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James A.R. Nafziger

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RESOLVING INTERNATIONAL CONFLICT OF LAWS BY FEDERAL AND STATE LAW

James A.R. Nafziger†

THE ISSUE: A PRELIMINARY ANALYSIS

A recurring problem in a federal system is to determine the applicability of state law in international cases before civil courts. In the United States this problem arises in both state courts and federal courts considering cases under diversity jurisdiction. From one viewpoint, rules applicable in domestic cases ought generally to apply in international cases as well. Thus, state law should apply in international cases when it would ordinarily apply in domestic cases. An important corollary is that federal common law should not displace state law except when federal interests are unusually compelling. This is generally the rule today. A contending argument, however, favors a more fully federalized choice of law to replace state law in both federal and state courts.

In an able exposition of the latter argument¹ Professor Daniel Chow proposes that “when the use of state law to decide international choice of law issues *may compromise* significant federal interests, federal and state courts should apply a federal common law rule that preempts state law.”² In constitutional terms, this means essentially that whenever a choice of state law by a court might impede the exercise of foreign relations powers attributed to the federal government, federal common law should replace state law.³ Later, in discussing an appropriate choice of law rule for international cases, Professor Chow ap-

† B.A., M.A., J.D.; Professor of Law and Director of the China Program, Willamette University College of Law.

¹ Chow, *Limiting Erie in a New Age of International Law: Toward a Federal Common Law of International Choice of Law*, 74 IOWA L. REV. 165 (1988) (emphasis added).

² *Id.* at 169.

³ Compare this with U.S. CONST. art. VI, cl. 2.

pears to modify his proposition slightly as follows: "cases affecting foreign relations interests would be decided using the same federal choice of law rule."⁴ Presumably, this statement of the appropriate choice of law contemplates only those cases where foreign relations interests, but not necessarily significant ones, actually *would be* affected, rather than all cases where they *might be* affected. Finally, in the conclusion of the article, the central proposition is stated in an even more qualified manner: "Federal and state courts should undertake this federal common law analysis on a case-by-case basis and apply a federal rule to an international choice of law issue only after a considered judgment that state law *would compromise significant* federal interests."⁵ As articulated, the proposition comes close to restating current rules of law. Although the precise contours of Professor Chow's proposition are therefore somewhat unclear, he seems to prefer throughout his analysis the relatively radical version stated at the beginning of this paragraph. For convenience, we may call this the "federal presumption" argument. The following critique questions both the necessity and the efficacy of that argument. Professor Chow has, in any event, examined a problem that ought to be of fundamental interest to everyone concerned about the further development of a just choice of law process in international cases.

The issue of whether state law should be replaced by federal common law in international cases has become more significant as those cases have become more frequent in the courts. Likewise, national and international legislation designed to regulate transnational activity and dispute resolution is becoming more common.⁶ We are ever more a global community. The federal

⁴ Chow, *supra* note 1, at 214 (emphasis added).

⁵ *Id.* at 224 (emphasis added).

⁶ *E.g.*, S. 1071, 99th Cong., 1st Sess., 131 CONG. REC. 5370 (1985) (a proposal to use arbitration and other means to simplify and alleviate problems in the application of the Foreign Sovereign Immunities Act, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1332(a) (2)-(4), 1391 (f), 1441(d), 1602-1611 (1988)) [hereinafter FSIA]); Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, *opened for signature* July 1, 1964, 834 U.N.T.S. 169 (entered into force Aug. 23, 1972); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159. For in-depth discussion see Bilder, *An Overview of International Dispute Settlement*, 1 EMORY J. INT'L DIS. RES. 1 (1986); *see also*

presumption argument asserts that because international cases are becoming more common and decisions arising from them may affect the foreign relations powers of the federal government, there is a need to develop a body of federal common law to supplant state law in order to protect the federal, more or less "national," interest. Both the minor premise and the conclusion of this argument, however, may be questioned. Just because a case is *international* does not mean that the foreign relations or other interests of the federal government are affected significantly enough to replace the normal application of state law. In fact, they usually are not. Quite the opposite may be more characteristic. Particularly if the interests of the federal government in a given matter are limited, they may be best served by *not* being spotlighted. Discretion may be the better part of diplomatic valor.

Even when federal interests are significantly affected, it is reasonable to expect that existing rules and principles ensure the application of federal law rather than conflicting state law. The most important of these overriding rules and principles are well established within the existing framework for resolving international cases: the act of state doctrine;⁷ treaty law;⁸ Acts of Congress;⁹ transnational judicial cooperation;¹⁰ the principle of

Bilder, *International Third Party Dispute Settlement*, 17 DEN. J. INT'L L. & POL'Y 471 (1989); Bilder, *International Dispute Settlement and the Role of International Adjudication*, 1 EMORY J. INT'L DISP. RES 131 (1987); Berman, *the Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RES. 235 (1988).

⁷ "[T]he courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). Earlier important cases applying the act of state doctrine include *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918) and *Ricaud v. American Metal Co., Ltd.*, 246 U.S. 304 (1918). It has been asserted that the doctrine does not bar adjudication when the State Department determines that the foreign relations of the United States will not be impaired. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (Chemical Bank & Trust Co., Third-Party Defendant)*, 210 F.2d 375 (2d Cir. 1954). However, the acceptability of the Bernstein doctrine is open to serious question. *See also* *W. S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 110 S. Ct. 701 (1990).

⁸ U.S. CONST. art. VI, cl. 2 (supremacy clause).

⁹ *Id.* Examples of these acts are: FSIA, *supra* note 6; Alien Tort Statute, 28 U.S.C. 1350 (1988).

¹⁰ *See, e.g.*, Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302; Treaty on Extradition and Mutual Assistance in Criminal Matters, June 1, 1979, United States-Turkey, 32 U.S.T. 3111,

comity,¹¹ and fundamental policies of dispute resolution.¹² A case in point is *Philippines v. Marcos*,¹³ involving a clear federal interest in cooperating with the Philippine government to effect the return of assets alleged to have been illegally taken out of its territory by deposed President Ferdinand Marcos and his wife.

In choice of forum disputes, international public policy also plays an important role, as the Supreme Court's opinions in *Scherk v. Alberto-Culver Co.*,¹⁴ and *Mitsubishi Motors v. Soler Chrysler-Plymouth*¹⁵ make clear. Fortunately, party autonomy in contracting obviates most choice of law and jurisdictional disputes.

The *Erie* and *Klaxon* doctrines¹⁶ in diversity cases do not pose a particular problem. A state's choice of law rules may take

T.I.A.S. No. 9891; Treaty on Mutual Legal Assistance, June 12, 1981, United States-Netherlands, T.I.A.S. No. 10734; Treaty on Mutual Legal Assistance in Criminal Matters, November 9, 1982, United States-Italy, S. Exec. Doc. No. 98-25, 98th Cong. 2d Sess. (1984); Convention on Mutual Assistance in Criminal Matters, October 17, 1983, United States-Morocco (not yet in force).

¹¹ See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895) (stating the principles of comity); *John Sanderson & Co. (Wool) Pty., Ltd., v. Ludlow Jute Co., Ltd.*, 569 F.2d 696 (1st Cir. 1978); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Moore v. Mitchell*, 30 F.2d 600, 603 (2d Cir. 1929), *aff'd on other grounds*, 281 U.S. 18 (1930).

¹² See *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

¹³ In *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. dismissed sub nom. Ancor Holdings, N.V. v. Republic of Philippines*, 480 U.S. 942 (1987), *cert. denied*, 481 U.S. 1048 (1987), "the Republic of the Philippines sought an order enjoining its deposed former leader, Ferdinand Marcos, from disposing of allegedly ill-gotten real estate holdings in New York City and the surrounding area." Chow, *supra* note 1, at 212. The federal district court granted the injunction. On appeal, the Second Circuit upheld the exercise of federal question jurisdiction to permit the issuance of the injunction, on the basis of a "powerful" federal interest in governing "the necessary implications of such an action for United States foreign relations." *Marcos*, 806 F.2d at 353-54.

¹⁴ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (enforcing the arbitration clause in a contract despite conflict with a federal statute).

¹⁵ *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985) (The arbitration clause in a contract encompassing an antitrust counterclaim is enforceable and compelling under the Federal Arbitration Act).

¹⁶ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) (Courts are without authority to create federal general common law except in matters governed by the Federal Constitution or by Acts of Congress; state substantive law will ordinarily apply in federal cases based on diversity jurisdiction), *cert. denied*, 305 U.S. 637 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (The Supreme Court held that under the *Erie* doctrine, a federal court in a diversity case must apply the conflicts rules of the state in which it sits.), *cert. denied*, 316 U.S. 685 (1942).

into account federal, foreign or international interests, policies and rules. State substantive law can and often does incorporate these. Federal attempts to extend regulations abroad, legislation to implement treaty law affecting private interests, clawback provisions responding to regulatory overreaching, and so forth, can all be given effect by existing exceptions to the *Erie* doctrine in the federal courts and by ordinary choice of law rules by state courts. While fundamental questions may arise concerning the *Erie* doctrine in theory, as well as to its applicability in individual cases, it is at least subject to these important exceptions. Thus, international cases would not seem to warrant any greater judicial deference to federal authority than would be warranted in domestic cases. Although *Swift v. Tyson*¹⁷ lives on in many international cases based on diversity jurisdiction, this does not mean that the courts should broaden the *Swift* doctrine so as to presume the application of federal law, much less require it. In determining whether to apply federal common law, courts may differ. However, current rules seem to strike an acceptable compromise between the interests of the federal system and the federal interest in systemizing international conflicts cases.

Thus, although the world may be getting smaller and international cases routine, it does not follow that federalizing the law further is necessary for a fair and just resolution of international cases within a federal system. Indeed, it is puzzling why, if international transactions and legal cases are becoming routine, they should not be handled routinely. One might reasonably conclude that the more routine international cases become, the more they should be routinely handled by applying ordinary choice of law rules rather than federal common law. Accordingly, the argument is strong that the latter should continue to be reserved for special cases where the need for national uniformity or for conveying a clear foreign relations or other federal message is truly compelling.

¹⁷ 41 U.S. (16 Pet.) 1 (1842) (pre-*Erie* rule of applying federal common law in all diversity cases).

ARGUMENTS AGAINST STATE LAW

What is the jurisprudential source of the argument for further federalizing the law in international cases? The hoary doctrine of inherent powers, fashioned by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*,¹⁸ is a partial explanation.¹⁹ According to that doctrine, the political branches of the federal government have *inherent powers* in the realm of foreign relations under authority of the Constitution. Under an expansive reading of the doctrine, courts may be obliged to declare any case nonjusticiable that has even a single pertinent foreign element. The dead hand of the inherent powers doctrine has been controversial in the half century of its existence.²⁰ Therefore, care should be exercised before allowing the doctrine to tear further into the fabric of constitutional and private law by enlarging the fiction of inherent foreign relations powers as a means for further displacing the ordinary application of state law.

As a political matter, a fully federalized choice of law in international cases might well appeal to political conservatives, especially when the federal courts and the nation's agenda are conservative. The reliance of the federal presumption argument on Justice Sutherland's famous opinion in *Curtiss-Wright* to establish executive omnipotence in foreign affairs seems in accord with this viewpoint.²¹

The federal presumption argument is, however, premised on three additional observations: (1) that state courts are parochial;²² (2) that they "do not have the correct analytic ingredients to measure an international choice of law situation";²³ and (3) that federalist fragmentation of choice of law doctrine frustrates the federal interests of the United States in the interna-

¹⁸ 299 U.S. 304 (1936).

¹⁹ For a brief critique of the doctrine see Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 823 (1983).

²⁰ See Lofgren, *United States v. Curtiss-Wright Export Corporations: An Historical Reassessment*, 83 YALE L. J. 1 (1973).

²¹ Chow, *supra* note 1, at 204-205 n.214 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-33 (1936)).

²² *Id.* at 181, 224.

²³ *Id.* at 223-24.

tional context.²⁴ Although the basis for the first two observations is unclear, evidence for the third point includes the often bewildering diversity of choice of law methodologies among state courts and the observations of rather antiquated case law.²⁵ Furthermore, the same methodology may be unpredictably and parochially trumped by a public policy exception in favor of local law. This may be viewed as a problem in international cases because, with several important exceptions, courts generally resolve interstate and international conflicts the same way.²⁶ Today, however, there is surprising agreement among state courts, at least on standards of applying the public policy exception. Many state courts are surprisingly generous about the relative strength and acceptability of a foreign state's interest as reflected, for example, in California's comparative impairment technique for resolving a true conflict of laws.²⁷

Although a federal system may present a confusing picture to the outside world because of a welter of diverse state choice of law rules and approaches, this apparent lack of uniformity may not be as much of a problem as the contending choice of law approaches might suggest.²⁸ There is somewhat greater agreement on an interest analysis used in the Restatement (Second) of the Law of Conflict of Laws²⁹ than a mere classification of diverse methodologies might suggest. Interest-oriented ap-

²⁴ *Id.* at 181.

²⁵ *Id.* at 192 n.140.

²⁶ See generally J. NAFZIGER, *CONFLICT OF LAWS: A NORTHWEST PERSPECTIVE* 65-91 (1985).

²⁷ The comparative impairment technique applies the law of the state whose interest would be impaired to a greater degree if its law were not applied. See, e.g., *Offshore Rental Co., Inc. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721 (1978) (California applied Louisiana law instead of its own because the impairment of its interests was less than what the impairment of Louisiana's interests would have been if California law had been applied. The issue was whether a California corporate employer could recover damages from a Louisiana corporation for loss of services of a key employee, who was negligently injured on the Louisiana corporation's premises.); *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976) (California law was applied in this instance to avoid impairment of its state interest in holding tavern owners liable for injuries resulting from drunk driving accidents. California's interest was deemed to be stronger than Nevada's interest in protecting tavern owners.), *cert. denied*, 429 U.S. 859 (1976).

²⁸ For an alternative analysis, see R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 362-411 (3d ed. 1986).

²⁹ *RESTATEMENT (SECOND) LAW OF CONFLICT OF LAWS* §§ 2, 6, 10 (1971).

proaches do not ensure uniformity of decisions among multiple jurisdictions, but they do enhance the likelihood of uniformity. Also, under most modern approaches to choice of law, federal courts often find a false conflict of laws.³⁰ Indeed, in the modern era of conflicts law, courts are encouraged to find a false conflict of laws. *British Columbia v. Gilbertson*,³¹ which is a model of this technique, found a false conflict between state and foreign-sensitive federal law, although its reliance on the largely discarded requirement of reciprocity as an element of international comity is somewhat aberrant.

Conversely, the content of an expanded federal common law would itself be somewhat difficult to discern. Even if federal common law simply duplicated international law, which state law is also competent to do, it is quite often subject to the vagaries of common law analysis. Although treaties, like statutes, offer somewhat of a black letter articulation of the law, they too require interpretation. Defining international custom is often even more problematic. Custom, which is akin to the common law, plays a particularly important role today in the contemporary system of international law. Examples of this are: the World Court's opinion in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua*;³² the opinions of the Inter-American Court of Human Rights in the *Honduras Disappearances Cases*;³³ contemporary law of the sea without a binding, comprehensive treaty;³⁴ the burgeoning field of refugee and international immigration law, despite the aberrant opinion in *Garcia-Mir v. Meese*;³⁵ and the law of naval warfare³⁶ all disclose

³⁰ A false conflict of laws arises when the laws in each jurisdiction either are identical or would produce the same effect. D. CAVERS, *THE CHOICE OF LAW PROCESS* 89 (1965).

³¹ *Her Majesty Queen in Right of British Columbia v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979).

³² *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 22 (Judgment of June 27).

³³ *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. Human Rights 3, Ser. C, No. 4 (Judgment of July 29), *reprinted in* 28 I.L.M. 291 (1989); *Godínez Cruz Case*, 1989 Inter-Am. Ct. Human Rights 3, Ser. C, No. 5 (Judgment of Jan. 20).

³⁴ *United Nations Convention on the Law of the Sea, opened for signature December 10, 1982*, U.N. Doc. A/CONF.62/122 and Corr. 1-11, *reprinted in* 21 I.L.M. 1261 (1982).

³⁵ 788 F.2d 1446 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986) (political act supersedes custom).

³⁶ *See generally* *THE LAW OF NAVAL WARFARE* (N. Ronzitti ed. 1988). A specific ex-

the vital role of custom.

At the core of the federal presumption argument in international cases is a perception that when state courts or federal courts in diversity cases decide international conflicts issues they are making "foreign policy"³⁷ at least "in a significant number of cases . . . forbidden by the Constitution."³⁸ It is argued that all foreign affairs must be addressed by a central political authority, not by a myriad of courts: "'the country must speak with a united voice.'"³⁹ Why this is so is not entirely clear. After all, this country's legal system could simply tell the rest of the world, in effect, that courts in a federal system do not necessarily speak with one voice except in matters where the political branches insist that the courts do so, or where the courts must do so in order to comply with international law or otherwise implement strongly expressed national interests. It is also somewhat unclear why "it is now unacceptable for the United States to have the treatment of foreign law (and thus federal interests) depend on the policy of the state where the litigation happens to take place."⁴⁰

Professor Chow's article suggests that the threats to the integrity and uniformity of the judicial process by state courts have become more acute because of three factors. First, as the world gets smaller, litigation is becoming more international.⁴¹ That seems correct. The current framework of state and federal law can and does, however, accommodate foreign parties' inter-

ample is the traditional doctrine of right of convoy, which prevents belligerents from boarding and searching convoyed ships and instructs those wishing to examine cargoes to be content with a statement by the commander of the convoy that no contraband is being transported. This was employed by the United States in the Persian Gulf during the Iran/Iraq War. The United States employed this doctrine as a means of preventing the Iranian Navy from exercising the doctrine of contraband which provides for the lawful visitation, search, and seizure of contraband. *Id.* at 7-8. Caspar W. Weinberger, then United States Secretary of Defense, stated that "[t]he United States will be in full compliance with international law in providing escort to the reflagged [Kuwaiti] tankers. International law clearly recognizes the right of a neutral State to escort and protect its flagged vessels in transit to neutral ports." 87 DEP'T ST. BULL. 60 Nö. 2124 (1987).

³⁷ Chow, *supra* note 1, at 184.

³⁸ *Id.* at 167.

³⁹ *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 50-51 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966), *quoted in* Chow, *supra* note 1, at 189.

⁴⁰ Chow, *supra* note 1, at 224.

⁴¹ *Id.* at 168-69.

ests and international interests. Second, foreign governments now assume control over activities that were formerly private.⁴² Although that has indeed occurred, one might reasonably ask whether the trend is not in the opposite direction. Major examples of this countertrend would include economic deregulation in North America and Western Europe, and privatization in Eastern Europe, Africa and Asia. The dramatic changes in Eastern Europe may perhaps become the best evidence of this countertrend.⁴³ Third, it is argued that because of the first two factors, what were formerly private disputes are now more apt to be imbued with public interest.⁴⁴ The trend toward blending public and private law into a system of transnational law may lead some observers to the conclusion that the judicial system must be more alert to the foreign policy implications of what formerly were common domestic issues in state or federal diversity cases.⁴⁵ However, one might argue just the opposite; even if the public sector is becoming more pervasive in international transactions and therefore more involved in the process of private international law, the sovereign is becoming just one more routine player not meriting any special judicial concern.

Indeed, this is exactly the way Congress and the federal courts seem to view the trends. Observe the codification of the restrictive theory of sovereign immunity, with its commercial activities exception, in the FSIA.⁴⁶ Witness, also, Congressional acquiescence in governance by state law of numerous FSIA issues, *Harris v. Polskie Linie Lotnicze*⁴⁷ notwithstanding, and some erosion of the act of state doctrine.⁴⁸

⁴² *Id.* at 168-69, 193-94.

⁴³ The dismantling of communist control has encouraged some privatization of Eastern European economies.

⁴⁴ Chow, *supra* note 1, at 193-94.

⁴⁵ *Id.* at 169.

⁴⁶ FSIA, *supra* note 6, *cited in* Chow, *supra* note 1, at 195 n.154.

⁴⁷ *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987) *discussed in* Chow, *supra* note 1, at 205 n.215 (applying federal common law for a choice of law rule).

⁴⁸ *See, e.g., Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985) (Recognizing both inconsistent federal and foreign interests and consistent federal and state (New York) interests, the court held that the act of state doctrine did not bar inquiry into a dispute when the foreign act was a decree prohibiting repayment of foreign currency obligations that required extraterritorial enforcement, and therefore New York law applied), *cert. dismissed*, 473 U.S. 934 (1985).

APPLICATION OF FEDERAL LAW WITHIN
Zschernig-Erie/Klaxon FRAMEWORK

Even the celebrated opinion in *Zschernig v. Miller*,⁴⁹ which confines the scope of state law within a theory of federal preemption, applies only in instances where state law provides for and actually has led to "minute inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements."⁵⁰ On this point *Zschernig* is somewhat ambiguous. In the words of Professor Louis Henkin:

It may be, then, that *Zschernig v. Miller* excludes only state actions that reflect a state policy critical of foreign governments and involve "sitting in judgment" on them (footnote omitted) . . . Or is the Court suggesting different lines—between state acts that impinge on foreign relations only "indirectly or incidentally" and those that do so directly or purposefully? (footnote omitted) Between those that "intrude" on the conduct of foreign relations and those that merely "affect" them?⁵¹

The basic rule, stated by Professor Henkin, nevertheless remains. Interestingly, Justice Harlan, who had written for the Court in *Banco Nacional de Cuba v. Sabbatino*,⁵² the classic act of state doctrine case and the apotheosis of an exception to *Erie*, delivered a concurring opinion in *Zschernig* in which he argued against declaring the state statute unconstitutional as applied.⁵³ Citing the Uniform Foreign Money-Judgments Recognition Act⁵⁴ and other authority of less significance today, Harlan argued that state courts must and do regularly engage in well-informed scrutiny of foreign laws and legal systems.⁵⁵

Advocates of a more radical displacement of state law perceive several specific inadequacies in the *Zschernig* framework. Professor Chow, for example, cites four instances where courts should have applied or should hypothetically apply federal com-

⁴⁹ 389 U.S. 429 (1968).

⁵⁰ *Id.* at 435.

⁵¹ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 240-41 (1972).

⁵² 376 U.S. 398 (1964).

⁵³ *Zschernig*, 389 U.S. at 443-62.

⁵⁴ *Id.* at 461-62, (citing Uniform Foreign Money Judgments Recognition Act § 4(a)(1), 9B U.L.A. 67. The most recent publication of the statute is located at 13 U.L.A. 268 (1986)).

⁵⁵ *Zschernig*, 389 U.S. at 461.

mon law. These instances involve both state jurisdiction and federal diversity jurisdiction under the *Klaxon*⁵⁶ extension of *Erie*. They include: (1) the *Marcos*⁵⁷ and *Republic of Iraq*⁵⁸ bank assets cases, according to which American courts may bar foreign decrees from reaching assets in this country;⁵⁹ (2) a hypothetical case based on the reach of Article VIII, section 2(b) of the Bretton Woods (IMF) Agreement;⁶⁰ (3) foreign debt forgiveness cases;⁶¹ and (4) the case of *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), Ltd.*,⁶² in which a state court refused to give effect to an anti-Semitic decree of Idi Amin. The *Marcos* and *Republic of Iraq* cases applied the act of state doctrine, which is existing federal common law under *Sabbatino*. Any disagreement we may have with the application of the doctrine in these cases does not call for new federal common law. The hypothetical case simply involves the application of treaty law, the supreme law of the land.⁶³ Under existing law, the debt forgiveness cases can be handled, as in *Allied Bank*,⁶⁴ by comparing the strength of local interests with federal or foreign relations interests and properly applying the act of state doctrine.

Professor Chow's criticism of the *Zschernig - Erie/Klaxon*

⁵⁶ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), *cert. denied*, 316 U.S. 685 (1942).

⁵⁷ *Republic of the Philippines v. Marcos*, 806 F.2d 344 (2nd Cir. 1986), *cert. dismissed sub nom. Ancor Holdings, N.V. v. Republic of the Philippines*, 480 U.S. 942 (1987), *cert. denied*, 481 U.S. 1048 (1987).

⁵⁸ *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47 (2nd Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966).

⁵⁹ See also *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2nd Cir. 1985), *cert. dismissed*, 473 U.S. 934 (1985).

⁶⁰ Under Article VIII, section 2(b) an exchange contract between American citizens and the nationals of another member of the IMF would be unenforceable in the United States if the foreign nation enacted currency decrees prohibiting payment on the contract even if the contract were payable in the United States. Chow, *supra* note 1, at 203 (discussing Article VIII, § 2(b), Articles of Agreement of the International Monetary Fund (the Bretton Woods Agreement), Dec. 27, 1945, 60 Stat. 1401, 1411, T.I.A.S. No. 1502, 2 U.N.T.S. 39, as amended May 31, 1968, 20 U.S.T. 2775, T.I.A.S. No. 6748, and Apr. 30, 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937).

⁶¹ Chow, *supra* note 1, at 209.

⁶² 37 N.Y.2d 220, 227, 333 N.E. 2d 168, 173, 371 N.Y.S.2d 892, 899 (1975), *cert. denied*, 423 U.S. 866 (1975).

⁶³ Incidentally, letters of credit seem to be intentionally excluded from the scope of Article VIII, § 2(b) of the Bretton Woods Agreement, *supra* note 61.

⁶⁴ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2nd Cir. 1985), *cert. dismissed*, 473 U.S. 934 (1985).

framework relies heavily on a critique of the *Zeevi* decision. In *Zeevi*, the interests balanced were those of New York, in protecting its integrity as a financial center by routinely honoring irrevocable letters of credit there, and Uganda's interest in upholding Idi Amin's discriminatory, anti-Semitic decree. Surely, under these circumstances, the *Zeevi* decision was correct in giving effect to New York law and public policy, just as it would have been appropriate to override Nazi confiscation measures or decrees providing for confiscation of property without compensation. In other cases, dealing with less offensive foreign laws than Idi Amin's decree, New York courts might well give effect to foreign exchange controls, even outside the scope of the Bretton Woods commitment. Indeed, if the foreign interests were compelling, as they certainly were not in *Zeevi*, courts might be required to fashion federal common law under *Swift* in federal diversity cases or by preemption of state law in state court cases.

Professor Chow acknowledges that the New York court applied local public policy to bar recognition of Idi Amin's decree while assessing the foreign policy interests.⁶⁵ Thus, the New York court *was* taking account of the federal interests and simulating a federal common law; in any event, express application of the latter would doubtlessly have produced the same result. Professor Chow expresses concern that "the *Zeevi* court ignored the possible political ramifications,"⁶⁶ but the United States policy was one of firm opposition to Idi Amin, regardless of potential countermeasures by the latter. The decision therefore would seem to have supported national policy, that is, the federal interest. It is questionable whether Uganda, which was not a party to the litigation, had any real interest, as Professor Chow implies,⁶⁷ in seeking foreign recognition of currency controls in private litigation such as this between Mr. Zeevi and Grindlays Bank.

The *Zeevi* decision is a reminder that in our federal system, states may have paramount interests which may sometimes merit as much respect as compelling foreign interests, and that state courts are quite capable of taking into account the foreign

⁶⁵ Chow, *supra* note 1, at 184-85.

⁶⁶ *Id.* at 186.

⁶⁷ *Id.* at 185-87.

relations and other interests of the federal government. State courts can also "move with the circumspection appropriate when [a court] is adjudicating issues inevitably entangled in the conduct of our international relations."⁶⁸

If a state court should inappropriately transgress into the domain of sensitive foreign policy, there is always the *Zschernig* doctrine to bar any interference in the federal domain of foreign relations. Moreover, federal and foreign interests do not necessarily coincide; sometimes they may even be antagonistic.⁶⁹

CONCLUSION

Further federalizing choice of law in international cases to create a presumption in favor of federal law is unnecessary. In federal diversity cases the *Erie/Klaxon* doctrines provide sufficient opportunity to take into account federal and foreign relations interests. In state court cases, the federal preemption doctrine of *Zschernig* is effective, although it will continue to require further clarification by the courts. Its incompleteness as a framework for determining the role of federal common law is an inadequate reason for converting its curb on state law into a presumption in favor of federal law. Like all common law, it will "take many years and many cases to develop the distinctions and draw the lines that will define the new limitations on the states."⁷⁰ "[W]hile the preemptive scope of the foreign affairs power is not capable of precise contours, it can be developed by the courts on a case-by-case basis."⁷¹ *Zschernig* seems equal to this task. If properly though narrowly applied, the *Zschernig* limitation on the reach of state courts should help, in most cases, to vanquish the demons of state court parochialism and federal fragmentation. The argument for a federal common law in international cases is at its strongest when it limits the application of that body of law to only the most sensitive, political cases, such as the *Marcos* case. Such an application has been provided for within the *Zschernig* framework.

⁶⁸ *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959).

⁶⁹ *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir. 1985), *cert. dismissed*, 473 U.S. 934 (1985).

⁷⁰ L. HENKIN, *supra* note 51, at 239.

⁷¹ Chow, *supra* note 1, at 214.

It may not be efficacious to further federalize the choice of law process. Expanding federal common law to resolve international conflict of laws, thus extending beyond the existing jurisprudential framework, might not live up to its promise of stabilizing expectations, enhancing predictability of the courts, avoiding foreign policy conflicts, and generally overcoming the fragmentation characteristic of a federal system. Professor Chow suggests, for example, that the courts might "adopt a [choice of law] rule from sources in domestic law,"⁷² but if the court finds that such a rule would not be sufficiently sensitive to federal and foreign interests, it should "turn to other sources of federal common law."⁷³ Three of these other sources are identified: the act of state doctrine; but if it is deemed to be "too rigid and mechanical," a "balancing approach" that takes account of a multiplicity of factors; or simply a presumption in favor of foreign law.⁷⁴ It is unclear how such an open texture of considerations would support a more "stable and predictable . . . system"⁷⁵ of judicial decision-making. In sum, limiting the *Erie/Klaxon* doctrine and otherwise presumptively applying federal common law in international cases before state and federal courts seems ill-advised, given that existing rules of law take adequate consideration of overriding federal, foreign and international interests.

⁷² *Id.* at 222.

⁷³ *Id.* at 223.

⁷⁴ *Id.*

⁷⁵ *Id.* at 225.