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No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation

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NOTE

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INTRODUCTION

In an increasingly common litigation strategy,[1] plaintiffs in *Patrickson v. Dole Food Company*,[2] laborers in the banana industries of Costa Rica, Ecuador, Guatemala and Panama, brought a class-action suit in Hawaii state court against Dole Food and other defendants.[3] Plaintiffs brought only state law causes of action, alleging that they had been harmed by Dole Food's use of DBCP, a toxic pesticide banned from use in the United States.[4] Dole Food removed the case to federal district court seeking the procedural advantages of a federal forum,[5] as corporate defendants facing alien tort plaintiffs seeking redress for overseas conduct invariably do. The advantages Dole Food sought from a federal forum included: stricter standing requirements, stricter burdens of proof,[6] and a more liberal standard for forum non

1. *See generally* Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315 (5th Cir. 1997); Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Aquafaith Shipping v. Jarillas, 963 F.2d 806 (5th Cir. 1992); Alomang v. Freeport-McMoran, Inc., 1996 U.S. Dist. LEXIS 15908 (E.D. La. Oct. 17, 1996); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525 (S.D. Tex. 1994); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994).

2. 251 F.3d 795 (9th Cir. 2001) (Kozinski, J.), *cert. granted in part*, 122 S. Ct. 2657 (U.S. June 28, 2002) (No. 01-593).

3. *Id.* at 798.

4. *Id.* at 798-99.

5. *See* Armin Rosencranz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 189-90 (1999).

6. *Id.* at 190.

conveniens dismissal.[7] Of these, federal forum non conveniens doctrine was, arguably, Dole Food's strongest weapon. A forum non conveniens dismissal that forces plaintiffs to seek recovery in Central American courts, as was the case in *Patrickson*, generally equates to a victory for a corporate defendant.[8] As is often the case, the district court granted Dole Food's motion to dismiss based on forum non conveniens.[9]

On appeal, plaintiffs sought to void the removal to federal court, and the subsequent dismissal, by arguing that the district court lacked subject matter jurisdiction.[10] Plaintiffs chose to file suit in Hawaii state court in order to avoid removal based on diversity jurisdiction,[11] forcing Dole Food to argue that a federal question was raised by the com-

7. *See id.* at 179-80 (discussing federal forum non conveniens doctrine in this context); *see also* Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 44-49 (1998) (providing an overview of how defendants use forum non conveniens to dismiss human rights cases in federal court); Rosencranz & Campbell, *supra* note 5, at 188 n.266 (noting that although many states are adopting the strict federal approach to forum non conveniens, many others have explicitly rejected this strict view).

8. A forum non conveniens dismissal in federal court assumes that another court exists with jurisdiction. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947). A foreign plaintiff's choice of a federal forum is given less deference than a citizen's choice of a federal forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 256 (1981). Further, when determining whether forum non conveniens dismissal is appropriate, federal courts consider two sets of factors: private interests — proximity and accessibility of evidence, availability of compulsory process for witnesses, travel costs for witnesses, possibility of viewing relevant property, and the enforceability of any resulting judgment — and public interests — docket control, burden upon local citizens for jury duty, interest in having cases decided in the locality in which they arose, and difficulty for the court in applying foreign substantive law. *Gulf Oil*, 330 U.S. at 508-09. The public interest factors weigh heavily against foreign plaintiffs in situations such as those that arose in *Patrickson* because most of the evidence, property, and witnesses are abroad and foreign law probably governs such cases. As many of the courts in Central America are notoriously deferential toward corporate misconduct, forum non conveniens dismissals for *Patrickson* type plaintiffs generally terminate any effective redress for them. *See, e.g.*, Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 688-89 (Tex. 1990) ("When a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct. . . . The parochial perspective embodied in the doctrine of forum non conveniens enables corporations to evade legal control merely because they are transnational."); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992) (discussing the impact of forum non conveniens doctrine on international plaintiffs).

9. *Patrickson*, 251 F.3d at 798.

10. *Id.*

11. *See id.* at 798 n.1; *see also* 28 U.S.C. § 1332(c)1 (1994) (stating that a corporation is a citizen of its state of incorporation and of its principle place of business); 28 U.S.C. § 1441(b) (stating that a defendant may not remove to federal court on diversity of citizenship grounds if defendant is a citizen of the state in which the case was brought); 15 MOORE'S FEDERAL PRACTICE ch. 102 (3d ed. 1998) (providing general discussion of diversity jurisdiction). Additionally, Hawaiian courts have not yet settled their forum non conveniens doctrine, leaving room for plaintiffs to press their case. *See* David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEXAS L. REV. 937, 950-53 (1990).

plaint.[12] Dole Food responded that the complaint implicated the federal common law of foreign relations,[13] thereby raising federal question subject matter jurisdiction ("federal question jurisdiction").[14] The Ninth Circuit rejected this argument, holding that the district court lacked subject matter jurisdiction, and remanded the case to Hawaii state court.[15]

In so holding, the Ninth Circuit split with the *Torres v. Southern Peru Copper Corp.*[16] line of cases ("the *Torres* approach") from the Fifth and Eleventh Circuits.[17] In *Torres*, 700 Peruvian miners brought

12. *Patrickson*, 251 F.3d at 798; *see* 15 MOORE'S FEDERAL PRACTICE § 103 (3d ed. 1998) (providing general discussion of federal question jurisdiction); *see also infra* Section I.A.1 (discussing federal question jurisdiction).

13. Unlike state courts, federal courts do not have broad powers to develop common law, but they may develop common law in matters delegated to the federal government by the Constitution. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law."). Once made, federal common law, via the Supremacy Clause, pre-empts state law. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 99-100 (1972) (holding federal common law has the same status as federal statutory law). Unlike constitutional decisions, Congress may overrule federal common law by statute. *See* City of Milwaukee v. Illinois, 451 U.S. 304, 315-32 (1981) (holding that congressional pollution act overrules previous federal common law pollution claims). Generally, federal courts are hesitant to make federal common law, recognizing that Congress should make such decisions. *See* Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966). Nevertheless, federal courts will create and apply federal common law in two general areas: (1) those where Congress has left the development of the law to the courts and (2) those areas where a uniquely federal interest is at stake and there is no applicable federal statute. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). Federal common law of foreign relations is an example of the second category of federal common law. Federal common law of foreign relations seldom, if ever, entirely pre-empts state causes of action. Rather, it supplies the governing standard for certain foreign affairs issues that arise within the context of state causes of action. For example, in *Banco Nacional de Cuba v. Sabbatino*, only the issue of the validity of Cuba's expropriation decree was governed by the federal common law of foreign relations. The other elements of the underlying conversion tort remained governed by state law. *See Sabbatino*, 376 U.S. 398, 439 (1964). See *infra* Section I.A.2 for a discussion of federal common law of foreign relations.

14. *Patrickson*, 251 F.3d at 799.

15. *Id.* at 804-05, 808-09.

16. 113 F.3d 540 (5th Cir. 1997) (holding federal question jurisdiction extends to state causes of action brought by foreign plaintiffs when the litigation affects important sovereign and economic interests of foreign states); *see also* Republic of Venezuela v. Philip Morris, Inc., 287 F.3d 192, 199 (D.C. Cir. 2002) (recognizing the existence of this circuit split).

17. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998) (applying the *Torres* approach, but finding no federal question jurisdiction); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997) (same), *vacated on other grounds*, 145 F.3d 211 (5th Cir. 1998) (en banc), *rev'd and remanded on other grounds*, 526 U.S. 574 (1999); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994) (holding federal question jurisdiction extends to state causes of action brought by foreign plaintiffs that implicate important interests for foreign sovereigns when the foreign sovereign is not a party to the litigation); Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 531-32 (S.D. Tex. 1994) (indicating in dicta that federal question jurisdiction extends to state causes of action brought by class action plaintiffs, including Americans, that implicate important interests for foreign sovereigns when the foreign sovereign is not a party to the litigation); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1355-57 (E.D. Tex. 1993) (holding federal question

state tort causes of action in Texas state court against an American multinational mining corporation.[18] The defendant, Southern Peru Copper Corporation ("SPCC"), removed to federal court and was granted a forum non conveniens dismissal.[19] As in *Patrickson*, the *Torres* plaintiffs appealed, arguing that the federal district court lacked subject matter jurisdiction.[20] The government of Peru, although not a party to the dispute, filed statements in opposition to the plaintiffs' case with the State Department and with the court.[21] The Fifth Circuit found that federal question jurisdiction existed in this case, thus the removal and the subsequent dismissal were proper.[22]

This Note argues that foreign plaintiffs should be able to sue American multinational corporations in state courts. Part I advances the most charitable readings of both the *Torres* approach and the *Patrickson* challenge to that view. Part II contends that while the *Patrickson* court reaches the correct result, it fundamentally misinterprets the *Torres* approach, thereby failing to attack the core deficiencies of the *Torres* approach. Part III argues that the foreign sovereign conduct approach, an alternative analysis of the federal common law of foreign relations, best reflects established case law. This Note concludes that providing foreign plaintiffs an opportunity to seek redress in state courts fosters corporate responsibility among American multinational companies.

I. FEDERAL COMMON LAW OF FOREIGN RELATIONS: EXPANSIVE AND RESTRICTIVE JURISDICTIONAL VIEWS

Corporate defendants such as SPCC and Dole Food often rely upon expansive notions of federal question jurisdiction to remove cases to federal court, in an effort to avoid an on the merits defense of their conduct abroad. Part I advances the most charitable readings of the *Torres* and *Patrickson* resolutions of this issue. Section I.A provides a doctrinal argument on behalf of the *Torres* approach. Section I.B presents the doctrinal arguments implicitly relied upon by the *Patrickson* court.

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jurisdiction extends to state causes of action brought by an American plaintiff that implicate important interests for a foreign sovereign when the foreign sovereign is not a party to the litigation); *see also In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942-44 (N.D. Cal. 2000) (citing *Torres* as authority for extending federal common law of foreign relations to issues involving American plaintiffs suing Japanese corporations under state tort law).

18. *Torres*, 113 F.3d at 541.

19. *Id.* at 541-42.

20. *Id.* at 542.

21. *Id.*

22. *Id.* at 543-44.

A. *The* Torres *Approach*

The *Torres* approach extends federal question jurisdiction to state causes of action that significantly affect the vital economic and sovereign interests of foreign states, even when a foreign sovereign is not a party to the litigation.[23] The *Torres* court presents precious little argument itself in support of its extension of federal question jurisdiction, citing only two supporting cases and devoting merely one page of the *Federal Reporter* to the approach.[24] This section formulates a doctrinal defense on behalf of the *Torres* approach. Although this approach is ultimately untenable, this Section argues that it is best understood as a specific application of the well-pleaded complaint rule that is triggered when two additional criteria are met: (1) the foreign government involved lodges a protest with the court and (2) both the plaintiffs and the injuries complained of are of foreign origin.[25]

1. *The* Torres *Approach's Consistency with the Well-Pleaded Complaint Rule*

The Fifth Circuit views the *Torres* approach as "a very specific application of the well-pleaded complaint rule,"[26] noting that, even within the erudite realm of federal common law of foreign relations, the well-pleaded complaint rule applies.[27] As such, proponents of the *Torres* approach do not view it as an exception to the well-pleaded complaint rule, as its opponents contend,[28] but rather as an independent corollary to it.[29]

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23. *Id.* at 542-43.

24. *Id.* One of the cited cases, *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), is cited only to support the proposition that federal courts can make federal common law — not particularly specific grounds for support. *See* Patrickson v. Dole Foods Co., 251 F.3d 795, 801 n.4 (9th Cir. 2001) (discussing this point).

25. Some courts have not presented the *Torres* approach in this fashion. *See Patrickson*, 251 F.3d at 801-05; *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 35-38 (D.D.C. 2000).

26. Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997). *Contra Patrickson*, 251 F.3d at 801 (characterizing the *Torres* approach as an exception to the well-pleaded complaint rule).

27. Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808 (5th Cir. 1992) (holding federal common law of foreign relations raised as a defense insufficient for a finding of federal question jurisdiction).

28. *See infra* Section I.B.1.

29. *See* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 22 (1983) (citing Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists, 367 F.2d 337, 339-40 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968)).

All grants of federal question jurisdiction are subject to the well-pleaded complaint rule.[30] Following the rule, only issues raised in a plaintiff's complaint can establish federal question jurisdiction.[31] Thus in *Torres*, defenses raised by SPCC that rely upon federal law supply an insufficient foundation for establishing federal question jurisdiction.[32] The well-pleaded complaint rule makes the plaintiff "the master of the claim," allowing the plaintiff to avoid federal question jurisdiction — and a federal forum — by alleging only state claims.[33] The *Torres* and *Patrickson* plaintiffs took this approach.[34] Nevertheless, in an effort to investigate potentially artfully pled complaints, the *Torres* court felt obliged to look past the face of the complaint to determine if the federal common law of foreign relations was implicated by the plaintiff's claims.[35]

Although the court does not provide a robust defense of this view, doctrinal support for the court's action is forthcoming.[36] Congress codified its general grant of federal question jurisdiction in Title 28 United States Code § 1331.[37] "Although the language of § 1331 parallels that of the 'Arising Under' Clause of Art. III, [the Supreme] Court never has held that statutory 'arising under' jurisdiction is identical to Art. III 'arising under' jurisdiction."[38] The Court interprets § 1331 as granting a much narrower scope of federal question jurisdiction than

30. Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 370 (1988).

31. *See* Louisville & Nashville Rail Co. v. Mottley, 211 U.S. 149, 152 (1908) (establishing the rule).

32. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986).

33. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987).

34. Patrickson v. Dole Foods Co., 251 F.3d 795, 799 (9th Cir. 2001); Torres v. S. Peru Copper Corp., 113 F.3d 540, 541 (5th Cir. 1997).

35. Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997); *Torres*, 113 F.3d at 542; *see also* Federated Dep't Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1354 (E.D. Tex. 1993).

36. Defendant in *Torres* reached federal court by removal from state court. *Torres*, 113 F.3d at 541-42. Cases filed in state court may be removed to federal court if the defendant so elects, and the case originally could have been filed in federal court. 28 U.S.C. § 1441(a) (1994). *See* 16 MOORE'S FEDERAL PRACTICE § 107 (3d ed. 1998) (providing general discussion of removal doctrine). Assuming personal jurisdiction, a case may only be originally filed in federal court if the court has subject matter jurisdiction over the issue). *See, e.g.*, FED. R. CIV. P. 12h(3). As such, the analysis for determining legitimate removal to federal court is identical to the subject matter jurisdiction analysis applied to cases originally filed in a federal court. *See* 16 MOORE'S FEDERAL PRACTICE § 107.14 (3d ed. 1998).

37. 28 U.S.C. § 1331 (1994). For the remainder of this Note the term "federal question jurisdiction" will refer to the statutory grant of jurisdiction, namely 28 U.S.C. § 1331. Reference to the broad scope of the constitutional grant of federal question jurisdiction will be made by explicit reference the Constitution.

38. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 494 (1983).

the Constitution permits.[39] The Court has established two independent tests for meeting the § 1331 grant of jurisdiction: (1) the plaintiff's cause of action was created by federal law ("Holmes test")[40] and (2) vindication of plaintiff's state cause of action necessarily requires the construction of federal law ("necessary construction test").[41]

Plaintiffs in *Torres* rely exclusively upon state causes of action; hence, the Holmes test is inapplicable in this instance.[42] As such, SPCC pursued federal jurisdiction via the necessary construction test.[43] Even though the Supreme Court has stated that this test should be applied with caution, as this realm of jurisdiction lies at the outer reaches of

39. *Id.* The Constitution prescribes the limits of subject matter jurisdiction for the federal courts. U.S. CONST. art. III, § 2. As a matter of Constitutional law, the scope of federal question jurisdiction, jurisdiction "arising under the Constitution, laws, or treaties of the United States," is quite broad. *See* Osborn v. Bank of the United States, 22 U.S. 738, 822-23 (1824) (holding that any federal "ingredient" is sufficient to satisfy the Constitution's federal question jurisdiction parameters). Despite this broad constitutional scope, the Constitution is not self-executing in this regard. Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 807 (1986). Congress retains broad control of the jurisdiction of the inferior federal courts, and it may grant a narrower scope of subject matter jurisdiction than is found in Article III. *See, e.g.*, Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982) (espousing the traditional view that Congress is not required by Article III to vest full Constitutional subject matter jurisdiction in the inferior federal courts). *Contra* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 209 (1985) (arguing that Congress must vest some of the Article III heads of jurisdiction in the federal judiciary); *see also* Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981) (arguing that there are non-Article III limits to Congress's discretion in vesting inferior federal courts with subject matter jurisdiction). Exercising this control over inferior courts, Congress withheld general federal question jurisdiction from them until 1875. *See* Judiciary Act of March 3, 1875, ch. 137, 18 Stat. 470; Randall, *supra* note 30, at 363, 365 n.76 (stating that the 1875 Act was the first general congressional grant of federal question jurisdiction to the inferior federal courts and that it is the predecessor statute to § 1331, the current statutory grant of federal question jurisdiction).

40. The Court has long held that a suit arises under federal law if federal law creates the plaintiff's cause of action ("the Holmes test"). Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.). The majority of federal question jurisdiction cases fall within this category. *Merrell Dow Pharm.*, 478 U.S. at 808. The Holmes test best operates as a rule of inclusion not exclusion (i.e., it provides a sufficient, but not necessary, ground for federal question jurisdiction); T.B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.); *see also* Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983).

41. *Merrell Dow Pharm.*, 478 U.S. at 808-09. Some courts and commentators have suggested a three way partition of federal question jurisdiction, adding claims arising under federal common law as the third prong. *See, e.g.*, *T.B. Harms*, 339 F.2d at 828 (2d Cir. 1964). However, the Court continues to apply the two-prong approach. *Merrell Dow Pharm.*, 478 U.S. at 808-09. Cases arising under federal common law are treated, for § 1331 jurisdictional purposes, just like statutory law. *See* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972). This two test approach to issues of federal question jurisdiction is the conventional, 'black-letter,' approach. *See* 15 MOORE'S FEDERAL PRACTICE § 103.31 (3d ed. 1998).

42. *See* Torres v. S. Peru Copper Corp., 113 F.3d 540, 541 (5th Cir. 1997).

43. *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921).

§ 1331,[44] the Fifth Circuit found that the *Torres* complaint passed in this case.[45]

The Fifth Circuit's well-pleaded complaint rule analysis invoked the ban on "artfully plead" complaints.[46] "[I]t is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint."[47] A plaintiff, then, may not escape federal question jurisdiction by artfully pleading a federal claim in state law terms.[48] Federal courts have an obligation to investigate complaints to determine if a complaint alleging only state law causes of action actually is founded upon federal law.[49] In *Torres*, SPCC, relying upon this judicial duty, contended that the plaintiffs artfully pled their complaint to avoid addressing federal common law of foreign relations.[50] As such, the extension of federal question jurisdiction did not violate the well-pleaded complaint rule — as long as the federal common law of foreign relations was applicable.[51]

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44. *Merrell Dow Pharm.*, 478 U.S. at 810; *see also* Christianson v. Colt. Indus. Operating Corp., 486 U.S. 800, 808 (1988) (holding that plaintiff's right to relief must necessarily depend upon the "resolution of a substantial question of federal law") (internal citation omitted); *Smith*, 255 U.S. at 199 (holding cases that present issues merely colorable as federal or unreasonably relying upon federal law are not proper grounds for federal question jurisdiction).

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

46. *See id.* at 542.

47. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 22 (1983).

48. *See* Aquafaith Shipping v. Jarillas, 963 F.2d 806, 808 (5th Cir. 1992); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1353-54 (E.D. Tex. 1993).

49. *See* Federated Dep't Stores v. Moitie, 452 U.S. 394, 397 n.2 (1981); *Grynberg Prod. Corp*, 817 F. Supp. at 1354.

50. *See Torres*, 113 F.3d at 542.

51. *Franchise Tax Bd.*, 463 U.S. at 22. A recent district court opinion has questioned the validity of *Torres'* reasoning in this regard. Navarro v. Bell Helicopter Services, Inc., No. Civ.A.3:00-CV-2005-D, 2001 WL 454558, at *3 (N.D. Tex. Jan. 25, 2001) (stating that removal by way of the necessary construction test is no longer available in the Fifth Circuit). *Navarro* relies upon Fifth Circuit precedent in forming this unsupportable view. Waste Control Specialists, L.L.C. v. Envirocare of Texas, Inc., 199 F.3d 781, 783-84 (5th Cir. 2000) (citing Rivet v. Regions Bank of Louisiana, 522 U.S. 470 (1998)). In *Rivet*, the Court reversed the Fifth Circuit's determination that federal question jurisdiction extended to cases in which the defendant sought to present a federal res judicata defense. *Rivet*, 522 U.S. at 478 ("In sum, claim preclusion by reason of a prior federal judgment is a defensive plea that provides no basis for removal under § 1441(b). Such a defense is properly made in the state proceedings. . . ."). In *Waste Control*, plaintiffs presented state anti-trust claims. Upon removal defendant argued that one of the claims was pre-empted by federal anti-trust law. *Waste Control*, 199 F.3d at 782. The Fifth Circuit found the removal void because "[t]he artful pleading doctrine allows removal where federal law completely pre-empts a plaintiff's state-law claim." *Id.* at 783 (quoting *Rivet*, 522 U.S. at 475). The Fifth Circuit stated that this has been the circuit rule since at least 1995. *Id.* at 784. *Rivet* and *Waste Control* do not compel *Navarro*'s holding, as the court itself admits. *Navarro*, 2001 WL 454558, at *3 ("[T]he *Waste Control Specialists* panel did not state explicitly that the substantial federal question doctrine can never support removal jurisdiction absent complete preemption, its reasoning leaves little room for doubt."). First, pre-emption cases arise in federal question jurisdiction by way

2. *The* Torres *Approach's Use of the Federal Common Law of Foreign Relations*

In *Torres*, SPCC presented the novel, but ultimately flawed, argument that the plaintiffs' complaint implicated the federal common law of foreign relations.[52] SPCC argued that this was the case because Peru's vital economic and sovereign interests were at stake.[53] SPCC was the largest mining company in Peru, an industry that accounted for fifty percent of Peru's export income and eleven percent of its gross domestic product.[54] The court accepted, without citing any authority, SPCC's view that a vital, Peruvian economic interest was at stake.[55] The court found, again without citing authority, that the sovereign interests of Peru were involved because it owned the land upon which SPCC mined, owned the extracted minerals, granted SPCC concessions, and actually owned the mining refinery itself until 1994.[56] The court held, citing only *Republic of the Philippines v. Marcos*,[57] that

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of the Holmes test, not the necessary construction test as in the *Torres* approach. *See Rivet*, 522 U.S. at 476 (quoting Caterpillar, Inc., v. Williams, 482 U.S. 386, 393 (1987)). Hence, neither *Rivet* or *Waste Control* directly applies to the *Torres* approach. The fact that the rule espoused in *Waste Control* dates to at least 1995, two years prior to *Torres*, reinforces the view that the "complete pre-emption rule" does not apply to the *Torres* approach. Second, the Supreme Court in *Rivet* did not state that complete pre-emption was the only situation in which the artfully plead doctrine applies. Rather, it stated the artfully plead doctrine applies in pre-emption cases only when the pre-emption is complete. *See Rivet*, 522 U.S. at 476. Federal common law of foreign relations seldom presents pre-emption issues at all. *See supra* note 13 and *infra* note 146. Federal common law of foreign relations issues tend to mimic the scenario in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), where pre-emption is not at issue, but the plaintiff's state claims necessarily rely upon federal law to adjudicate elements of the state claim. *See infra* Section II.A.1. This rule for pre-emption cases does not apply to the *Torres* approach. Finally, since the necessary construction test is a well established rule of law, *see supra* note 43 and accompanying text, it is doubtful that the *Rivet* Court meant to signal a radical change in the law by its passing statement of the complete pre-emption rule. *See Rivet*, 522 U.S. at 475.

52. Torres v. S. Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620-21 (1997) [hereinafter Goldsmith, *Federal Courts*] (outlining the justification for the conventional expansive view of federal common law of foreign relations). The conventional view holds that the Constitution entrusts foreign relations powers exclusively with the federal political branches. *Id.* at 1620. On occasion, in the absence of federal action the states will attempt to act in this arena either by direct political action or by allowing state law to govern litigation impacting upon foreign relations. *Id.* As in dormant commerce clause cases, the federal judiciary prohibits state action in such cases in order to protect the uniquely federal interest in conducting foreign affairs by creating federal common law. *Id.* at 1620-21.

53. *Torres*, 113 F.3d at 542.

54. *Id.* at 543.

55. *Id.* In contrast, three weeks later, in Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997), the same panel distinguished *Torres* by refusing to extend federal question jurisdiction to a German gas supplier as the court was unconvinced that a vital economic interest of Germany was at stake.

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

57. 806 F.2d 344 (2d Cir. 1986).

these two Peruvian interests raised important American foreign policy concerns, thereby implicating the federal common law of foreign relations.[58] Following the *Torres* approach, when a complaint strikes at the vital economic and sovereign interests of a foreign state, the federal common law of foreign relations is implicated, giving rise to federal question jurisdiction.[59]

This decision represents an unprecedented, and in the end unsupportable, extension of federal jurisdiction, yet the *Torres* court provides only two short paragraphs (containing mostly facts about the Peruvian mining industry) in support.[60] Nevertheless, it is possible to advance a doctrinal argument in support of this approach. The United States Supreme Court ended the era of general federal common law in diversity jurisdiction in 1938, in *Erie R.R. Co. v. Tompkins*.[61] Nevertheless, in a case decided on the same day as *Erie* — and in an opinion by *Erie*'s author — the Court upheld the use of federal common law in an interstate waterway case — a case, like *Torres*, arising under federal question jurisdiction.[62] The Court currently authorizes the creation of federal common law within two areas: (1) where the federal government has constitutional authority and Congress has allowed the federal courts to develop the law (e.g., admiralty), and (2) where the federal government has constitutional authority and a federal rule of decision is necessary to protect an uniquely federal interest.[63] SPCC relied upon the federal common law of foreign relations that falls within the second category; our attention turns there.

In *Banco Nacional de Cuba v. Sabbatino*,[64] the first case to address the federal common law of foreign relations doctrine,[65] the Supreme

58. *Torres*, 113 F.3d at 543 n.8 (citing Republic of the Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986), *cert denied*, 481 U.S. 1048 (1987)). In *Marcos*, the newly installed Aquino regime sought to recover government funds absconded by former President Marcos and invested in New York City real estate. The Philippines brought state causes of action in New York state court. The case was removed. The Second Circuit affirmed the district court's finding that the federal common law of foreign relations should govern the complaint because important foreign policy issues were implicated.

59. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377 (11th Cir. 1998); *Marathon Oil*, 115 F.3d at 320; *Torres*, 113 F.3d at 543 n.8. *Contra In re* Tobacco/Governmental Health Care Costs Litigation, 100 F. Supp. 2d 31, 36 (D.D.C. 2000) (characterizing this element of the *Torres* approach as applying to complaints that impact "vital economic *or* sovereign interests" (emphasis added)). *In re Tobacco* appears to be a misstatement of this element of the *Torres* approach. This Note accepts the *Torres* line of cases characterizing the impact as "vital economic *and* sovereign interests," as this line of cases established the rule and indubitably uses "and" as opposed to "or."

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

61. 304 U.S. 64, 78 (1938) (Brandeis, J.).

62. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (Brandeis, J.); *see also* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (articulating the limits of judiciary's power to make federal common law).

63. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981).

64. 376 U.S. 398 (1964).

Court held that the federal common law of foreign relations must provide the governing standard for international law issues, even in diversity cases, to protect the uniquely federal interest in conducting foreign affairs from potentially parochial and divergent judgments of the several states.[66] (Although federal common law of foreign relations is often implicated by state causes of action, it seldom pre-empts state causes of action entirely; rather, it governs specific foreign affairs issues within the context of the state cause of action.[67]) Following *Sabbatino*, the Second Circuit, in *Marcos*, expanded federal common law of foreign relations to govern issues that "directly and significantly affect American foreign relations."[68] Conventionally, this line of cases has come to stand for the proposition that federal courts can make federal common law in nearly all areas significantly affecting international affairs.[69] Despite this strong conventional view, neither the *Sabbatino* nor the *Marcos* decision held that litigation affecting vital economic and sovereign interests significantly affects American for-

65. *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 35 (D.D.C. 2000); *see also* Goldsmith, *Federal Courts*, *supra* note 52, at 1625-30 (arguing that federal common law of foreign relations arises from the *Sabbatino* decision, which was founded upon protecting an uniquely federal interest).

66. *Sabbatino*, 376 U.S. 398, 424-26 (1964).

67. For example, in *Sabbatino* only the issue of the validity of Cuba's expropriation decree was governed by federal common law of foreign relations. The other elements of the underlying conversion tort remain governed by state law. *See id.* at 439. Similarly, only the issue of the validity of the Filipino executive order in *Marcos* is governed by federal common law of foreign relations. *See* Republic of Philippines v. Marcos, 806 F.2d 344, 353-54 (2d Cir. 1986).

68. *Marcos*, 806 F.2d at 352. *But see* Patrickson v. Dole Food Co., 251 F.3d 795, 801-02 (9th Cir. 2001) (arguing that an alternative reading of *Marcos*, extending federal question jurisdiction because the validity of an act of a foreign sovereign is in question, is the best interpretation). However, the courts and commentators have not accepted the reading suggested in *Patrickson*. *See, e.g.*, Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994); Grynberg Prod. Corp. v. British Gas, P.L.C., 817 F. Supp. 1338, 1355 (E.D. Tex. 1993); Goldsmith, *Federal Courts*, *supra* note 52, at 1636.

69. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); Goldsmith, *Federal Courts*, *supra* note 52, at 1632-36; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 15-19 (1995). This conventional reading of *Sabbatino*, when coupled with the holding of *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (federal courts have jurisdiction under § 1331 for cases arising under federal common law), has the potential to greatly expand federal question jurisdiction beyond its traditional boundaries. Weisburd, *supra*, at 20 (noting that the amount of commercial activity with some tie to foreign affairs is vast). This reading of *Sabbatino* has not gone without criticism, however. *See, e.g.*, *Patrickson*, 251 F.3d at 800 (arguing that *Sabbatino* is best read as a choice of law decision within the *Erie* doctrine, because jurisdiction in *Sabbatino* was based on diversity of citizenship, rendering federal question jurisdiction unnecessary); Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 LAW & POL'Y INT'L BUS. 461, 474-82 (1993) (arguing that *Sabbatino* properly instructs federal courts to refrain from engaging in foreign policy issues); Goldsmith, *Federal Courts*, *supra* note 52, at 1690-98 (outlining the detrimental impact of this reading of *Sabbatino*); Weisburd, *supra*, at 20-27 (arguing that the "foreign means federal" approach is too broad).

eign relations.[70] The *Torres* court, by finding that these interests do implicate significant foreign affairs issues, expanded federal common law of foreign relations doctrine beyond its traditional limits.[71]

3. *Protest by a Foreign Nation is Necessary to Trigger the* Torres *Approach*

Not every case implicating vital economic and sovereign interests of foreign states properly calls for federal question jurisdiction under the *Torres* approach. Proponents of the *Torres* approach contend that two triggering criteria must be met as well.[72] These criteria are conceptually distinct from the well-pleaded complaint rule and federal common law elements of the *Torres* approach, because the triggering criteria perform a restrictive function. That is to say, the Torres approach expands federal question jurisdiction while the triggering criteria limit the range of cases to which the approach might otherwise be applied.

For the *Torres* extension of federal question jurisdiction to apply, it is necessary, but not sufficient, for the foreign government to lodge a protest with the court.[73] In *Torres* and *Marathon Oil Co. v. Ruhrgas, A.G.*,[74] Peru and Germany, respectively, filed amicus briefs with the court in opposition to the litigation.[75] The Fifth Circuit found that this involvement by the foreign sovereigns did "not, standing alone, create a question of federal law."[76] Nonetheless, the Eleventh Circuit, in *Pacheco de Perez v. AT&T Co.*,[77] stated that, without a protest from the foreign nation involved, it was reluctant to find that the plaintiff's claims implicated important foreign policy issues that provide grounds for federal question jurisdiction.[78] Although the court provided no

70. *In re Tobacco*, 100 F. Supp. 2d at 35-36.

71. *See id.*

72. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997); Torres v. S. Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997). The term triggering criteria is the author's, not the courts'. As argued infra, these criteria limit the range of cases to which the approach might otherwise be applied.

73. *Pacheco de Perez*, 139 F.3d at 1378 (finding Venezuela's lack of protest indicative that no significant foreign relations issues are at stake); *Marathon Oil*, 115 F.3d at 320 (finding Germany's protest of the suit not sufficient grounds for jurisdiction); *Torres*, 113 F.3d at 542-43 (finding Peru's protest alone insufficient grounds for jurisdiction).

74. 115 F.3d 315 (5th Cir. 1997).

75. *Marathon Oil*, 115 F.3d at 320; *Torres*, 113 F.3d at 542-43.

76. *Torres*, 113 F.3d at 542-43.

77. 139 F.3d 1368 (11th Cir. 1998).

78. *Id.* at 1378.

doctrinal rationale for this decision,[79] the court reasoned that Venezuela's lack of protest was "significant" as an indication that substantial foreign policy concerns were not raised by the complaint.[80]

4. *Foreign Plaintiffs Injured on Foreign Soil Necessary to Trigger* Torres *Approach*

The *Torres* extension of federal question jurisdiction applies only when foreign plaintiffs seek recovery for injuries that occurred entirely on foreign soil.[81] None of the courts that adhere to the *Torres* approach cite any authority for this proposition or provide any other argumentation in defense of this triggering criterion.[82] Perhaps the best defense is that it represents a federalism concern. Namely, suits brought under state law to recover for wrongs that occurred within the state's territory should remain, absent diversity jurisdiction, in state court as a matter of judicial federalism.[83]

B. *The* Patrickson *Challenge*

Although the fact patterns in *Torres* and *Patrickson* are nearly identical,[84] the Ninth Circuit rejected the *Torres* approach, foreclosing corporate defendant Dole Food's access to a federal forum.[85] The *Patrickson* court, in declining to follow *Torres*, provides a scathing, though seldom convincing, critique of the *Torres* approach.[86] This Section reconstructs the Ninth Circuit's scatter-shot objections to the *Torres* approach. The court provides three arguments; namely, the

79. Further, there does not appear to be a doctrinal rationale that could be supplied on the court's behalf. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 803 (9th Cir. 2001) (considering foreign government's interests irrelevant to federal jurisdictional issue).

80. *Pacheco de Perez*, 139 F.3d at 1378.

81. *See id.* at 1377; *Marathon Oil*, 115 F.3d at 320 (refusing to grant federal question jurisdiction because injuries took place, at least partially, on American soil); *cf. In re* World War II Era Japanese Forced Labor Litig., 114 F. Supp. 2d 939, 942-944 (N.D. Cal. 2000) (citing *Torres* as authority for extending federal common law of foreign relations to issues involving American plaintiffs suing Japanese corporations under state tort law for events that occurred abroad).

82. *See Pacheco de Perez*, 139 F.3d at 1377; *Marathon Oil*, 115 F.3d at 320; *Torres*, 113 F.3d at 541-43.

83. *See, e.g.*, Linda S. Mullenix, *Mass Tort Litigation the Dilemma of Federalization*, 44 DEPAUL L. REV. 755, 767-71 (1995) (providing a federalism argument for limiting the role of federal courts in adjudicating common law tort cases); Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. PA. L. REV. 2263, 2265-67 (2000) (arguing that tort adjudication has traditionally been left to the state courts as a matter of federalism).

84. The notable exception is the lack of government protest in *Patrickson*. *See* Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001).

85. *Id.* at 799-805.

86. *Id.*

Torres approach represents an illegitimate exception to the well-pleaded complaint rule, the approach misconstrues the federal common law of foreign relations, and foreign governmental protest has no logical relationship to federal question jurisdiction.[87] This Section addresses these arguments in turn.

1. *The* Torres *Approach Represents an Illegitimate Exception to the Well-Pleaded Complaint Rule*

Although the Fifth Circuit fashioned the *Torres* approach as "a very specific application of the well-pleaded complaint rule,"[88] the Ninth Circuit reads the *Torres* approach as an exception to the well-pleaded complaint rule.[89] This disagreement forms the crux of the *Patrickson* court's argument against the *Torres* approach.

The *Patrickson* court argues that the plaintiffs' assertion of "federal right or immunity," not Dole Food's defenses, establishes federal question jurisdiction in accordance with the well-pleaded complaint rule.[90] In so arguing, the court makes implicit reference to the Holmes test.[91] Following the Holmes test, a plaintiff's cause of action must be created by federal law to give rise to federal question jurisdiction.[92] The court concludes that because the plaintiffs' complaint turns entirely upon state law, any federal issues arising in the case, such as federal common law of foreign relations, could only be raised as a defense.[93] Thus, the court concludes that the *Torres* approach must represent an exception to the well-pleaded complaint rule.[94]

Although the *Patrickson* court stops here, the argument is incomplete. The court tacitly relies upon the proposition that courts cannot fashion exceptions to the well-pleaded complaint rule. It is possible to formulate a doctrinal argument on the *Patrickson* court's behalf. There is only one exception to the well-pleaded complaint rule: federal officers may establish federal question jurisdiction via a federal defense.[95] Importantly, Congress created this exception, not the

87. *Id.*

88. Marathon Oil Co. v. Rurhgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997); *see supra* Section I.A.1.

89. *Patrickson*, 251 F.3d at 801.

90. *Id.* at 799; *see supra* note 31 and accompanying text.

91. *See supra* note 40 and accompanying text.

92. Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916).

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

94. *Id.* at 801.

95. Mesa v. California, 489 U.S. 121, 136-37 (1989). Aquafaith Shipping, Ltd. v. Jarillas, 963 F.2d 806, 808 (5th Cir. 1992) (stating that the only exception to the well-pleaded complaint rule is that federal officers can establish jurisdiction with a federal defense).

courts.[96] It follows, then, that only Congress, or perhaps the Supreme Court,[97] can create exceptions to the well-pleaded complaint rule.[98] As such, the *Torres* approach represents an illegitimate (i.e., lower court created) exception to the rule.[99]

2. Torres *Misconstrues the Federal Common Law of Foreign Relations*

Although finding Dole Food's reliance upon the *Torres* approach in violation of the well-pleaded complaint rule is sufficient for denying federal question jurisdiction, the *Patrickson* court goes on, presumably in dicta, to provide a critique of the *Torres* approach's view of federal common law of foreign relations.[100] As argued above,[101] the *Torres* court relied implicitly upon *Sabbatino*, and explicitly upon *Marcos*, for its view of federal common law of foreign relations.[102] The *Patrickson* court criticizes the Fifth and Eleventh Circuits' reading of this line of cases.[103] In an effort to present the *Patrickson* court's convoluted critique in the best light, it is presented as two distinct arguments — although the court itself presents the critique as one argument.[104]

The first argument concerns the scope of federal common law of foreign relations. The *Torres* court views federal common law of foreign relations expansively, including any issue that substantially affects American foreign affairs.[105] The *Patrickson* court takes issue with this expansive reading.[106] The *Patrickson* court argues that *Sabbatino* is a

96. *Aquafaith*, 963 F.2d at 808 (citing 28 U.S.C. § 1442(a)).

97. The Court originally fashioned the rule in *Louisville & Nashville Rail Co. v. Mottley*, 211 U.S. 149, 152 (1908), and presumably could make exceptions to it.

98. *See Patrickson*, 251 F.3d at 804 ("If federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving us that jurisdiction.").

99. *See id.* at 804-05. The *Patrickson* court also notes that Congress has not acted to grant jurisdiction beyond § 1331 to cases that raise the federal common law of foreign relations as a defense. *Id.* at 803. The court runs through a list of statutory grants of jurisdiction relating to foreign affairs. *Id.* The court notices that "[w]hat Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue." *Id.* Thus, the court concludes that, excepting the possible applicability of § 1331, there are no grounds for federal question jurisdiction. *Id.*

100. *Id.* at 801-03.

101. *See supra* Section I.A.2.

102. Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997).

103. *Patrickson*, 251 F.3d at 801-03.

104. *Id.*

105. *Torres*, 113 F.3d at 543 n.8; *see also* Republic of Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986); Goldsmith, *Federal Courts*, *supra* note 52, at 1632-36; Weisburd, *supra* note 69, at 15-19.

106. *Patrickson*, 251 F.3d at 801-03.

choice of law case within the *Erie* doctrine, not a case granting sweeping federal common law making power to the lower federal courts as the expansive view suggests.[107] The court notes that *Sabbatino* reached the Supreme Court by way of diversity jurisdiction, and the Supreme Court specifically rejected addressing federal question jurisdictional issues.[108] From this reading, the *Patrickson* court limits the holding of *Sabbatino* to determining "[w]hether a foreign state's act is given legal force in the courts of the United States."[109] As such, the federal common law of foreign relations is applicable only when the validity of an act of a foreign state is in question.[110]

Turning next to the *Marcos* case, the court suggests an alternative holding to the one relied upon in *Torres*.[111] Following its reading of *Sabbatino*, the court argues that federal question jurisdiction extended to the *Marcos* case only because the validity of an act of a foreign state was raised in the complaint, not because the complaint raised a substantial issue of American foreign policy.[112] Sticking with this interpretation of *Sabbatino* and *Marcos*, Dole Food has no grounds for federal question jurisdiction, because the plaintiffs' complaint does not turn on the validity of an act of a foreign state.[113]

The Ninth Circuit's second argument concerns exclusive federal jurisdiction. The court reads the *Torres* approach as granting federal courts exclusive jurisdiction over all cases involving the federal common law of foreign relations.[114] Yet, it is Congress' prerogative to grant the federal courts such exclusive jurisdiction.[115] Moreover, as

107. *Id.* at 799-800, 802; *see also* Garvey, *supra* note 69, 474-82 (arguing that *Sabbatino* properly instructs federal courts to refrain from engaging in foreign policy issues); Weisburd, *supra* note 69, at 20-27 (arguing that the "foreign means federal" approach is too broad); Goldsmith, *Federal Courts*, *supra* note 52, at 1690-98 (outlining the detrimental impact of this expansive reading of *Sabbatino*).

108. *Patrickson*, 251 F.3d at 800, 802 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

109. *Patrickson*, 251 F.3d at 799.

110. *Id.* at 799-800.

111. *Id.* at 801; *see supra* note 67 and accompanying text.

112. *Patrickson*, 251 F.3d at 801 (noting that the Philippine's claim rested upon the validity of a Filipino executive order, i.e., an act of state).

113. *Id.* at 800. However, the court realizes, along with most other courts and scholars, that "*Marcos* clearly *said* more, broadly suggesting that federal-question jurisdiction could 'probably' be premised on the fact that a case may affect our nation's foreign relations." *Id.* at 802. The court argues that this reading of *Marcos* is incompatible with its "act of state" reading of *Sabbatino*. *Id.* As such, it rejects this reading. *Id.*

114. *See id.* at 802 ("But *Sabbatino* does not say that federal courts alone are competent to develop this body of law."); *id.* at 803 ("We see no reason to treat the federal common law of foreign relations any differently than other areas of federal law [and would allow state courts to apply it].").

115. *See id.* at 804-05; *see also* Tafflin v. Levitt, 493 U.S. 455, 459 (1990) (stating that exclusive federal jurisdiction over federal question cases has been the exception rather than the rule); Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (holding that there

"*Sabbatino* [is] about choice of law, not jurisdiction," that case does not provide a basis for finding exclusive federal jurisdiction in federal common law of foreign relations cases.[116] As such, the court rejects the *Torres* approach insofar as it imposes exclusive federal court jurisdiction.[117]

3. *Protests by a Foreign Government Have No Logical Connection to Federal Jurisdiction*

A necessary condition for triggering the *Torres* approach is that the foreign government involved in the litigation — but not a party to it — file a brief opposing the litigation.[118] The *Patrickson* court criticizes this proposition both as a matter of doctrine and as a matter of institutional competency.[119]

The court levels the doctrinal attack first.[120] The *Patrickson* court characterizes the governmental protest element of the *Torres* approach as standing "for the proposition that federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome."[121] The court argues that there is no logical connection between a foreign government's opposition to litigation, in which it is not a party, and federal question jurisdiction, as there is no doctrinal hook upon which to hang this triggering element of the *Torres* approach.[122]

Further, in the court's view, as a matter of institutional competence, the executive branch provides the appropriate venue for foreign governments to express their displeasure with litigation in the United States's courts.[123] The judiciary is uniquely the most incompetent branch of government to make foreign policy judgments as called for in the *Torres* approach.[124] This is the case, as "the federal courts have little context or expertise by which to analyze and address the poten-

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is a presumption of concurrent state and federal jurisdiction over all federal law that can only be overcome by explicit congressional command, unmistakable legislative history, or a clear incompatibility between state court jurisdiction and federal interests).

116. *Patrickson*, 251 F.3d at 802.

117. *Id.* at 802.

118. *See supra* Section I.A.3.

119. *Patrickson*, 251 F.3d at 803-04.

120. *Id.* at 803.

121. *Id.* This reading is overly strong, *see infra* Section II.A.3.

122. *Patrickson*, 251 F.3d at 803.

123. *Id.*; *see also In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000).

124. *Patrickson*, 251 F.3d at 804.

tial implications of a lawsuit on foreign relations."[125] Therefore, in the Ninth Circuit's view, "[c]ourts should not put themselves in the position of having to make such judgments."[126] Having advanced these three scathing critiques, the court rejected the *Torres* approach.

II. SCYLLA AND CHARYBDIS: A CRITIQUE OF THE ATTRACTION TOWARD BROAD AND NARROW JURISDICTIONAL EXTREMES

Part II argues that neither the *Torres* approach nor the *Patrickson* challenge are persuasive. Section II.A argues that the *Patrickson* court fundamentally misinterprets the *Torres* approach. Section II.B advances both pragmatic and doctrinal critiques of the *Torres* approach.

A. *The* Patrickson *Straw Man*

The *Patrickson* court provides three critiques of *Torres*; namely, the approach represents an illegitimate exception to the well-pleaded complaint rule, the approach misconstrues the federal common law of foreign relations, and foreign governmental protest has no logical relationship to federal question jurisdiction.[127] Section II.A addresses these in turn, arguing that the court misinterprets the *Torres* approach, resulting in an unconvincing, straw man critique.

1. Patrickson *Ignores the Necessary Construction Test as It Relates to the Well-Pleaded Complaint Rule*

The *Patrickson* court argues that the *Torres* approach represents an illegitimate exception to the well-pleaded complaint rule, even though proponents of the approach present it as a specific application of the rule.[128] This forms the heart of the *Patrickson* challenge.[129] In so arguing, the Ninth Circuit sought to establish federal question jurisdiction via the Holmes test[130] — one of *two* independent tests for determining federal question jurisdiction.[131] The *Patrickson* court furnishes a fine analysis of the Holmes test, holding that the case does not present a federal question because the complaint does not rely upon a fed-

125. *Id.* (quoting *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000)).

126. *Id.* at 804 n.8.

127. *See supra* Section I.B.

128. *Patrickson*, 251 F.3d at 801; Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997) (characterizing the *Torres* approach as a "very specific application of the well-pleaded complaint rule"); *see supra* Section I.B.1.

129. *See supra* Section I.B.1.

130. *See supra* note 91 and accompanying text.

131. *See supra* notes 40-41 and accompanying text.

erally created cause of action.[132] The Holmes test, however, is a rule of inclusion, not exclusion, with regard to federal question jurisdiction.[133] Proponents of the *Torres* approach rely upon the necessary construction test for federal question jurisdiction, not the Holmes test.[134] In fact, proponents of the *Torres* approach concede that federal question jurisdiction cannot be grounded via the Holmes test.[135] As such, the Holmes test analysis provided in *Patrickson* is irrelevant as failure to pass it does not equate to a failure to obtain federal question jurisdiction.

To attack the *Torres* approach on well-pleaded complaint grounds directly, an opponent of the view must confront the *Torres* approach's use of the necessary construction test. Yet, the *Patrickson* court does not seriously address this test. The court makes only a passing reference to the test in a footnote, asserting that the *Torres* approach's reliance on the necessary construction test is "curious."[136] Citing *Franchise Tax Board v. Construction Laborers Vacation Trust*,[137] the *Patrickson* court argues that a state cause of action can pass the necessary construction test "when Congress has established a federal cause of action pre-empting state law."[138] The court then notes that Congress has not passed a statute pre-empting state law for issues that implicate the federal common law of foreign relations.[139] As such, *Patrickson* concludes that the *Torres* approach's use of the necessary construction test is illegitimate.[140]

The court's argument at this juncture is vague, but under any interpretation it is unconvincing. First, the *Patrickson* court appears to conflate the necessary construction jurisdictional test with federal pre-emption doctrine.[141] The necessary construction test is not identical to the question of statutory pre-emption.[142] For example, in *Merrell Dow*

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132. *See* Am. Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.) (establishing the Holmes test); *see also supra* note 40 and accompanying text.

133. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 9 (1983).

134. *See supra* note 42 and accompanying text; *see also* Merrell Dow Pharm., Inc v. Thompson, 487 U.S. 804, 808-09 (1986) (discussing necessary construction test).

135. *See* Torres v. S. Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997).

136. Patrickson v. Dole Food Co., 251 F.3d 795, 802 n.5 (9th Cir. 2001).

137. 463 U.S. 1 (1983).

138. *Patrickson*, 251 F.3d at 802 n.5.

139. *Id.*

140. *Id.*

141. *See id.*

142. *See* Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 199 (1921) (establishing the necessary construction test and holding that cases must present issues that are more than merely colorable as federal and reasonably rely upon federal law to ground federal question jurisdiction); *see also* Christianson v. Colt. Indus. Operating Corp., 486 U.S. 800, 808 (1988) (holding that plaintiff's right to relief must necessarily depend upon the "resolution of a sub-

Pharmaceuticals, Inc. v. Thompson,[143] the Supreme Court found, by stipulation, that Congress did not intend to create a federal cause of action or pre-empt state tort law under the Food, Drug, and Cosmetic Act ("FDCA").[144] Nevertheless, the Court required additional analysis to determine whether a state tort cause of action that relied upon the FDCA to establish a presumption of negligence established federal question jurisdiction via the necessary construction test.[145] If the pre-emption analysis and the necessary construction test were one in the same, the Court would not have required this extra analysis. The Court simply could have found jurisdiction lacking by stipulation.[146]

Second, even assuming the *Patrickson* court is not applying a pre-emption analysis, its argument concerning the necessary construction test is unconvincing. The court could be arguing for two different positions.[147] The first possible reading of the court's argument is that pleading congressional action pre-empting state law is one way, but not the only way, of passing the necessary construction test.[148] If this is

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stantial question of federal law" (internal citation omitted)); *cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (providing a primer on pre-emption doctrine):

> A fundamental principle of the Constitution is that Congress has the power to pre-empt state law. Even without an express provision for pre-emption, we have found that state law must yield to a congressional Act in at least two circumstances. When Congress intends federal law to occupy the field, state law in that area is pre-empted. And even if Congress has not occupied the field, state law is naturally pre-empted to the extent of any conflict with a federal statute. We will find pre-emption where it is impossible for a private party to comply with both state and federal law, and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . .

Id. (internal citations and quotation marks omitted).

143. 478 U.S. 804 (1986).

144. *Id.* at 810-11.

145. *See id.* at 811-17.

146. Federal common law of foreign relations seldom, if ever, entirely pre-empts state causes of action. Rather, it supplies the governing standard for certain foreign affairs issues that arise within the context of state causes of action. For example, in *Sabbatino* only the issue of the validity of Cuba's expropriation decree was governed by federal common law of foreign relations. The other elements of the underlying conversion tort remain governed by state law. Banco de Nacional de Cuba v. Sabbatino, 376 U.S. 398, 439 (1964). Similarly, only the issue of the validity of the Filipino executive-order in *Marcos* is governed by federal common law of foreign relations. Republic of Philippines v. Marcos, 806 F.2d 344, 352–62 (2d Cir. 1986). The *Torres* court does not make clear what particular issue is governed by federal common law of foreign relations, perhaps because it immediately proceeds to affirm the forum non conveniens dismissal. Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997). Perhaps *Torres'* lack of clarity led the *Patrickson* court to perceive it as entirely pre-empting state tort causes of action.

147. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 802 n.5 (9th Cir. 2001).

148. *See id.* Of course, if Congress has created a cause of action by pre-emption, then the case properly arises under the Holmes test. *See* Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987).

the best reading of *Patrickson* on this point, the argument is again irrelevant — or at best incomplete. Proving that the *Torres* approach does not conform to one method of passing the necessary construction test does not prove that the approach fails to conform to other methods of passing the necessary construction test. The second possible reading here is that pleading congressional action pre-empting state law is the *sole* method of passing the necessary construction test.[149] This reading simply misstates necessary construction test doctrine as pre-emption doctrine, but, as argued above, the necessary construction test and preemption doctrine are not one in the same analyses.[150] As such, the *Patrickson* court's well-pleaded complaint rule argument fails to undercut the *Torres* approach's position.

2. Patrickson's *View of Federal Common Law of Foreign Relations is Too Restrictive*

The *Torres* approach to the federal common law of foreign relations encompasses claims affecting the vital economic and sovereign interests of a foreign state even when the foreign state is not a party.[151] The *Patrickson* court argues that *Torres'* treatment of federal common law of foreign relations is too expansive.[152] The court presents two distinct arguments here.[153] First, the court argues that case law only supports viewing federal common law of foreign relations as applicable when the validity of an act of a foreign state is in question.[154] Second, the *Patrickson* court argues that the *Torres* approach's vesting of exclusive jurisdiction in the federal courts is beyond the power of a lower federal court.[155] In formulating its critique, *Patrickson* misinterprets the *Torres* approach and the surrounding doctrine, thereby offering criticisms of a straw man version of *Torres*.

Beginning with the *Patrickson* court's second argument, the court properly admonishes those who would claim exclusive jurisdiction for the federal courts over federal common law of foreign relations issues.[156] As the Ninth Circuit notes, all species of federal common law

149. *See Patrickson*, 251 F.3d at 802 n.5.

150. *See* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 810-17 (1986) (requiring analysis in addition to a stipulation that Congress had not pre-empted state tort law to determine if a state tort cause of action relying upon federal law to prove a presumption of negligence created federal question jurisdiction under the necessary construction test).

151. Torres v. S. Peru Copper Corp., 113 F.3d 540, 542 (5th Cir. 1997).

152. *Patrickson*, 251 F.3d at 799-803.

153. *Id.*; *see also supra* Section I.B.2.

154. *Patrickson*, 251 F.3d at 799-800; *see also supra* note 107 and accompanying text.

155. *Patrickson*, 251 F.3d at 802-03; *see also supra* note 116 and accompanying text.

156. *Patrickson*, 251 F.3d at 802-03.

may be applied by state courts via the Supremacy Clause.[157] Nonetheless, the court misses the mark here, because proponents of the *Torres* approach never assert exclusive jurisdiction over federal common law of foreign relations issues.[158] Even courts and commentators critical of the *Torres* approach do not construe it as claiming exclusive federal jurisdiction.[159] The *Patrickson* court simply misreads *Torres*, making the court's objections irrelevant on this score.[160]

The *Patrickson* court's first argument advances the view that case law only supports viewing federal common law of foreign relations as applicable when the validity of an act of a foreign state is in question. The court goes astray here by committing two errors in formulating this ultra-restrictive view: (1) it presents an overly narrow interpretation of *Sabbatino* and (2) it fails to address *Zschernig v. Miller*.[161]

As was discussed above,[162] the *Patrickson* court narrowly interprets *Sabbatino* as a choice of law decision within the *Erie* doctrine.[163] The court reads *Sabbatino* as establishing an exception to the usual presumption in favor of state law in diversity cases when the validity of an act of a foreign state is in question.[164] According to the *Patrickson* court, *Sabbatino* does not justify general federal common law making powers in the foreign affairs arena.[165] Such a reading of *Sabbatino* places the *Patrickson* court out of the mainstream on this issue. Nearly all courts and scholars read *Sabbatino* as authorizing the creation of federal common law of foreign relations with a scope broader than the *Patrickson* court provides.[166] Although a small contingent of scholars

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157. *Id.*

158. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998) (not claiming exclusive jurisdiction); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315 (5th Cir. 1997) (same); Torres v. Southern Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997) (same); *see also supra* Section I.A.

159. *See, e.g.*, *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 34-38 (D.D.C. 2000) (failing to attribute exclusive federal jurisdiction to the *Torres* approach); Goldsmith, *Federal Courts*, *supra* note 52, at 1695-98 (same).

160. *See Patrickson*, 251 F.3d at 802-03. Perhaps defendant Dole Food argued that the federal courts should have exclusive jurisdiction over such claims, thus explaining this apparent mistake by the court.

161. 389 U.S. 429 (1968).

162. *See supra* note 107 and accompanying text.

163. *Patrickson*, 251 F.3d at 799-800.

164. *Id.*

165. *Id.*

166. *See, e.g.*, Atherton v. F.D.I.C., 519 U.S. 213, 226 (1997) (quoting with approval *Texas Indus.* statement affirming federal courts' power to make common law in the foreign affairs arena); Boyle v. United Tech. Corp., 487 U.S. 500, 518 (1988) (Brennan, J., dissenting) (quoting with approval the *Texas Indus.* statement affirming federal courts' power to make common law in the foreign affairs arena); Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[F]ederal common law exists . . . [in] disputes implicating . . . our relations with foreign nations"); Zschernig v. Miller, 389 U.S. 429, 441 (1968) (holding an

supports a restrictive approach toward the federal common law of foreign relations,[167] even these scholars do not support the ultra-restrictive vision of federal common law of foreign relations that the *Patrickson* court offers.[168]

The Ninth Circuit's unique interpretation of federal common law of foreign relations might be tenable if it could account for all binding precedent on the issue.[169] The *Patrickson* court stumbles on this point.[170] First, the Supreme Court has on several occasions quoted with approval the following statement from *Texas Industries, Inc. v. Radcliff Materials, Inc.*[171]: "[F]ederal common law exists . . . [in] dis-

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Oregon probate law void, even in the absence of federal legislative or executive action, because it may adversely affect the power of the federal government to conduct foreign affairs); Republic of Philippines v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986), *cert denied*, 481 U.S. 1048 (1987) (noting federal courts' power to create common law in foreign relations arena); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.2.4, at 349 (2d ed. 1994) (noting federal courts' power to create common law of foreign relations to ensure uniformity of decisions within foreign affairs arena); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 139 (2d ed. 1996) ("[F]oreign affairs [is] a domain in which federal courts can make law with supremacy."); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 125 (2d ed. 1990) (stating that *Sabbatino* recognized the federal courts' power to make common law in the foreign affairs arena); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-5, at 656-57 (3d ed. 2000) (noting that state infringement into the realm of foreign affairs is unconstitutional); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 332 n.109 ("Even commentators relatively unsympathetic to the development of federal common law recognize that foreign relations is a special case."); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1292-98 (1996) (noting overwhelming judicial and scholastic support for power to create federal common law of foreign relations); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 288 n.84 (1992) (noting general support for power to create federal common law of foreign relations).

167. *See* Goldsmith, *Federal Courts*, *supra* note 52, at 1632 n.62 (stating that, in addition to himself, only Peter J. Shiro and Arthur M. Weisburd would radically limit the scope of the federal common law of foreign relations). The author of this Note would add Jack I. Garvey to Professor Goldsmith's list. Garvey, *supra* note 69, at 474-76 (although not directly addressing federal common law of foreign relations, Garvey argues that *Sabbatino*, properly understood, prohibits federal courts from getting involved in foreign affairs issues).

168. *E.g.*, Goldsmith, *Federal Courts*, *supra* note 52, at 1710-11 (conceding that a 'motive review' of state court decisions within the foreign affairs arena under federal common law of foreign relations could be justified); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 161-74 (1994) (arguing that the externalities logic for uniform federal laws in international issues is obsolete insofar as foreign states can economically retaliate against individual states, but noting there is presently a slim basis for recognizing that targeted retaliation is a trend); Weisburd, *supra* note 69, at 59 (arguing that federal common law of foreign relations should be restricted to three distinct areas).

169. *See* Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) (Kozinski, J.) ("Binding authority within this [hierarchical] regime [of the federal court system] cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point *is* the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect.").

170. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 799-802 (9th Cir. 2001).

171. 451 U.S. 630 (1981).

putes implicating . . . our relations with foreign nations."[172] This statement is broader than the *Patrickson* court's ultra-restrictive foreign act of state approach.[173] Despite the Supreme Court's reiterations of the *Texas Industries* statement,[174] the *Patrickson* court does not, presumably, consider it binding because it was originally made in dictum.[175]

The *Patrickson* court cannot provide a similar argument for its failure to even mention *Zschernig*.[176] In fact, Professor Goldsmith's *Federal Courts, Foreign Affairs, and Federalism*, which the *Patrickson* court approvingly cites,[177] refers to the *Zschernig*[178] decision on numerous occasions as a foundational case for the conventional view of federal common law of foreign relations.[179] Additionally, *In re Tobacco / Governmental Health Care Costs Litigation*,[180] also approvingly cited by the court, treats *Zschernig* as a foundational case for federal common law of foreign relations.[181] In *Zschernig*, the Supreme Court held an Oregon probate statute invalid, which required the state courts to, in effect, normatively evaluate the political systems of foreign nations, because it impermissibly engaged the state in foreign relations.[182] This holding indubitably broadens the scope of federal common law of foreign relations beyond the *Patrickson* court's ultra-

172. *Id.* at 641; *see also supra* note 166.

173. *See Patrickson*, 251 F.3d at 799-802.

174. *See supra* note 166.

175. *See Patrickson*, 251 F.3d at 801 n.4; *see also* Goldsmith, *Federal Courts*, *supra* note 52, at 1704 n.358 (characterizing the *Texas Indus.* statement as dictum).

176. *See Patrickson*, 251 F.3d at 799-805.

177. *Id.* at 804.

178. Zschernig v. Miller, 389 U.S. 429 (1968) (holding an Oregon statute that required probate courts to evaluate the normative value of foreign political systems, under the guise of reciprocity, before transferring property to foreign next of kin invalid as an intrusion upon the federal government's exclusive right to conduct foreign affairs even though the president and Congress had failed to act).

179. Goldsmith, *Federal Courts*, *supra* note 52, at 1621, 1629-1639, 1699-1700, 1704, 1711.

180. 100 F. Supp. 2d 31, 35 (D.D.C. 2000). In the court's defense, the Supreme Court did not style the *Zschernig* decision as an application of the federal common law of foreign relations. *Zschernig*, 389 U.S. at 430-41. However, *Zschernig* is considered an application of federal common law of foreign relations principles by legal scholars and courts. *See, e.g.*, *In re Tobacco*, 100 F. Supp. 2d at 35; Goldsmith, *Federal Courts*, *supra* note 52, at 1621 (*Zschernig* is an application of the federal common law of foreign relations doctrine); Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 136-159 (1971) (discussing *Zschernig* and its aftermath as a seminal case in federal common law of foreign relations jurisprudence); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1241-43 (1999) (discussing importance of *Zschernig* in judicially establishing federal dominance over the states in foreign affairs); Weisburd, *supra* note 69, at 6-8 (characterizing *Zschernig* as one of the essential cases establishing federal common law of foreign relations).

181. *Patrickson*, 251 F.3d at 803, 803 n.7, 804 (citing *In re Tobacco*).

182. *Zschernig*, 389 U.S. at 441.

restrictive view.[183] Although lower courts have given *Zschernig* a narrower reading in recent years,[184] the Supreme Court has not overruled it.[185] As such, the Ninth Circuit continues to be bound by *Zschernig*, rendering the court's ultra-restrictive view of federal common law of foreign relations untenable.

3. Patrickson *Misinterprets the* Torres *Triggering Criteria*

The *Torres* approach incorporates two triggering criteria.[186] The *Patrickson* court challenges one of them; namely, the triggering element requiring foreign governments to protest the litigation before a grant of federal question jurisdiction will be considered.[187] The Ninth Circuit leveled two attacks on this score: a doctrinal concern, arguing that subject matter jurisdiction has no logical connection to foreign governmental protest,[188] and an institutional competence concern, arguing that the courts are uniquely unqualified to determine when issues substantially affect foreign relations.[189] The court finds these criticisms fatal for the *Torres* approach.[190] Although the substance of these challenges are persuasive, the *Patrickson* court fails to properly understand the triggering criterion itself and the role it plays in the *Torres* approach, leading the court to overstate its conclusion.

The Ninth Circuit declines to follow the *Torres* approach "insofar as [it] stand[s] for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome."[191] The court construes the foreign government's protest of the litigation as a sufficient condition for applying the *Torres* approach.[192] As was previously argued, the foreign government's protest of the litigation is a necessary — not suffi-

183. *See id. Contra Patrickson*, 251 F.3d at 799-802.

184. *See, e.g.*, Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 913-14 (3rd Cir. 1990) (upholding state "buy American" statute against a *Zschernig* based attack because the statute did not allow state officials to comment upon, nor discriminate among, foreign nations); Bd. of Trustee's of the Employees' Retirement Sys. v. Mayor of Baltimore, 562 A.2d 720, 746 (Md. 1989) (distinguishing *Zschernig* as proscribing only *extensive* state judicial scrutiny and criticism of foreign nations).

185. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 n.8 (2000) (declining to address the *Zschernig* issue).

186. *See supra* Section I.A.3-4.

187. *See supra* Section I.B.3.

188. Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 803 (9th Cir. 2001); *see also supra* Section I.B.3.

189. *Patrickson*, 251 F.3d at 803-04. This argument will be addressed *infra* Section II.B.2.

190. *Patrickson*, at 804-05.

191. *Id.* at 803.

192. *See id.*

cient — condition for the application of the *Torres* approach.[193] Even proponents of the *Torres* approach would not apply it simply because a foreign government expressed a special interest in the litigation.[194]

Putting this misunderstanding aside, the *Patrickson* court does go on to argue convincingly that a foreign government's protest of a case has no logical connection to the granting of federal question jurisdiction — even as a necessary condition.[195] This is not a damning blow to the *Torres* approach. Foreign government protest of litigation is but a triggering criterion for the *Torres* approach.[196] It is conceptually distinct from the *Torres* approach proper because it performs a limiting function — not an expansive function as the other elements of the approach do. As such, the *Torres* approach is conceptually feasible without the foreign government's protest of the litigation as a triggering criterion — it is simply more expansive. Ironically, the *Patrickson* court's critique merely severs the untenable foreign government's protest of the litigation triggering criterion from the *Torres* approach proper, leaving the approach more expansive than even its proponents advocate.

B. *The* Torres *Reproach*

This Section advances pragmatic and doctrinal criticisms of the *Torres* approach. First, this Section argues that the *Torres* approach threatens to swamp the federal courts by funneling an overwhelming amount of litigation into the federal system. Second, this Section contends that constitutional doctrine requires that the bulk of civil litigation remain in the state courts. Finally, this Section argues that the *Torres* approach's attempt to avoid these problems by limiting federal question jurisdiction to cases implicating only important foreign policy concerns presents an unworkable regime.

193. Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1378 (11th Cir. 1998) (finding Venezuela's lack of protest indicative that no significant foreign relations issues are at stake); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997) (finding Germany's protest of the suit insufficient grounds for jurisdiction); Torres v. S. Peru Copper Corp. 113 F.3d 540, 542-43 (5th Cir. 1997) (finding Peru's protest alone insufficient grounds for jurisdiction); *see also supra* Section I.A.3.

194. *Compare Patrickson*, 251 F.3d at 803 (stating that the *Torres* approach grants federal question jurisdiction when a foreign government expresses a special interest in a case), *with Marathon Oil*, 115 F.3d at 320 (denying federal question jurisdiction despite Germany's express special interest in the case).

195. *See Patrickson*, 251 F.3d at 803.

196. *See supra* note 72 and accompanying text.

1. *Pragmatic and Doctrinal Concerns*

Strong pragmatic concerns counsel against adopting the *Torres* approach. In 1994, approximately 85 million cases were filed in the United States.[197] Of these, 19 million cases were filed as civil actions.[198] Of these 19 million civil actions, approximately 236,000 were filed in federal court, slightly more than one percent.[199] The remaining 18.77 million cases were filed in state courts.[200] As is evident, the American civil justice system is set up to steer the vast bulk of litigation into the state courts.[201] Although traditionally civil actions involved mostly domestic litigants and issues, the globalization phenomenon increasingly injects international litigants and international issues into these disputes.[202] For example, "[o]ne in six domestic private-sector jobs in the United States is now linked to the global economy."[203] It is little wonder, then, that traditional state causes of action, such as tort and contract, often implicate foreign affairs.[204] In an increasingly globalized world, taking the *Torres* approach for all it is worth would have the effect of allowing any case with international aspects an opportunity for removal from the state courts to the federal courts.[205] Yet, the federal courts are already overcrowded.[206] Potentially allowing every multina-

197. STEPHEN C. YEAZELL, CIVIL PROCEDURE 310 (5th ed. 2000) (citing BRIAN J. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (1996)).

198. *Id.*

199. Annual Report, Administrative Office of the United States Courts 1998, Tables C-2, C-2A, D-1, *available at* http://www.uscourts.gov/dirrpt98/index.html (last visited Jan. 19, 2002). This percentage is a rough figure using rounded total filing figures, but the basic point — that federal question jurisdiction represents a very small fraction of over all civil filings — is accurate.

200. *Id.*

201. *See id.*

202. *See e.g.*, Garvey, *supra* note 69, at 462 (noting the effect that globalization has had upon civil litigation); Goldsmith, *Federal Courts*, *supra* note 52, at 1634-35, 1671-77 (arguing that the increasing percentage of civil suits that involve foreign parties or transactions makes the traditional distinction between domestic and international litigation almost impossible to make); Charlotte Ku & Christopher J. Borgen, *American Lawyers and International Competence*, 18 DICK. J. INT'L L. 493, 494-501 (2000) (arguing that globalization on numerous fronts — economic, political, environmental, public health, travel — has transformed the American practice of law, forcing American lawyers to address international issues on a regular basis).

203. Spiro, *supra* note 180, at 1248.

204. *See* Goldsmith, *Federal Courts*, *supra* note 52, at 1672-73.

205. *See* Weisburd, *supra* note 69, at 20 ("To argue that federal common law must govern whenever a case implicates the international relations of the United States is to provide a basis for taking *all* cases with international elements out of the state courts.").

206. *See e.g.*, United States v. Mendoza, 464 U.S. 154, 161 (1984) (referring to "the crowded dockets of the courts"); WILLIAM P. MCLAUCHLAN, FEDERAL COURT CASELOADS 73-166 (1984); RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND

tional corporate defendant involved in transnational litigation access to the federal removal docket would overwhelm the system, even if the federal courts remanded most of these cases.[207] From a purely practical perspective, the *Torres* approach must be rejected, leaving state courts to hear the bulk of international cases. The federal judiciary simply does not have the capacity to take them.

Constitutional doctrine counsels against the adoption of the *Torres* approach as well. The federal courts, unlike the state courts, are courts of limited jurisdiction, requiring constitutional and congressional authority to hear cases.[208] As a consequence, since the founding of the Republic the state courts have provided the primary fora for litigation.[209] As Alexander Hamilton argued in *Federalist 82*, "the States will retain all *pre-existing* authorities which may not be exclusively delegated to the federal head . . . [and] as a rule . . . the State courts will *retain* the jurisdiction they now have."[210] Additionally, constitutional

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REFORM 59-93 (1983); MATTHEW SILBERMAN, THE CIVIL JUSTICE PROCESS 156 (1985); Thomas E. Baker & Denis J. Hauptly, *Taking Another Measure of the "Crisis of Volume" in the U.S. Courts of Appeals*, 51 WASH. & LEE L. REV. 97 (1994); Thomas E. Baker, *Imagining the Alternative Futures of the U.S. Courts of Appeals*, 28 GA. L. REV. 913, 915, 918 (1994); *Developments in the Law — The Paths of Civil Litigation*, 113 HARV. L. REV. 1753, 1806, 1826 (2000). Overcrowding continues to worsen in the federal courts. *See, e.g.*, Sec'y of Labor v. DeSisto, 929 F.2d 789, 795 n.5 (1st Cir. 1991) (noting that "there is a sense that the congestion [of court dockets] is worsening"). From 1995-1999, the average number of cases disposed of by district court judges rose from 383 to 403, an increase of five percent. *See* STATISTICS DIV., ADMIN. OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1999 ANNUAL REPORT OF THE DIRECTOR 25 (2000) [hereinafter JUDICIAL BUSINESS], *available at* http://www.uscourts.gov/judbus1999/contents.html (last visited Jan. 19, 2002).

207. The federal courts heard 31,543 civil cases on removal from state courts in 1998. *See* JUDICIAL BUSINESS, *supra* note 206, at 53, tbl. S-7. Removal cases, then, already account for approximately 13% of total civil cases in federal court. On average, federal district courts take nine months to issue dismissals in civil cases before the pre-trial stage. *See id.* at 166, tbl. C-5. Adding more cases to this already precarious mix could lead to a collapse of the federal court system. *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535, 540-41 (1999) (describing the swamping of the federal courts after the Civil War when Congress expanded the removal docket out of a distrust of Southern courts, which led to congressional tightening of removal jurisdiction twelve years later).

208. U.S. CONST. art. III, § 2; Aldinger v. Howard, 427 U.S. 1, 14-15 (1976) (stating that the federal courts' jurisdiction is controlled by Congress). The exception to this requirement of congressional delegation of authority is the Supreme Court's original jurisdiction under Article III. Marbury v. Madison, 5 U.S. 137 (1803); *see also supra* note 39.

209. The first Congress, staffed by several constitutional convention delegates, provided for limited federal court jurisdiction, beginning a tradition of preference for litigation in state courts. *See, e.g.*, The Judiciary Act of 1789, 1 Stat. 73 (1789); William R. Casto, *An Orthodox View of the Two-Tier Analysis of Congressional Control over Federal Jurisdiction*, 7 CONST. COMMENTARY 89, 93 (1990) (arguing that the 1789 act excluded many possible heads of federal jurisdiction in favor of state courts); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL. L.Q. 499 (1928) (providing a concise history of the balance of power between the federal and state courts); *see also supra* note 39.

210. THE FEDERALIST NO. 82, at 460 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

history illustrates that judge-initiated expansions of federal judicial power are met with disdain by both Congress and the states.[211] The *Torres* approach invites a radical realignment in the federated nature of the United States judicial system by allowing a large percentage of civil suits access to the federal courts.[212] This realignment is contrary to the primary tenets of judicial federalism. For this reason, the view should be rejected.

2. *Lack of Judicial Competence in Foreign Affairs*

The previous two critiques of the *Torres* approach are predicated upon giving the approach an expansive reading. A proponent of the view could retort that this is not the best reading of the *Torres* approach, arguing that the approach attempts to prevent this flood of litigation from inundating the federal courts by restricting its expansion of federal jurisdiction only to cases implicating important foreign policy concerns,[213] and thus enabling the approach to avoid the pragmatic and doctrinal concerns raised above. The *Torres* approach's efforts to stem this tide of litigation fails on two grounds.

First, restricting the expansion of federal jurisdiction to important policy concerns does not alleviate the pragmatic concern.[214] The *Torres* approach's proposed limitation upon federal jurisdiction requires that the federal courts determine, on a case-by-case basis, whether the instant litigation raises important foreign policy concerns.[215] This provides a strong incentive for defendants to remove to federal court, if for no other reason than as a stalling tactic. Even if a vast majority of cases involving foreign affairs were remanded to state court, the sheer volume of motions to remand could swamp the federal courts.[216]

Second, even if this case-by-case review of motions to remove is feasible, the judiciary, as the *Patrickson* court convincingly argues, is not well suited to make foreign policy decisions.[217] "[T]he federal

211. *See, e.g.*, U.S. CONST. amend. XI; Chisholm v. Georgia, 2 U.S. 419 (1793) (finding the Constitution grants federal jurisdiction to suits between a state and a citizen of another state); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1481-84 (stating the traditional view that the Eleventh Amendment was quickly passed as an expression of outrage concerning the holding in *Chisholm*).

212. *See supra* Section II.B.1.

213. Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997); *see also* Republic of Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986) (restricting federal jurisdiction to cases that significantly affect American foreign relations).

214. *See supra* Section II.B.1.

215. *See* Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1378 (11th Cir. 1998) (finding that the present litigation does not raise important foreign policy concerns); Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997) (same); *Torres*, 113 F.3d at 543 (finding that the present litigation does raise important foreign policy concerns).

216. *See supra* note 207.

217. *See* Patrickson v. Dole Food Co., 251 F.3d 795, 803-04 (9th Cir. 2001).

courts have little context or expertise by which to analyze and address the potential implications of a lawsuit on foreign relations."[218] This lack of competence is worsened by the fact that, when assessing the foreign relations implications of litigation, courts seldom rely on foreign policy authorities.[219] "Rather, they usually make a simple intuitive judgment about the foreign relations consequences of the adjudication."[220] These uninformed, intuitive judgments, when made on a case-by-case basis, lead to decentralized, non-uniform foreign policy proclamations by the federal courts.[221] Such a result is perverse, as the *raison d'être* for the federal common law of foreign relations is to prevent differing judicial rulings in the foreign affairs arena.[222]

The *Torres* approach has led to such differing judicial rulings in practice. In *Torres* itself, the Fifth Circuit, with no apparent consultation from the State Department or other foreign affairs authority, concluded that the litigation raised important foreign policy concerns.[223] The court intuited that foreign policy concerns were raised because mining is a large part of the Peruvian economy and the government was intimately involved in this particular mining site.[224] The same Fifth Circuit panel, less than a month later, intuited that a suit against Germany's leading natural gas producer concerning a deal worth hundreds of millions of dollars involving nearly a quarter of the volume of the North Sea's Heimdal gas field did not raise foreign policy concerns.[225] Both cases seem to raise foreign policy concerns equally; that is to say, both involve huge sums of money, both involve industries

218. *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000) (criticizing the *Torres* approach); *see also* Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983) ("This Court has little competence in determining precisely when foreign nations will be offended by particular acts. . . ."); Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial.").

219. *See, e.g.*, *Pacheco de Perez*, 139 F.3d at 1378 (neglecting to rely upon a foreign policy authority); *Marathon Oil*, 115 F.3d at 320 (same); *Torres*, 113 F.3d at 543 (same); Republic of Philippines v. Marcos, 806 F.2d 344, 352-54 (2d Cir. 1986) (same); Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62-63 (S.D. Tex 1994) (same); Grynberg Production Corp., v. British Gas, P.L.C., 817 F. Supp. 1338, 1356-57 (E.D. Tex. 1993) (same); Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1414-15 (1999) [hereinafter Goldsmith, *The New Formalism*] (arguing that courts never attempt to assess the content of U.S. foreign policy in such situations). *But see* Kern v. Jeppesen Sanderson, Inc., 867 F. Supp. 525, 531-32 (S.D. Tex. 1994) (citing Convention on International Civil Aviation, article 1).

220. Goldsmith, *The New Formalism*, *supra* note 219, at 1415.

221. *See id.* at 1417-18.

222. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964); *see also supra* note 66 and accompanying text.

223. Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997).

224. *Id.*

225. Marathon Oil Co. v. Rurhgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997).

crucial to their domestic economies and both governments protested the litigation.[226] This factual congruence leads one to view the decisions as inconsistent.[227] The effect of the *Torres* approach is to give preferential judicial treatment to certain countries based upon courts' merely intuitive analysis of American relations with that country. However, decisions concerning which nations are to be favored by American foreign policy properly belong to the political branches.[228] Thus, the *Torres* approach's attempt to limit the volume of litigation sweeping into the federal courts via its liberal use of federal common law of foreign relations is unworkable.

III. AN ANACHRONISM JUST IN THE NICK OF TIME: A TRADITIONAL JURISDICTIONAL VIEW IN THE ERA OF GLOBALIZATION

An unworkable *Torres* approach presents a quandary. Federal common law of foreign relations cannot be restricted, as the *Patrickson* court would have it, merely to questions concerning the validity of the acts of foreign sovereigns. Even though this outlook prevents illegitimate corporate flight to federal fora, established case law compels a broader view. By the same token, federal common law of foreign relations cannot be so broad that it destroys the balance between the state and federal court systems and allows easy access to federal rubber stamp forum non conveniens dismissals for transnational corporate defendants as the *Torres* approach does. Moreover, an approach to the federal common law of foreign relations should avoid the sort of jurisdictional case-by-case intuitive reasoning relied upon by the *Torres* approach.

Part III argues for a way out of this quandary that fosters on the merits defenses of corporate overseas conduct. Section III.A argues that limiting federal common law of foreign relations to issues directly involving the conduct of foreign sovereigns fits well with established case law, and that, in most cases, it is easier to apply than competing approaches. This foreign sovereign conduct approach would leave the bulk of cases implicating foreign relations, when a sovereign is not a party, in state court. Section III.B addresses legitimate concerns raised by this result, arguing that indispensable party doctrine, coupled with the Foreign Sovereign Immunities Act ("FSIA"), and choice of law doctrine dispel most of them. In an effort to illustrate the effects of the

226. *Id.* at 317-320; *Torres*, 113 F.3d at 541-43.

227. *See* Goldsmith, *Federal Courts*, *supra* note 52, at 1695-98 (arguing that the Fifth Circuit's decisions in *Torres* and *Marathon Oil* are inconsistent).

228. *In re* Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000) (stating that it is for the President and Secretary of State to determine when the U.S. will favor one nation over another).

foreign sovereign conduct approach, Section III.C applies it to facts of *Patrickson* and *Torres*.

A. *Foreign Sovereign Conduct Approach*

Having rejected the jurisdictional extremes of *Torres* and *Patrickson*, the scope of federal common law of foreign relations must be reconceived. A review of the case law finds that limiting the federal common law of foreign relations to adjudicating issues of foreign sovereign conduct fits well with precedent. Additionally, this view of federal common law of foreign relations offers an ease of applicability for jurisdictional purposes not afforded by competing models.

1. *Scope of Established Federal Common Law of Foreign Relations Case Law*

Excluding the *Torres* line of cases, established case law presents a relatively defined scope for the federal common law of foreign relations. Having a foreign sovereign as a named party to a case is not necessary or sufficient to implicate the federal common law of foreign relations. Indeed, the federal common law of foreign relations never provides federal subject matter jurisdiction when a foreign sovereign is a named defendant.[229] On the other hand, a foreign sovereign acting as plaintiff will not always have its complaint governed by the federal common law of foreign relations.[230] Moreover, cases lacking a foreign sovereign as a named party may implicate the federal common law of foreign relations.[231]

The federal common law of foreign relations, regardless of the status of the parties to the litigation, governs uniquely federal issues raised by state causes of action. These uniquely federal interests include the following: applying the act of state doctrine;[232] adjudicating

229. *See* Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et. seq.* (1994) (providing jurisdictional immunity to foreign sovereigns, and entities owned by them, in state and federal court subject to listed exceptions); *see also*, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-39 (1989) (holding the Foreign Sovereign Immunities Act is the sole method for gaining subject matter jurisdiction over a foreign sovereign defendant).

230. *See, e.g.*, *In re Tobacco*, 100 F. Supp. 2d at 36-37 (holding that litigation involving foreign sovereign plaintiffs seeking recovery under state law does not necessarily implicate uniquely federal interests to be governed by federal common law).

231. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968) (applying federal common law of foreign relations in an Oregon probate case between two non-sovereigns).

232. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (creating the act of state doctrine and holding that federal common law of foreign relations governs its application); Patrickson v. Dole Food Co., 251 F.3d 795, 799-800 (9th Cir. 2001) (arguing that the act of state doctrine provides the outer limit of the scope of federal common law of foreign relations); Republic of Philippines v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986) (holding that the act of state doctrine is governed by federal common law of foreign relations);

the enforceability of foreign non-judicial decrees within the United States;[233] subjecting a foreign sovereign's public policies to judicial evaluation;[234] applying customary international law;[235] and resolving diplomatic, military and immigration issues not governed by congressional or executive branch action.[236]

Republic of Iraq v. First Nat'l City Bank, 353 F.2d 47, 50 (2d Cir. 1965) (holding that the effect of an act of a foreign state "must be treated . . . as an aspect of federal law" (internal citation omitted)).

233. *See Marcos*, 806 F.2d at 353 (holding that the enforceability of Filipino Executive orders are a matter of federal law); *Republic of Iraq*, 353 F.2d at 50 (holding that the enforceability of a non-judicially ordered confiscatory decree is a matter of federal law). Some courts have gone so far as to find that the enforcement of foreign judicial judgments and decrees should be governed by federal common law of foreign relations. *See, e.g.*, Tahan v. Hodgson, 662 F.2d 862, 868 (D.C. Cir. 1981) (holding enforcement of all foreign judgments governed by federal common law); Her Majesty Queen in Right of British Columbia v. Gilbertson, 597 F.2d 1161, 1163 n.2 (9th Cir. 1979) (holding the enforcement of foreign tax judgments a matter of federal law). The author of this Note chooses not to include *Tahan* and *Gilbertson* as they appear to be aberrant, later courts have declined to follow them, and following them would seriously erode a traditional area of state competence. *See, e.g.*, Uniform Foreign-Money Claims Act § 10 (1989) (state law controls the recognition of foreign judgments for money).

234. *See Zschernig*, 389 U.S. at 441 (holding that state law, even absent treaty or actions by the federal political branches, may not be used to evaluate the policies of foreign governments); Trojan Tech., Inc. v. Pennsylvania, 916 F.2d 903, 913-14 (3d Cir. 1990) (applying *Zschernig* to a state statute, upholding the statute constitutional as it did not allow state officials to comment upon, nor discriminate among, foreign nations).

235. *See, e.g.*, First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (quoting approvingly *The Paquete Habana*); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law. . . ."); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (stating that it is a "settled proposition that federal common law incorporates [customary] international law"); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995) ("[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law."). *But see* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law ought not to have the status of federal law, absent action by the executive or Congress, as it raises serious separation of powers and federalism issues, is undemocratic, and misconstrues the bases for federal common law). Customary international law does proscribe some conduct of individuals as well as nation-states; *e.g.*, crimes against humanity and war crimes. *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 73-77 (2001). But generally speaking, customary international law operates upon sovereigns, not individuals. *See id.* at 14-24.

236. *See* Boyle v. United Tech. Corp., 487 U.S. 500, 504 (1988) (stating that some areas of law raise such uniquely federal interests that, absent statutory or agency action, the issue must be controlled by federal common law). The Constitution raises several areas of unique federal interest in the foreign affairs venue. *See* U.S. CONST. art. III, § 2 (extending the federal judicial power to cases affecting ambassadors and consuls); U.S. CONST. art. II, § 3 (President retains power to receive diplomats); U.S. CONST. art. II, § 2 (President is commander in chief of the armed services and may call up the state militias); U.S. CONST. art. I, § 8, cls. 11-16 (Congress has power to fund and regulate the armed forces as well as declare war); U.S. CONST. art. I, § 8, cl. 4 (Congress retains the power to control immigration); U.S. CONST. art. I, § 10 (limiting the States' ability to engage in diplomatic and military endeavors); Weisburd, *supra* note 69, at 58-60 (arguing that federal common law of foreign relations properly controls diplomatic, military and immigration issues by constitutional assignment). Of course, Congress so heavily legislates and ratifies treaties within this realm that it is un-

The theme that holds these five areas together is that they all involve the interaction of the United States with the official conduct of foreign sovereigns.[237] The first area, the act of state doctrine, governs the respect the United States will grant to the acts of foreign sovereigns within the foreign sovereign's territory.[238] The second area, enforceability of non-judicial foreign decrees, governs the weight the United States will grant to the acts of foreign sovereigns within American territory. The third area, judicial evaluation of foreign public policy, governs the level of scrutiny applied to the policies of foreign sovereigns. The fourth area, customary international law, primarily governs relations between sovereigns in the absence of treaty law or general legal principles.[239] And the fifth area, the vesting of diplomatic, military and immigration issues exclusively in the federal government, controls which American governmental entities may officially interact with foreign sovereigns.[240] This theme provides a concise rubric for the scope of federal common law of foreign relations: federal common law of foreign relations governs how the United States reacts to the official conduct of foreign sovereigns in the absence of congressional or executive branch action.

This view of foreign affairs, limiting the scope of federal common law to the conduct of foreign sovereigns, is unquestioningly an anachronistic view of international relations. Traditionally, international law and foreign relations were the exclusive domain of nations in their sovereign capacities.[241] This is no longer the case as non-sovereign en-

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likely that the federal courts will often have to resort to federal common law to resolve issues of immigration, diplomatic or military concern. *See* Goldsmith, *Federal Courts*, *supra* note 52, at 1707.

237. *See Sabbatino*, 376 U.S. at 425 ("[Issues involving] our relationships with other members of the international community must be treated exclusively as an aspect of federal law").

238. *See* BEDERMAN, *supra* note 235, at 196-99 (providing overview of the act of state doctrine.).

239. *See id.* at 14-24 (providing general overview of customary international law). It is important to note that contemporary international law does have a limited applicability to individuals. *See id.* at 73-77, 93-109.

240. *See, e.g.*, HENKIN, *supra* note 166, at 135 (arguing that the States have no role, constitutionally speaking, in foreign affairs). Of course, the States act, in a non-sovereign capacity, on the international stage all the time. *See, e.g.*, Daniel Halberstam, *The Foreign Affairs of Federal Systems: A National Perspective on the Benefits of State Participation*, 46 VILL. L. REV. 1015, 1029 n.73 (2001) (stating that in March of 2001 the several states maintained 260 overseas trade offices and representatives).

241. *See* BEDERMAN, *supra* note 235, at 1-6 (providing a brief account of the development of international law from an exclusively sovereign domain to a body of law that operates directly upon individuals and non-governmental organizations as well); Goldsmith, *Federal Courts*, *supra* note 52, at 1670 ("Foreign relations was traditionally understood to be relations among the national governments of sovereign nation-states.").

tities, such as the United Nations,[242] and individuals[243] are directly subject to international law and integrally involved in foreign affairs. Moreover, "trade, investment, technology and energy transfers, environmental and social issues . . . migratory and commuting labor [capacity], drug traffic, and epidemics" often dominate foreign affairs agendas, while the decrees of foreign chief executives and the niceties of customary international law often pale in shadow of these other concerns.[244]

This anachronistic perspective is not a mark against the foreign sovereign conduct approach. There is no doctrinal principle that requires the federal common law of foreign relations to track innovations in actual international affairs, while there are overwhelming constitutional principles that require the bulk of litigation to remain in state court.[245] As there must be a clear limit to the range of the federal common law of foreign relations, lest every case with an international element be subject to federal common law,[246] the federal common law of foreign relations must lag behind the ever-expanding scope of international affairs.

2. *Ease of Administrability*

The foreign sovereign conduct approach is easier for courts to apply than the *Torres* approach because this perspective, with its five areas of applicability, is fairly well defined as compared with the merely intuited boundaries of the *Torres* approach. The first and second areas of federal common law of foreign relations, the act of state doctrine and the enforceability of non-judicial foreign decrees, are almost mechanically applicable for jurisdictional purposes. The court need only satisfy itself that the foreign state actually engaged in the act or made the decree pleaded. The third area, limiting the scope of state evaluation of a foreign sovereign's public policy, is easily applied for jurisdictional purposes. A reading of the state statute in question, or a quick review of how it is applied, should readily reveal whether the state is normatively evaluating the public policy of foreign sovereigns. The fifth area, federal control of immigration, military and diplomatic affairs, is a jurisdictional slam-dunk. These are constitutionally assigned to the federal government, placing federal subject matter jurisdiction beyond question.

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242. *See* Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (establishing the international legal personality of the United Nations).

243. *See* BEDERMAN, *supra* note 235, at 73-77, 93-109 (discussing the international criminal law applicable to individuals and international human rights protections).

244. Goldsmith, *Federal Courts*, *supra* note 52, at 1671.

245. *See supra* Section II.B.1.

246. *See supra* note 205 and accompanying text.

The fourth area, customary international law, provides a partial exception to this ease of administrability advantage. Determining whether binding customary international law exists on a particular issue requires voluminous compilation of past practice of nations and case law from numerous authorities.[247] Nevertheless, the foreign sovereign conduct approach remains superior to the *Torres* approach on this score. Even when the foreign sovereign conduct approach presents taxing problems, such as determining past practice of nations and compiling customary international case law, the difficulties presented are judicially cognizable ones as opposed to the *Torres* approach's intuitive foreign policy judgments. Further, the foreign sovereign conduct approach constructs a frame to contain future expansions of federal common law of foreign relations beyond the five established areas, limiting the evolution of the federal common law to areas where a foreign sovereign's conduct is at issue. The *Torres* approach provides no such concrete limiting principle.

The foreign sovereign conduct model surpasses the only other competing model for limiting the scope of the federal common law of foreign relations.[248] Professor Goldsmith's motive review model holds that the federal common law of foreign relations should apply only to prevent state action motivated by a state's desire to conduct its own foreign affairs.[249] Such a view comports well with the *Zschernig* line of cases.[250] Nevertheless, Goldsmith's view is inferior to the foreign sovereign conduct approach on two counts. First, the motive review model does not have the ease of administrability that the foreign sovereign conduct model has for jurisdictional purposes. The motive review model requires a case-by-case review, similar to the *Torres* ap-

247. *See* The Paquete Habana, 175 U.S. 677, 686-714 (1900) (taking nearly thirty pages to prove that international law protects non-combatant fishing boats in time of war); BEDERMAN, *supra* note 235, at 16-17 (noting the difficulty encountered in establishing norms of customary international law).

248. There are two other potential models. They are not directly addressed as they do not present viable alternatives to the foreign sovereign conduct approach. First, Professor Weisburd suggests limiting the scope of federal common law of foreign relations to diplomatic, military and immigration issues. Weisburd's approach is incorporated into the foreign sovereign conduct approach. *See supra* note 236. These issues are so dominated by positive law that "federal common law of foreign relations so conceived would have very little practical scope." Goldsmith, *Federal Courts*, *supra* note 52, at 1707 (criticizing Professor Weisburd's view). Second, federal common law of foreign relations could be restricted to those cases that the executive identifies as impacting the foreign relations of the United States. *See id.* at 1708. Such a view has several flaws. *Id.* at 1709-10. Chief among them: Congress has not delegated such law making power to the president; such a position raises serious due process concerns and the Court has consistently resisted such an approach. *Id.* Not surprisingly, "no one has seriously proposed that the executive suggestion replace the federal common law of foreign relations." *Id.* at 1710.

249. Goldsmith, *Federal Courts*, *supra* note 52, at 1711.

250. Zschernig v. Miller, 389 U.S. 429 (1968) (holding Oregon probate law that evaluated the public policy of Soviet-bloc countries unconstitutional).

proach, to determine if the state legislature was improperly motivated.[251] Moreover, determining legislative motives is notoriously difficult.[252] The foreign sovereign conduct approach, on the other hand, often offers bright line jurisdictional tests. Second, the motive review model excludes the other four established areas of federal common law of foreign relations. Such a view is simply inconsistent with entrenched case law.[253] Goldsmith himself admits as much.[254] Addressing Goldsmith's arguments against the whole concept of federal common law of foreign relations is beyond the scope of this Note.[255] As the goal of this inquiry is to provide the best view of what the law is, not what it ought to be, it will have to suffice to say that Goldsmith's exclusion of the remaining four well-established areas of federal common law of foreign relations is not regarded by most authorities as an accurate portrayal of current law.[256]

B. *Remaining Concerns and Remedies*

Following the foreign sovereign conduct approach, most defendants seeking federal question jurisdiction by claiming that vital sovereign and economic interests are at issue will find themselves in state court. Nonetheless, leaving cases that strike at vital interests of foreign nations in state court does raise some legitimate concerns. For example, it is often stated that state courts may issue parochial or divergent rulings in such cases.[257] This Section argues that the indispensable party[258] and choice of law doctrines[259] mitigate these fears.

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251. *See supra* Section II.B.2. (discussing difficulty of the case-by-case jurisdiction review employed by the *Torres* approach).

252. *See* United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive . . . . Inquiries into congressional motives or purposes are a hazardous matter."); Paul Brest, *The Misconceived Quest For the Original Understanding*, *in* MODERN CONSTITUTIONAL THEORY: A READER 132, 136-39 (John H. Garvey & T. Alexander Aleinikoff eds., 4th ed. 1999) (discussing difficulty of discovering legislative motives and intentions).

253. *See supra* notes 214-216 and accompanying text.

254. *See* Goldsmith, *Federal Courts*, *supra* note 52, at 1632-1641 (discussing the scope of federal common law of foreign relations case law under the traditional view).

255. Goldsmith argues the federal common law of foreign relations cannot be supported from a historical perspective. Moreover, he argues that the doctrine is undemocratic, raising serious political question doctrine and federalism concerns. *Id.* at 1713-15 (summarizing his critique of the federal common law of foreign relations).

256. *See supra* note 166.

257. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (stating this concern).

258. *See* Rosencranz & Campbell, *supra* note 5, at 200-05 (noting that indispensable party doctrine coupled with the Foreign Sovereign Immunities Act may halt litigation impacting non-party foreign sovereigns).

Indispensable party doctrine protects many of the interests a foreign sovereign might have concerning state court litigation. A foreign sovereign, though not a party to a private transnational litigation in state court, may be so wrapped up in the transactions leading up to the litigation that it qualifies as an indispensable party. Every state has some formulation of indispensable party doctrine similar to Federal Rule of Civil Procedure 19.[260] The federal rule provides that a party is indispensable if (1) in the party's absence, complete relief cannot otherwise be accorded to the present parties, or the absent party claims an interest in the litigation that may subject the present parties to inconsistent, or multiple judgments, or a judgment in the present litigation may, as a practical matter, impair the absent party's interest; (2) and the court determines in equity and good conscience that the litigation should not proceed without the absent party.[261] Failure to join an indispensable party provides a court with reason to dismiss.[262]

In most private transnational cases, parties will not be able to join a foreign sovereign as an indispensable party, thus protecting the interest of foreign sovereigns by providing state courts with grounds for dismissal. The FSIA is the sole means of acquiring subject matter jurisdiction over a foreign sovereign defendant.[263] Although the FISA does provide a few exceptions,[264] it generally excludes state and federal courts from taking subject matter jurisdiction over foreign sovereign defendants.[265] Thus, non-party foreign sovereigns may not be joined in most private transnational litigation. If the interests of the foreign sovereign are such that it will be prejudiced by the continua-

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259. *See* Garvey, *supra* note 69, at 498 (stating that traditional choice of law principles would often result in the application of foreign law in such cases, thereby avoiding the concerns of state parochialism); James A.R. Nafziger, *Resolving International Conflict of Laws by Federal and State Law*, 2 PACE YEARBOOK OF INT'L L. 67 (1990) (arguing that as international litigation becomes more routine, the argument for applying traditional conflict of law analyses strengthens).

260. *See generally* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986) (providing summaries of the similarities and differences of the federal and state rules of civil procedure).

261. FED. R. CIV. P. 19.

262. *See* Rosencranz & Campbell, *supra* note 5, at 200.

263. *See* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-39 (1989) (holding that the Foreign Sovereign Immunities Act is the sole method for gaining jurisdiction over a foreign sovereign defendant).

264. 28 U.S.C. § 1605 (1994 & Supp. 2001) (courts do have subject matter jurisdiction over foreign sovereigns if the sovereign has waived the immunity, is involved in commercial activities, is taking property in the United States, is acquiring a gift by succession in the United States, has committed torts in the United States, was involved in specified maritime activities, or engaged in or sponsored terrorist activity).

265. 28 U.S.C. § 1602 *et seq.* (1994) (providing jurisdictional immunity to foreign sovereigns, and entities owned by them, in state and federal court subject to listed exceptions).

tion of the case in its absence, state courts have reason to dismiss the case.[266]

On the other hand, if a foreign sovereign meets one of the exceptions listed by the FSIA (e.g., by engaging in commercial activity[267]) and it is joined into state court litigation, the foreign sovereign "has an absolute right of removal to the federal courts."[268] If a foreign state's interests are so intertwined with those of state court litigants that it is joined in the litigation, it is protected from potentially parochial state adjudication by removal to federal court.

Even if a private transnational case, with a fact pattern similar to *Patrickson*, remained in state court, choice of law doctrine protects the interests of affected foreign sovereigns. Although the states employ a wide range of choice of law doctrines,[269] generally they are "generous about the relative strength and acceptability of a foreign state's interest as reflected, for example, in California's comparative impairment technique."[270] Indeed, in fact patterns such as those found in *Torres* and *Patrickson* — where the plaintiffs are foreign citizens suing in tort for injuries that occurred in their home country and foreign law favors the instate defendant — most states will apply the substantive law of the foreign state.[271] Thus, even if a foreign state's interests are not so commingled with those of private transnational state court litigants as to be an indispensable party or to be joined, the foreign sovereign's interests will often be safeguarded by applying its substantive law in the litigation.

Finally, if a foreign sovereign is unhappy that a suit, to which it is not a party, is proceeding in state court, it can seek to intervene in the litigation, thereby triggering an absolute right of removal to federal

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266. *See* FED. R. CIV. P. 19(b) ("The factors to be considered by the court [in dismissing] include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person. . . .").

267. 28 U.S.C. § 1605(a)(2) (1994).

268. Kern v. Jeppesen Sanderson, Inc., 867 F. Supp 525, 530 (S.D. Tex. 1994) (citing 28 U.S.C. § 1441(d)).

269. *See* WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 193-266 (2d ed. 1993) (providing a survey of the modern state law approaches to choice of law problems). One does not escape these differing choice of law doctrines by going to federal court. Should such a choice of law issue be governed by federal common law in federal question jurisdiction, the federal court would likely appropriate state law as the federal rule of decision. *See* Kamen v. Kemper Fin. Serv., 500 U.S. 90, 98 (1991) ("[F]ederal courts should incorporate state law as the federal rule of decision, unless application of the particular state law in question would frustrate specific objectives of the federal programs.") (internal citation and quotation marks omitted). Moreover, federal courts sitting in diversity jurisdiction apply the choice of law rules of the state in which they sit. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

270. Nafziger, *supra* note 259, at 73.

271. For example, this is clearly the result under a *lex loci delicti* regime. *See* RICHMAN & REYNOLDS, *supra* note 269, at 171-74. It is also the result under a comparative impairment regime as it presents a false conflict. *See id.* at 221-23.

court.[272] Most states have a civil procedure provision comparable to Federal Rule of Civil Procedure 24.[273] Rule 24 allows non-litigants to intervene when the intervenor has an interest relating to the subject matter of the suit, the intervenor, as a practical matter, is likely to be impaired in this interest by the disposition of the suit, and the existing parties do not adequately represent the intervenor's interests.[274] If a foreign sovereign has legitimate interests that a suit in state court is likely to impact negatively, it may seek to intervene.[275] Should the court grant the motion to intervene,[276] the foreign sovereign can protect its interests by its absolute right to remove to federal court and to seek a federal forum non conveniens dismissal.[277]

C. Patrickson *and* Torres *Revisited*

In practice, the foreign sovereign conduct approach will leave most transnational cases in state court. By way of illustration, consider how the *Patrickson* and *Torres* cases would fare under the foreign sovereign conduct approach. Plaintiffs in *Patrickson* brought state tort claims against Dole Food for personal injuries caused by Dole Food's use of dangerous pesticides.[278] Nothing in the facts, as laid out by the court, suggests that the several foreign nations in which the plaintiffs resided were involved in the transactions leading up to the use of the pesticides.[279] This fact ought to lead a court to believe that the plaintiff's state law claims do not raise issues governed by the federal common law of foreign relations.[280] The case would remain in Hawaii state court, then, because the complaint fails both the Holmes and necessary construction tests.[281] Assuming that the economies of the Central

272. *Kern*, 867 F. Supp at 530.

273. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 374 (3d ed. 1999).

274. *See* FED. R. CIV. P. 24; FRIEDENTHAL, *supra* note 273, at § 6.10.

275. *Id.*

276. An intervenor may seek to intervene as of right or permissively. *See* FRIEDENTHAL, *supra* note 273, at 374.

277. *Kern*, 867 F. Supp. at 530. Many foreign sovereigns may decline to take this strategy as it involves a degree of risk, because the foreign sovereign must allow itself to become a defendant. If the federal court refuses, as is unlikely, to grant a forum non conveniens dismissal, the foreign sovereign could be found liable for damages.

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

279. *Id.*

280. The validity of Panama's, et al., actions within its territory are not at issue, *see supra* note 232, the extraterritorial validity of Panama's, et al., actions are not at issue, *see supra* note 233, Hawaiian law does not require a normative evaluation of Panama's, et al., public policy, *see supra* note 234, there are not issues of customary international law raised, *see supra* note 235, nor are issues of military, diplomatic or immigration law raised, *see supra* note 236.

281. *See supra* Section I.A.1.

American nations involved in *Patrickson* heavily depend upon agriculture, the *Patrickson* litigation may very well strike at vital economic interests of these nations. These interests should be adequately protected in Hawaiian court by the choice of Panamanian, Costa Rican, Ecuadorian, or Guatemalan substantive law.

The *Torres* case presents a more complicated picture. Plaintiffs in *Torres* brought state tort claims against SPCC, alleging personal injuries from sulfur dioxide emissions.[282] Unlike the governments involved in *Patrickson*, the government of Peru was involved in SPCC's mining operation.[283] Nonetheless, based on the facts presented, the plaintiffs' claims do not appear to implicate issues governed by federal common law of foreign relations.[284] As the complaint appears to fail both the Holmes and necessary construction tests, the case should remain in Texas state court.[285] Nevertheless, it is doubtful whether the state court would take the case to trial. Peru's intimate involvement with SPCC's mining operation — including ownership of the refinery from 1975-1994, during which time many of the plaintiffs were allegedly injured[286] — could lead a court to conclude that Peru is an indispensable party. This would provide the court with reason to dismiss the case.[287] On the other hand, it is possible that the commercial activities exception to the FSIA would apply to Peru's conduct.[288] Should this occur, and if a Texas court could gain personal jurisdiction over Peru, Peru could be joined.[289] In such an event, Peru would have an absolute right of removal to federal court.[290] If Peru was as involved in the transactions leading up to the *Torres* case as the Fifth Circuit intimates, there is little reason to fear that the foreign sovereign conduct approach would leave Peru's interests to the mercies of a potentially parochial Texas trial court.[291]

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282. Torres v. S. Peru Copper Corp., 113 F.3d 540, 541 (5th Cir. 1997).

283. *Id.* at 543 (Peru owns the land being mined, owns the mineral, extracted, grants SPCC concessions for a fee, and owned the refinery itself until 1994).

284. That is to say, the validity of Peru's actions within its territory are not at issue, *see supra* note 232; the extraterritorial validity of Peru's action are not at issue, *see supra* note 233; Texas law does not require a normative evaluation of Peru's public policy, *see supra* note 234; there are not issues of customary international law raised, *see supra* note 235, nor are issues of military, diplomatic or immigration law raised, *see supra* note 236.

285. *See supra* Section I.A.1.

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

287. *See supra* note 262 and accompanying text.

288. *See supra* note 267 and accompanying text.

289. *See id.*

290. *See supra* note 268 and accompanying text.

291. If the foreign sovereign conduct approach were adopted, corporate defendants such as Dole Food and SPCC, presumably, would take actions to minimize the impact of this approach. Such actions might include the following: first, corporate defendants could seek to persuade state courts or legislatures to adopt the federal standard for forum non conveniens

CONCLUSION

American multinational corporations, following the *Torres* approach, have used the federal common law of foreign relations to manufacture federal question jurisdiction to escape on the merits defenses of state tort actions brought by foreign plaintiffs. Contrary to the position taken in the *Torres* approach, the federal common law of foreign relations is best understood as not providing federal question jurisdiction in such cases. In reaching this conclusion, the *Patrickson* challenge to *Torres* was considered and rejected as attacking merely a straw man version of the *Torres* approach. The *Torres* approach was rejected as well, because it was unable to overcome damning pragmatic and doctrinal critiques. In its place, this Note argued that the foreign sovereign conduct approach provides the most accurate depiction of the scope of federal common law of foreign relations. This view leaves most private transnational litigation in state courts by restricting the scope of federal common law of foreign relations to issues requiring the United States to react to the official conduct of foreign sovereigns in the absence of congressional or executive branch action. Finally, state courts were found to provide numerous protections for the legitimate interests of foreign sovereigns. In a world where engaging in business overseas is becoming the rule rather than the exception, limiting access to federal rubber stamp forum non conveniens dismissals would foster transnational corporate responsibility. American multinational corporations should not be able to escape the obligation to present on the merits defenses in American courts simply because the transactions leading up to litigation happened to occur abroad.

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dismissals. *See* Rosencranz & Campbell, *supra* note 5, at 188 n.266 (noting that several states have adopted the federal forum non conveniens standard). Second, corporate defendants could restructure their presence overseas so that American parent corporations are not liable for the acts of their overseas subsidiaries. *See, e.g.*, H. Lowell Brown, *Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act*, 50 BAYLOR L. REV. 1 (1998) (outlining the corporate practice of forming foreign subsidiary corporations to limit liability and the effect of the Foreign Corrupt Practices Act upon these practices). Third, corporate defendants could attempt to use forum selection clauses, selecting Central American fora, in their contracts with foreign workers. *See, e.g.*, Ryan Kelly McLemore, Comment, *Forum-Selection Clauses and Seaman Personal Injury: A Modern Analytical Framework with International Emphasis*, 25 TUL. MAR. L.J. 327, 328-30 (2000) (discussing the use of forum selection clauses for employees in the international shipping business to avoid unfavorable fora).