The Federal Common Law of Foreign Relations

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I. INTRODUCTION

Currently, the federal circuits are split over the scope of the federal common law of foreign relations. This comment asserts that mere foreign policy implications should not be enough to establish federal jurisdiction over the litigation of an otherwise exclusively state law claim, as some circuits have allowed. The Second, Fifth and Eleventh Circuits have allowed such state law claims to be removed to the federal courts, arguing that implications of foreign policy are important federal interests supportive of the federal common law of foreign relations. By treating such important federal interests as the subject of federal common law, the case can then be

1. See Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Republic of the Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).
2. The statutory grant of federal jurisdiction reads, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “Federal common law is, of course, federal law; so if a plaintiff’s claim arises under the federal common law recognized by Sabbatino, the federal courts will have jurisdiction under 28 U.S.C. § 1331.” Patrickson v. Dole Food Co., 251 F.3d 795, 800 (9th Cir. 2001).
said to arise under the law of the United States, thereby warranting federal jurisdiction over the case.2

The Ninth Circuit, however, rejects the proposal that the federal courts are somehow better equipped to hear cases which implicate foreign policy concerns.3 Questions of foreign policy are generally not the subject matter of the judicial branch, but of the legislative and executive branches. Members of Congress and of the State Department should be fielding the complaints of affected foreign nations, not the federal judiciary.4 Neither vigorous objection from a foreign sovereign,5 nor the threatened economic impact on that foreign country's gross domestic product should determine the jurisdiction of a case.6

Judicial presumptions of what the United States' interests might be in the realm of foreign relations should not be the dispositive factor for establishing federal jurisdiction.7 Out of deference to the separate branches

3. "Because such political judgments are not within the competence of either state or federal courts, we can see no support for the proposition that federal courts are better equipped than state courts to deal with cases raising such concerns." Patrickson, 251 F.3d at 804.

4. "If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate—up to and including passing legislation." Id. at 803.

5. Compare Patrickson, 251 F.3d at 803 (rejecting Marcos, Torres, and Pacheco de Perez, "insofar as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome.")., with Marcos, 806 F.2d at 353 (asserting that "there is federal question jurisdiction over actions having important foreign policy implications"), Torres, 113 F.3d at 542 (predicating federal jurisdiction on the federal common law of foreign relations as applied to cases where "vital economic interests" of a foreign nation are threatened and the foreign nation vigorously opposes the action), and Perez 139 F.3d at 1377 (refusing to recognize important foreign policy implications where the foreign nation sounded no objection to the suit in state court).

6. "Inviting foreign governments to tell us how litigation in our courts affects their interests can only put us in the awkward position of causing an affront to those governments if their interests are not respected. We consider it far more prudent to state clearly that the effect of the litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction." Patrickson, 251 F.3d at 804 n.9.

7. "The Executive Branch is responsible for the conduct of foreign affairs and may address any potential foreign relations issues that may arise. . . . By contrast, the federal courts have little context or expertise by which to analyze and address the potential implications of a lawsuit on foreign relations." In re Tobacco/Governmental Health Care Costs Litig., 100 F. Supp. 2d 31, 38 (D.D.C. 2000).
of government and their respective roles, and in the interest of promoting federalism, the federal judiciary should narrowly restrict the use of the federal common law of foreign relations as a jurisdiction granting tool.8

II. HISTORY

Federal common law is "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments – constitutional or congressional."9 For the century prior to the landmark 1938 decision in Erie Railroad Co. v. Tompkins,10 federal courts routinely generated federal common law under the Swift v. Tyson doctrine, which allowed the federal courts to ignore state common law and generate their own judge-made law.11 Pursuant to the Swift doctrine, the federal courts generated this judge-made law "without apparent authorization from Congress or the Constitution, and without being bound by state court decisions."12

Erie ostensibly put an end to the federal court's practice of generating common law and recognized it as an "unconstitutional assumption of powers."13 The effect of the Erie decision was that, "in local matters, state law will govern, and federal courts must follow the state's lead."14 In no uncertain terms, the Supreme Court held in Erie that, "[t]here is no federal general common law."15

8. "In the absence of diversity, it would be an unwarranted usurpation of the states' interests to carve out federal jurisdiction whenever a foreign sovereign seeks a large recovery through the state court system." Id. at 37. See also, Andrew C. Baak, The Illegitimacy of Protective Jurisdiction Over Foreign Affairs, 70 U. CHI. L. REV. 1487, 1507 and 1509 (2003) (arguing that in essence, "federal courts are using protective jurisdiction to deprive state courts of the opportunity to interpret and apply state law based on a federal interest that is purely speculative," and that "allowing jurisdiction based solely on a suit's speculative impact on U.S. foreign affairs is inconsistent with the respect for federalism traditionally shown by both the courts and Congress.").
11. See generally Swift v. Tyson, 41 U.S. 1 (1842).
15. Erie, 304 U.S. at 78.
However, despite that misleadingly definitive assertion, the practice of generating federal common law lives on today, albeit in a more specialized manner. 16 Namely, when congressional or constitutional authorization is present, the federal courts may continue to develop their own variety of common law. 17 Because the federal common law generated after the Erie decision is recognized as either congressionally or constitutionally authorized, it is considered binding upon the states under the supremacy clause, 18 unlike the pre-Erie variety of federal common law. 19

What exactly constitutes congressional or constitutional authorization sufficient to justify the creation of federal common law is open to debate. 20 Professor Erwin Chemerinsky recognizes such authorization in three main situations: 1) where the existing statutory or constitutional provisions have gaps which require filling; 2) where congressional intent could be served by creating such a body of federal common law; and 3) where there are important federal interests at stake which are not protected by existing federal statutory provisions. 21 What makes these categories of authorization objectionable is that they are not explicitly authorized, but are implied authorizations which blur the line between statutory interpretation and judicial lawmaking. 22

Where “uniquely federal interests” are at stake, absent explicit statutory directive, state law is pre-empted and replaced by federal common law. 23 Foreign relations have been held to comprise such a uniquely federal interest, 24 giving rise to the body of law known as the federal common law of foreign relations. 25 When implicated, this body of federal

17. Baak, supra note 8, at 1491.
18. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby.”).
20. “The Supreme Court has provided little guidance on how courts should determine whether they are authorized to create federal common law.” Id.
22. “[T]he line between interpretation and lawmaking is often indiscernible.” See Goldsmith, supra note 12, at 1626.
25. There was no federal common law of foreign relations before the Supreme
law serves to allow a case, based on state law, federal court jurisdiction in spite of the fact the there is no federal question in the pleadings sufficient for jurisdiction under 28 U.S.C. § 1331, or diversity of citizenship sufficient for federal jurisdiction under 28 U.S.C. § 1332.26

The federal common law of foreign relations was first recognized in Banco National de Cuba v. Sabbatino,27 which involved a dispute over the proceeds from a shipment of sugar that the Cuban government had expropriated from a company owned primarily by United States residents.28 Ironically, federal jurisdiction was not at issue in Sabbatino because diversity of citizenship existed, so the case properly came before the District Court.29 Rather than jurisdiction, the issue before the court was whether to apply state law pursuant to Erie, or federal law.30

In order to block inquiry into the validity of the Cuban government’s expropriation, Banco National asserted the act of state doctrine, which precludes the courts of the United States from inquiring into the validity of the public acts that a foreign sovereign committed within its own territory.31 The Supreme Court held that the law of foreign relations falls outside the scope of Erie, and applied the act of state doctrine as federal common law, thereby creating an exception to the Erie doctrine.32

The Supreme Court claimed in Sabbatino that to question the legality of a foreign state’s action is to address a uniquely federal interest because doing so directly implicates this nation’s foreign affairs.33 Such delicate questions should not be left to “divergent and perhaps parochial state interpretations,” said the Court, but should instead be addressed by the more uniform voice of the federal courts.34 Thus, the Court asserted federal jurisdiction over all cases implicating the act of state doctrine based on its


26. In order to achieve federal jurisdiction under § 1331 a federal right or immunity must be an essential element of the plaintiff’s cause of action. This is known as the well pleaded complaint rule. See Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11 (1983) (quoting Gully v. First Nat’l Bank, 299 U.S. 109, 112 (1936)).

27. 376 U.S. at 401.

28. In an interesting contextual note, Professor Goldsmith points out that “[i]t is probably no accident that the Supreme Court applied a judge-made federal foreign relations law for the first time less than two years after the Cuban Missile Crises in a case involving a Cuban expropriation of American property.” Goldsmith, supra note 12, at 1663-64.

29. Patrickson, 251 F.3d at 800.

30. Id.

31. Id. at 799.

32. Id. at 800.


34. Id. at 425.
own analysis of the foreign policy interests of the United States and thereby instituted the amorphous federal common law of foreign relations. 35

Nothing in the Constitution or any statute explicitly supports the court's adoption of the act of state doctrine, though the court did claim that "[t]he act of state doctrine does, however, have 'constitutional' underpinnings." 36 Rather, the court created this doctrine based on its own analysis of the foreign relations interests of the United States, without any explicit textual support from the Constitution or any enactments from the political branches, which are normally responsible for carrying out the foreign policy of the nation. 37 This is a highly unusual role for the judiciary and rife with separation of powers concerns, given the executive branch's exclusive authority over foreign policy. 38 Nevertheless, the Court held "it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" 39

Despite the lack of a constitutional or statutory foundation for the jurisdictional grant available through the federal common law of foreign relations, this body of federal common law is widely accepted as an appropriate exercise of judicial law making. 40 Very few scholars have

35. See Goldsmith, supra note 12, at 1627-29.
36. Sabbatino, 376 U.S. at 423. The Court held in Sabbatino that the act of state doctrine:

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

Id. Framed in such terms of competency and separations of powers, it would seem the court was granting much deference to the executive. However, where the federal common law of foreign relations permits federal courts to hear such cases and rule on their merits, rather than simply dismissing them, there appears less deference to the executive and more of an assumption of powers by the federal court at the expense of both the executive branch and the state courts.

37. See Goldsmith, supra note 12, at 1627-29.
38. "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative--'the political'--Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).
40. See, Goldsmith, supra note 12, at 1632 (finding that "lower courts and scholars have broadly embraced the doctrine.").
challenged the authority of the courts to craft such judge made law, despite the lack of a well-defined scope of the federal common law of foreign relation's applicability. The lack of clarity with regard to this doctrine's proper application can be explained in part by its infrequent use by the courts.

However, with the increasingly international flavor of litigation since the adoption of the federal common law of foreign relations, opportunities to apply this doctrine are likely to become much more frequent. With its increased application, the contours of the federal common law of foreign relations are sure to become more defined. The courts now face such an opportunity to define the future role of the federal common law of foreign relations in light of the current circuit split over its application brought out in Patrickson v. Dole Food Co., considered below.

III. CIRCUIT SPLIT

A. OVERVIEW

What does Sabbatino mean for the jurisdiction of cases that raise the federal common law of foreign relations? Did it introduce a broad rule that allows the federal courts original jurisdiction over any case in which the political relations of the United States and a foreign country are implicated, as the Second, Fifth and Eleventh Circuits have held? If so, what constitutes such an implication of this broad rule? Is mere economic impact enough? What if the case severely impacts, or even cripples a foreign nation's most prominent commercial enterprise? Must the foreign sovereign file a brief with the court requesting the application of the

41. See id.; Terrell, supra note 14, at 1649.
42. Terrell, supra note 14, at 1650.
44. Patrickson, 251 F.3d 795.
45. See Pacheco de Perez v. AT&T Co., 139 F.3d 1368 (11th Cir. 1998); Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997); Republic of Philippines v. Marcos, 806 F.2d 344 (2d Cir. 1986).
common law of foreign relations? Must the state department do so on the foreign nation's behalf? What effect does the silence of the executive branch, or that of a foreign sovereign, have on the jurisdiction of the case? Does a broad reading take the principle announced in Sabbatino too far, and turn its rather limited holding into a whole new variety of protective jurisdiction?

Perhaps rather than the ill-defined, sweeping rule embraced by the Second, Fifth and Eleventh Circuits, the Ninth Circuit's understanding is more appropriate. The Ninth Circuit, in Patrickson v. Dole Food Co., found foreign policy implications irrelevant in establishing jurisdiction and considered the circuit's ruling otherwise as expanding the federal courts' original jurisdiction in contravention of the explicit statutory grant of jurisdiction in 28 U.S.C. § 1331.

In order to best frame the conflict, this comment now turns to the circuit courts' contradictory rulings. By understanding the principles on which these cases were founded and the context in which the decisions were made, a clearer perception of the debate is available with which one may better discern the appropriate remedy.

B. MARCOS AND THE SECOND CIRCUIT

The first time the federal common law of foreign relations was used to establish federal question jurisdiction was in the 1986 decision of Republic of Philippines v. Marcos. The underlying dispute in Marcos was over some valuable New York and Long Island properties purchased by the former Phillipine dictator Ferdinand Marcos, allegedly paid for with money stolen from the Philippine government during his reign which was characterized by the imposition of martial law, the widespread denial of human rights and summary incarceration and execution. The issue before the court, however, was merely a state law claim for conversion, requiring the imposition of a constructive trust upon the ill-gotten gains. There was no claim arising under federal law.

The well-pleaded complaint rule requires that federal matters are raised in the complaint itself, and bars federal jurisdiction where such matters are only put at issue in the answer or in some subsequent plead-

46. For a detailed explanation of the subtleties of protective jurisdiction as applied to foreign affairs, see Baak, supra note 8.
47. Patrickson, 251 F.3d at 800-05.
49. Id. at 348.
50. Id. at 354.
ing.\textsuperscript{51} Indeed, where the parties are lacking diversity, the district courts only have jurisdiction to "hear cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."\textsuperscript{52}

However, there was no federal law at issue in the plaintiff's complaint in \textit{Republic of Philippines v. Marcos}.\textsuperscript{53} The state law complaint concerning conversion was filed in state court, but was removed to the District Court where the judge issued the Philippine government a preliminary injunction barring the transfer of the disputed properties.\textsuperscript{54} Defendants appealed, and the Court of Appeals for the Second Circuit found that the grant of federal jurisdiction was properly based upon the federal common law of foreign relations.\textsuperscript{55} Relying on \textit{Sabbatino}, the court reasoned that although this case had nothing to do with the act of state doctrine, the "constitutional underpinnings" of the federal common law of foreign relations supported the extension of the doctrine to encompass foreign policy matters that are raised by a foreign government's request.\textsuperscript{56}

The Philippine government, which replaced that of Ferdinand Marcos after he surrendered his position and fled the country, had promulgated executive orders with the purpose of recovering all the ill-gotten wealth of former President Marcos.\textsuperscript{57} These orders requested participating foreign governments freeze any such assets in their countries in aid of that goal.\textsuperscript{58} The court claimed that the question, whether to honor the request of a

\textsuperscript{51} Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).
\textsuperscript{53} "On the face of the complaint, to be sure, the plaintiff brought this case under a theory more nearly akin to a state cause of action for conversion, requiring the imposition of a constructive trust or equitable lien upon the 'ill-gotten' gains... rather than under stated federal common law." Marcos, 806 F.2d at 354.
\textsuperscript{54} Id. at 349.
\textsuperscript{55} Id. at 354. Holding that:
[F]ederal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives .... The question whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state, .... regardless of whether the overall claim is viewed as one of federal or state common law.
\textsuperscript{56} Id. (citation omitted).
\textsuperscript{57} Id. at 354.
\textsuperscript{58} Id. at 353.
foreign government to freeze property in the United States, is an exclusively federal question, sufficient for the requirements of 28 U.S.C. § 1331.59

However, there is nothing in 28 U.S.C. § 1331 that suggests that the request of a foreign government, or the United States’ obligation to address such a request, arises under the Constitution, laws, or treaties of the United States.60 As such, jurisdiction in Marcos was not federal question jurisdiction based on 18 U.S.C. § 1331, but rather, federal question jurisdiction based upon the federal common law of foreign relations, which had hitherto never been a basis for establishing federal jurisdiction.61 Thus, the scope of the federal common law of foreign relations was thereby greatly expanded to encompass cases that have foreign policy implications brought to the attention of the court by the foreign party to the case.62 The Court did not grant federal jurisdiction based upon the act of state doctrine as it could have, given the precedent Sabbatino provided. Rather than characterizing the executive orders as an act of state sufficient to justify federal jurisdiction based on the federal common law of foreign relations in line with Sabbatino, the Court granted jurisdiction because the case had important foreign policy implications.63 Thus, the Court created a loophole in the well-pleaded complaint rule, as well as 28 U.S.C. § 1331, when it used the request of a foreign government to justify federal jurisdiction over an otherwise state law claim.

C. TORRES AND THE FIFTH CIRCUIT

In 1997, eleven years after the Second Circuit’s decision in Marcos, the Fifth Circuit ruled on the applicability of the federal common law of foreign relations in Torres v. Southern Peru Copper Corp.64 Some 700 Peruvian citizens brought suit in Texas state court, alleging harms caused by the sulfur dioxide emissions from the defendant’s smelting operation in

59. Marcos, 806 F.2d at 353.
61. Baak, supra note 8, at 1496.
62. Holding that “federal jurisdiction is present ... because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government's directives ... regardless of whether the overall claim is viewed as one of federal or state common law.” Marcos, 806 F.2d at 354.
63. Id. at 353.
64. Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997).
Ilo, Peru. The defendants removed the case to federal court, and the plaintiffs filed a motion to remand since there was no federal question on the face of their complaint. The district court denied the motion and held that, despite the lack of diversity jurisdiction, federal question jurisdiction existed. The district court then dismissed the case citing *forum non conveniens* and comity among nations as grounds to do so. Plaintiffs appealed and brought the case before the Court of Appeals for the Fifth Circuit.

The Appellate Court acknowledged Peru's protest to the validity of the suit as manifested by Peru's letter filed with the State Department and the amicus brief submitted to the court. Peru's position was that this case implicated some of its most vital interests and would thereby affect its relations with the United States. Southern Peru Copper Corporation used the foreign policy concerns manifested by Peru in an effort to prove that the plaintiff's complaint did in fact implicate the federal common law of foreign relations because the case raised substantial questions of federal law.

The vital interests of Peru, asserted through its letter to the State Department and the amicus brief to the court, included the fact that Peru's economy is critically dependant on mining; 50% of its export income and 11% of its gross domestic product comes from the mining industry, of which Southern Peru Copper Corporation is the largest company. More importantly, the Peruvian government itself actually participated with Southern Peru Copper Corporation. Peru owned the land mined by the corporation, owned the minerals extracted, owned the Ilo refinery from 1975 until 1994 (during which time emissions may have contributed to the injuries complained of) and finally, Peru received an annual fee from the corporation in exchange for granting it concessions that allowed it to operate.

Distinguishing its ruling from the Second Circuit's ruling in *Marcos*, the court declared that the fact that a foreign nation had injected itself into

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65. *Id.* at 541.
66. *Id.*
67. *Id.* at 542.
68. *Id.*
69. *Id.*
70. *Torres*, 113 F.3d at 542.
71. *Id.*
72. *Id.* at 543.
73. *Id.*
the lawsuit, alone, was not sufficient to constitute a federal question.\textsuperscript{74} However, the court went on to claim that Peru’s “vigorousness in opposing the action, however, has alerted us to the foreign policy issues implicated by this case.”\textsuperscript{75} Based on Peru’s vigorous opposition to the case, the Fifth Circuit held that the plaintiff’s complaint did raise “substantial questions of federal common law by implicating important foreign policy concerns,” in tune with Southern Peru Copper Corporation’s argument.\textsuperscript{76}

This ruling was reached, like that in\textit{Marcos}, without reliance upon the statutory grant of federal question jurisdiction in 28 U.S.C. § 1331, but upon the federal common law of foreign relations. Since the case was considered to have been properly before the district court in light of its foreign policy implications, which were so vigorously championed by the Peruvian government itself, the appellate court upheld the district court’s dismissal of the case on the basis of\textit{forum non conveniens} and comity among nations.\textsuperscript{77}

\section*{D. PEREZ AND THE ELEVENTH CIRCUIT}

In 1998, just one year after the\textit{Torres} decision from the Fifth Circuit, the Eleventh Circuit weighed in on the application of the federal common law of foreign relations in\textit{Pacheco De Perez v. AT&T Co.}\textsuperscript{78} This case was brought by individuals injured by a huge explosion that took place in Venezuela which killed fifty people when a gas pipeline was struck by a machine digging a trench for laying fiber-optic cable.\textsuperscript{79} Plaintiffs allege that AT&T and its agents caused the explosion.\textsuperscript{80} Plaintiffs filed suit in Georgia state court, claiming various state law claims, but defendants removed the case to the District Court for the Northern District of

\begin{itemize}
\item \textsuperscript{74} “That Peru has injected itself into this lawsuit does not, standing alone, create a question of federal law.” \textit{Id.} at 542-43. Distinguish that language from\textit{Marcos}:
\begin{quote}
The question whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state . . . regardless of whether the overall claim is viewed as one of federal or state common law.
\end{quote}
\textit{Marcos}, 806 F.2d at 354.
\item \textsuperscript{75} \textit{Torres}, 113 F.3d at 543.
\item \textsuperscript{76} \textit{Id.} at 543.
\item \textsuperscript{77} \textit{Id.} at 544.
\item \textsuperscript{78} \textit{Pacheco De Perez}, 139 F.3d 1368.
\item \textsuperscript{79} \textit{Id.} at 1371.
\item \textsuperscript{80} AT&T Andinos, a subsidiary of AT&T, subcontracted the trenching operation to a Venezuela corporation, whose machine actually struck the pipeline causing the explosion. \textit{Id.} at n.2.
\end{itemize}
The district court denied the plaintiffs' motion for remand and dismissed the case under *forum non conveniens.*

On appeal, the issue was whether the district court had jurisdiction or should have remanded the case back to the Georgia state court for lack of federal jurisdiction. Removal based upon diversity of citizenship is not available if any of the defendants are citizens of the state in which the suit was originally filed. Removal to the district court was not supported by diversity jurisdiction in this case because the defendants were actually Georgia citizens and Georgia is where the suit was filed. Since federal jurisdiction could not be predicated on diversity, the defendants resorted to, among other equally unsuccessful strategies, the federal common law of foreign relations for establishing federal jurisdiction over the plaintiffs' state law claims.

The court relied on the principle from *Sabbatino,* that international relations are governed exclusively by federal law, as well as the principle under *Marcos,* that "[w]here a state law action has as a substantial element an issue involving foreign relations or foreign policy matters, federal jurisdiction is present." However, the court also recognized the limiting characteristics of *Sabbatino* and *Marcos.* Specifically, one of the named parties to the suit in *Sabbatino* was a foreign government whose interests were implicated in the suit, and in *Marcos,* it was the direct actions of a foreign government at issue.

Furthermore, the court recognized the expansion of the doctrine by the Fifth Circuit in *Torres,* which allows for federal jurisdiction in cases between private parties that happen to implicate the "vital economic and sovereign interests" of the nation where the parties' dispute arises. Relying on the *Torres* rationale, the defendants in this case claimed the vital economic interests of Venezuela were implicated to such a degree that the federal common law of foreign relations should apply to this case.

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81. *Id.*
82. *Id.*
83. *Id.*
84. "Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b) (2000).
85. *Pacheco,* 139 F.3d at 1371.
86. *Id.* at 1372.
87. *Id.* at 1376-77; *Sabbatino,* 376 U.S. at 423-24.
88. *Pacheco de Perez,* 139 F.3d at 1377 (citing *Marcos,* 806 F.2d at 353).
89. Terrell, *supra* note 14, at 1656.
90. *Pacheco de Perez,* 139 F.3d at 1377; *Torres,* 113 F.3d at 543 n.8.
91. *Pacheco de Perez,* 139 F.3d at 1377.
After all, the injuries occurred on foreign soil, the foreign sovereign's policy decisions and actions are brought into question by this suit, and the foreign sovereign may have been involved in the wrongdoing or may be affected by the economic ramifications of this suit. All these factors allegedly implicating foreign relations, according to the defendants, mirror the considerations made by the Fifth Circuit in deciding the Torres case.\(^{92}\)

As such, the defendants assert that they, like the defendants in Torres, should be granted the federal court's jurisdiction under the federal common law of foreign relations.\(^{93}\)

However, the court decided not to grant federal jurisdiction in this case.\(^{94}\) One reason the court provided for rejecting the defendants' argument was that the Venezuelan government had taken no position on whether the suit should proceed in the United States, or in Venezuelan courts.\(^{95}\) The court explained that, "[w]ithout such an indication from the foreign nation, we are reluctant to find that the plaintiffs' private cause of action sounding in Georgia tort law implicates important foreign policy on the face of the plaintiffs' pleadings."\(^{96}\) Further, since it is more likely that any such foreign policy claim will arise in the form of a defense by AT&T, and since federal question jurisdiction cannot be founded upon a federal defense,\(^{97}\) the court declined to grant federal question jurisdiction in this case.\(^{98}\)

Another reason the court rejected the defendants' argument was because the slight amount of evidence supporting foreign policy implications was much too speculative and tenuous.\(^{99}\) Unlike the pervasive interconnectedness between the Southern Peru Copper Corporation and the Peruvian government in the Torres case, here, there was no proof of Venezuela's dependence upon the fiber optic cable project, or even upon the entire telecommunications industry in Venezuela, for that matter.\(^{100}\) While AT&T's operation within Venezuela was jeopardized by this suit, there was no evidence that Venezuela itself was harmed, or that this suit would damage U.S. and Venezuelan relations.\(^{101}\)

92. Id. at 1377-78; Torres, 113 F.3d at 542-43.
93. Pacheco de Perez, 139 F.3d at 1377-78.
94. Id. at 1378.
95. Id.
96. Id.
97. Mottley, 211 U.S. at 152.
98. Pacheco de Perez, 139 F.3d at 1378.
99. Id.
100. Id.
101. Id.
Since there was no interest in the litigation expressed by Venezuela, and no evidence that AT&T was interconnected with Venezuela sufficient to find otherwise, the court ruled there was no reason to grant this case federal jurisdiction as the defendants contended. The district court was thus without jurisdiction to hear the case, so it was sent back to the district court with directions that the case be remanded to the state court from which it originated.

What is significant about the Perez case in terms of our analysis of the federal common law of foreign relations is that, although the Eleventh Circuit drew the line and declined to continue the expansion of the doctrine, it still applied the doctrine in its expanded form as handed down from the Torres court. Thus, in refusing to grant federal jurisdiction based upon the federal common law of foreign relations, the court did so by pointing out the lack of interest in the litigation on the part of Venezuela. This interest of a third party sovereign is treated in an altogether different manner in the Patrickson case, below.

E.  PATRICKSON AND THE NINTH CIRCUIT

Dibromochloropropane (DBCP) is a pesticide so powerful and toxic that it was banned by the Environmental Protection Agency in 1979. However, the defendants in Patrickson v. Dole Food Company, Inc. continued to use this chemical pesticide in developing nations in apparent disregard of its adverse effects. Plaintiffs, banana workers from Costa Rica, Guatemala, and Panama, alleged injuries caused by the defendants' use of DBCP in their home countries. Among their complaints were "sterility, testicular atrophy, miscarriages, liver damage, cancer and other ailments that you wouldn't wish on anyone." Plaintiffs brought suit in Hawaii state court asserting only state law claims of negligence, conspiracy, strict liability, intentional torts, and breach of implied warranty. Dole, a Hawaii corporation, impleaded two Israeli chemical companies which were alleged to have manufactured some of the DBCP used in the plaintiffs' homeland. Dole then removed the case to federal court based

102.  Id.
103.  Id. at 1381.
104.  Pacheco de Perez, 139 F.3d at 1378.
105.  Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001).
106.  Id.
107.  Id.
108.  Id. at 798-99.
109.  Id. at 798.
on the federal common law of foreign relations. The district court denied the plaintiffs' motion for remand, and the case was dismissed based upon forum non conveniens.110

On appeal the Ninth Circuit's Judge Kozinski narrowly read the Sabbatino opinion in applying it to the jurisdictional issue at hand.111 Rather than recognizing a broad exception to the federal jurisdictional limitations embodied in 28 U.S.C. § 1331, Judge Kozinski asserted that Sabbatino only addressed the choice of law applicable to a case concerned with the "validity or invalidity of any act of a foreign state," not the choice of jurisdiction applicable to such a case.112 Since the plaintiffs' complaint did not address any act of a foreign government, the case did not implicate the federal common law of foreign relations, and thus, was improperly removed to federal court.113

Dole's position was that regardless of the complaint's lack of allegations concerning an act of a foreign state, the common law of foreign relations should have applied because the case concerned "a vital sector of the economies of foreign countries," and thereby had "implications for our nation's relations with those countries."114 If the court were to grant the plaintiffs relief in this case, argued the defendant, Dole, "American courts would damage the banana industry—one of the most important sectors of those countries' economies—and cast doubt on the balance those governments have struck between agricultural development and labor safety."115 Given the "uniquely federal" interest in foreign relations, Dole claimed the case must be heard in federal court.116

However, the court was not convinced by Dole's argument and recognized that Dole's interpretation of Sabbatino would create an exception, not only to the Erie doctrine, but to the well-pleaded complaint rule as well.117 The court recognized that Dole's position was supported by the Fifth Circuit's decision in Torres, the Eleventh Circuit's position in Perez, and underlying those decisions, the Second Circuit's decision in Marcos.118 However, the decision in Marcos, which was the first case to declare that

110. Id.
111. "Sabbatino ... was a diversity case and thus has nothing to say about federal-question jurisdiction." Patrickson, 251 F.3d at 802 n.5.
112. Id. at 799-800.
113. "The case—at least as framed by plaintiffs—does not require us to evaluate any act of state or apply any principle of international law." Id. at 800.
114. Id. at 799-800.
115. Id. at 800.
116. Id. at 801.
117. Patrickson, 251 F.3d at 801.
118. Id.
"there is federal question jurisdiction over actions having important foreign policy implications," could have been made consistent with Sabbatino by framing the issuance of the Philippine executive orders as an act of state. That is not what they did in Marcos; rather, by claiming foreign policy implications alone were enough for the federal common law of foreign relations, they went too far.

Sabbatino was not about jurisdiction, as it has been expanded to encompass, but about choice of law. While the Court in Sabbatino mentioned the need for uniformity, it was speaking of uniformity in the source of the substantive law of foreign relations, the federal courts. However, despite the federal source of the law, Sabbatino does not claim that state courts are barred from developing this body of law; in fact, Sabbatino recognizes that there are "enclaves of federal judge-made law which bind the States." The language that speaks of binding the States "makes sense only if one assumes that the state courts will be called upon to apply the law of foreign relations," according to Judge Kozinski. State courts routinely apply federal law and thereby develop it through its application. Furthermore, throughout the entire history of the Republic, both state and federal courts have developed international law through its application.

Since uniform federal laws are often disparately applied in federal courts, the same practice in state courts would not drastically undermine the uniformity of the federal laws. Besides, the same safeguard exists to resolve questions of federal law, whether they come from state or federal court: the Supreme Court has the final word. The finality of the Court's decision is thought to be sufficient to ensure uniformity in patent law, labor law, and criminal procedure, so it should serve as a check to ensure the uniform application of the federal common law of foreign relations as well.

119. Id. (quoting Marcos, 806 F.2d at 353).
120. Id.
121. That an action arises under the federal common law of foreign relations merely because of implications of such an action for United States foreign relations "reads far too much into Sabbatino." Id. at 802.
122. Id.
123. Patrickson, 251 F.3d at 802.
124. Sabbatino, 376 U.S. at 426.
125. Patrickson, 251 F.3d at 802.
126. Id.
128. Patrickson, 251 F.3d at 802.
129. Id.
Because Congress has been silent on the issue of the jurisdictional effects of the federal common law of foreign relations, the Ninth Circuit refused to read that silence as authorization to extend federal question jurisdiction, and instead, took it as an "endorsement of the well-pleaded complaint rule." Criticizing the expansion of the doctrine to permit federal jurisdiction over cases in which a government has expressed a special interest in its outcome, Judge Kozinski pointed out that those interests are implicated both in federal and in state court, and that federal judges can not dismiss a case merely because a foreign power finds it "irksome," nor can they "tailor their rulings to accommodate a non-party." He goes on to say:

Federal judges, like state judges, are bound to decide cases before them according to the rule of law. If a foreign government finds the litigation offensive, it may lodge a protest with our government; our political branches can then respond in whatever way they deem appropriate—up to and including passing legislation. Our government may, of course, communicate its own views as to the conduct of the litigation, and the court—whether state or federal—can take those views into account. But it is quite a different matter to suggest that courts—state or federal—will tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party.

Furthermore, even if foreign relations were an appropriate topic for judges to grapple with, they should not be weighing the foreign state's interests, but merely those of the United States. However, courts, be they state or federal, are not capable of making political judgments in the best interests of United States' foreign relations or of taking responsibility for such judgments.

The Marcos court claimed that the question, whether or not to honor the request of a foreign government, is an exclusively federal question, sufficient for the requirements of 28 U.S.C. § 1331. The Torres court refined that rule saying it was not enough for a foreign government to

130. Id. at 803.
131. Id.
132. Id.
133. Id. at 804.
134. Patrickson, 251 F.3d at 804.
135. Marcos, 806 F.2d at 353.
merely inject itself into the case, but it must show "vigorousness in opposing the action," to raise "substantial questions of federal common law by implicating important foreign policy concerns." Finally, the Perez court ruled that where there is no expressed interest in the litigation by the foreign government and no evidence that the defendant was interconnected with that government, there was no reason to grant the case federal jurisdiction as the defendants contended.137

Each of these decisions relied upon the expression of interest in the litigation by a foreign nation. The Ninth Circuit was the only court to declare such considerations irrelevant.138 Thus, the current state of the federal common law of foreign relations remains divided between these two camps. Ironically, despite Sabbatino's purported aim at creating uniformity in this area of the law, it has become the underlying precedent causing the current inconsistency in the application of the federal common law of foreign relations.

IV. PROTECTIVE JURISDICTION

When a case that would not otherwise meet the strict requirements of Article III is nonetheless ushered into federal court out of some desire to protect an important federal interest, many scholars would suggest that such behavior constitutes protective jurisdiction.139 Protective jurisdiction allows claims governed by state law to be heard in federal court, despite the failure to meet Article III's requirement that the case arise under federal law, thereby rendering Article III limitations "essentially meaningless."140 The Supreme Court has never explicitly supported the existence of protective jurisdiction, and in fact spoke out against it in Textile Workers Union v. Lincoln Mills.141

Lincoln Mills involved the Taft-Hartley Act, in which Congress provided the federal courts with jurisdiction over certain breach of contract suits, although it did not create any substantive law with which the federal courts were to carry out the task.142 Holding that Congress intended the

136. Torres, 113 F.3d at 542-43.
137. Pacheco de Perez, 139 F.3d at 1378.
138. Patrickson, 251 F.3d at 803.
140. Baak, supra note 8, at 1502.
142. See id. at 488.
federal courts to create a federal common law for labor-management contracts, the majority held that such cases were permissible under Article III. However, in his dissenting opinion, Justice Frankfurter declared that:

‘Protective jurisdiction’ . . . cannot be justified under any view of the allowable scope to be given to Article III. . . . That rubric is properly descriptive of safeguarding some of the indisputable, staple business of the federal courts. . . . ‘Protective jurisdiction’ cannot generate an independent source for adjudication outside of the Article III sanctions and what Congress has defined. The theory must have as its sole justification a belief in the inadequacy of state tribunals in determining state law.

The alleged inadequacy of state tribunals and the general distrust of state courts are realities manifested by the very existence of the federal courts, according to the supporters of protective jurisdiction. Professor Chemerinsky explains, “[i]f state courts were fully trusted, federal courts and federal jurisdiction would be unnecessary.” However, if federal jurisdiction can attach to any case of federal interest, what becomes of the requirements of Article III? If a mere federal interest is sufficient to meet the requirement that the case arise under a federal law, then the only limitation on federal jurisdiction is that the case be of federal interest.

Because the Torres, Perez and Marcos decisions are entirely based on state law principles, and because they have no “readily identifiable ingredient of federal law,” these cases lack “even the minimum federal element necessary to satisfy the requirements of Article III.”

143. Id.
144. Id. at 474-75.
145. See Chemerinsky, supra note 21, at 275.
146. Id.
147. U.S. CONST. art. III, § 2 (“The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority.”). Consider also that, unlike admiralty law and disputes between states:

the federal common law of foreign relations is not tied to any particular grant of Article III jurisdiction. Nor was “foreign relations” recognized as a distinct body of federal common law throughout most of U.S. history. . . . That a case implicates foreign relations does not by itself show that the plaintiff’s case arises under federal law.

148. See Chemerinsky, supra note 21, at 275.
149. Baak, supra note 8, at 1504.
The role of the common law in each case is illusory; it is offered not to provide a rule of decision, but only to signal that the case has possible foreign policy implications. The result is to allow federal question jurisdiction over state causes of action where no federal law is implicated. Quite obviously, there is no basis for jurisdiction in such a case; since there is no federal law at issue (and therefore no “arising under” jurisdiction), and the cases do not otherwise fall within Article III, there is no constitutional ground for jurisdiction.¹⁵⁰

If the federal common law of foreign relations is understood as a form of protective jurisdiction, then it has even less credibility due to its unconstitutional, unlimited expansion of federal subject matter jurisdiction. Seen in this light, the Ninth Circuit’s holding in *Patrickson* stands not only as a refusal to expand an illegitimate form of federal common law, but also as a tacit rejection of protective jurisdiction.

V. RESOLUTIONS

The Congress can craft a statutory resolution to this divisive issue. Consider the way it created 28 U.S.C. § 1251(b)(1), granting the Supreme Court original jurisdiction over all actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties.¹⁵¹ Also, 28 U.S.C. § 1351, grants the district courts original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against consuls or vice consuls of foreign states.¹⁵² So too, 28 U.S.C. § 1330 allows federal district courts to have original jurisdiction, without regard to the amount in controversy, over any non-jury civil action against a foreign state.¹⁵³ Likewise, 28 U.S.C. § 1350 provides that the district courts shall have original jurisdiction of any civil action by an alien for a tort only, “committed in violation of the law of nations or a treaty of the United States.”¹⁵⁴

Thus, it would not be unduly burdensome for the legislature to add another such jurisdiction-granting statute applicable to suits which

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¹⁵⁰. *Id.* at 1506.
implicate delicate foreign relations concerns. It could be written to provide for federal jurisdiction in the event that the foreign sovereign at interest, its ambassador, diplomat, or agent, petitions the court.\textsuperscript{155} It could be written to grant federal jurisdiction only upon petition to do so made by the State Department, or some other arm of the United States’ executive branch.\textsuperscript{156} Or, if the current ambiguities are favored, it could simply be written to codify the Second, Fifth, and Eleventh Circuits’ understanding and provide federal jurisdiction where important foreign policy interests are implicated by the suit, leaving to the courts the difficult job of defining what interests are sufficient to trigger federal jurisdiction.\textsuperscript{157} At a minimum, passing such a legislative enactment would put the dispute over the federal common law of foreign relations to rest and the split among the circuits would be resolved, adding some much needed uniformity to an otherwise splintered area of law.

Alternatively, a decisive ruling by the Supreme Court could provide the answer once and for all on what precedent \textit{Sabbatino} really established. That way, the lower courts could apply the federal common law of foreign relations with the confidence that they are making the right call in admitting such cases into federal court. By authoring a controlling opinion on the matter, the Supreme Court would decide either that the Second, Fifth, and Eleventh Circuits’ rule is proper, or, conversely, the Court could affirm the explicit requirements of Article III and the well-pleaded complaint rule, in accordance with Judge Kozinski’s position in \textit{Patrickson}.

In light of the Supreme Court’s recent disposition toward foreign relations cases, Professor Jack Goldsmith suggests that, with regard to those cases in which the executive and legislative branches have remained silent, “the Court follows an interpretive strategy that both eschews foreign policy judgments by the judiciary and encourages the political branches to consider and address such concerns in enacted federal law.”\textsuperscript{158} This

\textsuperscript{155} This seems especially problematic since it would allow foreign nations to impact the jurisdiction of a case they might not even be a party to, as the Peruvian government did in \textit{Torres}.

\textsuperscript{156} Terrell, supra note 14, at 1674-75 (suggesting that allowing the executive to determine whether sufficient foreign policies are raised is the best method of expanding § 1331 jurisdiction, while recognizing the difficult problems that even this option faces: What amounts to sufficient implication of foreign relations? Who has the authority to make that determination?).

\textsuperscript{157} This is hardly a resolution since it would effectively solidify the status quo and its concomitant ambiguities. As such, it has been deemed the “most difficult and least likely to be considered constitutional” due to the fact that the executive has constitutional authority over foreign relations as does the legislative and would be ill-served by such a power stripping statutory modification. Terrell, supra note 14, at 1674-75.

\textsuperscript{158} Goldsmith, supra note 12, at 1702.
outlook does not bode well for the Second, Fifth, and Eleventh Circuits’ federal common law of foreign relations jurisprudence and suggests a change to come that is in line with the Ninth Circuit’s reasoning.

VI. CONCLUSION

This divisive issue is one with real effects on justice and the operation of the federal judiciary. Without a resolution to the circuit split, a person filing a suit with arguable foreign policy implications is in something of a quandary. Whether the case makes it into federal court and gets dismissed on forum non conveniens grounds or gets remanded to state court for a hearing on the merits depends largely upon which circuit’s understanding of the federal common law of foreign relations happens to prevail in the lower federal court the suit is removed to. Whether one supports the Second, Fifth, and Eleventh Circuits’ application of the rule, or Judge Kozinski’s rationale for rejecting it, there is one thing everyone is sure to agree on: federal jurisdiction should not be so arbitrary as to hinge upon one’s geographic happenstance. A clear, uniform rule is needed in order to promote foresight and simplify what is an otherwise unpredictable gauntlet.\textsuperscript{159}

This comment has argued that Judge Kozinski’s opinion in \textit{Patrickson} should be upheld as the proper reading of \textit{Sabbatino}. His unwillingness to play international politics from the bench exhibits the proper deference to the state courts, especially in light of the ever increasing effects of globalization and what that foretells for the judiciary, both state and federal.\textsuperscript{160} A clear legislative resolution to the circuit split, or a definitive


\textsuperscript{160.} Consider the words of Thomas R. Phillips, Chief Justice of the Supreme Court of Texas:

Leaving certain international law questions to the state courts seems to me perfectly consistent with the constitutional scheme. After all, the Supremacy Clause itself, by binding state judges under oath to make “all Treaties made, or which shall be made, under the Authority of the
Supreme Court ruling would be a most welcome answer to the question of what the *Sabbatino* decision means today and how the courts are to rule in light of it.

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