

## ERIE'S INTERNATIONAL EFFECT: A REPLY

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### INTRODUCTION

If recent trends continue, it is likely that U.S. federal district courts sitting in diversity or alienage will confront transnational choice of law issues<sup>1</sup> in a significant number of cases in the years to come.<sup>2</sup> Currently, when resolving these issues, federal district courts unflinchingly follow *state* choice of law rules to determine the governing substantive law (U.S. state or foreign).<sup>3</sup> Federal courts believe they are compelled by the *Erie* doctrine to follow state choice of law rules even in transnational cases because, according to the Supreme Court in a decision from the 1970s that predates the substantial expansion of transnational litigation, a “federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.”<sup>4</sup> Even when the foreign affairs or public policy interests of the United States might be implicated in the case, and even when those interests might be significantly different from the forum state’s interests, federal courts apply state choice of law rules. Put simply, transnational

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<sup>1</sup> As used here, *transnational choice of law* refers to a case where a federal court is asked to choose between applying U.S. law (e.g., the law of Virginia) or foreign, non-U.S. law (e.g., the law of France). See SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 3–4 (2006) (defining *international (state) conflicts* as conflicts between the laws of the several states and the laws of foreign countries). Transnational choice of law issues would tend to arise in cases involving a foreign plaintiff, a foreign defendant, acts or omissions occurring in a foreign country, or some combination of these elements.

<sup>2</sup> See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L LAW 31, 37 (2011) (“Our third conjecture is that in 2021, U.S. judges and lawyers will encounter issues involving the law of foreign countries more often than ever.”). There is also reason to believe that state courts will confront similar issues. See, e.g., Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Christopher A. Whytock, Donald Earl Childress III, & Michael D. Ramsey, *Foreword: After Kiobel—International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013).

<sup>3</sup> See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that under the *Erie* doctrine, a federal court must apply state choice of law rules).

<sup>4</sup> *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam).

choice of law in diversity and alienage cases before federal district courts is U.S. state law.

In *When Erie Goes International*<sup>5</sup> (the Article), I endeavored to open up a conversation concerning the *Erie* doctrine's applicability in transnational cases. While potential points for discussion were many, I explored the concrete questions raised by the application of the *Erie* doctrine to transnational choice of law. I began by evaluating whether the Constitution, the Rules of Decision Act, and the Rules Enabling Act, which may counsel in favor of the application of the choice of law rules of the several states in domestic cases, similarly require the application of state choice of law rules in transnational cases. They do not.<sup>6</sup>

Given that the *Erie* doctrine is animated by the "twin aims" of discouraging forum shopping between state and federal courts and avoiding the inequitable administration of the laws,<sup>7</sup> I next evaluated whether those aims were met by applying state choice of law rules in transnational cases. At least in some cases, they were not.<sup>8</sup> Among other things, I illustrated that a doctrine designed to create parity between federal and state courts when interpreting state law in domestic cases has morphed into a doctrine that also elevates parity between federal and state courts in the same state when applying state or foreign law in transnational cases.<sup>9</sup> As the Article explored, this should not necessarily be the case in light of the modern experience with transnational litigation, where, in many cases, federal interests and foreign affairs are implicated.

Even more troubling for our federal system, this parity requirement creates the opportunity for forum shopping between the several states for the most favorable state choice of law rule to govern a transnational case. For instance, if a French plaintiff is injured in France by a U.S. corporation subject to general jurisdiction in California and Virginia, the French plaintiff will compare those states' choice of law rules to determine where the case should be filed. If the plaintiff desires French law, she might favor filing in Virginia, given that Virginia's choice of law rules select the law where the injury occurred.<sup>10</sup> If, however, California law is more favorable to the plaintiff's claim, she might favor filing in California, where choice of law rules might select the law of California.<sup>11</sup> Enter horizontal forum shopping.

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<sup>5</sup> Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531 (2011).

<sup>6</sup> *See id.* at 1555–66.

<sup>7</sup> *See* *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965).

<sup>8</sup> *See* Childress, *supra* note 5, at 1570–73.

<sup>9</sup> *See id.*

<sup>10</sup> *See, e.g.,* *Hodson v. A. H. Robins Co.*, 528 F. Supp. 809, 823 (E.D. Va. 1981) (finding "that the Virginia rule in personal injury actions is . . . the law of the place of the injury").

<sup>11</sup> *See, e.g.,* *Bernhard v. Harrah's Club*, 546 P.2d 719, 721 (Cal. 1976) (illustrating California's comparative impairment approach).

As this example shows, there is also the risk of inequitable administration of the laws in transnational cases. These cases will be treated differently by the varying choice of law rules of the several states depending on where they are filed. More so, there is the risk that important federal interests will not be given effect in transnational cases because state choice of law rules are seen as the only rules that matter.

A brief example that is currently bedeviling courts shows the present salience of the question: Should it be the case that the choice of law rules of New York determine whether heirs of Holocaust victims, whose art was allegedly stolen by the Nazis, may state a claim for relief in federal court, when it is the United States that has undertaken international law obligations to repatriate this property?<sup>12</sup> In short, applying the *Erie* doctrine in transnational cases without a critical lens perhaps leads to results adverse to U.S. public policy.

In light of *Erie*'s twin aims, I put forward a suggested approach to encourage courts to more forthrightly engage in analyzing transnational conflicts cases.<sup>13</sup> In brief, the approach was as follows. First, a federal court should determine whether a conflict between U.S. and foreign law exists.<sup>14</sup> If there is not a conflict, the court may apply forum law, assuming that law has at least some constitutionally sufficient connection to the case. Second, if there is a conflict, the federal court should evaluate critically whether the application of a state's choice of law rules support federal objectives.<sup>15</sup> In other words, it should not unflinchingly apply state choice of law rules in transnational cases. Should those rules, however, support federal objectives, it is well established that federal district courts may apply state law, not because of compulsion under *Erie* and *Klaxon* but because it does not thwart federal objectives.<sup>16</sup> As such, a federal court may choose to follow state conflict of laws rules directing it to apply foreign law or some other law.

Third, if the court concludes that federal interests are not effectuated by state choice of law rules, it must endeavor to locate a jurisdiction that

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<sup>12</sup> See, e.g., *Bakalar v. Vavra*, 500 F. App'x 6 (2d Cir. 2012), *cert. denied*, No. 12-1160, 2013 WL 1193864 (U.S. Apr. 29, 2013).

<sup>13</sup> See Childress, *supra* note 5, at 1573–79.

<sup>14</sup> In many circumstances, even this initial inquiry is short circuited on account of the increasing willingness of courts to dismiss on forum non conveniens grounds. *Id.* at 1572.

<sup>15</sup> Cf. *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232–33 (11th Cir. 2004) (noting that the *Erie* doctrine does not apply to litigation that implicates the nation's foreign relations; federal common law applies in those cases).

<sup>16</sup> See *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 98 (1991) (“[F]ederal courts should ‘incorporat[e] [state law] as the federal rule of decision,’ unless ‘application of [the particular] state law [in question] would frustrate specific objectives of the federal programs.’”) (alterations in original) (quoting *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979)); see also *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001) (“This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.”).

has the requisite constitutional contacts with the case such that the application of that law would effectuate federal interests. A court would not be left to totally write on a clean slate, as most federal courts recognize generally that for purposes of federal conflicts law the Second Restatement is controlling.<sup>17</sup> Furthermore, courts could look to the development of the law in the several states.<sup>18</sup>

In exploring *Erie*'s transnational effects in the choice of law context, I had several hopes. First, I hoped to encourage a more sophisticated understanding of the unique dynamics that transnational litigation presents for domestic courts. I wanted to test whether importing whole-cloth domestic doctrines like the *Erie* doctrine to adjudicate transnational cases makes sense. In some cases, it might; in others, it might not. In either event, we need to examine critically whether a doctrine's application serves its stated goals. It is questionable whether the *Erie* doctrine does that in transnational choice of law cases.

Second, I hoped to explain that transnational and domestic cases might be different and could be treated differently by courts. Third, I wanted to test empirically the impact that the *Erie* doctrine might have on other doctrines. Surprisingly, I discovered that it might have an impact on the forum non conveniens doctrine.<sup>19</sup> Fourth, I hoped that bringing the unique issues presented by transnational litigation in the *Erie* context to light would encourage further scholarly study, leading to better outcomes in transnational choice of law cases.

In light of these goals, I was pleased to see that one of the leading scholars of the *Erie* doctrine, Professor Michael Steven Green, paid me the high honor of engaging the Article.<sup>20</sup> In his response, Professor Green makes three points. First, he seeks to clarify that most of the *Erie* doctrine still applies in the international context.<sup>21</sup> Second, he critiques my arguments for abandoning the *Erie* doctrine in transnational choice of law

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<sup>17</sup> See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 19 (E.D.N.Y. 2005) (refusing to apply the logic of *Klaxon* to the choice of law question because of the international complexion of the case and instead looking to Ninth Circuit case law as well as the Second Restatement to craft a federal common law rule); see also, e.g., *Alvarez-Machain v. United States*, 331 F.3d 604, 611 (9th Cir. 2003) (illustrating that the court looked to the Second Restatement to determine choice of law rules), *rev'd on other grounds sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>18</sup> See, e.g., *Hisrich v. Volvo Cars of N. Am., Inc.* 226 F.3d 445, 449 n.3 (6th Cir. 2000) (illustrating the relevance of "restatements of law . . . and the majority rule among other states" in resolving underdeveloped questions of law).

<sup>19</sup> See Childress, *supra* note 5, at 1560–65.

<sup>20</sup> See Michael Steven Green, *Erie's International Effect*, 107 NW. U. L. REV. COLLOQUY 165 (2013), <http://www.law.northwestern.edu/lawreview/colloquy/2012/17/LRColl2012n17Green.pdf>.

<sup>21</sup> See *id.* at 165–70.

cases.<sup>22</sup> Third, he argues that, even if my arguments succeed, the impact my approach will have on many transnational cases is limited.<sup>23</sup>

Professor Green has given me much to think about, and I thank him for that. In this Reply, I will follow his thoughtful lead and make one point of clarification before exploring more critical points. My clarificatory point (Part I) is that the Article was indeed limited to transnational choice of law and developing federal procedural common law rules for transnational choice of law cases. However, even with that limitation, it has relevance to other transnational areas impacted by the *Erie* doctrine. In short, while Professor Green appears to focus on the fact that much of the *Erie* doctrine remains applicable in many transnational cases, the fact that transnational choice of law determinations will be on the rise in years to come counsels in favor of a qualitative reevaluation of the *Erie* doctrine in those cases. As I explain below, my critical point (Part II) is that the *Erie* doctrine, as applied in transnational choice of law, may have effects on transnational forum shopping. I conclude in Part III by illustrating briefly where continuing the conversation on *Erie*'s international effects might take us.

### I. *ERIE* AND TRANSNATIONAL CHOICE OF LAW

Let me begin with where we agree. As Professor Green recognizes, the point of the Article was *not* to suggest that federal district courts sitting in diversity or alienage adjudicating transnational cases have the ability to craft a federal common law rule to govern the *substance* of the dispute.<sup>24</sup> Federal district courts are not free, absent congressional authorization, to make substantive law to govern transnational cases when sitting in diversity or alienage, just as they are not free to create such rules in domestic cases. Rather, my argument was that in certain circumstances where a federal interest is manifest, federal district courts *might* displace a state choice of law rule with a federal choice of law rule that would support federal interests. In other words, a federal district court may develop federal *procedural* common law to vindicate federal interests. As such, the federal court, through its own choice of law rule, might choose to apply different substantive law—be it U.S. state or foreign—in a transnational case, than would a state court in the forum where it sits.

In making this clarification, I appreciate that Professor Green highlights one question that looms behind my observation that the twin aims of *Erie* might encourage the development of a federal procedural common law rule in transnational choice of law cases—namely, whether this federal procedural common law is preemptive federal law that must be

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<sup>22</sup> See *id.* at 170–75.

<sup>23</sup> See *id.* at 175–79.

<sup>24</sup> See *id.* at 166–69.

applied not only in federal court but also in state court.<sup>25</sup> As I explained in the Article, transnational choice of law rules could be developed as federal common law that is either preemptive federal law or nonpreemptive federal procedural common law. In my view, courts should adopt the latter approach and develop federal procedural common law, which is not treated as preemptive federal law.<sup>26</sup> In taking this more limited approach, the opportunity for further refinement, perhaps even by Congress, is left open.<sup>27</sup>

Let me briefly note one disagreement with this clarificatory point that will be discussed in more detail below. In Professor Green's view, "[e]ven if the arguments in Childress's article succeed, their effect is relatively narrow."<sup>28</sup> To begin with, this is an empirical question. Professor Green's response provides no empirical evidence that the impact will indeed be narrow. In fact, his response does not discuss any actual cases where the impact of the doctrine might be applicable. In short, if his is a quantitative point, I think we need to have a firmer grasp of the universe of cases before we can proclaim such narrow applicability. Even assuming the impact is narrow, however, I think there is something to be gained by questioning the application of a domestic doctrine from the last century to the fast-moving transnational world of litigation today. In short, narrowness might point the way to significant problems created by the unflinching application of domestic doctrines to transnational cases.

## II. *ERIE'S* IMPACT ON TRANSNATIONAL CHOICE OF LAW

In this Part, I examine more closely the impact that the *Erie* doctrine has in transnational choice of law cases. First, I explore how the doctrine encourages horizontal forum shopping. Second, I examine the doctrine's impact on forum non conveniens and the enforcement of foreign judgments. Both of these sections illustrate why continued reevaluation of the *Erie* doctrine's applicability in transnational cases is timely and appropriate.

### A. *Horizontal Forum Shopping*

Professor Green criticizes my argument that horizontal forum shopping supports reevaluating *Erie's* application to transnational choice of law. He argues that my analysis is too comprehensive (because my arguments apply beyond transnational cases) and yet also too narrow (because I do not go as far as federalizing choice of law in state courts).<sup>29</sup> As to comprehensiveness,

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<sup>25</sup> See *id.* at 170.

<sup>26</sup> See Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 818 (2008) (noting that "procedural common law differs from substantive common law only in that it . . . does not bind state courts").

<sup>27</sup> The disuniformity and inequity created by refusing to completely federalize choice of law in transnational cases will be discussed, with other matters, in Part II.

<sup>28</sup> Green, *supra* note 20, at 165.

<sup>29</sup> *Id.* at 172.

he notes that if *Klaxon* is undermined by transnational forum shopping, so too is it undermined by domestic forum shopping. According to him, I “offer[] no evidence that horizontal forum shopping is more of a problem when the choice is between the laws of a state and a foreign nation than when it is between the laws of two states.”<sup>30</sup>

But horizontal forum shopping is a greater concern in transnational cases. In the early 1980s, Lord Denning, perhaps the most celebrated English judge of the twentieth century,<sup>31</sup> famously opined: “As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”<sup>32</sup> There are several reasons for this. First, U.S. substantive law is thought to be more favorable to plaintiffs than the laws of other countries. Second, U.S. procedural law—in particular, notice pleading, liberal discovery, and aggregate litigation—gives plaintiffs substantial leverage in pleading, proving, trying, and settling their cases. Third, U.S. damages law—especially punitive damages and jury awards—presents the potential for a windfall for plaintiffs, or, at a minimum, significant ability to force defendants to settle.<sup>33</sup> While we are in the midst of change to the substantive and procedural laws of foreign fora, in part brought about by a restrictive U.S. approach to transnational litigation, the general belief is that a foreign plaintiff would be expected to choose a U.S. forum to bring suit, if possible as a matter of jurisdiction, in order to take advantage of more favorable U.S. law. This is so even in cases where the harms complained of occurred abroad and in cases where the evidence is located abroad.

Of course, these reasons illustrate why a plaintiff would choose to bring suit in the United States generally. A plaintiff would want to bring a transnational case in the United States specifically because they can forum shop amongst the several states for the most favorable substantive law. The *Erie* doctrine makes this forum shopping possible in federal court as well by requiring federal courts to apply the choice of law rules of the state in which they sit, even when application of those rules might not effectuate federal interests or public policy. As Professor Green’s hypothetical illustrates, a California plaintiff injured in Germany by a product made by a California company subject to general jurisdiction in California and Virginia, who would prefer to have German law apply, would consider

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<sup>30</sup> *Id.* at 171.

<sup>31</sup> J. Skelly Wright, *Law and the Logic of Experience: Reflections on Denning, Devlin, and Judicial Innovation in the British Context*, 33 STAN. L. REV. 179, 180 (1980).

<sup>32</sup> *Smith Kline & French Labs. Ltd. v. Bloch*, [1983] 1 W.L.R. 730 (A.C.) at 733 (Eng.).

<sup>33</sup> See Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09, 516 (2008).

forum shopping to Virginia, as it follows the First Restatement and would be expected to apply the law of the state of injury.<sup>34</sup>

Compare this to purely domestic cases. While there are procedural differences between the several states, they are not as great as those encountered between U.S. and foreign jurisdictions. For instance, most states provide for class actions, while aggregate litigation is limited abroad. Similarly, most states provide for liberal discovery, which is also limited abroad. Likewise, there is a greater likelihood of similarity between the substantive laws of various U.S. jurisdictions, as opposed to the laws between a common law jurisdiction like the United States and the rest of the world, which is predominantly based on civil law. The greater similarity in procedural and substantive law between the several states prevents many of these forum shopping incentives from having the same impact in domestic cases.

Above and beyond all of these concerns, perhaps the most compelling reason that transnational forum shopping is a concern is that it risks entangling courts with foreign sovereigns and enmeshing courts in foreign affairs. Foreign sovereigns have objected frequently to U.S. courts hearing transnational cases. Many transnational cases also present issues perhaps more appropriately within the competence of the Executive or Congress. These issues do not exist with the same force in domestic forum shopping cases.

Confirming the importance of the transnational forum shopping problem, a scholarly literature is developing that illustrates a transnational forum shopping market to enforce foreign judgments in the United States.<sup>35</sup> This transnational market is developing precisely because state recognition and enforcement rules differ,<sup>36</sup> and because federal district courts sitting in diversity or alienage believe that the *Erie* doctrine requires the application of state recognition and enforcement rules.<sup>37</sup> As a result, judgment creditors take advantage of disparate enforcement regimes in the several states to forum shop for a state where enforcement will be most easily granted. Once granted, the foreign judgment is treated as a domestic judgment and must be granted full faith and credit in another U.S. state. With the likelihood of

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<sup>34</sup> See Green, *supra* note 20, at 171. I have had to change Professor Green's hypothetical slightly to account for personal jurisdiction. In his original hypothetical, a California company manufactured a product in California that injured a Californian in Germany. Under such facts, the only fora where the plaintiff could file suit would be California or Germany.

<sup>35</sup> See generally Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 HARV. INT'L L.J. (forthcoming 2013) (examining the way litigants forum shop for favorable enforcement law).

<sup>36</sup> See *id.*

<sup>37</sup> See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. c (1971) (noting that there is "consensus" in state and federal courts that such matters are governed by state law).

such enforcement actions increasing before U.S. courts,<sup>38</sup> so too is the potential for increased forum shopping in transnational cases.

In short, the risk of horizontal forum shopping is greater in transnational cases. As these cases continue to make their way into U.S. courts, the ill effects of the present approach to transnational choice of law will become more manifest. In light of the fact that transnational cases risk bringing the United States in conflict with foreign sovereigns, there is every reason to support reexamining the *Erie* doctrine's application in transnational choice of law cases.

As to Professor Green's narrowness point, he is correct that I do not believe transnational choice of law should "be federalized in state court."<sup>39</sup> Of course, this belief creates tension because the potential unity encouraged by federalizing some choice of law in transnational cases filed in federal courts might be short circuited by forum shopping between state courts. In other words, what good is it if plaintiffs can escape federal procedural choice of law by filing in state courts to avail themselves of favorable choice of law rules?

Two responses: First, many transnational cases will be subject to removal and thus limit the possibility of state-to-state forum shopping that is risked by not federalizing state choice of law. To be sure, there is some risk that reverse forum shopping by defendants might be equally problematic. However, by providing a federal forum that takes account of federal interests, there is the possibility that the playing field might be leveled. Second, the fact that federal courts would be permitted, in my approach, to develop federal choice of law will place state choice of law in sharp relief. To the extent a federal district court creates a federal choice of law rule in an instant case, such a rule will signal to other courts and policymakers that legal reform might be necessary. For instance, Congress might step in to resolve some of the issues created by disuniform federal and state rules, as was done in the case of the Class Action Fairness Act.<sup>40</sup> As such, and to the extent there is disuniformity, Congress might be moved to take legislative action to account for this type of horizontal forum shopping.

### B. *Forum Non Conveniens*

Continuing his theme that my approach is both too comprehensive and too narrow, and after agreeing with the Article (although not its proposals) that requiring the application of state choice of law rules in transnational

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<sup>38</sup> See Quintanilla & Whytock, *supra* note 2, at 39 (stating that U.S. courts are encountering foreign law issues with greater frequency).

<sup>39</sup> Green, *supra* note 20, at 172.

<sup>40</sup> 28 U.S.C. §§ 1332(d), 1453, 1711–15 (2006); see Childress, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, *supra* note 2, at 755–57.

cases is about the twin aims of *Erie* and not the Rules of Decision Act,<sup>41</sup> Professor Green turns to my argument that federal courts are increasingly using forum non conveniens to short circuit choice of law analysis in transnational cases. In examining how forum non conveniens and the *Erie* doctrine overlap, my point was to show that legal doctrine has litigation effects that should be explored empirically. Professor Green argues that at best this observation would support “a federal common law rule that limits a court’s ability to dismiss on forum non conveniens grounds simply because foreign law applies,”<sup>42</sup> and does not support the creation of federal choice of law rules in transnational cases. Before getting to the substance of his critique, let us look at some updated numbers that paint a more complete picture from the numbers developed in the original Article.

As I noted in the Article, there has been a significant increase in forum non conveniens decisions in federal courts in recent years. Between 1990 and 2006, there were roughly 691 (about 43 per year) reported transnational forum non conveniens decisions by federal courts.<sup>43</sup> Overall, the courts dismissed in favor of a foreign forum in about 50% of these cases.<sup>44</sup> In cases involving a foreign plaintiff, the dismissal rate was higher, at 63.4%.<sup>45</sup> Moreover, foreign plaintiffs are “twice as likely to have their suits dismissed” compared to domestic plaintiffs.<sup>46</sup>

In light of these numbers, the Article took a snapshot of cases filed pre- and post-*Sinochem*,<sup>47</sup> up to April 1, 2011. *Sinochem* is not only the Court’s most recent forum non conveniens decision, but also might encourage

<sup>41</sup> I am unclear as to Professor Green’s ultimate conclusion on the Rules Enabling Act’s applicability. At one point, he seems to say that it applies, and then, in a footnote, he reserves judgment. See Green, *supra* note 20, at 169 & n.38. He argues that I give “no reason to think that the Rules Enabling Act’s substantive right limitation does not apply in an international context.” *Id.* at 169. But, he gives us no reason to think that it does. See *id.* at n.38. One would think greater specificity should be required when applying congressional legislation to foreign issues. See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (reaffirming the presumption against the extraterritorial application of acts of Congress).

<sup>42</sup> Green, *supra* note 20, at 174.

<sup>43</sup> Christopher A. Whytock, Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens 15 (Feb. 28, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033).

<sup>44</sup> *Id.* at 16.

<sup>45</sup> Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 503 (2011). This is likely accounted for by the fact that in conducting the forum non conveniens analysis a court may give less deference to a foreign plaintiff’s choice of forum under Supreme Court case law. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255–56 (1981) (“When the home forum [is] chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is . . . less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.”). Indeed, I note that such a demonstrated disparity between domestic and foreign plaintiffs may itself have implications for U.S. foreign relations.

<sup>46</sup> Whytock, *supra* note 45, at 503–04.

<sup>47</sup> *Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.*, 549 U.S. 422 (2007).

greater use of the doctrine, as the Court there held that a *forum non conveniens* dismissal could be entered even before determining the question of jurisdiction.<sup>48</sup> A search of cases invoking the doctrine after the Supreme Court's decision in *Sinochem* up to January 1, 2012, confirms that motions to dismiss on grounds of *forum non conveniens* may be on the rise.<sup>49</sup>

Since *Sinochem*, 94 reported cases have raised the issue (about 24 per year). Of those, 48% were dismissed.<sup>50</sup> Of these dismissals, 82% explicitly recognized that a reason for dismissal was the application of foreign law.<sup>51</sup> When foreign plaintiffs are involved, the numbers tell a slightly different story. Since *Sinochem*, 56 of the 94 cases (nearly 60%) involved foreign plaintiffs. Of these cases, the dismissal rate was 52%.

Yet these numbers likely underreport the real impact of the doctrine on cases before the federal courts. Since 2007, courts have increasingly dealt with these issues through unpublished opinions—while 45% of these cases were reported in 2007, only 17% were reported in 2011.<sup>52</sup> Indeed, during the timeframe of Whytock's study, the reporting rate was closer to 45%.<sup>53</sup> While the dismissal rate for unpublished decisions hovers around 51%, what is striking is that there had been 261 unpublished cases raising *forum non conveniens* since *Sinochem*. Of these unreported cases, 75% explicitly recognized the application of foreign law as a reason for dismissal.<sup>54</sup> When foreign plaintiffs were involved (in 102 of the 261 cases), the dismissal rate jumped to 71%. In sum, approximately 355 cases since *Sinochem* have raised *forum non conveniens*, with an average of 78.5% recognizing foreign law as an important factor in dismissing the case.<sup>55</sup> One hundred fifty-eight of these cases involved foreign plaintiffs, and on average, 62% were dismissed.<sup>56</sup>

The data for all of 2012 presents a slightly different picture. In 2012, twelve reported cases raised the issue of *forum non conveniens*. Of those,

<sup>48</sup> *Id.* at 435.

<sup>49</sup> In short, the approach was as follows: First, the Westlaw database was searched for all U.S. district court cases raising the term *forum non conveniens* between March 5, 2007, (the date of the *Sinochem* decision) and January 1, 2012. Second, all decisions were then reviewed and cases that were not actual decisions by U.S. federal district courts granting or denying a *forum non conveniens* motion in favor of a foreign forum were discarded. Third, these cases were then analyzed to yield the results explained in the text above. See Memorandum from Donald Earl Childress III (June 13, 2013) (on file with author and *Northwestern University Law Review Colloquy*).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> This number was reached by comparing the number of published cases to unpublished cases during the time of Whytock's study. This statistic suffers from some incompleteness, as there is no good denominator because not all published and unpublished cases are included in the available databases. In short, it is complicated to estimate publication rates based on current databases.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

42% were dismissed. Of these dismissals, 60% explicitly recognized that a reason for dismissal was the application of foreign law. When foreign plaintiffs were involved, the numbers changed. In 2012, seven of twelve reported cases (58%) involved foreign plaintiffs. Of these cases, the dismissal rate was 57%.

In 2012, only 20% of cases raising forum non conveniens questions were reported, with 80% being unreported. Of the unreported cases, 45% were dismissed. Sixty-seven percent of unreported cases explicitly recognized the application of foreign law as a reason for dismissal. When foreign plaintiffs were involved (36% of cases), the dismissal rate was 71%. Courts may thus be using the forum non conveniens doctrine to resist applying foreign law and may be pushing such decisions to unreported cases.

As explained in the Article, the fact that the *Erie* doctrine might be creating this system in part is yet another reason to reexamine our commitments to its application in transnational cases. As Professor Green notes, federalizing choice of law in transnational cases is but one way to deal with this issue. But, there may be other ways to deal with this issue. These ways will only be considered once we cast aside our uncritical commitment to *Erie*'s absolute application in transnational choice of law. In sum, I may be right that limited federalization of choice of law in transnational cases helps deal with this issue; Professor Green may be right that federalizing and changing the forum non conveniens doctrine may be the more appropriate approach.

As I illustrated in the Article, we cannot get to the proposal stage without being willing to question the *Erie* doctrine's application in actual transnational cases. The fact that Professor Green has offered a counterproposal to a proposal put forward in light of a critical evaluation of the *Erie* doctrine's application in transnational cases illustrates why the unflinching application of the *Erie* doctrine in transnational cases is worth questioning, for it might lead to law reform.

### III. WHAT WILL THE FUTURE BRING?

Professor Green's final point is that my approach will be applied only rarely. Indeed, I argue that federal choice of law rules should be developed only in cases where federal interests are frustrated and a federal rule would do more than a state rule to further those interests. According to Professor Green, my position would work in *Sabbatino*-like cases, but other situations would be "unusual."<sup>57</sup>

Yet, we cannot know what the future will bring. As already alluded to, however, transnational litigation, transnational choice of law, and

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<sup>57</sup> See Green, *supra* note 20, at 175–76; see also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

transnational enforcement of judgments are growing industries. Some transnational cases will be filed that raise issues primarily of importance only to the parties—e.g., a suit between a foreign plaintiff and a U.S. defendant for alleged tortious interference with a private contract in a foreign country. Other cases will, however, raise important public regulatory concerns—e.g., a suit between a foreign plaintiff and a U.S. defendant for alleged torts committed in violation of environmental laws, where such actions were taken in concert with foreign governments or officials. And, of course, the question of enforcement of foreign judgments may raise many public and federal interests as well.

Here is just one example. On April 17, 2013, the Supreme Court applied the presumption against extraterritoriality to limit the Alien Tort Statute.<sup>58</sup> As I have suggested elsewhere, there is every reason to believe that foreign plaintiffs will now seek to bring these suits under state and foreign law in federal court.<sup>59</sup> Federal district courts sitting in diversity and alienage will now face significant choice of law questions. “If courts in fifty-two jurisdictions are asked to apply state choice of law rules, the possible solutions to the choice-of-law conundrum are almost immeasurable. With so many inputs, probability analysis reveals literally hundreds of available outcomes.”<sup>60</sup> In a post-*Kiobel* world where plaintiffs forum shop in pursuit of the most favorable outcome, the divergent choice of law approaches must be part of the analysis. And the appropriateness of a federal choice of law rule might be necessary and fitting.

In such cases, which could amount to scores in any given year if past numbers are accurate, U.S. federal courts would be asked to call into question actions taken by a foreign sovereign within that sovereign's territory. Cases like *Sabbatino* are not as unusual as they may seem in light of the rapidly evolving world of transnational litigation.

Finally, Professor Green explains that my “reconceptualization of international choice of law would be . . . disruptive.”<sup>61</sup> Experimentation in situations where the status quo presents the potential for inadequacy is always disruptive. Disruption has its own benefit: it signals to policymakers that legal doctrine is perhaps not working and should be subject to investigation not just by courts but by democratically elected branches of government.

In sum, laying bare the policy arguments and implications of the *Erie* doctrine's application in transnational choice of law cases affords us the

<sup>58</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>59</sup> See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, *supra* note 2, at 723–28.

<sup>60</sup> Roger P. Alford, *Human Rights after Kiobel: Choice of Law in Transnational Tort Litigation* 11 (June 13, 2013) (unpublished manuscript) (on file with author).

<sup>61</sup> Green, *supra* note 20, at 179.

opportunity to pull back the curtain on an area of law that is in need of clarity and development.

### CONCLUSION

Let me return again to a point made earlier. The purpose of *When Erie Goes International* was to open up a conversation concerning the applications and implications of the *Erie* doctrine in transnational cases. In short, the question was: Should federal courts continue to unflinchingly apply the *Erie* doctrine in transnational choice of law cases? There are many other related questions that could be asked. For instance, when choosing foreign law, it is debatable what level of interpretive fidelity must be given to the foreign jurisdiction's determinations as to its law. Indeed, it is contestable whether that is the right question to ask at all or whether the question is what interpretive fidelity would the state court give to the foreign jurisdiction's determinations.<sup>62</sup> According to one recent article, "when federal courts apply a state's choice of law rules, they are not bound to follow state courts' understanding of foreign law that applies under such rules."<sup>63</sup> While they are not bound, they may choose to do it nonetheless.<sup>64</sup> In my view, the *Erie* doctrine muddles the analysis because it forecloses forthright engagement with the real question at stake in many transnational cases: Which state's law should be applied?

Even beyond these questions, other questions that relate to transnational choice of law and the *Erie* doctrine remain. Is the *forum non conveniens* doctrine substantive or procedural for *Erie* purposes? Should the question of recognition and enforcement of foreign judgments be governed by federal or state law?

In conclusion, the Article and this wonderful conversation with Professor Green emphasize that there are many reasons to support reexamining the application of the *Erie* doctrine in transnational cases. My proposal—a first attempt, if you will, at working through these complex issues—is not the only way to deal with the issues. If *Erie* is to "go international," we should carefully examine the reasons for so doing in light of present realities in transnational litigation and examine other proposals.

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<sup>62</sup> See *Anglo Am. Ins. Grp. v. CalFed, Inc.*, 899 F. Supp. 1070, 1077 (S.D.N.Y. 1995).

<sup>63</sup> Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 682 n.109 (2013).

<sup>64</sup> Compare *Anglo Am. Ins. Grp.*, 899 F. Supp. at 1077 (trying to foretell "what the courts of the forum state would predict that the courts of the foreign jurisdiction would find"), with *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1380 (S.D. Fla. 2003) (rejecting the suggestion that the court "import[] American principles of statutory construction into the analysis" of Honduran law).