue in spite of the obvious disagreement among the three opinion writers in *Hansen v. Harris*.[157] Although the Supreme Court denied estoppel in *Schweiker*, the federal courts, relying upon the Court's dicta, began to base their government estoppel decisions upon a finding of affirmative misconduct.[158] These lower court decisions, however, are not all reconcilable with *Schweiker*.[159]

B. The First and Ninth Circuit Responses to *Schweiker*

In two significant immigration cases, the First and Ninth Circuits distinguished the *Schweiker* case, rendering it inapplicable to all immigration cases.[160]

1. *The First Circuit and Akbarin v. Immigration and Naturalization Service*[161]

An Iranian student was ordered to show cause why he should not lose his student status because he had accepted part-time employment inconsistent with his student status. In response, the student claimed he had acted in reliance upon misinformation provided by an unidentified INS official. The First Circuit Court of Appeals held that these facts, if proven, would estop the gov-

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> Court in recognizing the need for estopping the government, and the Second Circuit in the *Hansen* case did so more or less deliberately, following its own instincts about the needs of justice. The Supreme Court's response may have been more a reaction to the failure to follow its leadership than a reaction to the merits of the particular problem. In its per curiam opinion, the Supreme Court at no point came to grips with the problem of whether fairness to Mrs. Hansen required that the government be estopped.

Id.

156. For criticism of this result, see Recent Development, *supra* note 138, at 618, 622-25.

157. 619 F.2d at 944-63.

158. *See* Note, *supra* note 72, at 131. For a good treatment of the law of estoppel in the lower courts after *Schweiker*, see 4 K. DAVIS, *supra* note 46, § 20:6, at 15-22.

159. *See* New Jersey v. Department of Health & Human Services, 670 F.2d 1284, 1296 n.17 (3d Cir. 1982) ("It is arguable . . . that many of the 'modern-trend' cases are not reconcilable with language contained . . . in Schweiker v. Hansen . . .").

160. *See* Hing, *supra* note 115, at 35.

161. 669 F.2d 839 (1st Cir. 1982).

ernment[162] and remanded the case for further proceedings.[163] The *Akbarin* court stated that, after *Schweiker*, estoppel cannot lie against the government unless an individual reasonably relies upon affirmative government misconduct.[164] The First Circuit also pointed out that the courts should apply the doctrine cautiously if the public fisc is threatened.[165] The *Akbarin* court concluded that *Schweiker* was distinguishable from the case before the court because *Schweiker* concerned a threat to the public fisc whereas immigration cases do not.[166] The First Circuit then proposed its own two-part test for estoppel of the government in immigration cases. The test consists of the following two questions: (1) "whether the Government's action was error, and, if the complaining party reacted to the error," and (2) "whether the action was intended to or could reasonably have been intended to induce reliance."[167] This test, basically the traditional equitable estoppel principle, refines earlier cases that relied on notions of "elementary fairness" to protect reliance interests.[168] The test has been characterized as "an outstanding example of a lower court's insistence that the government, despite [Schweiker v.] Hansen, still may be estopped without 'affirmative misconduct.' "[169] The spirit, if not the letter, of *Akbarin* was adopted by the Ninth Circuit when it considered Horacio Ramos Miranda's application for adjustment of his residency status.

2. *The Ninth Circuit and Miranda v. Immigration and Naturalization Service*[170]

Miranda, a Philippino who entered the United States in 1971 on a temporary visitor's visa, overstayed his visa period and mar-

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162. *Id.* at 844.
163. *Id.* at 845.
164. *Id.* at 842.
165. *Id.*
166. *Id.* at 843.
167. *Id.*
168. *See* Hing, *supra* note 115, at 31.
169. 4 K. DAVIS, *supra* note 46, § 20:6, at 17. The *Akbarin* court's attempt to devise an alternate standard has been praised as "a significant advance in the development of estoppel law in the immigration area," Hing, *supra* note 115, at 30, and has been criticized for leaving "the door open for evidence of equities and other sympathetic facts." *Id.* at 33.
170. There are actually three *Miranda* opinions: Miranda v. INS, 638 F.2d 83 (9th Cir. 1980), *vacated and remanded sub nom.* INS v. Miranda, 454 U.S.

ried a United States citizen in 1976. Miranda's bride petitioned the INS to grant Miranda an immigrant visa as the spouse of a United States citizen. Simultaneously, Miranda applied to have the INS adjust his status to permanent resident alien. Miranda would have been eligible for the adjustment if his wife's petition had been granted, but the INS failed to act on Mrs. Miranda's petition for eighteen months. Meanwhile, the Mirandas divorced and Miranda's ex-wife withdrew her petition. The INS ordered Miranda to show cause why he should not be deported, and the immigration judge ruled against Miranda. Miranda appealed to the Board of Immigration Appeals (BIA), arguing that the INS should be estopped from denying his application because of unreasonable delay in processing his ex-wife's petition.[171] The BIA found no affirmative misconduct by the INS and refused to use estoppel against them.[172] Miranda appealed and the Ninth Circuit Court of Appeals reversed the BIA decision.[173]

The Ninth Circuit cited two of its previous decisions in which it held unreasonable delay to be affirmative misconduct.[174] Comparing those cases to the one at bar, the Ninth Circuit held that "[t]he unexplained failure of the INS to act on the visa petition for an eighteen-month period prior to the petitioner's withdrawal following the breakup of Miranda's marriage was affirmative misconduct . . . ."[175] The court then reversed and remanded the case for consideration of Miranda's application, instructing the INS to "treat [Mrs. Miranda's] visa petition as if it were approved."[176] The Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Ninth Circuit "for further consideration

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808 (1981) (mem.) [Miranda I]; Miranda v. INS, 673 F.2d 1105 (9th Cir. 1982) [Miranda II], *rev'd sub nom.* INS v. Miranda, 103 S. Ct. 281 (1982) (per curiam) [Miranda III].

171. 103 S. Ct. at 282.

172. 638 F.2d at 84.

173. *Id.*

174. 638 F.2d at 83 (citing Villena v. INS, 622 F.2d 1352 (9th Cir. 1980) (en banc); Sun Il Yoo v. INS, 534 F.2d 1325 (9th Cir. 1976)). In *Sun Il Yoo*, a one year delay was held to constitute affirmative misconduct. *Id.* at 1328. The court stated that "once an alien has gathered and supplied all relevant information and has fulfilled all requirements, INS officials are under a duty to accord to him within a reasonable time the status to which he is entitled by law." *Id.* at 1328-29. For a list of other cases where courts excused noncompliance with time limits, see Asimow, *supra* note 10, at 31-32 n.110.

175. 638 F.2d at 84.

176. *Id.*

in light of *Schweiker v. Hansen*."[177]

In a per curiam opinion on remand, the Ninth Circuit again held that the INS was estopped.[178] The court distinguished *Schweiker* on the grounds that *Schweiker* threatened the public fisc, but *Miranda* did not; affirmative misconduct was found in *Miranda*, not in *Schweiker*;[179] and, Mrs. Hansen had had an opportunity to correct her mistake, but Miranda had no opportunity to correct the problem.[180] Without citing the case, the Ninth Circuit essentially adopted the First Circuit's *Akbarin* reading of *Schweiker*[181] and concluded that the Supreme Court's holding in *Schweiker* was not controlling.[182]

C. The Supreme Court Reacts: *Immigration and Naturalization Service v. Miranda*[183]

The Supreme Court granted certiorari[184] and in a per curiam decision reversed the Ninth Circuit. The Court found that *Schweiker* could not be distinguished from *Miranda* and that the INS had not engaged in affirmative misconduct.[185] Rejecting the argument that *Schweiker* turned on public fisc considerations, the Court stated that *Schweiker* gave "no indication that the Government would be estopped in the absence of the potential burden on the fisc."[186] Furthermore, the Court noted that enforcement of the immigration laws is "becoming more difficult," and concluded that, in order for the INS to function effectively, "[a]ppropriate deference must be accorded its decisions."[187] The Court denied that *Schweiker* stood for the proposition that estoppel would lie

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177. 454 U.S. at 808.
178. 673 F.2d at 1105-06.
179. 103 S. Ct. at 282.
180. 673 F.2d at 1106. *But see* Hing, *supra* note 115, at 28.
181. *See supra* text accompanying notes 162-69.
182. 673 F.2d at 1106.
183. 103 S. Ct. 281 (1982) (per curiam).
184. *Id.* at 282.
185. *Id.* at 283-84.
186. *Id.*
187. *Id.* at 284. The Court also rejected the Ninth Circuit's third distinction—that the harm to each party was different—in the following statement: "*Montana* and *Hibi* make [it] clear that neither the Government's conduct nor the harm to the respondent is sufficient to estop the Government from enforcing the conditions imposed by Congress for residency in this country." *Id.* at 283.

against the government for affirmative misconduct.[188] The Court, however, found that the Ninth Circuit had correctly considered, as a preliminary matter, if affirmative misconduct was present,[189] but disagreed with the Ninth Circuit's conclusion that affirmative misconduct was present. Instead, the Court cited *Hibi* and *Montana*, cases in which it had denied estoppel, and concluded that the failure to process a petition within eighteen months was not as blameworthy as the government conduct in *Hibi* and *Montana*.[190] Thus, because the misstatement in *Montana*[191] was "far short of misconduct" that might allow for estoppel of the government, there was no affirmative misconduct in *Miranda*.[192] Finally, the Court again declined to state if affirmative misconduct would precipitate estoppel of the government, opining only that proof of government failure "to process promptly an application falls far short of establishing such conduct."[193]

IV. ANALYSIS

The most obvious effect of the Supreme Court's *Miranda* opinion was to halt the First and Second Circuits' attempts to distinguish *Schweiker* out of the immigration field.[194] The Court thereby implies that congressional immigration policies deserve the same judicial protection as that given to the public fisc.[195] By rescuing *Schweiker*, the Court reintroduced the principle that, even in immigration cases, there may be overriding public interests that prevent estoppel, even when affirmative misconduct can be shown.

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188. *Id.* at 282.

189. *Id.* at 283.

190. *Id.*

191. Montana v. Kennedy, 366 U.S. 308, 314-15 (1961).

192. 103 S. Ct. at 283.

193. *Id.* at 284. Justice Marshall filed a dissent in which he argued that the case should never have been granted certiorari, and that it should not have been disposed of summarily. *Id.*

194. Because *Schweiker* never explicitly rejected the Second Circuit's substantive/procedural distinction, *see supra* text accompanying note 148, that mode of analysis arguably has survived *Miranda* as well.

195. The Supreme Court could have cited *Utah Power* for the proposition that "laches or neglect of duty on the part of officers or agents of the government is no defense to a suit by it to enforce valid congressional policy on immigration." *See* Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

In *Miranda* the Court refused to estop the government and summarily disposed of the estoppel issue in a per curiam decision without oral argument. Thus, *Miranda* is weak precedent for the proposition that the government may, in some circumstances, be estopped. Yet, the Court continues to imply exactly that when it declines, in case after case, to address the issue it reserved in *Hibi*: "whether affirmative misconduct in a particular case would estop the Government from enforcing the immigration laws."[196]

The Supreme Court has not defined affirmative misconduct or articulated a specific standard for its application. In *Miranda* the Court implicitly adopted the comparative test of *Santiago v. INS* as an initial test for affirmative misconduct.[197] Without specifically citing the Ninth Circuit opinion, the Supreme Court compared the delay complained of in *Miranda* with the statements and actions of government agents in *Hibi* and *Montana*[198] to determine if those in *Miranda* were "more blameworthy."[199] The Court thereby established a minimum threshold for affirmative misconduct and offered some guidance to practitioners and judges: if the action complained of is not as bad as that in *Hibi* or *Montana*, it cannot be affirmative misconduct. The Court in *Miranda* also arguably rejects the First Circuit's *Akbarin* alternative to affirmative misconduct.[200]

Finally, it is possible to derive from *Miranda* a rudimentary analysis for determining when estoppel of the government will *not* be allowed. The following analysis, consisting of five questions, is grounded upon a synthesis of the *Santiago* comparative test,[201] which the Court clandestinely adopted,[202] and the *Akbarin* description of the state of government estoppel after *Schweiker*.[203] If the facts of a case do not permit an affirmative answer to each question, then the Supreme Court would probably deny estoppel.

1) Has there been reliance upon some conduct of a government agent?

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196. 103 S. Ct. at 284.
197. 526 F.2d 488 (9th Cir. 1975). *See supra* text accompanying notes 134-36.
198. *See* 103 S. Ct. at 283.
199. *Id.*
200. *See supra* text accompanying note 167.
201. *See supra* text accompanying notes 134-36.
202. *See supra* text accompanying notes 190-92.
203. *See supra* text accompanying note 164.

2) If so, was this reliance reasonable?

3) Was or will the party be injured as a result of this reliance?

4) Was the government agent's conduct "affirmative misconduct?"[204]

5) If there has been affirmative misconduct on the part of government officials, would estoppel pose any threat to the public fisc (or to any other valid congressional policy, such as effective implementation of the immigration laws)?

The flaw in this analysis is the inability to predict when estoppel *will* be allowed against the government. Only the Supreme Court can correct that flaw. At present, if all the above conditions are satisfied, the most one can say is that, perhaps, the government will be estopped.

V. Conclusion

It would seem that the Supreme Court's position on estoppel of the government has changed very little since Mr. Lee was fleeced by Mr. Munroe. Recent opinions, however, at least suggest that the Court is willing to consider estopping the government in a case involving egregious conduct by a government official that causes severe injury to a hapless individual. The only clear teaching of the Court's action in these cases is that it will not stand aside for subordinate court development of the estoppel doctrine. For the present, the standard will be affirmative misconduct as set out in *Montana, Hibi, Schweiker*, and *Miranda*. Unfortunately, this fairly ambiguous standard will continue to generate litigation.

If the Simpson-Mazzoli bill is enacted by the 98th Congress, procedures implemented by the bill are likely to be fertile ground for this litigation. Most, if not all, of these suits will be ineffective because the *Miranda* decision suggests that the Supreme Court is

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204. For this determination, compare the facts against those in *Hibi, Montana, Schweiker*, and *Miranda*. If the facts do not show conduct as bad as, or worse than that in any one of those four cases, there can be no estoppel. If the action complained of is worse than that in the other cases, then it *may* amount to affirmative misconduct.

not likely to permit estoppel of the government, especially when estoppel would interfere with the effective implementation of the immigration laws.

Daniel M. FitzPatrick

THE SUPREME COURT'S VERLINDEN DECISION: A RETREAT TO ACTIVISM

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I. INTRODUCTION

Rarely is the Supreme Court presented with a case addressing issues of exceptional international and domestic significance. *Verlinden B.V. v. Central Bank of Nigeria*[1] was such a case. The nature and quantity of the amicus briefs that were filed with the Supreme Court prior to oral argument of the case indicates *Verlinden*'s[2] significance. The United States, the Rule of Law Committee, the Association of the Bar of the City of New York, and

1. 103 S. Ct. 1962 (1983) [hereinafter cited as *Verlinden III*].
2. *See* Supreme Court Docket Extract No. 81-920-CFX, Verlinden B.V. v. Central Bank of Nigeria, docketed Nov. 13, 1982.

the Republic of Guinea submitted briefs.[3] These briefs discussed domestic concerns, including federalism[4] and the separation of powers,[5] as well as international issues such as sovereign immunity[6] and the abrogation of treaty rights.[7]

Apart from the substantive focus of *Verlinden*, one of the most intriguing aspects of the case was the Supreme Court's activist posture concerning resolution of the dispute. The Court managed to find a way, albeit cloaked in "plain meaning" language, to permit the appellant, Verlinden, to stumble its way into the United States federal courts. In so doing, the Court avoided the ground swell of criticism that would have resulted had it followed the

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3. *Id.* The Republic of Guinea had a substantial interest in the case for two reasons. First, Guinea was the appellant in a case then pending before the Court of Appeals for the District of Columbia, which involved issues virtually identical to those found in *Verlinden*. *See In re* Maritime Int'l Nominees Establishment v. Republic of Guinea, 505 F. Supp. 141 (D.D.C. 1981), *rev'd*, 693 F.2d 1094 (D.C. Cir. 1982). The plaintiff, Maritime International Nominees Establishment, invoked the federal jurisdictional grant contained in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 (1976), and obtained a ruling that arbitration between the litigants was permissible "before an American panel, under American Arbitration Association Rules, in English." *See* Brief of Amicus Curiae, The Republic of Guinea, in support of Respondent at 2, *Verlinden III*, 103 S. Ct. at 1962 [hereinafter cited as Guinea Brief]. Significantly, the contract which spawned the dispute provided for arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID"). *Maritime Int'l*, 505 F. Supp. at 142. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Aug. 27, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, provides for ICSID arbitration, which would have ordained an international panel governed by internationally approved rules. *See* Guinea Brief, *supra*, at 2. Under those rules, sovereign immunity is preserved. *See id.* As a result of this litigation, a United States arbitration panel awarded $27,000,000 to Maritime International, a result unobtainable under ICSID arbitration. *See id.* Because an award of that size potentially could have crippled Guinean currency, *id.*, Guinea "lodged a formal diplomatic protest with the Department of State." *Id.* Clearly this sort of decision has international import significantly affecting United States foreign relations.

Second, Guinea, like other nations, is concerned about situations in which it might be brought into United States courts to defend claims. *Id.* This concern is of special importance to developing nations concerned with the workings of Western judicial systems. *Id.* The United States must be aware of these concerns in order to maintain appropriate diplomatic and trade relations with developing nations.

4. *See infra* notes 217-27 and accompanying text.
5. *See infra* notes 195-205 and accompanying text.
6. *See infra* notes 93-135 and accompanying text.
7. *See infra* notes 239-43 and accompanying text.

Second Circuit in holding the Foreign Sovereign Immunities Act (FSIA)[8] unconstitutional.[9] These divergent results are not surprising, though, in light of the FSIA's blatant incongruity. Bluntly stated, the FSIA is "a [six]-year-old statutory labyrinth that, owing to the numerous interpretive questions engendered by its bizarre structure and vague provisions, has during its brief existence been a financial boon for the private bar but a constant bane of the federal judiciary."[10] It is against this backdrop that the Supreme Court's *Verlinden* decision must be analyzed.

II. Statement of the Case

The *Verlinden* controversy arose "out of one of the most enormous commercial disputes in history."[11] Indeed, the dispute spawned litigation throughout the world.[12] In 1975 the Republic of Nigeria contracted to purchase extraordinary quantities of Portland cement.[13] Nigeria executed 109 contracts with sixty-eight suppliers to purchase sixteen million metric tons of cement at the cost of approximately one billion dollars.[14]

In April 1975 Verlinden,[15] a Dutch corporation, contracted to supply Nigeria with 240,000 metric tons of cement over the course of several months at sixty dollars per ton.[16] Nigeria promised to

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8. 28 U.S.C. §§ 1602-1611 (1976).

9. *See* Brief for Petitioner at 7, *Verlinden III*, 103 S. Ct. at 1962.

10. Gibbons v. Udaras Gaeltachta, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

11. Texas Trading & Milling Corp. v. Republic of Nigeria, 647 F.2d 300, 302 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

12. *E.g.*, Reale Int'l, Inc. v. Federal Republic of Nigeria, 647 F.2d 330 (2d Cir. 1981), *on remand*, 562 F. Supp. 54 (S.D.N.Y. 1982); Gemini Shipping, Inc. v. Foreign Trade Org. for Chems. & Foodstuffs, 647 F.2d 317 (2d Cir. 1981); Ipitrade Int'l, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978) (enforcing Int'l Chamber of Commerce arbitration award (Apr. 25, 1978)); Hispano Americana Mercantil, S.A. v. Central Bank of Nigeria, [1979] 2 Lloyd's L.R. 277; Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 2 W.L.R. 356, Judgment of Dec. 2, 1975, District Court, Frankfurt, 16 I.L.M. 501.

13. *Texas Trading & Milling Corp.*, 647 F.2d at 302. Nigeria's massive development projects reflected the sudden and dynamic increases in the balance of payments resulting from its huge exportation of crude oil. *Id.*

14. *Id.* at 303.

15. Verlinden B.V. is a Dutch corporation maintaining its principal offices in Amsterdam, Netherlands. Verlinden B.V. v. Central Bank of Nigeria, 647 F.2d 320, 322 (2d Cir. 1981) [hereinafter cited as *Verlinden II*], *rev'd*, 103 S. Ct. 1962 (1983).

16. *Id.* The contracts executed by Nigeria with each of its suppliers were

secure the contract by an "Irrevocable, Transferable abroad, Divisible and Confirmed Letter of Credit in favour of the seller for the total purchase price through Slavenburg's Bank, Amsterdam, Netherlands."[17] Verlinden and Nigeria agreed that the contract[18] would be governed by the laws of the Netherlands.[19] Any disputes concerning the contract were to be settled by arbitration before the International Chamber of Commerce in Paris, France.[20] Nigeria, however, failed to honor the terms of its contract completely. This letter of credit (Morgan Letter of Credit) was established instead at the Central Bank of Nigeria,[21] and was made payable through the Morgan Guaranty Trust Company in New York (Morgan).[22] Moreover, the Morgan Letter of Credit was uncon-

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virtually identical. *Texas Trading & Milling Corp.*, 647 F.2d at 303. Apparently, the contracts were mimeographed in blank and details as to individual suppliers were written in. *Id.*

17. *Verlinden II*, 647 F.2d at 322. That letter of credit was supposed to be governed by the Uniform Customs and Practice for Documentary Credits. *Id.* (citing INT'L CHAMBER OF COMMERCE BROCHURE No. 222 (1962 rev. ed.)).

18. Specifically, the "Permanent Secretary, Ministry of Defense, Lagos . . . on behalf of the Federal Military Government of the Federal Republic of Nigeria" signed the contract. Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1287 n.2 (S.D.N.Y. 1980) [hereinafter cited as *Verlinden I*], *aff'd*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 103 S. Ct. 1962 (1983). The contract called for shipment at the rate of 20,000 metric tons per month to commence 45 days after Verlinden received the documentary irrevocable letter of credit in its favor. *Id.* at 1287. Under the contract, demurrage was set at "a rate not exceeding $3,500 *per diem* per vessel," if the discharge rate of 1,000 tons per day of cement was not satisfied. *Id.* Demurrage payments were to commence on the first day after a ship's arrival at its designated Nigerian port. *Id.*

19. *Id.*

20. *Id.*

21. Central Bank of Nigeria is an organ of the Federal Republic of Nigeria, *Verlinden II*, 647 F.2d at 322 n.4, and performs "functions similar to the United States Federal Reserve and the Bank of England." *Id.* The Central Bank was established in 1958 pursuant to the Central Bank of Nigeria Act of 1958. *Texas Trading & Milling Corp.*, 647 F.2d at 304 n.12. Its express functions are to: "Issue legal tender currency in Nigeria, to maintain external reserves to safeguard the international value of that currency, to promote monetary stability and a sound financial structure in Nigeria and to act as banker and financial adviser to the Federal Government." *Id.* (quoting § 4(1) of the Central Bank of Nigeria Act of 1958).

22. *Verlinden II*, 647 F.2d at 322. Nigeria's choice of Morgan as its advising bank was not surprising. Morgan and Nigeria had a long-standing relationship. Central Bank used Morgan as its correspondent bank for a multitude of transactions in the United States. *Texas Trading & Milling Corp.*, 647 F.2d at 304. As outlined by Judge Kaufman for the Second Circuit Court of Appeals:

firmed and not divisible.[23]

In August 1975 Verlinden subcontracted for the purchase of the cement it had promised to ship to Nigeria.[24] Shortly thereafter, Verlinden's subcontractor began to bag and ship the cement to Nigeria. Other subcontractors who were beneficiaries of identical cement contracts also began to bag and ship cement.[25] Hundreds of vessels started to arrive at the Nigerian port of Lagos. The port facilities, capable of accepting only one to five million tons of cement annually, were woefully inadequate to handle the sixteen million tons Nigeria had ordered.

By September, the Nigerian ports were bottlenecked.[26] As demurrage accrued and suppliers continued to dispatch cement-

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Employees of Central Bank regularly came to Morgan for training seminars. On Nigeria's request, Morgan made payments to Nigerian students in the United States, to American corporations to which Nigeria owed money, and to the Nigerian embassy and consulates in the United States. Indeed, Nigeria used Morgan to make payments (for salaries, operating expenses, and the like) to Nigerian embassies in other countries as well. Until 1974, Morgan had the right to draw up to $1 million per day from Nigeria's account at the Federal Reserve Bank of New York to satisfy Nigeria's obligations. Nigeria raised the limit to $3 million per day in 1974, and Morgan enjoyed unlimited drawing rights on Nigeria's funds beginning in November 1975. Central Bank kept over $200 million of securities in a custody account at Morgan. Morgan advised as much as $200 million in letters of credit established by Nigeria, and confirmed, in addition, letters of credit totalling at least $70 million more.

Id. at 304-05.

23. *Verlinden I*, 488 F. Supp. at 1287. The Morgan Letter also differed significantly in other respects from the cement contract. For example, it failed to specify when demurrage payments would begin. *Id.* As initially drafted, Verlinden deemed the Morgan Letter to be "commercially ineffective and unusable." *Id.* Consequently, Verlinden requested amendments to the Letter. *Id.* Although Nigeria honored these requests, Morgan did not notify Verlinden of the adjustments until September 1975. *Id.*

24. *Verlinden II*, 647 F.2d at 322. Verlinden subcontracted with Interbuco Anstalt, a Liechtenstein corporation. Specifically, Interbuco agreed to provide Verlinden with 240,000 tons of cement at $51 per ton. *Id.* Verlinden promised to pay Interbuco five dollars per ton if Verlinden breached the contract. *Id.*

25. *Texas Trading & Milling Corp.*, 647 F.2d at 305.

26. *Verlinden II*, 647 F.2d at 322. As early as July 1975, the Nigerian harbors were desperately overworked. Over 400 ships needed to be unloaded. *Texas Trading & Milling Corp.*, 647 F.2d at 305. Although Nigeria may have acted imprudently by entering into an extraordinary number of cement contracts, its past experiences did not prepare it adequately for this shipping nightmare. In fact, Nigeria expected only 20% of its suppliers to perform. *Id.*

laden vessels, Nigeria responded frantically. First, the Nigeria Ports Authority issued a regulation requiring ships sailing for Nigeria to notify the Ports Authority two months prior to setting sail with information concerning their projected time of arrival.[27] The regulation further provided that the Ports Authority would "co-ordinate all sailing and that it would refus[e] service to vessels" that did not comply with its terms.[28] One week later Nigeria formally requested its suppliers to stop loading, chartering ships, and sending cement.[29] Then, Nigeria took action "on a scale previously unknown to international commerce,"[30] unilaterally instructing Morgan not to honor any letters of credit, unless the supplier submitted a statement from the Central Bank indicating approval of the payment.[31] Morgan notified each supplier of Nigeria's instructions and began refusing to pay on the letters of credit.[32] In a final effort to unclog its congested ports, Nigeria threatened to impose criminal sanctions against any ship that attempted to enter a Nigerian port without first obtaining official permission two months prior to sailing.[33] Concurrently, Nigeria "invit[ed] its suppliers to cancel the contracts."[34]

Verlinden did not cancel its contract and instead initiated suit in the Southern District of New York against the Central Bank.[35] Verlinden argued that Nigeria's actions constituted an anticipatory breach of its letter of credit[36] and that the FSIA provided

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27. *Texas Trading & Milling Corp.*, 647 F.2d at 305. Specifically, Government Notice No. 1434 was issued on August 9, 1975. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* The ramifications of Nigeria's unilateral alteration of the letters of credit were not unknown to Central Bank. Morgan explained the possibility of extensive litigation to Central Bank personnel, but Central Bank insisted upon nonpayment. The Deputy of Central Bank stated that the Nigerian Government might even sue Morgan, if Morgan honored the letters as initially drafted. *Id.*

33. *Id.* Decree No. 40 of December 19, 1975, contained this prohibition. *Id.*

34. *Id.* Nigeria held a meeting in New York to inform various members of the United States financial community of its position. As a result, over 40 suppliers settled. *Id.* at 306.

35. *Verlinden I*, 488 F. Supp. at 1284.

36. *Id.* at 1286. Central Bank did not deny during trial that its instructions to Morgan were an anticipatory breach in violation of the Documentary Credits Brochure. *Verlinden II*, 647 F.2d at 322 n.7. Article 3 of the Uniform Documentary Credits Brochure provides in relevant part:

An irrevocable credit is a definite undertaking on the part of an issuing

federal jurisdiction over the suit.[37] The Central Bank responded that the FSIA did not confer jurisdiction upon a federal district court to adjudicate a dispute solely between foreign entities.[38]

A. *Verlinden I*: The District Court Refusal to Entertain the Case

After rigorously analyzing the FSIA's jurisdictional provisions, the Southern District of New York adopted the Central Bank's position that personal jurisdiction over the suit was lacking.[39] The district court focused initially upon the FSIA's jurisdictional pro-

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bank and constitutes the engagement of that bank to the beneficiary . . . that the provisions for payment, acceptance or negotiation contained in the credit will be duly fulfilled . . . . Such undertakings can neither be modified nor cancelled without the agreement of all concerned.

INT'L CHAMBER OF COMMERCE, THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1962 revision) (CHAMBER OF COMMERCE BROCHURE No. 222).

37. 28 U.S.C. § 1330 (1976). Section 1330 provides in relevant part:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) . . . .

Id.

Specifically, Verlinden posited that by virtue of its contract with Interbuco, Verlinden exposed itself to potential liability for liquidated damages. *Verlinden I*, 488 F. Supp. at 1288. Accordingly, Verlinden sought recovery of damages for payments made and owing to Interbuco and compensatory damages totalling $4,660,000 for lost profits, counsel fees, and expenses. *Id.* Verlinden also sought substantial punitive damages. *Id.*

38. *Verlinden II*, 647 F.2d at 323. In total, Central Bank presented five motions to dismiss the action. They were based upon:

(1) lack of subject matter jurisdiction; (2) lack of in personam jurisdiction over Central Bank based upon sovereign immunity and the act of state doctrine; (3) its motion for summary judgment on the merits; (4) also its motion . . . to be relieved of an order directing that it instruct Morgan Guaranty to keep funds in a separate account sufficient to satisfy any judgment plaintiff may recover; and (5) plaintiff's renewed motion for the entry of default judgment based upon defendant's failure timely to file its answer.

Verlinden I, 488 F. Supp. at 1288.

39. *Verlinden I*, 488 F. Supp. at 1302.

visions. Section 1330(a) gives the federal district courts jurisdiction "as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . . under sections 1605-1607 . . . ."[40] Section 1330(b) confers personal jurisdiction automatically if subject matter jurisdiction exists.[41] Thus, the district court focused upon those situations when subject matter jurisdiction exists or, in other words, when a foreign sovereign is not immune from suit under the FSIA. Pursuant to the FSIA, a foreign sovereign is not immune from suit if it engages in commercial activity in the United States or waives its immunity.[42] The court concluded that Central Bank did not engage in commercial activity under the FSIA's three-prong definition.

The first prong, "commercial activity carried on in the United States,"[43] was not satisfied because Central Bank lacked substantial contact with the United States. Central Bank was neither engaging in a regular course of business in the United States, nor was it a party to a particular commercial transaction in the United States.[44] The *Verlinden I* court concluded that Verlinden's commercial transaction was insufficient to confer jurisdiction because the letter of credit and its underlying contract concerned commercial activity that took place overseas; in addition, the letter of credit and contract (1) were formed abroad, (2) benefitted foreign entities, and (3) contained substantive provisions that provided for performance of the contract outside of the United States by non-United States citizens.[45] The court deter-

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40. 28 U.S.C. § 1330(a).

41. *Id.* § 1330(b).

42. *Id.* § 1605(a)(1)-(2); *see also infra* notes 122-26 and accompanying text.

43. *Id.* § 1605(a)(2).

44. *Verlinden I*, 488 F. Supp. at 1294; *see* FSIA, 28 U.S.C. §§ 1603(d)-(e) ("commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States).

45. *Verlinden I*, 488 F. Supp. at 1294. The court's reasoning was buttressed by the terms of the underlying contract. Specifically, the contract contained no provision indicating that either Verlinden or Central Bank "intended to invoke the benefits and privilege of [United States] law." *Id.* In fact, disputes under the contract were to be governed by Dutch law. *Id.* Moreover, the court interpreted the FSIA to require a "nexus between the forum and the particular facts giving rise to the cause of action." *Id.* at 1296. Thus, even though Central Bank kept large sums of United States dollars on deposit at Morgan, sent its employees to Morgan for training seminars, and regularly advised letters of credit through Morgan, a "regular course of business" for FSIA purposes was lacking. *Id.* at

mined that the second prong, "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,"[46] was not fulfilled because the instruction not to honor the letters of credit, the source of Verlinden's claim, was issued in Nigeria.[47] The final prong, "an act outside the . . . United States . . . that causes a direct effect in the United States,"[48] was also found to be inapplicable. Relying upon the FSIA's legislative history and case law, the district court stated that the exception applied only if a substantial effect within the United States was a direct and foreseeable result of the conduct abroad.[49] Accordingly, the Southern District concluded that because the locus of Verlinden's injury was not within the United States and because the parties never used the protection of New York law, a direct and substantial effect in the United States did not exist to allow the court personal jurisdiction over Verlinden.[50] Finally, the district court examined the relationship between the litigants and concluded that Central Bank did not waive its sovereign immunity.[51] Central Bank did not expressly waive immunity, nor did it implicitly waive immunity when it consented to arbitration in a third-party nation.[52]

1294-97.

46. 28 U.S.C. § 1605(a)(2).

47. *Verlinden I*, 488 F. Supp. at 1297. The Southern District believed that it was irrelevant that " '[t]he repudiating instructions had their effect and found their target in the U.S. not in Nigeria.' " *Id.* (quoting Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss and for Summary Judgment at 11, *Verlinden I*, 488 F. Supp. 1284).

48. FSIA, 28 U.S.C. § 1605(a)(2).

49. *Verlinden I*, 488 F. Supp. at 1298. As a ground for this assertion the court cited H.R. REP. No. 1487, 94th Cong., 2d Sess. 6, 19, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6618 [hereinafter cited as H.R. REP. No. 1487], which adopts the principles contained in the RESTATEMENT (SECOND) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES § 18 (1965). Section 18 of the RESTATEMENT sets forth the standard requiring substantial, direct, and foreseeable effects before foreign sovereign immunity is lost. *See id.*; *see also Verlinden I*, 488 F. 2d at 1298. The court also cited Harris v. VAO Intourist, Moscow, 481 F. Supp. 1056, 1062-63 (E.D.N.Y. 1979), to the same effect. *See Verlinden I*, 488 F. Supp. at 1298 n.67.

50. *Verlinden I*, 488 F. Supp. at 1299.

51. *Id.* at 1300-02.

52. *Id.* at 1302. Although this argument appears tenuous, some cases support the position. The court in Ipitrade Int'l S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), another case resulting from the Nigerian cement fiasco, held that Nigeria's choice of European laws and a European forum to

Thus, the Southern District determined that none of the exceptions to the Act were applicable and granted Central Bank's motion to dismiss the complaint for lack of personal jurisdiction under the FSIA.[53] This decision, therefore, prevented a foreign plaintiff from suing a foreign defendant in a federal district court when neither party had de minimis contacts with the United States.

B. *Verlinden II*: The Second Circuit Steps Boldly

One year later, the Second Circuit Court of Appeals addressed the *Verlinden* dispute and "*sua sponte* . . . raised the question of Article III jurisdiction on oral argument . . . ."[54] "[W]ithout providing an opportunity for . . . argument . . . [on] the issue, the Court of Appeals held the Act *pro tanto* unconstitutional."[55] In reaching its decision, the Second Circuit looked to the Constitution, unlike the district court, which grounded its holding in the FSIA. Both courts, however, concluded that the FSIA could not confer upon the federal courts jurisdiction over the suit.[56] The district court[57] and the Second Circuit also agreed that under some circumstances the FSIA permitted a suit brought by an alien against a foreign state.[58] After examining the Constitution[59]

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resolve disputes was a waiver of sovereign immunity in the United States. *Id.* at 826.

53. *Verlinden I*, 488 F. Supp. at 1302.

54. Brief for Petitioner, *supra* note 9, at 7.

55. *Id.*

56. The Southern District reached a conclusion contrary to that of the Second Circuit concerning whether the FSIA constitutionally could provide subject matter jurisdiction for a suit like *Verlinden*. The Southern District opined:

> [E]ven though the plaintiff's claim is one grounded upon common law, the case is one that "arises under" a federal law because the complaint compels the application of [a] uniform federal standard governing assertions of sovereign immunity. In short, the Immunities Act injects an essential federal element into all suits brought against foreign states . . . . [T]he presence of aliens on both sides of this dispute does not deprive the Court of subject matter jurisdiction.

Verlinden I, 488 F. Supp. at 1292-93.

57. *Id.* at 1292.

58. *Verlinden II*, 647 F.2d at 324. The express wording of the FSIA, however, would seem to allow this type of suit. *See infra* text accompanying note 127.

59. The Second Circuit examined article III of the Constitution which extends judicial power to the federal courts. *See* U.S. CONST. art. III, § 2. Clause 1

and the statutory federal question grant,[60] however, the Second Circuit found the general jurisdictional provision of the FSIA to be a naked grant of power without the required constitutional underpinning.[61] Thus, the determinative issue for the Second Circuit was whether Congress had the authority within the limits of the Constitution to confer jurisdiction over Verlinden, not whether the parties fit within the language of the FSIA.[62]

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of § 2 is expressly on point. It provides in full:

> 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;-to all Cases affecting Ambassadors, other public Ministers and Consuls;-to all Cases of admiralty and maritime Jurisdiction;-to Controversies to which the United States shall be a Party;-to Controversies between two or more States;-between a State and Citizens of another State;-between Citizens of different States;-between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. art. III, § 2, cl. 1. Congress' power to confer jurisdiction is circumscribed by that clause—jurisdictional grants beyond its parameters are impermissible. *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809); Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980)(per curium)(en banc).

60. The Second Circuit found the statutory federal question grant contained in 28 U.S.C. § 1331 relevant because of its similarity to the crucial first phrase of U.S. CONST., art III, § 2, cl. 1. *See Verlinden II*, 647 F.2d at 325. Section 1331 provides in full: "The district courts shall have original jurisdiction over all civil actions . . . [arising] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

61. *See Verlinden II*, 647 F.2d at 324-30.

62. *Id.* at 324. Indeed, the first issue addressed by the Second Circuit was whether both Verlinden and Central Bank were parties contemplated by the FSIA. *See infra* note 120 and text accompanying note 127 (statutory provisions). The court held that Central Bank was an "instrumentality of a foreign state" under 28 U.S.C. § 1603(b) qualifying it as a foreign state under 28 U.S.C. § 1603(a), and therefore, Verlinden's action was "against a foreign state" under the FSIA. *Verlinden II*, 647 F.2d at 323. This conclusion was unavoidable under the FSIA. Section 1603(b) provides in relevant part:

> An "agency or instrumentality of a foreign state" means any entity —
> (1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

FSIA, 28 U.S.C. § 1603(b) (1976). Its counterpart, 28 U.S.C. § 1603(a), provides the definition of a foreign state and stipulates: "A 'foreign state', . . . includes a political subdivision of a foreign state or an agency or instrumentality of a for-

The *Verlinden II* court began its analysis of that issue by focusing on prior Supreme Court interpretations of article III of the Constitution.[63] In several decisions the Supreme Court has held that Congress may not grant federal jurisdiction beyond the bounds of article III.[64] Thus, to fulfill federal jurisdictional requirements every case must be supported by a congressional grant of jurisdiction that is grounded in the Constitution.[65] The court found that the only colorable constitutional basis for Verlinden's suit was the first phrase of article III.[66] That clause permits the federal courts to exercise 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."[67] Because that clause has been interpreted infrequently, the *Verlinden II* court turned to the many Supreme Court interpretations of the identical "arising under" language in 28 U.S.C. section 1331[68] and concluded that Verlinden's suit did not arise under federal law.

The Second Circuit grouped the Supreme Court's interpretations of the "arising under" language into three categories. The court found that the first group, lawsuits in which federal law "creates the cause of action,"[69] was inapplicable. Because the

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eign state as defined in subsection (b)." The Second Circuit next examined Verlinden's qualification under the Act. After examining the FSIA's legislative history and renowned treatises, the court concluded that Congress had formed no clear intent regarding a plaintiff's citizenship under the FSIA, and stated that a suit brought by an alien against a foreign state in federal district court is theoretically possible under the FSIA's terms. *Verlinden II*, 647 F.2d at 324.

63. *Verlinden II*, 647 F.2d at 324.

64. *See supra* note 59.

65. *See, e.g., Hodgson*, 9 U.S. (5 Cranch) 303 (1809).

66. *Verlinden II*, 647 F.2d at 325.

67. U.S. CONST. art. III, § 2, cl. 1 (emphasis added). The court first examined article III's diversity grant, which provides that the federal judicial power extends to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." *Id.* Because that phrase fails to address expressly a case between two aliens, it cannot be relied upon as a constitutional basis for a suit by an alien against a foreign sovereign.

68. *Verlinden II*, 647 F.2d at 325.

69. *Id.* at 326. *Verlinden II* acknowledged that the words "arising under" in article III of the Constitution may have a meaning at variance with the identical language contained in 28 U.S.C. § 1331. Indeed, the court stated: "The substantial identity of the words does not . . . require, on that score alone, an identical interpretation. The differences in the functions of the two enactments, in the circumstances surrounding their adoption and in their further provisions justify

FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual . . . ,"[70] the court determined that the FSIA was *not intended* to affect substantive liability.[71] Rather the Act was designed merely to provide "access to the courts to resolve ordinary legal disputes."[72] Thus, the FSIA did not create a new cause of action. Also, Verlinden's suit was deemed not to fall within the second group of suits, those in which the plaintiff's complaint requires the interpretation of a federal law.[73] The court of appeals cited two reasons for this conclusion. First, Verlinden's "well pleaded" complaint did not demonstrate a need for the court to "interpret" the FSIA because the affirmative defense of sovereign immunity would be raised only in a response by Central Bank.[74] Second, according to the Second Circuit, the FSIA neither confers substantive rights nor requires the construction of a law that confers substantive rights.[75] Specifically, Judge Kaufman opined that because the FSIA regulates only judicial practice[76] a lawsuit brought pursuant to the FSIA cannot fall within the second group; otherwise, the court would create jurisdiction over a claim where none existed

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inquiry as to whether their meaning is different." *Verlinden II*, 647 F.2d at 327 (quoting Shulman & Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L.J. 393, 405 n.47 (1936)).

70. 28 U.S.C. § 1606 (1976). The statute provides in full:

> § 1606. Extent of Liability. As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

Id.

71. *Verlinden II*, 647 F.2d at 326.

72. *Id.* at 326-27.

73. *Id.* at 327. For a discussion concerning suits "arising under" federal law because of the need for interpretation of a federal law, see *infra* notes 157-82 and accompanying text.

74. *Verlinden II*, 647 F.2d at 326-27.

75. *Id.* at 327.

76. *Id.*

before.[77] Finally, the court summarily dismissed the possibility of including Verlinden's claim in the third group. That group requires the imposition of "federal common law" in certain situations. In so ruling, the court stated that the *Verlinden* situation lacked a national interest strong enough to warrant preemption of state law by "judge-made" federal law.[78]

The Second Circuit proffered two cogent, alternative grounds for holding that the court lacked subject matter jurisdiction to hear the suit. First, the court stated that the Framers' primary intent in creating federal courts was to protect constitutional rights.[79] Accordingly, the court said that the Framers' concern for uniformity in the interpretation of federal laws pertained only to those laws regulating conduct.[80] This reasoning led the Second Circuit to conclude that a strong federal need for a uniform standard under which foreign states might be sued in United States courts cannot "implicate" a federal "cause" that would confer jurisdiction.[81] Second, the court stated that the structure of article III mandated the result. The court posited that if article III, section 2, clause 1 was not interpreted to mean "arising under a substantive law," then the other eight instances enumerated in that article that confer federal jurisdiction would be surplusage.[82] The

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77. *Id.* Judge Kaufman drew an analogy between the instant case and Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950), in which a federal statute, the Declaratory Judgment Act, 28 U.S.C. § 2201 (1980), had to be interpreted to vindicate a state-created right. *See Verlinden II*, 647 F.2d at 327. The Second Circuit reasoned that the Declaratory Judgment Act and the FSIA both regulate practice and, therefore, a suit cannot be brought for a violation of either. *Id.*

78. *Verlinden II*, 647 F.2d at 326.

79. *Id.* at 329. According to the court, the protection of rights created by federal law was only a secondary goal of the Framers. *Id.*

80. *Id.* The court based this conclusion on THE FEDERALIST, No. 80, at 495 (A. Hamilton) (Putnam ed. 1888), in which the need for uniformity was described as extending only to causes, not to all federal laws. *Verlinden II*, 647 F.2d at 329.

81. The court's reasoning was based upon notions of federalism and comity among the states. To drive home its point, the court quoted Alexander Hamilton: "Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." *Verlinden II*, 647 F.2d at 329 (quoting THE FEDERALIST, *supra* note 80, at 495).

82. *Verlinden II*, 647 F.2d at 329. For the language of article III, see *supra* note 59. The court proffered an excellent example to support its analysis stating:

> [I]f we decided that Verlinden's suit was one "arising under a law of the United States" because it was brought under § 1330, then we could simi-

Second Circuit held that because the FSIA merely regulates practice and does not confer substantive rights the FSIA does not confer original subject matter jurisdiction when a suit is brought by an alien against a foreign state in federal district court.[83]

C. *Verlinden III*: The Supreme Court's Expansion of the FSIA

Chief Justice Burger wrote for a unanimous Supreme Court which rendered a surprising reversal.[84] The Court, in a terse opinion, focused exclusively on the constitutional dimension of the case and held that the FSIA's jurisdictional grant was within the limits of article III. According to the Court, every action against a foreign sovereign necessarily requires the application of a body of substantive federal law and therefore arises under federal law, within the meaning of article III.[85] In reaching this result, the Court focused primarily upon the FSIA's language and Congress' power to confer jurisdiction.

In short, the Court's decision rested upon the premise that because Congress exercises considerable authority over foreign commerce and foreign relations, it must have "the undisputed power to decide, as a matter of federal law, whether and under what

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larly hold that a suit "arose under a law of the United States" because it was brought under § 1332. The constitutional diversity grant would then be surplusage. If we are not to read the other phrases out of the clause, we must restrict the first phrase to cases arising under a substantive law.

Id.

83. *Id.*

84. Indeed, law review articles seemed to be in accord with the lower courts' interpretation of the FSIA, viewing a Supreme Court reversal as unlikely. *See, e.g.*, Recent Decision, *Sovereign Immunity—Failure to Assert Affirmative Defense of Sovereign Immunity on Motion to Dismiss Does Not Waive Immunity by Implication Under the Foreign Sovereign Immunities Act of 1976*, 15 VAND. J. TRANSNAT'L L. 629, 650 (1982).

85. *Verlinden III*, 103 S. Ct. at 1971. Indeed, the tenor of the Court's opinion was lackluster. At one point the Court seemed to rely upon the broad statement of Congress' powers in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). The Court in *Osborn* posited: "[I]t be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." *Osborn*, *id.* at 822. The *Verlinden III* opinion later retreated slightly from this position, indicating that the *Osborn* holding may have been narrowed. *See Verlinden III*, 103 S. Ct. at 1971. The Supreme Court went on to state simply that *Verlinden* necessarily raised issues of substantive federal law because the case concerned a foreign sovereign. *Id.*

circumstances foreign nations should be amenable to suit in the United States."[86] The Court concluded that Congress enacted the FSIA to promote harmonious foreign relations and to foster foreign commerce.[87] Consequently, an interpretation of the FSIA was necessary in every action brought against a foreign state.[88] Specifically, the Court reasoned that to determine whether subject matter jurisdiction exists pursuant to the FSIA, a tribunal first must decide if one of the exceptions to sovereign immunity is applicable to the transaction in controversy.[89] The exceptions of the FSIA govern the types of actions for which foreign sovereigns may be held liable in a United States court. To that extent, "an action against a foreign sovereign arises under federal law, for purposes of Article III jurisdiction."[90]

The Court buttressed its conclusion by stating that the application of the standards contained in the FSIA requires the interpretation of numerous points of federal law[91] and that even when none of the FSIA's exceptions apply to a given case, such a case still would arise under federal law because the "construction" and interpretation of the FSIA would bar the plaintiff from bringing suit.[92]

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86. *Verlinden III*, 103 S. Ct. at 1971. The reasoning was that suits against foreign sovereigns raised sensitive issues concerning United States foreign relations. *Id.*

87. *Id.* Specifically, the Court stated: "In enacting the legislation, Congress relied specifically on its powers to prescribe the jurisdiction of the Federal courts, Art. I, § 8, cl. 9; to define offenses against the 'Law of Nations,' Art. I, § 8, cl. 10; to regulate commerce with foreign nations, Art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, Art. I, § 8, cl. 18." *Id.* at 1971 n.19.

88. *Id.* at 1971.

89. *Id.*

90. *Id.* The Supreme Court rejected explicitly the Second Circuit's analogy between the "arising under" language contained in article III and the identical language contained in the federal question grant of jurisdiction, 28 U.S.C. § 1331 (1976). *See Verlinden III*, 103 S. Ct. at 1971-73.

91. *Id.* at 1973.

92. To reach this conclusion the Court relied upon Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), which the Court had cited with reticence earlier in its opinion. The Supreme Court's ruling that the jurisdictional grant contained in the FSIA is consistent with the Constitution does not signal the end of the *Verlinden* litigation. The Supreme Court remanded the case to the Second Circuit to determine if statutory subject matter jurisdiction exists under one of the FSIA's exceptions to sovereign immunity. The Southern District held previously that the FSIA's commercial activity exceptions were in-

III. The Foundation for the Decision

A. Foreign Sovereign Immunity

Sovereign immunity is a principle of judicial restraint that bars consideration of a claim brought against a sovereign,[93] its agencies, or its instrumentalities. The doctrine is grounded in the notion that the exercise of jurisdiction by one nation over another conflicts with the concept of sovereign equality among nations.[94] Foreign sovereignty is not part of the Constitution; rather, it results from the respect the United States gives to the sovereignty of other nations.[95] Two theories address the scope of immunity granted to sovereign nations. The restrictive theory immunizes a foreign state from suits stemming from its public acts, but this immunity does not extend to suits concerning a government's private or commercial acts.[96] The absolute theory of sovereign immunity entitles foreign sovereigns to complete freedom from defending a suit in another nation.[97]

The United States adhered to the absolute theory of sovereign immunity for well over a century. The judicial bedrock of that position was *The Schooner Exchange v. M'Faddon*.[98] In that decision Chief Justice Marshall emphasized that nations are not ac-

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applicable to Central Bank. *See supra* notes 44-45 and accompanying text. The Second Circuit, however, has yet to consider whether jurisdiction exists under the FSIA's exceptions. If the Second Circuit concurs with the Southern District, the dispute will be over. Conversely, if the Second Circuit finds that jurisdiction exists under the FSIA, then *Verlinden* will be remanded to the Southern District and tried on its merits. *See Verlinden III*, 103 S. Ct. at 1974.

93. *See* Restatement (Second) of Foreign Relations Law of the United States § 41(e) (1965).

94. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 34-36 (1945).

95. *See id.*

96. H.R. Rep. No. 1487, *supra* note 49, at 7, *reprinted* at 6605.

97. *See* H. Steiner & D. Vagts, Transnational Legal Problems 645-46 (2d ed. 1976).

98. 11 U.S. (7 Cranch) 116 (1812). Chief Justice Marshall stated: "This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects." *Id.* at 137. *The Schooner Exch.* involved a libel action. Specifically, the plaintiffs alleged that their ship, the Schooner Exchange, was taken forcibly while afloat on the high seas upon the direct orders of Napoleon. When the Schooner Exchange landed in the port of Philadelphia, the plaintiffs sought to attach the vessel so that she could be restored to them. *Id.*

countable to one another.[99] Over one hundred years later in *Berizzi Brothers Co. v. Steamship Pesaro,*[100] the Supreme Court continued to follow the teachings of *The Schooner Exchange v. M'Faddon* and adhered to the absolute theory of sovereign immunity.[101] At the time of the decision, sovereign states had begun "to assume economic functions outside of the traditional framework of administration and management," and several nations adopted the restrictive theory of sovereign immunity.[102] During this period, initial decisions concerning the propriety of exercising jurisdiction over a foreign national in the United States federal courts were made normally by the executive branch, and the judiciary consistently deferred to these decisions.[103] In accordance with the prevailing absolute theory of sovereign immunity, the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns."[104]

Because of mounting international pressure and the realization that increased governmental involvement in commercial activities spawns litigation typical of usual business transactions, the United States judiciary began moving toward the restrictive theory of sovereign immunity. Two decisions, *Ex parte Peru*[105] and *Republic of Mexico v. Hoffman,*[106] illustrate this point. In *Ex parte Peru,*[107] the Supreme Court held that a Peruvian owned vessel was immune from a suit in which it was alleged that the defendant failed to carry out a charter party. Although the Court followed the State Department's recommendation that immunity be granted,[108] it acknowledged implicitly that immunity may not

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99. *Id.*

100. 271 U.S. 562 (1926).

101. *Id.* In *Berizzi Brothers* the Supreme Court was presented with a case of first impression and conferred immunity upon a merchant ship owned and operated by a friendly foreign government. *Id.* at 576. According to Justice Van Devanter, no logical reason existed to distinguish between merchant ships and warships owned and operated by a foreign sovereign. *Id.* Another catalyst fostering the movement toward the restrictive theory was "the spread of state trading organizations." H. STEINER & D. VAGTS, *supra* note 97, at 645.

102. H. STEINER & D. VAGTS, *supra* note 97, at 645. These functions included operating commercial vessels. *Id.*; *see also supra* note 100.

103. *See Ex parte Peru,* 318 U.S. 578, 587 (1943).

104. *Verlinden III,* 103 S. Ct. at 1968.

105. 318 U.S. 578 (1943).

106. 324 U.S. 30 (1945).

107. 318 U.S. at 580, 588-90.

108. *Id.* at 589.

always be absolute.[109] In *Hoffman* the Court went further than *Ex parte Peru*, and permitted jurisdiction over a Mexican owned commercial vessel.[110] Taking advantage of the State Department's reluctance to recognize the assertion of immunity by the Republic of Mexico, the Court stated:

> We can only conclude that it is the national policy not to extend the immunity in the manner now suggested, and that it is the duty of the *courts*, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize.[111]

Then, in 1952, the State Department completed the evolution by announcing its adoption of the restrictive theory of sovereign immunity.[112] Even so, the dilemma of when to grant sovereign immunity continued. The State Department retained its role of initially suggesting whether immunity should be granted, and again, the courts generally implemented those suggestions.[113] A natural byproduct of the new approach was the diplomatic pressure that foreign nations seeking immunity directed toward the State Department.[114] In addition, the State Department frequently abstained from making a determination, leaving the courts with dis-

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109. *See id.* at 588. The Court stated that "courts may not so exercise their jurisdiction by the seizure and detention of the property of a friendly sovereign, so as to embarrass the executive arm of the government in conducting foreign relations." *Id.*

110. 324 U.S. at 30. In actuality, the vessel belonged to the Mexican Government, but was in "the possession, operation, and control," *id.* at 32-33, of a private Mexican corporation. *Id.* The State Department took no official position regarding Mexico's assertion of immunity. *Id.* at 31-32. The Court proffered that where the State Department offered no official posture regarding immunity, "courts may decide for themselves whether all the requisites of immunity exist." *Id.* at 34-35.

111. *Id.* at 38.

112. *See generally* 26 DEPT. ST. BULL. 984-85 (1952)(letter from Acting Legal Advisor for the Secretary of State, Jack B. Tate, to Acting Attorney General, Phillip B. Perlman (May 19, 1952)) [hereinafter cited as Tate Letter]. The Tate Letter indicated the growing trend toward the restrictive theory, and then proceeded to outline the logic underpinning the State Department's decision to abandon the tenets of absolute immunity espoused in The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) and its progeny. *See* Tate Letter, *supra*, at 984-85; *see also supra* text accompanying notes 95-111.

113. *Verlinden III*, 103 S. Ct. at 1968.

114. *Id.*

cretion to decide if a sovereign should be immune from suit.[115] Because of this bifurcated system, the executive department and the judiciary considered widely differing criteria when deciding if sovereign immunity should be granted. Thus, the rules governing sovereign immunity were unclear and applied inconsistently.[116] Hoping to obviate these ad hoc determinations and their concomitant problems, Congress passed the FSIA in 1976. Although the FSIA appears to offer extensive guidance for applying sovereign immunity, in practice the FSIA has not proved very helpful to the courts. In fact, the language of the Act has been described as "little more" than "the starting point for analysis of any procedural question raised in an action against a foreign state."[117]

B. The Foreign Sovereign Immunities Act

Section 1602 of the FSIA contains the framework for sovereign immunity.[118] Congress deemed the FSIA to be the sole guide and standard for resolving questions of sovereign immunity.[119] The FSIA protects foreign sovereigns and their alter egos. In other words, a political subdivision, agency, or instrumentality of a foreign state is treated as a foreign sovereign.[120] The FSIA, however,

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115. *Id.*

116. *See* Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901, 906-09 (1969).

117. Gibbons v. Udaras na Gaeltachta, 549 F. Supp. 1094, 1106 (S.D.N.Y. 1982).

118. *See* FSIA, 28 U.S.C. § 1602. Section 1602 provides in relevant part: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." *Id.*

119. H.R. REP. No. 1487, *supra* note 49, at 12, *reprinted* at 6610.

120. FSIA, 28 U.S.C. § 1603. Section 1603 provides in relevant part:

> For purposes of this chapter -
>
> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity -
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Id. The congressional report underlying the FSIA sheds further light upon the

was not intended to change substantive liability.[121]

According to the restrictive theory of immunity as codified in the FSIA, a foreign state may be subject to the jurisdiction of United States courts only if one of the specific exceptions to immunity is met.[122] The exceptions contained in the FSIA permit actions in which a foreign state waives its immunity,[123] engages in commercial activity "connected" with the United States which gives rise to the cause of action,[124] or is subject to a counterclaim

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types of entities the Act's drafters intended to be covered by § 1603's broad brush: "[A]s a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation . . . a central bank [or] export association . . . ." H.R. REP. No. 1487, *supra* note 49, at 15-16, *reprinted* at 6614.

121. H.R. REP. No. 1487, *supra* note 49, at 12, *reprinted* at 6610.

122. *See* FSIA, 28 U.S.C. § 1604.

123. *Id.* § 1605. Under the Act, a waiver may be effected implicitly or explicitly. *Id.* Although at least one court held that immunity from United States jurisdiction was waived implicitly through an agreement between contracting parties to subject themselves to a foreign nation's jurisdiction, *see* Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978), the majority of courts have been reluctant to find implicit waivers. *See, e.g.*, Perez v. The Bahamas, 652 F.2d 186 (D.C. Cir.), *cert. denied*, 454 U.S. 865 (1981); Ohntrup v. Firearms Center Inc., 516 F. Supp. 1281 (E.D. Pa. 1981). For that reason it is easier to arrive at a definition of an implicit waiver by focusing upon the courts' holdings as to what conduct does not constitute a waiver of jurisdiction. *See* Castro v. Saudi Arabia, 510 F. Supp. 309, 312 (W.D. Tex. 1980) (agreement to indemnify United States does not result in a law of immunity); *see also In re* Rio Grande Transp., Inc., 516 F. Supp. 1155, 1159 (S.D.N.Y. 1981) ("conditional claim and answer" filed in response to a complaint, which by their terms were to be effective only if sovereign immunity claims were denied, was not an implicit waiver of immunity).

124. FSIA, 28 U.S.C. §§ 1605(a)(2), (3), 1605(b). The FSIA must be read in conjunction with § 1603, the Act's definitional provision. Section 1603 defines commercial activity as: "[E]ither a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." *Id.* § 1603(d). Section 1605 enunciates the Act's general commercial activity exception, denying immunity where:

> [T]he action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Id. § 1605(a)(2). The drafters of the FSIA encouraged the courts to take an ac-

that otherwise satisfies jurisdictional requirements.[125] Applying the FSIA, however, is not as simple as matching exceptions to causes of action. The structure of the FSIA intricately coordinates subject matter and personal jurisdiction, the requisites of service of process, and the availability of sovereign immunity as a defense.[126]

Title 28, section 1330(a) of the United States Code governs subject matter jurisdiction and confers upon the federal district courts "original jurisdiction without regard to the amount in controversy of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity."[127] Thus, under the FSIA, the absence of sovereign immunity is a precondition to subject matter jurisdiction.[128] Once subject matter jurisdiction is found[129] and service of process is made in accordance with detailed provisions of the Act,[130] personal jurisdiction exists automatically. Stated simply, "subject matter jurisdiction plus service equals personal jurisdiction, and personal jurisdiction coupled with proper service defeats a claim of immunity."[131] A final aspect of the FSIA warrants attention. The removal provision of the Act allows a foreign sovereign named as a defendant in any civil ac-

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tive role in establishing the parameters of the commercial activity exception. *See* H.R. REP. No. 1487, *supra* note 49, at 16-17, *reprinted* at 6615-16. To a large extent it is the judicial gloss upon that provision which gives the section its judicial meaning. *See, e.g., supra* notes 42-53 and accompanying text. As a general rule, commercial activity is in the nature of conduct that is "customarily carried on for profit." H.R. REP. No. 1487, *supra* note 49, at 16, *reprinted* at 6615.

125. FSIA, 28 U.S.C. § 1607.

126. Verlidor v. L/P/G/ Benghazi, 653 F.2d 812, 817 (3d Cir. 1981).

127. FSIA, 28 U.S.C. § 1330(a).

128. Maritime Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1099 (D.C. Cir. 1982).

129. FSIA, 28 U.S.C. § 1330(b). Section 1330(b) provides in full: "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under § 1608 of this title." *Id.*

130. *See id.* § 1608.

131. *Verlidor*, 653 F.2d at 817. Indeed, § 1605 incorporates implicitly the constitutional minimum contacts standard required for due process. *See, e.g.*, Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1255 (9th Cir. 1980); Waukesha Engine Div., Dresser Americas, Inc. v. Banco Nacional de Fomento Cooperativo, 485 F. Supp. 490, 492 (E.D. Wis. 1980).

tion initiated in a state court to remove the cause to a federal forum.[132] The FSIA recognizes that federal jurisdiction over foreign sovereigns is not exclusive. Yet, because of the removal provision, a foreign sovereign must acquiesce before it may be sued in state court.[133]

From this statutory framework, Congress hoped that a uniform procedure for establishing the presence or absence of immunity would evolve,[134] thereby eliminating the inherent problems of the State Department's ad hoc method used prior to the FSIA. "Practically speaking, [however,] the FSIA did little more than produce a statutory skeleton from which the federal judiciary has been left to create, through a case-by-case decisional process, a fully developed body of sovereign immunity law."[135] The Supreme Court's *Verlinden* holding is another step in that decisional process.

C. The "Arising Under" Language

The focal issue in both *Verlinden II*[136] and *Verlinden III*[137] was whether subject matter jurisdiction was lacking in the constitutional sense. This inquiry focused upon article III[138] of the Constitution and, to a lesser extent, the grant of federal question jurisdiction contained in the United States Code.[139] Because Congress lacks the power to expand the federal courts' jurisdiction beyond the bounds of the Constitution, an examination of article III is crucial to any investigation concerning the propriety of a jurisdictional grant.[140]

The seminal case construing article III's "arising under" lan-

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132. FSIA, 28 U.S.C. § 1441. Section 1441 allows for removal "to the district court of the United States for the district and division embracing the place where" such action is pending. *Id.*

133. *See id.* For a discussion regarding application of § 1441 to the *Verlinden* analysis, see *infra* notes 217-27 and accompanying text.

134. *See* H.R. REP. No. 1487, *supra* note 49, at 7-8, *reprinted* at 6605.

135. *Gibbons*, 549 F. Supp. at 1106.

136. 647 F.2d 320 (2d Cir. 1981).

137. 103 S. Ct. 1962 (1983).

138. U.S. CONST., art. III, § 2; *see supra* note 59 (text of art. III, § 2).

139. 28 U.S.C. § 1331 (1980). The language of § 1331 is virtually identical to that contained in article III. Section 1331 provides that: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States . . . ." *Id.*

140. Kline v. Burke Constr. Co., 260 U.S. 226, 234 (1922).

guage is *Osborn v. Bank of the United States*.[141] That case reflects an expansive view of article III. The fundamental tenet of *Osborn*, as stated by Chief Justice Marshall, is that "it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction."[142]

This broad view was refined in later decisions. In *Shoshone Mining Co. v. Rutter*,[143] the Court emphasized that "in a given case" a suit to enforce a right of possession conferred by the laws of the United States may not "arise under" the laws of the United States.[144] The Court in *Shoshone* recognized that "[a] statute authorizing an action to establish a right" differs significantly from a statute "which creates a right to be established."[145] Subsequent decisions clarified this view. In *Puerto Rico v. Russell & Co.*,[146] the Court reiterated that if the right asserted is nonfederal "[f]ederal jurisdiction may [not] be invoked . . .

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141. 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Supreme Court refused to strike down on article III grounds a statute granting the Bank of the United States the capacity to sue in federal court on "state" causes of action. Speaking for the Court, Chief Justice Marshall stated: "[T]he judicial department may receive from the Legislature the power of construing every such law" constitutionally enacted by the legislature. *Id.* at 818.

142. *Id.* at 822. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 481-82 (1957), the Supreme Court noted that the scope of the *Osborn* holding is subject to question. If interpreted literally, *Osborn* could allow for original federal jurisdiction in the remote situation where a federal question might be presented. *See id.*; *see also* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 866-68 (2d ed. 1973) [hereinafter cited as HART & WECHSLER].

143. 177 U.S. 505 (1900). In *Shoshone*, the Court refused to allow federal jurisdiction to a claimant who sought to litigate a dispute concerning the possession of land held under a federal patent. The Court emphasized that although some suits may arise under federal law, others may not contain any issue "under the Constitution, or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact." *Id.* at 508.

144. *Id.*

145. *Id.* at 510.

146. 288 U.S. 476 (1933). In *Russell*, the Puerto Rican Government sued to collect a tax. The defendant, Russell, petitioned for removal to a federal court. Russell argued that federal jurisdiction existed under article III because Congress established both the Puerto Rican Government and the plaintiff's right to sue. *Id.* at 482; *see* Guinea Brief, *supra* note 3, at 9 (presentation of the evaluation of the "arising under" clause and the role of *Russell* in that process).

merely because the plaintiff's right to sue is derived from federal law."[147] Thus, under this reasoning it is the nature of the right, not the source of the authority that establishes the right, determines when the federal courts have jurisdiction. Then, in *Gully v. First National Bank*,[148] the Court stated that the emergence of a federal question in a suit does not prove the suit is grounded in federal law.[149] The *Gully* Court answered the question of whether a suit arises under federal law by asking if construction of the federal law would be outcome-determinative of the underlying suit.[150] If the answer is positive, then the federal court has subject matter jurisdiction over the case.[151]

A review of these decisions does little to establish the precise boundaries of article III's "arising under" language. Indeed, the federal courts rarely have construed the language of article III, primarily because the passage in 1875 of the precursor to the federal question jurisdictional grant, 28 U.S.C. section 1331, obviated the need for "direct resort" to the Constitution.[152] Significantly, cases construing the statutory jurisdictional language, even though that language is virtually identical to that contained in article III, cannot be accepted as constitutional interpretations. Jurisdiction pursuant to article III's "arising under" language is broader than federal question jurisdiction pursuant to section 1331.[153] Heavy reliance upon decisions construing the language of

147. *Russell*, 288 U.S. at 483.

148. 299 U.S. 109 (1936). In *Gully*, the plaintiff sued in a Mississippi state court to recover a money judgment for back taxes against a national banking association. *Id.* at 111. First National Bank sought to remove the cause to federal court alleging that the suit "arose under" the Constitution or laws of the United States because the power to tax a national bank was created in a federal statute. *Id.* at 112.

149. *Id.* at 115.

150. *Id.* at 114.

151. *Id.*

152. *Verlinden II*, 647 F.2d at 325.

153. *Verlinden III*, 103 S. Ct. at 1972. The *Verlinden III* Court made clear that limitations imposed on jurisdiction under § 1331 are not limits on Congress' constitutional power to give the federal courts jurisdiction. *Id.* (citing Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959)). The Court went on to state emphatically that the *Verlinden II* court's "heavy reliance" on federal question decisions was "misplaced." *Verlinden III*, 103 S. Ct. at 1972. Jurisdictional scholars have argued that deciding whether identical language also requires similar interpretation depends in part upon the context in which the language is linked. *See* Shulman & Jaegerman, *supra* note 73, at 405 n.47.

the general federal question statute, therefore, would be imprudent. Yet, because courts have construed the statute in numerous decisions, those decisions at least offer valuable guidance to construction of that crucial constitutional language.[154]

Three distinct types of suit exist within the "arising under" language of section 1331. The first category, suits arising under the law creating the cause of action, was introduced by *American Well Works Co. v. Layne & Bowler Co.*[155] In that case the Court held that a cause of action for damages resulting from threat of suit under a patent law did not constitute a suit arising under the patent laws.[156] The decision in *Smith v. Kansas City Title & Trust Co.*[157] initiated the second category of suits. In that case the Court held that when a complaint requires the interpretation of a federal law, the constitutional jurisdictional requirements are met.[158] Two recent cases, *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*[159] and *Skelly Oil Co. v. Phillips Petroleum Co.*,[160] refined the principles enunciated in *Smith*. The *Ivy Broadcasting* court extended the *Smith* doctrine to include interpretations of federal common law, which confer substantive rights.[161] Conversely, the *Skelly Oil* court narrowed *Smith*, holding that the interpretation of a federal statute that regulates procedure was inadequate to provide a constitutional basis for juris-

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154. *Verlinden II*, 647 F.2d at 325.

155. 241 U.S. 257, 260 (1916). In *American Well Works Co.*, plaintiff alleged that defendants slandered his title to a water pump. Plaintiff argued that he was entitled to damages because defendants' remarks, constituted a patent infringement. *Id.* at 258-59. In reaching its decision that the suit did not "arise" under the patent law, the Court stated that "[w]hat makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business, which is a cause of action under the law of the state, not the infringement of a patent." *Id.* at 260.

156. *Id.*

157. 255 U.S. 180 (1921). In *Smith*, a shareholder sued to enjoin a corporation from purchasing allegedly illegal bonds in violation of its charter. State law created the cause of action because the corporate charter was enacted pursuant to state law. The plaintiff's grounds for suit, however, required the interpretation of federal law. The bonds were issued pursuant to a federal law that plaintiff believed was unconstitutional. *Id.* at 198-99.

158. *Id.* at 199.

159. 391 F.2d 486 (2d Cir. 1968).

160. 339 U.S. 667 (1950).

161. *Ivy Broadcasting*, 391 F.2d at 492-93. The *Ivy Broadcasting* court believed that "federal common law" regarding duties of communications carriers, when read in light of the Communications Act of 1934, affects substantive rights, thereby making subject matter jurisdiction available. *Id.* at 492-94.

diction.[162] Furthermore, both the courts and commentators agree that a federal statute that provides for affirmative defenses cannot be used to invoke jurisdiction on the grounds that the statute will be interpreted once the defense is raised.[163] For example, Justice Cardozo, speaking forcefully for the Court in *Gully v. First National Bank in Meridian*,[164] stated that "[a] suit does not arise under a law renouncing a defense, though the result of the renunciation is an extension of the area of legislative power which will cause the suitor to prevail."[165] The source of the third group of suits within section 1331's "arising under" language is *Clearfield Trust Co. v. United States*.[166] In that case Justice Douglas stated that "[i]n absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."[167] The *Clearfield* decision is now recognized as requiring the imposition of "federal common law" in those cases in which a court finds a national interest so strong that a judicially created federal rule of decision preempts the state law that would otherwise govern the cause of action.[168] *Clearfield* is

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162. *Skelly Oil*, 399 U.S. at 673-74. The conflict in *Skelly Oil* arose when a natural gas pipeline company sought a certificate required by federal law from the Federal Power Commission for the construction and operation of a pipeline. The pipeline company sought an interpretation of its contract pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201. *Skelly Oil*, 399 U.S. at 669-70. Although the suit required an interpretation of the Act, jurisdiction was denied. The Court stated that the right to be vindicated was "State created," and therefore, did not arise under federal law. *Id.* at 673.

163. *See* Gully v. First Nat'l Bank of Meridian, 299 U.S. 109 (1936); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

164. 299 U.S. 109 (1936).

165. *Id.* at 116.

166. 318 U.S. 363 (1943). In *Clearfield Trust*, a private business had honored a fraudulently endorsed check drawn on the Treasury of the United States. The check was subsequently endorsed over to the plaintiff trust company. Shortly thereafter, the intended beneficiary executed an affidavit alleging forgery. *Id.* at 364-65. The Court stated that the issuance of commercial paper by the United States is extensive and affects many states. *Id.* at 367. To avoid an inevitable diversity of results in suits involving such matters, the Court held that a "federal common law" should be developed to foster uniformity in the decisions. *See id.* at 367. The Court noted that the Treasury's authority to issue the check was vested in the Constitution and the federal laws and was not dependent upon any state law. *Id.* at 366.

167. *Id.* at 367.

168. *Verlinden II*, 647 F.2d at 326. Frequently, the national interest is uniformity of decision. *See In re* "Agent Orange" Prod. Liab. Litig., 635 F.2d 987

cited frequently and has received much comment in subsequent decisions. For example, in *United States v. Standard Oil Co.*,[169] the Supreme Court held that "federal common law" applied when the United States sought recovery in tort for a soldier's medical expenses resulting from the defendant's negligence.[170] A determinative factor in the Court's decision to apply "federal common law" was the absence of a state interest.[171] This state interest concept was determinative in *Standard Oil* and was expanded in *Wallis v. Pan American Petroleum Corp.*[172] The *Wallis* Court stated that when deciding whether to apply "federal common law" to a given suit, a court should determine if a federal policy or interest conflicts with state law, and also examine the strength of the state interest and the feasibility of creating a judicial substitute.[173] Subsequent decisions applied and refined the *Wallis* criteria. By holding that "federal common law" was inapplicable to an alleged breach of contract by the Federal Aviation Administration, the Supreme Court in *Miree v. DeKalb County*[174] narrowly construed *Wallis*.[175] Writing for the majority in *Miree*, Justice Rehnquist considered it dispositive that the petitioners did not raise a question concerning the liability or obligations of the

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(2d Cir. 1980).

169. 332 U.S. 301 (1947). In *Standard Oil*, a soldier was injured by defendant's truck and hospitalized. Upon payment of $300, the soldier released the defendant from any claims arising out of the accident. The government sought recovery of hospital expenses. *Id.* at 302.

170. *Id.* at 305.

171. *Id.* at 307.

172. 384 U.S. 63 (1966). *Wallis* presented the issue whether, in general, federal common law or state law should govern the dealings of private parties in an oil and gas lease when it was executed pursuant to the Mineral Leasing Act of 1920. *Id.* at 68. In holding that federal common law should not govern such a situation, the Court emphasized that no aspect of the federal statute was inconsistent with state law. *Id.* at 69-71.

173. *Id.* at 68.

174. 433 U.S. 25 (1977). *Miree* resulted from the crash of a Lear Jet shortly after its takeoff. The petitioner sought to impose liability on the respondent as a third party beneficiary of a contract between it and the Federal Aviation Administration. *Id.* at 26-27. The district court dismissed petitioner's claim, holding that DeKalb County was insulated from suit by governmental immunity. *Id.* at 27. The court of appeals sitting en banc reversed, holding that principles of "federal common law" should govern the case. *Id.* at 27-28. The Supreme Court reversed that decision. *Id.* at 26.

175. 384 U.S. 63 (1966).

United States.[176] Justice Rehnquist emphasized that the litigation was between private parties[177] and that its outcome had no direct impact on the United States or the Treasury.[178] In a more recent decision, *In re "Agent Orange" Product Liability Litigation (In re "Agent Orange")*,[179] the court clarified *Wallis* by urging courts to consider the presence of a substantial federal interest in the outcome of the litigation, the effect on the federal interest should state law be applied, and the effect on the state interest should state law be displaced.[180] The court in *In re Agent Orange* concluded that when a suit involves private litigants, the federal goal of uniformity of decision cannot be attained,[181] and therefore, this particular situation is inappropriate for the application of "federal common law."[182]

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176. *Miree*, 433 U.S. at 28-29.

177. *Id.* at 30-31. Chief Justice Burger, in a concurring opinion, stated that he did not read *Clearfield* as "precluding the application of 'federal common law' to all matters involving only the rights of private citizens." *Id.* at 34. Burger went on to state that "[a]lthough federal courts will be called upon to invoke it [federal common law] infrequently, there must be federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation." *Id.* at 35.

178. *Id.* at 29.

179. 635 F.2d 987 (2d Cir. 1980). In *In re "Agent Orange,"* a suit was brought by veterans of the United States armed forces against companies that supplied the United States with "Agent Orange" for use in the Vietnam War. The veterans alleged that they incurred various physical injuries from exposure to the defoliant. *Id.* at 988-89.

180. *Id.* The test was fashioned by the district court but applied by the Second Circuit. *See id.* at 990.

181. *Id.* at 993. The court in *In re "Agent Orange"* noted two concerns of the government in establishing a uniform body of law. They were "uniformity for its own sake" and uniformity in the content of the rules. *Id.* The court implied that both concerns must be satisfied before federal common law may be imposed. *See id.* The court considered the first concern to be inherently impossible to satisfy in a suit between two private litigants because no substantial rights of the government would depend upon the outcome of the suit. *Id.* at 993-94.

182. *Id.* at 994. Even the prospect of uniform decision making was viewed as an insufficient reason to invoke "federal common law." *Id.* at 993. Two reasons were cited. First, it is the nature of the federal system that different states will apply different laws to suit the perceived needs of their respective jurisdictions. *Id.* at 994. Second, "where a federal statutory program governs the rights of private litigants and Congress has left gaps to be filled by the courts, uniformity is not prized for its own sake." *Id.*

IV. The Significance of the Decision

A. The Court's Role in Interpreting the FSIA

The Supreme Court's *Verlinden* holding is unique. The Court necessarily had to choose a narrow or a broad interpretation of the FSIA. A narrow interpretation logically required the Court to declare the FSIA unconstitutional as applied to the *Verlinden* facts. Interpreting the Act broadly, however, would result in a significant expansion of federal jurisdiction absent any indication that Congress intended to expand jurisdiction. Because the Constitution does not permit Congress to expand the jurisdiction of the federal courts beyond the bounds of article III,[183] jurisdictional statutes should be interpreted narrowly absent a clearly expressed congressional intent to confer jurisdiction upon the federal courts.[184] Contrary to this fundamental tenet of statutory construction, the Supreme Court took an activist role in *Verlinden* and construed the statute in its most expansive terms.[185] That construction permits an alien to sue a foreign nation in United States federal courts even though "Congress formed no clear intent as to the citizenship of the plaintiffs under the Act."[186] Moreover, comparing the evolution and construction of

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183. *See, e.g.*, Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

184. *See Shoshone Mining Co.*, 177 U.S. 505, 506. The Court stated in *Shoshone* that where an ambiguous statute is at issue "the question is not one of the power of Congress, but of its intent." *Id.* at 506.

185. *See* FSIA, 28 U.S.C. § 1330(a). Section 1330(a) gives district courts original jurisdiction "of *any* non-jury civil action against a foreign state." *Id.* (emphasis added).

186. *Verlinden II*, 647 F.2d at 324. Two distinct lines of thought have developed concerning the Act's silence on the appropriateness of such suits. Arguably, the plain language of FSIA § 1330(a) allows an alien to bring suit against a foreign state in a federal district court. Professor J. Moore adopted this view. *See id.* (citing 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice ¶ 0.66[4], at 700.178-.179 (2d ed. 1983) [hereinafter cited as J. Moore]). Professor Moore sees a "plain intention . . . to confer on the district court jurisdiction of an action by an alien against a foreign state if the action otherwise meets the requirements" of the Act. *Id.* (quoting 1 J. Moore ¶ 0.66[4], at 700.178-.179). Professor Moore's conclusion is buttressed by the FSIA's removal provision—28 U.S.C. § 1441(d)(1976). *Id.* This new subsection allows a foreign sovereign named as a defendant in "[a]ny civil action brought in a state court" to remove to a federal forum. *Id.* Under this line of reasoning, if aliens were barred from suing foreign states in federal courts, the stated purpose of the removal provision, developing a uniform body of federal law governing assertions of sovereign immunity, H.R. Rep. No. 1487, *supra* note 49, at 32, *reprinted*

the FSIA's jurisdictional provision to its statutory counterparts reveals no evidence that Congress "intended to create a completely new federal jurisdiction over otherwise non-federal claims brought by foreign parties against foreign states."[187] An examination of the history of the FSIA further illustrates this point.

Before enactment of the FSIA, citizens could sue foreign states in federal court under either the federal question[188] or diversity

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at 6631, would be thwarted. *See Verlinden I,* 488 F. Supp. at 1292; 1 J. MOORE, *supra,* ¶ 0.66[4], at 700.179. Language throughout the Act's legislative history can also be construed to indicate that the FSIA's silence regarding whether the plaintiff must be a United States citizen was intentional. H.R. REP. No. 1487, *supra* note 49, provides that the FSIA determines "when and how parties," *id.* at 6, *reprinted* at 6604, can maintain a suit against a foreign state and that the Act applies to "any claim," *id.* at 13, *reprinted* at 6611, against a foreign state. *See Verlinden II,* 647 F.2d at 324. Furthermore, testimony presented at subcommittee hearings described the Act in the same broad terms. *See id.* at 323-24 (quoting *Hearings on H.R. 11315: Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 94th Cong., 2d Sess. (1976) [hereinafter cited as *1976 Hearings*]). The FSIA was described as providing relief for private parties with claims, *1976 Hearings, supra,* at 31 (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Dep't of Justice), and "private litigants," *id.* at 58 (testimony of Peter D. Trooboff, Chairman of the Committee on Transnational Judicial Procedure, International Law Section, American Bar Association).

An equally persuasive argument can be made that the FSIA was designed to ensure that United States citizens have access to federal courts when involved in suits against foreign nations. *Verlinden II,* 647 F.2d at 323. The draftsmen of § 1330(a) believed that because of the ever increasing contact "American citizens" have with foreign states, "U.S. businessmen" and "American property owner[s]" must have a means to resolve "ordinary legal disputes" against nations. *Id.* at 323 (quoting H.R. REP. No. 1487, *supra* note 49, at 6-7, *reprinted* at 6605). President Ford, when signing the Bill into law, reiterated this view stating: "[t]his legislation will enable American citizens . . . to ascertain when a foreign state can be sued in our courts." *Statement by the President on Signing H.R. 11315 Into Law,* 12 WEEKLY COMP. PRES. DOC. 1554 (1976). Finally, testimony at the hearings concerning the introduction of a statutory forerunner to the FSIA, referred extensively to "our citizens" in discussing the impact of the bill. *Hearings on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. 18 (1973), *cited in Verlinden II,* 647 F.2d at 323-24. In general, Congress emphasized that the Act was limited, stating that it did not intend "to open up our courts to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." *Id.* (quoting *1976 Hearings, supra,* at 31).

187. Guinea Brief, *supra* note 3, at 6.

188. *See* 28 U.S.C. § 1331 (1970).

statute.[189] Also, a technical reading of the pre-FSIA federal question statute permits suits between two foreign parties because the statute's jurisdictional grant "depended upon the nature of the claim rather than the parties' citizenship."[190]

Enactment of the FSIA changed the previous grants of diversity and federal question jurisdiction. Congress promulgated the FSIA's new jurisdictional provisions, 28 U.S.C. sections 1330 and 1332(a)(4), to provide specifically for actions against foreign states and continued jurisdiction over suits "between a foreign state as plaintiff and United States citizens or states."[191] Simultaneously, Congress deleted references to foreign parties in the diversity statute.[192] The statutory federal question grant, which was silent regarding citizenship, remained unchanged.[193] From this historical framework it may be inferred that the FSIA's jurisdictional provisions do not provide for a new class of plaintiffs, but clarify proper application of the FSIA's new sovereign immunity rules.[194]

The Court also assumed an activist role when it found the FSIA to be a substantive provision.[195] That finding strengthened the Court's conclusion that the Constitution did not preclude a federal court from hearing *Verlinden.* In support of this conclusion, the Court noted that Congress enacted the FSIA pursuant to its power to regulate foreign commerce and thereby established "comprehensive rules governing sovereign immunity."[196] According to the Court, the rules of the FSIA and their interpretations governed the types of actions in which jurisdiction over a foreign sovereign could be exercised.[197] Thus, the exercise of jurisdiction in *Verlinden* comported with article III's requirements because the FSIA necessitated interpretation by the Court.[198] By deeming the FSIA to be substantive, the Supreme Court deviated significantly from its earlier holdings that the underlying nonfederal dispute established the nature of a case, even if a federal statute

189. *See id.* § 1332.
190. Guinea Brief, *supra* note 3, at 5.
191. *See id.*
192. *Compare* 28 U.S.C. § 1332 (1970) *with* 28 U.S.C. § 1332 (1976).
193. *Compare* 28 U.S.C. § 1331 (1970) *with* 28 U.S.C. § 1331 (1976).
194. *See* Guinea Brief, *supra* note 3, at 6.
195. *Verlinden III,* 103 S. Ct. at 1973.
196. *Id.* (citing H.R. REP. No. 1487, *supra* note 49, at 12, *reprinted* at 6610).
197. *Id.*
198. *See supra* notes 84-90 and accompanying text.

authorized the suit and prescribed the procedure for asserting a claim.[199] The exceptions to the FSIA concern the circumstances under which a claim is actionable, not the kind of claims that may be brought or the procedure for bringing the suit. For example, the FSIA *permits* a contract action pursuant to its newly created commercial activity exceptions;[200] it does not create a new cause of action in "commercial activity." Thus, the FSIA does not actually govern the types of claims that are actionable, as the Supreme Court stated. Finally, when compared with similar statutes, on balance the FSIA appears to be primarily a jurisdictional statute. For example, 28 U.S.C. section 1350 permits an alien to bring suit in tort, but the district courts have jurisdiction only if the tort was "committed in violation of the law of nations or a treaty of the United States."[201] Although both section 1330(a) and section 1350 of the FSIA confer jurisdiction, section 1350, unlike section 1330(a), provides the federal courts with substantive "sources of decision"—the law of nations or a treaty of the United States.[202] The FSIA contains no parallel provision. Moreover, its drafters did not envision it to affect substantive liability.[203]

Despite the apparent inattention of the FSIA's drafters to the

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199. *See* Puerto Rico v. Russell & Co., 288 U.S. 476 (1933); Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

200. Arguably, a case between foreign litigants brought under the FSIA could be said to arise under federal law in the sense that the cause of action was created by the FSIA. That is, because no cause of action against a sovereign could be maintained by a private litigant at common law, *see* The Schooner Exch. v. M'Faddon, 11 U.S. (7 Cranch), 116 (1812), the FSIA can be said to provide "a judicially enforceable right against the foreign sovereign in place of the discretionary Executive remedy that had previously existed." *See* Brief for Petitioner, *supra* note 9, at 37. A modicum of support for this position may be garnered from the recent Supreme Court decision of Dames & Moore v. Regan, 453 U.S. 654 (1981). In that case the Court noted that traditionally the President of the United States settled citizens' claims against foreign sovereigns and implied that because of the FSIA's enactment, an individual might have a claim that this action by a President is a forced settlement and therefore a taking. *Id.* at 689; *see* Brief for Petitioner, *supra* note 9, at 37.

201. Brief for Petitioner, *supra* note 9, at 37.

202. 28 U.S.C. § 1350. Section 1350 provides in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

203. *See* Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 214 (N.D. Ill. 1982).

possibility of a suit with only foreign litigants and the potential ramifications of expanding section 1330, the Supreme Court interpreted the statute to establish a new type of jurisdiction in federal courts.[204] The effect is to broaden the class of plaintiffs that may sue a foreign sovereign in the United States and, to that extent, restrict a foreign state's immunity from suit in United States courts. In *Verlinden III* the Court did more than fill gaps in the language of the FSIA. The Court legislated a new jurisdictional grant, cloaked rhetorically as an inference of congressional intent, from the plain meaning of the statute's provisions. To that extent, the Court usurped Congress' role in derogation of the principle of the separation of powers.[205]

B. The Constitutional Impact

In *Verlinden III* the Supreme Court recognized[206] that the scope of the "arising under" language[207] in article III of the Constitution is significantly broader than the identical language found in the statutory federal question grant of jurisdiction.[208] The breadth of the Court's interpretation is astounding. The Court strongly implies that the "well-pleaded complaint" rule, a pillar of United States civil practice established in *Nashville & Louisville Railroad Co. v. Mottley*,[209] need not be followed at all

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204. *See supra* text accompanying notes 118-21.

205. The Court believed that the Act's legislative history, *see supra* note 186, revealed an intent not to limit jurisdiction under the FSIA. *Verlinden III*, 103 S. Ct. at 1969. No other jurisdiction expressed agreement with the view of the Supreme Court. *See Verlinden II*, 647 F.2d at 323-24; *Verlinden I*, 488 F. Supp. at 1289; *Jafari*, 539 F. Supp. at 213.

206. *See Verlinden III*, 103 S. Ct. at 1969. The Court rejected the Second Circuit's analogy between 28 U.S.C. § 1331 and article III of the Constitution, stating:

> 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. It is a statute, not a Constitution, we are expounding."

Verlinden III, 103 S. Ct. at 1972 (quoting Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959) (emphasis deleted)).

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

208. 28 U.S.C. § 1331.

209. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

times.[210] According to the rule, a defense that must be raised affirmatively cannot confer federal jurisdiction, no matter how urgent its federal nature or how likely it is that the allegation would raise a constitutional question. Sovereign immunity is an affirmative defense pursuant to the FSIA.[211] Until *Verlinden III*, a defense could not be "transformed into" part of the claim simply because a federal statute requires the plaintiff to plead the defense as a ground for jurisdiction. In fact, the Federal Rules of Civil Procedure provide that a jurisdictional statement in a claim is separate and apart from a claim.[212] The Supreme Court sidestepped this dilemma by distinguishing *Verlinden III* from *Mottley* on the grounds that in the latter case the Court interpreted the "arising under" terminology of the statute, not the Constitution.[213]

If the Court continues to espouse this broad view of the "arising under" language in the Constitution, the result could be to remove all bounds set by article III on Congress' ability to confer jurisdiction.[214] Pursuant to the Court's view in *Verlinden III*, virtually any jurisdictional statute could be deemed substantive if it promotes federal interests[215] and contains some standards for allowing jurisdiction.[216] Consequently, the other jurisdictional grants in article III may become surplusage.

C. Concerns Regarding Federalism

The Supreme Court's apparent "end-run" around the "well-pleaded complaint" rule of *Mottley* raises the possibility that the federal judiciary may intrude into the domain of the state judiciary. The "well-pleaded complaint" rule stems from the notion that federal defenses are only hypothetical until they are joined.[217] Generally, the federal elements of a case are not apparent until the case has been through the state court system.[218] That appellate federal review is available does not indicate that

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210. *See Verlinden III*, 103 S. Ct. at 1971-73.
211. *Verlinden II*, 647 F.2d at 326-27.
212. FED. R. CIV. P. 8(a).
213. *See Verlinden III*, 103 S. Ct. at 1972.
214. *Jafari*, 539 F. Supp. at 214.
215. *See Verlinden III*, 103 S. Ct. at 1973.
216. *See id.*
217. *See* Guinea Brief, *supra* note 3, at 19.
218. *See id.* at 20.

the federal courts have original jurisdiction over the matter.[219] Article III's mandate that the federal courts exercise jurisdiction only over genuine cases or controversies still must be satisfied.[220] Just as the independent state ground doctrine precludes federal courts from exercising jurisdiction over issues better left to the state courts,[221] so should the "well-pleaded complaint" rule preclude federal jurisdiction over issues better left to the state judiciary. For example, if a defendant waives the defense of sovereign immunity or concludes that a defense does not exist,[222] the court would decide a case in which the dispositive issues were grounded exclusively in state or common law.[223] Clearly, absent diversity jurisdiction, this situation trangresses the rule of constitutional federalism which does not permit federal courts to exercise jurisdiction over nonfederal claims.[224]

Moreover, *nonfederal* claims by aliens against foreign sovereigns can be adjudicated fully in the state courts. By its terms the FSIA regulates state judicial proceedings in which foreign sovereigns are defendants.[225] The Act's requirement for personal and subject matter jurisdiction protects the foreign state and hence, United States foreign relations.[226] Thus, "[f]ederal jurisdiction, per se, adds nothing" in nonfederal claims.[227]

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219. *Id.*

220. U.S. CONST., art. III, § 2.

221. *See, e.g.,* Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977). This doctrine prevents the courts from giving advisory opinions on federal issues ancillary to the judgment. *Id.* at 566. Thus, the rule ensures that federal courts merely correct state judgments when they interpret federal law inaccurately. *See* Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Thus, if an adequate and "independent state ground exists, review of the federal question would be advisory unless review is also had of the state ground." Guinea Brief, *supra* note 3, at 21. Review of the state ground, however, would impair federalism and transgress the teachings of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *See* Guinea Brief, *supra* note 3, at 21.

222. *See supra* notes 118-21 and accompanying text.

223. Guinea Brief, *supra* note 3, at 21-22.

224. *Id.* at 22.

225. *See* FSIA, 28 U.S.C. § 1441(d); *see also supra* notes 127-33 and accompanying text.

226. *See supra* notes 117-20, 122-26 and accompanying text.

227. Guinea Brief, *supra* note 3, at 16.

D. The Problem of Waiver Under the FSIA

Waiver of immunity by defendants can cause problems in the judicial system. Although the Supreme Court avoided expressly the issue of whether a foreign state could waive its immunity under the FSIA[228] and thereby consent to a suit stemming from activities "wholly unrelated" to the United States,[229] this result is inevitable under the Court's reasoning. Also, at least one court has held that a contract which provided for the application of law from a particular nation to disputes between the parties constituted a waiver of sovereign immunity in the United States.[230] The Court's determination that Congress intended the FSIA to allow the entire United States to be a forum[231] coupled with the opportunity for a nation to waive sovereign immunity, lends itself to international forum shopping. Other problems are also likely to arise. First, the traditional grounds for determining the proper forum are robbed of their logical significance. Second, ensuring a fair trial between two foreign entities would be difficult and complicated considering the problems of access to sources of proof, availability of compulsory process to compel the attendance of unwilling witnesses, cost of attaining willing witnesses, possibility of viewing the situs of the controversy, and the other practical problems that such logistics present. Also, due process would be especially difficult to implement when the results of litigation could easily depend upon which party had the deepest pockets.

E. Providing Adequate Protection for United States Foreign Relations

A chief concern of the Supreme Court in its *Verlinden III* holding was the need for the continued existence of cohesive foreign relations between the United States and foreign nations.[232] To a large extent the Court used this concern as a basis for its holding that the FSIA was a substantive statute.[233] Although the Supreme Court rightly took this concern into account, the Act of State

228. FSIA, 28 U.S.C. § 1605(a)(1).

229. *Verlinden III*, 103 S. Ct. at 1970 n.15.

230. *See* Ipitrade Int'l v. Federal Republic of Nigeria, 465 F. Supp. 824 (D.D.C. 1978).

231. *See Verlinden III*, 103 S. Ct. at 1969; *see also* Bankers Trust Co. v. Worldwide Transp. Servs., 537 F. Supp. 1101, 1108 (E.D. Ark. 1982).

232. *See Verlinden III*, 103 S. Ct. at 1971.

233. *See id.*

Doctrine, to some extent, accomodates the concern. The Act of State Doctrine requires United States courts to refrain from adjudicating a politically sensitive dispute that requires a court to determine the legality of a sovereign act by a foreign state.[234] The doctrine resembles the political question doctrine in domestic law,[235] and is grounded in the notion that "[t]o participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy."[236] Anytime courts must consider the legality of a foreign nation's acts, possible application of the Act of State Doctrine must be addressed.[237] Because of the protections offered by the Act of State Doctrine, the Court in its reasoning of the *Verlinden* case may have overemphasized the importance of federal regulation of jurisdiction under the FSIA.

F. Practical Significance

Verlinden III, despite its shortcomings, is not devoid of merit. First, the Supreme Court chose to address the constitutional issue. At least one court, commenting upon the Second Circuit's holding, implied that the constitutional problem could have been avoided if the Second Circuit had followed the well established principal favoring a statutory construction over constitutional interpretation.[238] Fortunately, the Court chose not to sidestep the

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234. International Ass'n of Machinists & Aerospace Workers v. OPEC, 649 F.2d 1354, 1358 (9th Cir. 1981).

235. *Id.* The Act of State Doctrine has a constitutional foundation. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964). It arises from the role of the United States courts in our tripartite governmental system. *International Ass'n of Machinists*, 649 F.2d at 1359. "It recognizes not only the sovereignty of foreign states, but also the spheres of power of the co-equal branches of our government." *Id.* In making a determination concerning the propriety of declining jurisdiction under the Act of State Doctrine, a court must consider the foreign government's motivations. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 607 (9th Cir. 1976). Such a consideration is irrelevant in sovereign immunity determinations under the FSIA. The "crucial element" for declining jurisdiction under the Act of State Doctrine is the potential for disrupting harmonious relations between sovereigns. *Id.*

236. *International Ass'n of Machinists*, 649 F.2d at 1359.

237. Indeed, while a court may exercise jurisdiction under the FSIA based on a commercial activity exception, the Act of State Doctrine is not necessarily triggered. *See id.* When the United States foreign relations are impaired because of commercial activity, the Act of State Doctrine becomes relevant.

238. Jafari v. Islamic Republic of Iran, 539 F. Supp. 209, 213 (N.D. Ill. 1982).

constitutional ramifications of *Verlinden* and offered an affirmative interpretation of the FSIA, upon which lower courts may rely.

Second, the Supreme Court's decision ensures that foreign nationals are precluded from asserting that the United States violated its treaties of establishment by declining jurisdiction of a suit brought by an alien against a foreign sovereign. The United States has executed this type of treaty with the majority of its most important trading partners.[239] According to those treaties, the United States must provide foreign enterprises and nationals with the same access to its courts as United States companies and nationals.[240] Thus, the treaties may require the courts to construe the jurisdictional provision of the FSIA as permitting a suit by a foreign national or company where a United States national or company could sue.[241] This construction comports with the Supreme Court's broad interpretation of the FSIA[242] and previous Supreme Court decisions stipulating that treaties can be modified only if Congress manifests clearly the intent that they be modified.[243]

Third, the thrust behind the *Verlinden III* decision may have been the Court's desire to guarantee that overseas United States concerns be provided with federal protection. If Congress intended the FSIA to protect United States enterprises,[244] then an overly narrow reading of the FSIA would obfuscate that goal. A substantial portion of the United States overseas commercial ac-

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That principle, however, should be followed only when an alternative reading of the statute is "fairly possible." *Id.*

239. *See* Brief for Petitioner, *supra* note 9, at 13.

240. *See id.* (citing Treaty of Friendship, Commerce, and Navigation, Mar. 27, 1956, United States—Netherlands, 8 U.S.T. 2043, 2048, T.I.A.S. No. 3942).

241. *Id.* at 14.

242. *See supra* sections IIC and IVA.

243. *See* Cook v. United States, 288 U.S. 102, 120 (1933); Brief for Petitioner, *supra* note 9, at 14. A cogent argument may be made indicating that treaties establishing friendship, commerce, and navigation would be unaffected if the Supreme Court decided differently. These treaties do not refer specifically to jurisdiction in the United States federal courts. *See* Guinea Brief, *supra* note 3, at 16. Accordingly, "[t]hey merely prohibit discrimination in access to United States courts, state or federal against the citizens of a contracting sovereign." *Id.* at 16-17. Thus, an alien plaintiff would be on no different footing than a United States citizen who asserts a "non-federal claim against a non-diverse defendant." *Id.* at 17.

244. Brief for Petitioner, *supra* note 9, at 13.

tivity, "including business with foreign sovereigns, is carried on through subsidiaries organized abroad."[245] Because foreign subsidiaries are "citizens" of the nation where they were organized,[246] suits that are substantively between United States businesses and foreign sovereigns could not have been brought pursuant to the FSIA[247] if the Court had construed the Act narrowly and held that in all circumstances an alien could not sue a foreign national in federal court.

G. Conclusion

The Supreme Court's holding properly permits foreign subsidiaries to enjoy the benefits of federal law pursuant to the FSIA. The breadth of the *Verlinden III* holding, however, is excessive. In *Verlinden II* the Second Circuit's decision did not completely prohibit aliens from suing a foreign sovereign in federal district court. Instead, the Second Circuit held it inappropriate to assert federal jurisdiction over the facts of *Verlinden*. The possibility that the FSIA could be invoked to permit jurisdiction over a foreign sovereign in situations involving a litigant with a genuine federal claim remained unanswered in *Verlinden II*. Indeed, after *Verlinden II* the opportunity remained for the Supreme Court to carve out areas of "federal common law" appropriate for the assertion of federal jurisdiction in suits between two foreign litigants. These steps could be taken in accordance with well established principles governing jurisdiction conferred by the statutory "arising under" language. This approach does not conflict with the Supreme Court's holding that the constitutional "arising under" language is broader than the identical statutory language; rather, it complements that reasoning. Because the constitutional language is broader, it must include at least the concepts embodied in the statutory language. When a federal claim does not ex-

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245. *Id.* This concern cannot be taken lightly. As counsel for Verlinden pointed out in its brief:

> According to the Department of Commerce, more than 85% of U.S. foreign direct investment is made through foreign subsidiaries. . . . In 1977, majority-owned nonbank foreign affiliates of U.S. companies had over $507 billion in sales and $335 billion in assets. . . . The figures for foreign companies in which there are substantial U.S. minority interests are much larger.

Id. at 13 (citations omitted).

246. *Id.* (citing Steamship Co. v. Tugman, 106 U.S. 118 (1882)).

247. *See id.*

ist, state courts governed by the immunity standards of the FSIA could handle the case until the point at which a federal claim is presented. Thus, because the Supreme Court refused to act boldly and decide that the FSIA as applied to the *Verlinden* situation lacked a constitutional basis, the Court necessarily assumed an activist role and in so doing expanded significantly the bounds of federal jurisdiction.

Gerald J. Pels