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Dow Chemical Company v. Castro Alfaro: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation

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Dow Chemical Company v. Castro Alfaro: The Demise of Forum Non Conveniens in Texas and One Less Barrier to International Tort Litigation

Michael T. Manzi

Abstract

This Comment argues that Castro Alfaro and the limitations it imposes on the doctrine of forum non conveniens in international tort litigation reflect an accurate interpretation of the statute and appropriate consideration of policy implications. Part I presents the background of forum non conveniens, jurisdiction, and venue. Part I also discusses specific jurisdiction and specific venue statutes in the United States and Texas. Part II discusses the background events of Castro Alfaro, the majority opinion, and the various concurring and dissenting opinions. Part III argues that the Castro Alfaro court based its decision on proper statutory interpretation and sound international policy. This Comment concludes that the Castro Alfaro decision will support the resolution of international tort litigation by suppressing the doctrine of forum non conveniens in cases where legislatures have provided for subject matter jurisdiction and venue in specific causes of action.

*DOW CHEMICAL COMPANY v. CASTRO ALFARO: THE
DEMISE OF FORUM NON CONVENIENS IN
TEXAS AND ONE LESS BARRIER TO
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INTRODUCTION

U.S. federal and state courts utilize the doctrine of *forum non conveniens* to dismiss cases over which they otherwise have jurisdiction.¹ Both federal and state legislatures, however, have enacted specific jurisdiction statutes that create subject matter jurisdiction for courts to hear particular kinds of cases.² These statutes often conflict with the doctrine of *forum non conveniens* when courts use the doctrine to defeat statutorily created jurisdiction.³ In *Dow Chemical Company v. Castro Alfaro*,⁴ an

1. *E.g.*, In re Air Crash Disaster near New Orleans, 821 F.2d 1147 (5th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (applying *forum non conveniens* analysis to Warsaw Convention case); *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 519 N.E.2d 370 (1988); *see infra* notes 6-11 and accompanying text (discussing doctrine of *forum non conveniens*). Black's Law Dictionary defines the doctrine as "the discretionary power of [the] court to decline jurisdiction when convenience of parties and ends of justice would be better served if action were brought and tried in another forum." BLACK'S LAW DICTIONARY 655 (6th ed. 1990).

2. *See, e.g.*, 45 U.S.C. §§ 51-60 (1988). The Federal Employers Liability Act ("FELA") states that

an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Id. § 56; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

3. *See* *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941) (discussing *forum non conveniens* dismissal under FELA). The federal circuit and district courts are currently divided as to the application of *forum non conveniens* to actions brought under the Jones Act. *See* *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990) (maintaining that federal defense of *forum non conveniens* overrides state laws not recognizing doctrine); In re Air Crash Disaster near New Orleans, 821 F.2d 1147 (5th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) (acknowledging use of *forum non conveniens* in Jones Act cases, but upholding trial court's denial of defendant's motion to dismiss for *forum non conveniens*); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (10th Cir. 1983) (holding *forum non conveniens* dismissal proper); *Szumlicz v. Norwegian Am. Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983) (holding that if U.S. law applies to suit, U.S. court should retain jurisdiction); *Koupetoris v. Konkar Intrepid Corp.*, 535 F.2d 1392, 1397 (2d Cir. 1976) (affirming *forum non conveniens* dismissal); *Dalla v. Atlas Maritime Co.*, 562 F. Supp. 752, 758 (C.D. Cal. 1983) (noting that because Jones Act applied, district court must retain jurisdiction), *aff'd*,

international tort case, the Supreme Court of Texas held that a specific jurisdiction statute⁵ barred a *forum non conveniens* dismissal.⁶

This Comment argues that *Castro Alfaro* and the limitations it imposes on the doctrine of *forum non conveniens* in international tort litigation reflect an accurate interpretation of the statute and appropriate consideration of policy implications. Part I presents the background of *forum non conveniens*, jurisdiction, and venue. Part I also discusses specific jurisdiction and specific venue statutes in the United States and Texas. Part II discusses the background events of *Castro Alfaro*, the majority opinion, and the various concurring and dissenting opinions. Part III argues that the *Castro Alfaro* court based its decision on proper statutory interpretation and sound international policy. This Comment concludes that the *Castro Alfaro* decision will support the resolution of international tort litigation by suppressing the doctrine of *forum non conveniens* in cases where legislatures have provided for subject matter jurisdiction and venue in specific causes of action.

I. FORUM NON CONVENIENS, JURISDICTION, AND VENUE IN THE UNITED STATES AND TEXAS

The doctrine of *forum non conveniens* gives a court discre-

771 F.2d 1277 (9th Cir. 1985); see also 46 U.S.C. § 688 (1988) (codifying Jones Act). The Jones Act grants federal courts jurisdiction over seamen suffering personal injuries in the district where the defendant employer resides or where the employer maintains its principal office. *Id.*

4. 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

5. A specific jurisdiction statute confers subject matter jurisdiction on a court to hear a particular kind of case. See *infra* notes 83-85 and accompanying text (discussing specific jurisdiction and specific venue statutes). The *Castro Alfaro* court considered the impact of the Texas Wrongful Death Statute (the "Texas Statute") on the doctrine of *forum non conveniens*. *Castro Alfaro*, 786 S.W.2d at 677-79; see TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

6. *Castro Alfaro*, 786 S.W.2d at 679. The five to four decision affirmed an appellate decision. See *Castro Alfaro v. Dow Chem. Co.*, 751 S.W.2d 208 (Tex. Civ. App. 1988), *aff'd*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991). Both decisions provoked an immediate response from commentators, much of it negative. See Fisher, *Alfaro Case Did the Right Thing*, Tex. Law., June 30, 1990, at 30; Wiehl, *Texas Courts Opened to Foreign Damage Cases*, N.Y. Times, May 25, 1990, at B6, col. 3; Note, *Dow Chemical Co. v. Alfaro: Forum Non Conveniens—Now Isn't That Convenient?*, 42 BAYLOR L. REV. 375 (1990); Note, *A Foreign Plaintiff Has an Absolute Right to Maintain a Personal Injury Cause of Action in Texas Without Being Subject to Forum Non Conveniens Dismissal*, 20 TEX. TECH. L. REV. 995 (1989).

tion to dismiss or transfer a case if another, more convenient forum exists.⁷ The U.S. government, and some U.S. states, have codified *forum non conveniens*.⁸ Other states employ it as a common law doctrine.⁹ Some states, however, do not recog-

7. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1969). The Restatement notes that "[a] state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff." *Id.* The Restatement further states that

the suit will be entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same will be true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he will not raise this defense in the second state.

Id. comment c. Another description states that

the forum non conveniens doctrine . . . permits a court having jurisdiction over an action to refuse to exercise its jurisdiction when the litigation could be brought more appropriately in another forum. . . . [D]ismissal on the basis of forum non conveniens also requires that there be an alternative forum in which the suit can be prosecuted. It must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court.

J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE 88-89 (student ed. 1985); *see infra* note 13 (discussing development of doctrine).

8. *See* 28 U.S.C. § 1404(a) (1988); ALA. CODE § 6-5-430 (1990); CAL. CIV. PROC. CODE § 410.30 (West Ann. 1973); LA. CODE CIV. PROC. ANN. art. 123(B) & (C) (West Supp. 1990); N.Y. C.P.L.R. 327 (McKinney 1990); N.C. GEN. STAT. § 1-75.12 (1990); WIS. STAT. ANN. §§ 801.52 & 801.63 (West Supp. 1990).

The text of the federal *forum non conveniens* statute provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1988). The New York codification of *forum non conveniens* states that:

(a) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

(b) Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement or undertaking to which section 5-1402 of the general obligations laws applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties in whole or in part.

N.Y. C.P.L.R. 327 (McKinney 1990).

9. *See* First Nat'l Bank & Trust Co. v. Pomona Mach. Co., 107 Ariz. 286, 486 P.2d 184 (1971); Country Pride Foods, Ltd. v. Medina & Medina, 279 Ark. 75, 648 S.W.2d 485 (1983); McDonnell-Douglas Corp. v. Lohn, 192 Colo. 200, 557 P.2d 373 (1976); Picketts v. International Playtex, Inc., 215 Conn. 490, 576 A.2d 518 (1990); Miller v. Phillips Petroleum Co. Norway, 537 A.2d 190 (Del. 1988); Houston v. Caldwell, 359 So. 2d 858 (Fla. 1978); Allen v. Allen, 64 Hawaii 553, 645 P.2d 300 (1982);

nize the doctrine, either by statute or common law.¹⁰ Because U.S. federal and state courts cannot transfer a case to a foreign court, the doctrine of *forum non conveniens* leads to the dismissal of international litigation in U.S. federal courts and those state courts that recognize the doctrine.¹¹

A. *The History of Forum Non Conveniens*

1. *Forum Non Conveniens* in U.S. Courts

In this century, U.S. courts have gradually accepted the doctrine of *forum non conveniens*.¹² A doctrine of obscure ori-

Williams v. Illinois State Scholarship Comm'n, 139 Ill. 2d 24, 563 N.E.2d 465 (1990); *Powell v. Khodari-Intergreen Co.*, 303 N.W.2d 171 (Iowa 1981); *Volt Delta Resources, Inc. v. Devine*, 241 Kan. 775, 740 P.2d 1089 (1987); *Skidmore v. Meade*, 676 S.W.2d 793 (Ky. 1984); *Corning v. Corning*, 563 A.2d 379 (Me. 1989); *Johnson v. G.D. Searle & Co.*, 314 Md. 521, 552 A.2d 29 (1989); *W.R. Grace & Co. v. Hartford Accident and Indem. Co.*, 407 Mass. 572, 555 N.E.2d 214 (1990); *Anderson v. Great Lakes Dredge and Dock Co.*, 411 Mich. 619, 309 N.W.2d 539 (1981); *Searles v. Searles*, 420 N.W.2d 581 (Minn. 1988); *Missouri Pac. R.R. Co. v. Tircuit*, 554 So. 2d 878 (Miss. 1989); *Willman v. McMillen*, 779 S.W.2d 583 (Mo. 1989); *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974); *Cariaga v. Eighth Judicial Dist. Court*, 104 Nev. 544, 762 P.2d 886 (1988); *Stankunas v. Stankunas*, 582 A.2d 280 (N.H. 1990); *D'Agostino v. Johnson & Johnson, Inc.*, 115 N.J. 491, 559 A.2d 420 (1989); *Bracken v. Yates Petroleum Corp.*, 107 N.M. 463, 760 P.2d 155 (1988); *Chambers v. Merrell-Dow Pharmaceuticals, Inc.*, 35 Ohio St. 3d 123, 519 N.E.2d 370 (1988); *G.S. v. Ewing*, 786 P.2d 65 (Okla. 1990); *State ex rel. Academy Press, Ltd. v. Beckett*, 282 Or. 701, 581 P.2d 496 (1978); *Okkerse v. Howe*, 521 Pa. 509, 556 A.2d 827 (1989); *Mansour v. Mansour*, 296 S.C. 215, 371 S.E.2d 537 (1988); *Zurick v. Inman*, 221 Tenn. 393, 426 S.W.2d 767 (1968); *Kish v. Wright*, 562 P.2d 625 (Utah 1977); *Burrington v. Ashland Oil Co.*, 134 Vt. 211, 356 A.2d 506 (1976); *Myers v. Boeing Co.*, 115 Wash. 2d 123, 794 P.2d 1272 (1990); *Norfolk & W. Ry. Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990).

10. See *Crowson v. Sealaska Corp.*, 705 P.2d 905 (Alaska 1985); *Southern Ry. Co. v. Goodman*, 259 Ga. 339, 380 S.E.2d 460 (1989); *Marco Distrib., Inc. v. Biehl*, 97 Idaho 853, 555 P.2d 393 (1976); *Haug v. Burlington N. R.R. Co.*, 236 Mont. 368, 770 P.2d 517 (1989); *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991); *Caldwell v. Seaboard Sys. R.R., Inc.*, 238 Va. 148, 380 S.E.2d 910 (1989), *cert. denied*, 110 S. Ct. 1169 (1990); *Booth v. Magee Carpet Co.*, 548 P.2d 1252 (Wyo. 1976).

11. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 7, at 87-91. This book summarizes *forum non conveniens* dismissals, noting that

[i]t is only when the more convenient forum is in a foreign country—or perhaps, under rare circumstance, is a state court—that a suit brought in a proper federal venue will be dismissed on grounds of *forum non conveniens*. In contrast, the doctrine of *forum non conveniens* continues to play an important role in the state courts because a court in one state cannot transfer a case to a court in another state.

Id. at 91.

12. See *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377

gin,¹³ *forum non conveniens* first entered U.S. law as a legal term in 1929.¹⁴ Prior to 1929, U.S. courts had been applying *forum non conveniens* as a nameless principle of law through which a court could decline to exercise jurisdiction, particularly in maritime cases between a foreign plaintiff and foreign defendant.¹⁵ Despite approval from the U.S. Supreme Court in 1929,¹⁶ state and federal courts did not begin to employ *forum non conveniens* widely except in maritime cases, and cases involving the internal affairs of a corporation.¹⁷

(1929); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932); *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123 (1933); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mut. Casualty*, 330 U.S. 518 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); see also Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929) (stating that U.S. courts have applied *forum non conveniens* in principle since nineteenth century).

13. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380, 386 (1947). No trace of the doctrine appears in Roman or continental law. *Id.* *Forum non conveniens* grew out of the doctrine of *forum non competens* in Scottish law. *Id.* Scottish courts found they had no jurisdiction in two instances: first, in cases where parties were non-residents; second, in cases where Scotland was an inconvenient forum. *Id.* at 387 n.35. Subsequently, courts invented *forum non conveniens* to replace *forum non competens* when jurisdiction clearly existed and only a question of discretion remained. *Id.*

14. See Barrett, *supra* note 13, at 388. Although commentators credit Mr. Blair with bringing the doctrine of *forum non conveniens* into U.S. law, his article did not produce widespread increase in the use of *forum non conveniens*, particularly at the state level. See Blair, *supra* note 12; see also Barrett, *supra* note 13, at 393 (noting no increase in use of *forum non conveniens* after Mr. Blair's article).

15. See *Gardner v. Thomas*, 14 Johns. 134 (N.Y. 1817) (holding that exercise of jurisdiction in maritime transitory causes of action rests in sound discretion of court); *Waisikoski v. Philadelphia & Reading Coal & Iron Co.*, 173 A.D. 538, 159 N.Y.S. 906 (2d Dep't 1916) (holding that trial court has discretion to entertain or refuse tort action brought under subject matter jurisdiction statute), *aff'd*, 228 N.Y. 581, 127 N.E. 923 (1920); *Charter Shipping Co. v. Bowering, Jones & Tidy, Ltd.*, 281 U.S. 515, 517 (1930) (noting that district court has discretion whether to retain jurisdiction of admiralty suit between foreign parties); see also Blair, *supra* note 12, at 22 (noting early use of *forum non conveniens*); Barrett, *supra* note 13, at 395 (noting development of *forum non conveniens*). Another commentator, however, considers Mr. Blair's conclusions regarding the development of *forum non conveniens* in the nineteenth century as questionable. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 796 n.43 (1985). Professor Stein maintains that many early state cases relied on by Mr. Blair were decided under rules that absolutely denied jurisdiction in the case at hand. *Id.*

16. See *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377 (1929) (holding that state use of *forum non conveniens* does not violate Privileges and Immunities Clause of article IV of U.S. Constitution). This suit, like many others involving retention of jurisdiction, concerned an action brought by an employee against an employer railroad under FELA. *Id.* at 385.

17. See *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 419 (1932) (not-

In 1947, the U.S. Supreme Court set forth an analytical framework for the doctrine of *forum non conveniens* in *Gulf Oil Corporation v. Gilbert*.¹⁸ In *Gilbert*, the Court held that the *forum non conveniens* analysis must balance the private interests of the litigants and the public interests of the forum against the plaintiff's interest in choosing the forum.¹⁹ The Court, however, established three factors that the trial court must consider

ing that courts have discretion to decline to hear case between foreigners if justice could serve foreigners in their home forum despite admiralty jurisdiction); *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123 (1933) (upholding dismissal of case involving internal affairs of defendant corporation). In *Rogers*, the Court noted that "jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case." *Id.* at 131; see Barrett, *supra* note 13, at 393.

The doctrine developed in the United States largely to curb widespread forum shopping by plaintiff employees who sought the fora of large, urban centers sympathetic to their claims. See Barrett, *supra* note 13, at 382-83. The legislature, however, made these fora available through statutes such as FELA, the venue provision of which Congress enacted in 1910. See 45 U.S.C. § 56 (1988); *supra* note 2 (setting forth text of section 56). Courts adopted the doctrine, even though, in the latter half of the nineteenth century and first half of the twentieth, the railroads bore the stigma that today attaches to many large corporations. See *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U.S. 336, 342 (1917) (noting that U.S. Congress enacted FELA as result of excessive casualties in railroad transportation due to railroad abuse of employees); see *C. DICKENS, DOMBEY & SON* (1847-1848) (portraying railroads as destructive influence in Victorian England); *F. NORRIS, THE OCTOPUS* (1901) (portraying railroad as mechanical monster crushing helpless individuals). The *Castro Alfaro* case also reflects the struggle of the individual against the corporation, as does much international tort litigation. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 688-89 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991); see also *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987). In *Union Carbide*, the U.S. Court of Appeals for the Second Circuit upheld the district court's *forum non conveniens* dismissal of the litigation resulting from a gas leak catastrophe in Bhopal, India. *Id.* at 197. The catastrophe claimed the lives of 2,000 people and injured 200,000, making it "the most devastating industrial disaster in history." *Id.*

18. 330 U.S. 501 (1947) (noting that district court has inherent power pursuant to doctrine of *forum non conveniens* to dismiss suit brought under general venue statute); see *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518 (1947) (upholding *forum non conveniens* dismissal of case involving internal affairs of defendant corporation).

19. *Gilbert*, 330 U.S. at 508-09. The *Gilbert* case involved a diversity action in which a Virginia citizen brought a tort action in the U.S. District Court for the Southern District of New York against a Pennsylvania corporation authorized to do business in New York and Virginia. *Id.* at 503. The plaintiff alleged that defendant's negligent delivery of gasoline to the plaintiff's warehouse tanks in Virginia caused the explosion and fire that destroyed his warehouse. *Id.* at 502-03. The U.S. Supreme Court ultimately upheld the district court's dismissal of the case. *Id.* at 512.

before beginning the *forum non conveniens* analysis.²⁰ First, a court must have jurisdiction to hear the case.²¹ Second, the venue of the court must be proper.²² Finally, the defendant must be amenable to process in another forum.²³ If the litigation meets these prerequisites, the court may consider a *forum non conveniens* dismissal.²⁴

The *Gilbert* Court held that in determining the appropriateness of a *forum non conveniens* transfer or dismissal, a trial court must weigh the private interests of the litigants.²⁵ The Court listed several factors for trial courts to consider.²⁶ Trial courts should consider the accessibility of witnesses and evidence.²⁷ Additionally, courts should consider the problems of delay, expense, and fairness if the case is litigated in the current forum.²⁸ Furthermore, courts should consider the enforceability of any judgment they might grant.²⁹

Moreover, the *Gilbert* Court enumerated the public interest factors that courts should consider in a *forum non conveniens* analysis.³⁰ Generally, courts should consider the forum's in-

20. *Id.* at 504-07.

21. *Id.* at 504; see *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 685 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991).

22. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947); see *Castro Alfaro*, 786 S.W.2d at 685 (Doggett, J., concurring). After 1948, the trial court could also transfer the case to another district in which venue was proper and the forum convenient. See 28 U.S.C. § 1404(a) (1988).

23. *Gilbert*, 330 U.S. at 507. The U.S. Supreme Court, however, did not address the issue of the adequacy of the alternative forum. See generally *id.* The Court would not address that issue until 1981. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

24. *Gilbert*, 330 U.S. at 504-07.

25. *Id.* at 508.

26. *Id.*

27. *Id.* In *Gilbert*, the Court noted that the sources of proof, such as firemen, contractors, and customers of the plaintiff, were located in Virginia. *Id.* at 511. The Court also stated that the district court should consider the availability of process for compelling the attendance of unwilling witnesses. *Id.* at 508. In *Gilbert*, all the witnesses, except experts, resided in Virginia. *Id.* at 511. If the case were heard in New York, the litigants could not compel personal attendance of these Virginia witnesses and would have to rely on depositions. *Id.* The court may also consider the convenience of viewing the physical premises that might be related to the litigation. *Id.* at 508. The district court in New York could not readily view the destroyed warehouse in Virginia that was the site of the alleged tort. See *id.* at 503 & 511.

28. *Id.* at 508.

29. *Id.*

30. *Id.* at 508-09.

terest in the litigation.³¹ The *Gilbert* Court also stated that the most appropriate forum should be the one whose law applies to the litigation.³²

The framework developed by the U.S. Supreme Court in *Gilbert* stresses two points.³³ First, courts should defer to the plaintiff's choice of forum.³⁴ Second, courts should not allow the plaintiff to vex, harass, or oppress the defendant by choosing an inconvenient forum.³⁵ A proper *forum non conveniens* analysis should determine where a trial would be most convenient and just for both parties.³⁶

In 1948, the U.S. Congress codified the doctrine of *forum non conveniens* in a statute that permits a district court to transfer a civil action to another district or division.³⁷ The use of common law *forum non conveniens* to dismiss a case thus became limited to state courts, and to federal courts in cases where the alternative forum is a foreign country.³⁸ This latter situation provided an opportunity for the U.S. Supreme Court to define the doctrine further in *Piper Aircraft Co. v. Reyno*.³⁹

Reyno involved a fatal air crash in Scotland in which many

31. *Id.* at 509. The Court stated that "[t]here is a local interest in having localized controversies decided at home." *Id.* The Court found no New York interest in the litigation at hand. *Id.* at 509-12. It stated that the trial court should also consider the burden of the litigation on its congested docket. *Id.* at 508. The *Gilbert* Court, however, did not analyze this factor in terms of the facts of the case at hand. *See id.* at 509-12. Another factor that the court may consider is the burden of jury duty on the community. *Id.* at 508-09. In *Gilbert*, the district court had rejected the plaintiff's argument that the Virginia jury would be more intimidated than a New York jury by the US\$400,000 amount in controversy. *Id.* at 510. The U.S. Supreme Court also rejected this argument and noted no reason for a New York jury to entertain the case. *Id.*

32. *Id.* at 509. The *Gilbert* Court noted that "[t]he course of adjudication in New York federal court might be beset with conflict of laws problems all avoided if the case is litigated in Virginia where it arose." *Id.* at 512.

33. *Id.* at 508 (discussing *forum non conveniens* analysis).

34. *Id.* The Court noted that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id.*

35. *Id.* The Court noted that "the plaintiff may not by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy." *Id.*

36. *See id.* at 507; *see also* *Koster v. Lumbermens Mut. Casualty Co.*, 330 U.S. 518, 527 (1947). The *Koster* Court stated that "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Id.*

37. 28 U.S.C. § 1404(a) (1988); *see supra* note 8 (containing text of section 1404(a)).

38. J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 7, at 91.

39. 454 U.S. 235 (1981).

witnesses and much evidence remained in the United Kingdom.⁴⁰ In *Reyno*, the plaintiff brought suit in the United States because Scottish law did not recognize strict liability in tort.⁴¹ The U.S. Supreme Court upheld the district court's *forum non conveniens* dismissal even though the defendant manufacturers of the plane and propeller were U.S. corporations.⁴²

The *Reyno* Court clarified a number of *forum non conveniens* issues that arise when a foreign country is the alternative forum.⁴³ The Court held that although the prerequisite of an alternative forum still exists, the trial court should not give conclusive or substantial weight to the possibility of different substantive law in the alternate forum.⁴⁴ In addition, the *Reyno* Court found that the plaintiff's right to choose a forum decreases if the plaintiff is foreign.⁴⁵ The *Reyno* Court also noted, however, that the need to apply foreign law in a U.S. forum is a factor favoring dismissal only when other *Gilbert* factors favor dismissal.⁴⁶ Finally, the *Reyno* Court clarified that to justify dismissal the trial need only be burdensome to the defendant, not fundamentally unfair.⁴⁷ The *Reyno* Court, like the *Gilbert*

40. *Id.* at 242. The deceased were Scottish citizens, and the plaintiff was the U.S. representative of the estates of the victims. *Id.* at 239-40. The defendants were the Pennsylvania manufacturer of the plane and the Ohio manufacturer of the propeller. *Id.* at 239. A company organized in the United Kingdom owned, registered, and maintained the plane while a Scottish company operated the plane. *Id.* An error by the Scottish pilot might have caused the crash. *Id.* The British Department of Trade investigated the accident and the preliminary report pointed to propeller failure. *Id.* All wreckage remained in England. *Id.* The U.S. Supreme Court found that the trial court did not abuse its discretion in employing the doctrine of *forum non conveniens*. *Id.* at 261.

41. *Id.* at 240.

42. *Id.* at 260-61.

43. *Id.* at 247.

44. *Id.* Under Scottish law, the decedents' relatives could bring a wrongful death action only for "loss of support and society." *Id.* at 240. As a result, plaintiff argued that Scotland did not provide an adequate alternative forum. *Id.* at 251. The Court rejected this argument. *Id.* The Court concluded that "[t]he possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Id.* at 247.

45. *Id.* at 265; see Note, *Forum Non Conveniens: Standards for the Dismissal of Actions from United States Federal Courts to Foreign Tribunals*, 5 FORDHAM INT'L L.J. 533, 564 (1982) (concluding that *Reyno* discourages manipulation of U.S. judicial system by foreign plaintiffs and that foreign plaintiffs' choice of U.S. forum "should be accorded little, if any, weight").

46. *Id.* at 260 n.29. The *Reyno* Court also stated that the trial court's discretion is reversible only upon a clear showing of abuse. *Id.* at 257.

47. *Id.* at 259.

Court, did not deal with specific venue statutes.⁴⁸

2. *Forum Non Conveniens* in Texas

Texas courts initially applied the doctrine of *forum non conveniens* without using it by name.⁴⁹ At the turn of the century, the courts declined jurisdiction over transitory causes of action for a number of reasons, all of which are factors in the current *forum non conveniens* analysis.⁵⁰ For instance, courts declined jurisdiction over cases that required the application of the law of another state or country having substantially different law than Texas.⁵¹ This ground for dismissal, known as the dissimilarity doctrine, mirrors the choice of law factor in *forum non con-*

48. See *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 728-29 (M.D. Pa. 1979), *rev'd*, 630 F.2d 149 (3d Cir. 1980), *rev'd*, 454 U.S. 235 (1981). The Supreme Court in *Gilbert* specifically noted that

in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*. But this was because the special venue act under which those cases are brought was believed to require it. Those decisions do not purport to modify the doctrine as to other cases governed by the general venue statutes.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 505 (1947) (citations omitted); see *infra* notes 77-79 and accompanying text (discussing jurisdiction); *infra* note 83 and accompanying text (discussing venue); *infra* notes 84-89 and accompanying text (discussing specific jurisdiction statutes and specific venue statutes).

49. See *infra* notes 50-60 and accompanying text (discussing *forum non conveniens* in Texas).

50. Compare *Mexican Nat'l R.R. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896) and *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S.W. 135 (1896) and *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890) with *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). The Texas Supreme Court defined a transitory cause of action by stating that "[i]f the cause of action be one that might have arisen anywhere, then it is transitory; if it could only have arisen in one place, then it is local." *Morris*, 78 Tex. at 20, 14 S.W. at 229. The Texas Supreme Court later stated that a transitory action may be maintained in any place where the defendant is found if no reason exists for the court not to entertain jurisdiction. *Jackson*, 89 Tex. 107, 33 S.W. 857.

51. See *Jackson*, 89 Tex. at 113, 33 S.W. at 860-61. The court specifically noted that "[t]he decisions of this court . . . establish the doctrine that the courts of this state will not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of this state in relation to the same subject." *Id.*

Jackson involved an injured employee who sued his employer, a Mexican railroad that extended into Texas, for negligence causing injuries he sustained in Mexico. *Id.* at 113, 33 S.W. at 857. Under the *lex loci delicti* rule that required the court to apply the law of the place where the tort occurred, the court found that Mexican law applied and that Mexican negligence law was sufficiently dissimilar to Texas law as to require dismissal of the case. *Id.* at 113-16, 33 S.W. at 860-61. The court also dis-

veniens.⁵² The Texas Supreme Court also declined jurisdiction on the ground of judicial comity—deference to the interests of another forum in the legal controversy.⁵³ Judicial comity overlaps the *forum non conveniens* consideration of the forum's interest in the litigation.⁵⁴

Moreover, Texas courts dismissed cases where they had jurisdiction over the defendants but the parties were non-residents and the causes of action originated outside Texas.⁵⁵ Texas courts also considered whether another forum had jurisdiction over the defendant and whether the other forum could better adjudicate the plaintiff's rights.⁵⁶ In addition, the Texas

missed the case on other grounds. *Id.* at 116-17, 33 S.W. at 861-62; *see infra* notes 56-58 and accompanying text (discussing other factors in *Jackson* dismissal).

52. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947); *supra* note 32 and accompanying text (discussing *forum non conveniens* choice of law factor).

53. *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890). The plaintiff in *Morris*, a U.S. citizen, became a resident of the Choctaw nation in the Indian Territory through marriage. *Id.* at 17, 14 S.W. at 228. He sued the defendant railroad, a Missouri corporation with an office and agent in Texas, for fire damage caused by defendant's locomotive to his personal property in the Indian Territory. *Id.* The court dismissed the case because the federal government, having jurisdiction over the Indian Territory, had the primary interest in the case. *Id.* at 22, 14 S.W. at 230. The court noted that "[j]urisdiction is entertained in such cases only upon principles of comity, and not as a matter of right." *Id.*; *see Mexican Nat'l R.R. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896). The court in *Jackson* also relied on comity principles in dismissing the plaintiff's case against a Mexican railroad, as well as on the ground that suit in Mexico would best serve public interest. *Id.* at 117, 33 S.W. at 861.

54. *Gilbert*, 330 U.S. at 509; *see supra* note 31 and accompanying text (discussing *forum non conveniens* public interest factors).

55. *See Morris*, 89 Tex. at 21, 14 S.W. at 230. The *Morris* court stated that "it has been held in such [transitory] actions, where the parties were non-residents and the cause of action originated beyond the limits of the state, these facts would justify the court in refusing to entertain jurisdiction." *Id.* (citation omitted).

This discretionary nature of jurisdiction that is the essence of *forum non conveniens* appears in *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S.W. 135 (1896). In *Graham*, the New Mexico plaintiff alleged that the defendant, a foreign corporation with an agent in El Paso, caused the destruction of his real and personal property in New Mexico. *Id.* The Texas Court of Civil Appeals noted that the district court had jurisdiction over the transitory cause of action involving the plaintiff's personal property. *Id.* at 568, 34 S.W. at 137. The Texas appeals court upheld the district court's decision to hear the case, noting that "had the district court, in the exercise of a sound discretion, refused to entertain jurisdiction of the case at all, this court would not have felt called upon to review its action." *Id.* at 567-68, 34 S.W. at 135. The appeals court also noted that when the district court "assumed jurisdiction, its action [would] not be disturbed in the absence of any facts tending to show that there was an abuse of discretion." *Id.*

56. *See Jackson*, 89 Tex. at 116, 33 S.W. at 861.

courts weighed the factors of public interest and justice.⁵⁷ Finally, even at the turn of the century, Texas courts considered the question of overburdened court dockets in deciding whether to dismiss a case.⁵⁸ These factors are all components of the U.S. Supreme Court's *forum non conveniens* analysis.⁵⁹

In this century, Texas courts dismissed cases under the dissimilarity doctrine⁶⁰ and the *forum non conveniens* doctrine.⁶¹ In 1979, however, the Texas Supreme Court abolished the dissimilarity doctrine.⁶² Texas courts applied *forum non conveniens* only sporadically after 1979.⁶³ Finally, in March of 1990, the

57. See *id.* at 116-17, 33 S.W. at 861 (considering grounds of Mexico's public interest, and justice not demanding that Texas exercise jurisdiction); Missouri, Kan. & Tex. Ry. Co. of Tex. v. Godair Comm'n Co., 39 Tex. Civ. App. 298, 299, 87 S.W. 871, 872 (1905) (affirming district court's refusal to dismiss because district court had "determined the question of public policy in favor of entertaining jurisdiction").

58. See Mexican Nat'l R.R. Co. v. Jackson, 89 Tex. 107, 117, 33 S.W. 857, 862 (1896); *Graham*, 12 Tex. Civ. App. at 572, 34 S.W. at 138. The *Jackson* court noted that "[i]f the facts showed that [hearing the case] was necessary in order to secure justice, and the laws were such as we could properly enforce, this consideration [of overburdened dockets] would have but little weight; but we feel that it is entitled to be considered where the plaintiff chooses this jurisdiction as a matter of convenience, and not of necessity." *Jackson*, 89 Tex. at 118, 33 S.W. at 862. The *Graham* court, in affirming the El Paso district court's maintenance of jurisdiction, noted that the case would place no burden on the El Paso court docket. *Graham*, 12 Tex. Civ. App. at 572, 34 S.W. at 138.

59. See *supra* notes 18-34 and accompanying text (discussing *forum non conveniens* analysis of U.S. Supreme Court).

60. See *Carter v. Tillery*, 257 S.W.2d 465 (Tex. Civ. App. 1953) (holding that no Texas jurisdiction over personal injury/negligence action arises out of plane crash in Mexico involving Texas plaintiff and defendant due to material differences between Texas and Mexican law), *writ ref'd*; *El Paso & Juarez Traction Co. v. Carruth*, 255 S.W. 159 (Comm. App. of Tex. 1923) (stating that laws of Texas and Mexico sufficiently different as to require dismissal for lack of jurisdiction).

61. See *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962) (reversing trial court's dismissal on ground of *forum non conveniens*); *Corliss v. Smith*, 560 S.W.2d 166 (Tex. Civ. App. 1977) (holding that no automatic assumption of jurisdiction exists despite long-arm statute when practical considerations warrant otherwise); *Cherokee Village v. Henderson*, 538 S.W.2d 169 (Tex. Civ. App. 1976) (*forum non conveniens* not available where parties are residents of state), *writ dismissed*; *Forcum-Dean Co. v. Missouri Pac. R.R. Co.*, 341 S.W.2d 464 (Tex. Civ. App. 1960) (holding that *forum non conveniens* provided ground for dismissal of action brought by Colorado partnership against Missouri railroad for damages to fruit shipped on defendant's railroad through Texas), *writ dismissed*.

62. See *Gutierrez v. Collins*, 583 S.W.2d 312, 321 (Tex. 1979).

63. See, e.g., *Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719, 720 (Tex. Civ. App. 1989) (noting that personal jurisdiction over defendant does not necessarily mean forum is convenient); *McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666 (Tex. Civ. App. 1985) (affirming district court's *forum non conveniens* dismissal of wrongful death action brought by Texas residents against California cor-

Texas Supreme Court held that the Texas Wrongful Death Statute (the "Texas Statute")⁶⁴ precludes a *forum non conveniens* dismissal in cases arising under the statute.⁶⁵

3. *Forum Non Conveniens* in Other States

The majority of state courts, as well as federal courts, currently utilize the doctrine of *forum non conveniens*.⁶⁶ Thirty-three states recognize the common law doctrine of *forum non conveniens*.⁶⁷ Two states have incorporated the doctrine into a procedural rule.⁶⁸ Six states have adopted the doctrine by statute.⁶⁹ Additionally, nine states have either rejected the doctrine or have not addressed its applicability as a ground for dismissal.⁷⁰

In the federal courts, the most dramatic recent use of the doctrine occurred in the litigation stemming from the Union Carbide gas leak in Bhopal, India.⁷¹ In that case, the U.S. Court of Appeals for the Second Circuit upheld dismissal of the litigation.⁷² The court declared that India was a more convenient forum.⁷³ The dismissal produced a flood of legal com-

poration concerning plane crash in Colorado in which Colorado citizen died); *Ismail v. Ismail*, 702 S.W.2d 216 (Tex. Civ. App. 1985) (holding that court should retain jurisdiction in divorce case between two Egyptian citizens where parties owned property in Texas and Texan law applied), *writ ref'd*. The author found only three Texas cases using *forum non conveniens* after 1979.

64. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

65. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991); see *In re Air Disaster at Lockerbie, Scotland*, 1991 U.S. App. LEXIS 4779 (2d Cir. Mar. 22, 1991) (holding that Warsaw Convention preempts state wrongful death actions when claim falls under scope of Convention regarding international transportation).

66. See *supra* notes 8-10 and accompanying text (discussing status of *forum non conveniens* in federal and state courts).

67. See *supra* note 9 (listing states applying common law *forum non conveniens*).

68. See IND. R. TRIAL PROC. 4.4(c) (1971); N.D. R. CIV. PROC. 4(b)(5) (1983).

69. See *supra* note 8 (listing state *forum non conveniens* statutes).

70. See *supra* note 10 (listing states that do not use *forum non conveniens*).

71. *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir.), *cert. denied*, 484 U.S. 871 (1987).

72. *Id.* at 202.

73. *Id.*; see *In re Union Carbide Corp.*, 1991 U.S. App. LEXIS 921 (2d Cir. Feb. 25, 1991) (holding that *forum non conveniens* dismissal does not preclude subsequent exercise by district court of ancillary jurisdiction to consider fee applications by plaintiffs' attorneys). The court noted, however, that the trial court has discretion to exercise ancillary jurisdiction based on judicial economy, convenience, and fairness to litigants. *Id.*

mentary, much of it negative.⁷⁴ The doctrine of *forum non conveniens*, in both state and federal courts, thus remains a controversial one.⁷⁵

B. *Specific Jurisdiction Statutes and Forum Non Conveniens*

1. Specific Jurisdiction Statutes and Specific Venue Statutes

Before a court can dismiss a case on the ground of *forum non conveniens*, it must possess jurisdiction and it must be the proper venue for the case.⁷⁶ Jurisdiction over the defendant must conform to the requirements of the Due Process Clause of the fourteenth amendment to the U.S. Constitution.⁷⁷ In

74. See McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 *TEX. INT'L L.J.* 333 (1985); Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 *DEN. J. INT'L L. & POL'Y* 235 (1987); Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 *GEO. WASH. J. INT'L L. & POL'Y* 215 (1988); Note, *The Bhopal Incident: How the Courts Have Faced Complex International Litigation*, 5 *B.U. INT'L L.J.* 445 (1987); Note, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 *GA. J. INT'L & COMP. L.* 109 (1986); Note, *The Razor's Edge: The Doctrine of Forum Non Conveniens and the Union Carbide Methyl Isocyanate Gas Disaster at Bhopal, India*, 10 *N.C. J. INT'L L. & COM. REG.* 743 (1985).

75. See Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 *CALIF. L. REV.* 1259 (1986).

76. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947); see *supra* notes 21-24 (discussing prerequisites to *forum non conveniens* analysis); cf. *Hoffman v. Blaski*, 363 U.S. 335 (1960) (holding that court can transfer action pursuant to 28 U.S.C. § 1404 only to court where jurisdiction and venue are proper).

77. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878); see *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). In *International Shoe*, the U.S. Supreme Court stated that

due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id. at 316 (citations omitted).

Due process also requires that the court give adequate notice of the suit to the defendant. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950). Moreover, the court must have authority to rule upon the subject matter of the litigation. *Pennoyer*, 95 U.S. at 733. The U.S. Congress under the guidance of the U.S. Constitution determines the subject matter jurisdiction of the federal courts. U.S. CONST. art. III, §§ 1 & 2; see 28 U.S.C. § 1331 (1988) (setting forth general subject matter jurisdiction of federal district courts); *id.* § 1367 (setting forth supplemental jurisdiction of federal district courts); see also J. FRIEDENTHAL, M. KANE & A. MILLER, *supra* note 7, at 13 (summarizing federal subject matter jurisdiction). State constitutions and legislatures determine the subject matter jurisdiction of the state courts. See TEX. CONST. art. V, § 8 (setting forth general subject matter jurisdiction of Texas state district courts).

determining such conformity, a court must analyze whether the defendant's contacts with the forum state warrant a finding of jurisdiction.⁷⁸ In analyzing these contacts, the court should consider factors of fairness and reasonableness.⁷⁹ Some U.S. statutes provide nationwide service of process for specific causes of action, thus achieving personal jurisdiction over defendants in actions that comply with the statute.⁸⁰ Some states possess general service statutes that provide for personal jurisdiction in state courts under circumstances co-terminous with due process jurisdiction.⁸¹ Most states provide for personal jurisdiction over an out-of-state defendant only if the defendant falls within the specific terms of the statute that constitute additional limitations on personal jurisdiction more stringent than the constitutional limits.⁸²

Some statutes confer subject matter jurisdiction, in addi-

78. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980). In the minimum contacts analysis, the Supreme Court has concentrated on the notion of foreseeability. *Id.* at 291. The Court stated that "[t]he defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

79. *Id.* at 292. The U.S. Supreme Court enumerated these factors. *Id.* The suit should comply with notions of fairness and justice. *Id.* The forum should be reasonable. *Id.* The court should consider the forum state's interest in the litigation. *Id.* Moreover, the court should consider the plaintiff's convenience and need for effective relief. *Id.* Furthermore, the court should look to an efficient resolution of the litigation. *Id.* Finally, the court may consider the fundamental social policy interest of the several states. *Id.* In his dissent, Justice Brennan advocated greater consideration of the fairness and reasonableness factors, including the actual inconvenience to the defendant. *Id.* at 299-300 (Brennan, J., dissenting).

The Supreme Court later gave even greater weight to these fairness and justice factors. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the weight of these factors was enough for the Court to find a lack of personal jurisdiction, despite the presence of minimum contacts between the defendant and the forum. *Id.* at 114-16.

80. See 15 U.S.C. § 78u(b) (1988) (empowering members of Securities and Exchange Commission to compel attendance of witnesses and production of records throughout United States); *id.* § 1312(d)(1) (granting nationwide jurisdiction in anti-trust actions); 18 U.S.C. § 1965 (1988) (allowing RICO actions to be instituted in any U.S. district court in which defendant resides, is found, has agent, or transacts affairs).

81. See CAL. CIV. PROC. CODE §§ 413.10 & 415.40 (West 1973) (providing for service of summons on parties outside California); R.I. GEN. LAWS § 9-5-33 (1985) (providing for long-arm jurisdiction not contrary to U.S. Constitution).

82. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041, 17.042, 17.043, 17.044 & 17.045 (conveying personal jurisdiction in tort actions where non-resident defendant does business in Texas). The statute considers the defendant's activity as doing business

tion to venue, on courts.⁸³ Specific subject matter jurisdiction statutes empower courts to hear particular causes of action.⁸⁴ Specific venue statutes enumerate the districts or courts in which a plaintiff may bring a specific cause of action.⁸⁵ Even

if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents directly or through an intermediary located in this state, for employment inside or outside the state.

Id. § 17.042. Known as "long-arm" statutes, such statutes create "long-arm" jurisdiction. *Id.*

83. *See* 28 U.S.C. § 1331 (1988). General subject matter jurisdiction statutes confer jurisdiction over a wide range of causes of action. *See id.* § 1332(a) (conferring general subject matter jurisdiction on federal district courts over actions involving diversity of citizenship).

To determine if venue is proper, the court must look to the appropriate venue statute that states that

(a) A civil action wherein jurisdiction is founded only in diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only [in] (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Judicial Improvement Act of 1990, Pub. L. No. 101-650 § 311, 104 Stat. 5114 (1990).

The Texas general venue statute states that "[e]xcept as otherwise provided by this subchapter . . . all lawsuits shall be brought in the county in which all or part of the cause of action accrued or in the county of the defendant's residence if defendant is a natural person." TEX. CIV. PRAC. & REM. CODE ANN. § 15.001 (Vernon 1986).

84. *See* 45 U.S.C. §§ 51-60 (1988). The pertinent part of FELA states that "[u]nder this chapter an action may be brought in a district court of the United States." *Id.* § 56. The Texas Wrongful Death Statute states that "[a]n action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state." TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 1986).

85. *See* 45 U.S.C. § 56 (1988). FELA states that "[u]nder this chapter an action may be brought . . . in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." *Id.*; *see* 46 U.S.C. § 688 (1988) (codifying Jones Act) (granting cause of action for damages at law to seamen who suffer personal injury in

though some of these statutes may authorize both jurisdiction and venue, the exercise of personal jurisdiction based on the defendant's contacts with the forum state must still satisfy the requirement of due process.⁸⁶

The U.S. Supreme Court has occasionally considered questions of case dismissals brought under specific subject matter jurisdiction or venue statutes.⁸⁷ In many instances,

course of employment). The Jones Act states that "[j]urisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." *Id.*

86. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 435, 176 N.E.2d 761, 762 (1961). In *Gray*, the Illinois Supreme Court decided whether a state long-arm statute violated due process of law. *Id.* at 435, 176 N.E.2d at 762. The long-arm statute provided that a non-resident who commits a tortious act within the state submits to jurisdiction of the state court. *Id.* The analysis regarding a long-arm statute thus becomes whether the defendant submits to jurisdiction under the statute and whether such jurisdiction violates due process. *Id.*; see *Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc.*, 32 N.Y.2d 583, 300 N.E.2d 421, 347 N.Y.S.2d 47 (1973) (noting that purpose of New York long-arm statute was to extend jurisdiction of New York courts to nonresidents who have engaged in purposeful activity in relation to matter of suit and that single transaction complies with statute).

87. See, e.g., *Douglas v. New York, N.H. & Hartford R.R. Co.*, 279 U.S. 377 (1929) (upholding state court's dismissal of case brought under specific jurisdiction and venue statute). In another FELA action twelve years later, the Court held that a district court could not dismiss an action appropriately brought under a specific venue statute. *Baltimore and Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941).

In *Kepner*, the defendant, a citizen of Ohio and employee of the plaintiff, brought an action under FELA against the plaintiff in the U.S. District Court for the Eastern District of New York. *Id.* at 48. The plaintiff, an interstate railroad, was doing business in that district. *Id.* The defendant sustained injury in Ohio. *Id.* The plaintiff sought an injunction in Ohio state court to bar the defendant's suit in the Eastern District of New York. *Id.* The Ohio trial court dismissed the plaintiff's action. *Id.* Both the Ohio Court of Appeals and the Ohio Supreme Court affirmed, holding that an employee had a right under FELA to bring an action. *Id.* at 48-49. The U.S. Supreme Court confirmed that "[a] privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative." *Id.* at 54.

In 1947, however, when the U.S. Supreme Court clarified the doctrine of *forum non conveniens*, it upheld the use of *forum non conveniens* in cases where a general venue statute conveyed jurisdiction. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). Subsequently, in a slight retreat from *Kepner*, the Court permitted a Missouri state court to apply the *forum non conveniens* doctrine to a FELA action. *Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1 (1950). In his opinion, Justice Frankfurter, who wrote the dissenting opinion in *Kepner*, claimed that *Kepner* did not limit

the power of a State to deny access to its courts to persons seeking recovery under the [FELA] if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially . . . so as not to involve a discrimination against [FELA] suits and not to offend against the

these statutes conflict with the doctrine of *forum non conveniens* because the doctrine appears to override the intent of the statutes to confer jurisdiction.⁸⁸ As a result of these decisions, the interaction among *forum non conveniens*, specific subject matter jurisdiction statutes, and specific venue statutes remains unresolved.⁸⁹

2. The Texas Wrongful Death Statute and *Forum Non Conveniens*

Like the federal courts, the Texas courts have struggled with the issue of whether a specific subject matter jurisdiction statute or a long arm statute precludes a *forum non conveniens* dismissal.⁹⁰ A conflict developed over time between *forum non*

Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers' Liability Act empowers their courts to entertain suits arising under it.

Id. at 4 (citations omitted). Unlike the action in *Mayfield*, the FELA action in *Kepner* originated in a federal, not state, court. *Kepner*, 314 U.S. at 48. FELA directly confers subject matter jurisdiction and venue on specific federal, not state, courts. 45 U.S.C. § 56 (1988); see *supra* note 2 (containing text of FELA statute). The *Mayfield* Court thus did not overrule its prior ruling that a district court could not dismiss a FELA action. See *Mayfield*, 340 U.S. at 4. In addition, between the *Kepner* and *Mayfield* decisions, Congress enacted the change of venue statute. See 28 U.S.C. § 1404(a) (1988). Section 1404 permits a federal court to transfer certain cases. *Id.* In his concurring opinion in *Mayfield*, Justice Jackson noted that "[c]ertainly a State is under no obligation to provide a court for two nonresident parties to litigate a foreign-born cause of action when the Federal Government, which creates the cause of action, frees its own courts within that State from mandatory consideration of the same case." *Mayfield*, 340 U.S. at 6 (Jackson, J., concurring).

Montana and Georgia have declined to apply the doctrine of *forum non conveniens* in FELA cases. *Brown v. Seaboard Coast Lines R.R. Co.*, 229 Ga. 481, 192 S.E.2d 382, 383 (1972); *Labella v. Burlington N. Inc.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

88. See *supra* notes 84-85 and accompanying text (discussing statutes conferring subject matter jurisdiction).

89. See, e.g., *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990) (noting that U.S. Court of Appeals for Fifth Circuit maintains federal defense of *forum non conveniens* in Jones Act cases, overriding Louisiana law that does not recognize *forum non conveniens*); *Go-Video, Inc. v. Akai Elec. Co.*, 885 F.2d 1406 (9th Cir. 1989) (holding that special venue provisions of Clayton Act supplement rather than preempt general venue statutes), *injunction pending appeal denied sub nom.*, *Go-Video, Inc. v. Matsushita Elec. Indus. Co.*, 111 S. Ct. 671 (1991); *Brown v. Seaboard Coast Lines R.R. Co.*, 229 Ga. 481, 192 S.E.2d 382, 383 (1972) (holding that FELA does not permit *forum non conveniens* defense).

90. See *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932), *writ ref'd*; *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962); *Couch v. Chevron Int'l Co.*, 682 S.W.2d 534 (Tex. 1984) (per curiam); *McNutt v. Teledyne Indus. Inc.*, 693 S.W.2d 666 (Tex. Civ. App. 1985) (all dealing with Texas Statute); see also *Corliss v. Smith*, 560 S.W.2d 166

conveniens and the Texas Wrongful Death Statute (the “Texas Statute”) that grants specific subject matter jurisdiction.⁹¹ The Texas legislature enacted the predecessor of the current Texas Statute in 1913 (the “Act of 1913”).⁹² The Act of 1913 con-

(Tex. Civ. App. 1977) (declining to assert jurisdiction even though plaintiffs’ case satisfied requirements of specific jurisdiction statute of family law code); *Van Winkle-Hooker Co. v. Rice*, 448 S.W.2d 824 (Tex. Civ. App. 1969) (holding that *forum non conveniens* dismissal violates public policy of “long-arm” personal jurisdiction statute).

91. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986). The Texas Statute currently states that

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Id.; see *Allen*, 47 S.W.2d 426; *Flaiz*, 359 S.W.2d 872; *Couch*, 682 S.W.2d 534; *McNutt*, 693 S.W.2d 666.

92. Act of April 8, 1913, ch. 161 § 1, 1913 Tex. Gen. Laws 338 [hereinafter Act of 1913]. The wording of the text is as follows:

An Act for the protection of persons of this State who may be injured in a foreign country and providing for adequate compensation therefor, and declaring an emergency.

SECTION 1. That whenever the death or personal injury of a citizen of this State or of a country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by a wrongful act, neglect or default in any State, for which a right to maintain an action and recover damages in respect thereof is given by a statute or by law of such State, territory or foreign country, such right of action may be enforced in the courts of the United States, or in the courts of this State, within the time prescribed for the commencement of such action by the statute of this State, and the law of the former shall control in the maintenance of such action in all matters pertaining [pertaining] [sic] to procedure.

SEC. 2. The fact that there is now no law permitting citizens of this State who receive injuries in a foreign country from bringing an action for said injuries under the laws of this State, creates an emergency and imperative public necessity requiring that the constitutional rule that bills shall be read upon three several days, should be suspended and it is hereby suspended, and this Act shall take effect from and after its passage.

Id.

ferred a right to bring actions in Texas courts for wrongful death or personal injury on citizens of Texas or foreign countries having equal treaty rights with the United States.⁹³ In 1917, the Texas legislature amended the Act of 1913 to include actions brought by citizens of other U.S. states (the "Act of 1917").⁹⁴

Under the Act of 1917, the Texas Court of Civil Appeals in *Allen v. Bass*⁹⁵ held that a New Mexican plaintiff had an absolute right to bring his personal injury case in a Texas court and that the trial court had no discretion to dismiss the action.⁹⁶ The *Allen* court viewed the Act of 1913 and the Act of 1917 as conveying compulsory jurisdiction over certain wrongful death or personal injury actions.⁹⁷ The legislature has amended the

93. *Id.*

94. Act of March 30, 1917, ch. 156, § 1, 1917 Tex. Gen. Laws 365 [hereinafter Act of 1917]. The amended text read as follows:

An Act for the protection of citizens of this State and of the United States, and citizens of countries having equal treaty rights with the United States on behalf of their citizens, who may be killed or injured in a foreign state or country, and providing for the procedure of trying such suits and causes of action in the courts of the State of Texas, and providing compensation therefor, and declaring an emergency.

SEC. 1. That whenever the death or personal injury of a citizen of this State or of the United States, or of any foreign country having equal treaty rights with the United States on behalf of its citizens, has been or may be caused by the wrongful act, neglect or default of another in any such foreign state or country for which a right to maintain an action and recover damages thereof is given by the statute or law of such foreign state or country, such right of action may be enforced in the courts of this State within the time prescribed for the commencement of such actions by the statute of this State, and the law of the forum shall control in the prosecution and maintenance of such action in the courts of this State in all matters pertaining to the procedure.

SEC. 2. The fact that there is now no law permitting citizens of this State, or of a foreign state or country, who may be killed or injured in a foreign state or country, for bringing an action for such injury or death under the laws of this State and in the courts of this State, creates an emergency and imperative public necessity

Id.

95. 47 S.W.2d 426 (Tex. Civ. App. 1932), *writ ref'd.*

96. *Id.* at 427. The *Allen* case involved a vehicular accident. *Id.* The plaintiff was a citizen of New Mexico. *Id.* The defendant driver was also from New Mexico, while the defendant insurer of the driver did business and maintained offices in both Texas and New Mexico. *Id.*

97. *Id.* In 1947, a legal commentator listed Texas as one of the states that did not recognize the doctrine of *forum non conveniens*, citing *Allen* for support. Barrett, *supra* note 13, at 388 n.40.

Texas Statute since *Allen*.⁹⁸ Until 1990, however, neither the legislature nor the Texas Supreme Court addressed the issue of whether the Texas Statute precluded a *forum non conveniens* dismissal.⁹⁹

II. THE CASTRO ALFARO DECISION

In *Castro Alfaro*, an international tort case, the Supreme Court of Texas concluded that a specific subject matter jurisdiction statute, the Texas Statute, precludes a *forum non conveniens* dismissal.¹⁰⁰ The Texas Supreme Court thereby abolished *forum non conveniens* in cases brought under the Texas Statute.¹⁰¹ This decision has removed a major barrier to international tort litigation in Texas.¹⁰²

A. Facts and Procedural History

In *Castro Alfaro*, Costa Rican farm workers brought an action in Texas state court alleging injuries from the use of a

98. See Act of June 19, 1975, ch. 530 § 2, 1975 Tex. Gen. Laws 1381, 1382 [hereinafter Act of 1975]. The new language states that "[a]ll matters pertaining to procedure in the prosecution or maintenance of such action in the courts of this State shall be governed by the law of this State, and the court shall apply such rules of substantive law as are appropriate under the facts of the case." *Id.* This amendment resolved the problems of the *lex loci delicti* principle and the dissimilarity doctrine. See *id.*; *supra* note 55 and accompanying text (discussing *lex loci delicti* and dissimilarity). The current codification of the Texas Statute took effect on September 1, 1985. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986); *supra* note 91 (setting forth text of Texas Statute).

99. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 677-78 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991); *Couch v. Chevron Int'l Co.*, 682 S.W.2d 534 (1984). The court in *Couch* did not reach the issue of *forum non conveniens* but dismissed the case because the plaintiffs waived the wrongful death cause of action by not pleading it until appeal. *Id.* at 535. The court, however, did note that "the applicability of *forum non conveniens* to a [wrongful death] cause of action is an open question." *Id.* at 535; *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962). In *Flaiz*, the Texas Supreme Court reversed the trial court's opinion that dismissed a personal injury action because South Dakota law would have applied. *Id.* at 873. The *Flaiz* court refrained from deciding the extent of *forum non conveniens* in Texas, and whether the Texas Statute precluded a *forum non conveniens* dismissal. *Id.* at 874. Subsequently, the fifth appellate district in Texas found that the Texas Statute was permissive, not mandatory, in regard to a court's exercise of jurisdiction. See *McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666 (Tex. Civ. App. 1985).

100. *Castro Alfaro*, 786 S.W.2d at 679. *Castro Alfaro* involved the Texas Statute giving a right to foreign plaintiffs to bring a wrongful death action in Texas. *Id.* at 675; see TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

101. See *Castro Alfaro*, 786 S.W.2d at 679.

102. *Id.* at 690 (Gonzalez, J., dissenting).

pesticide.¹⁰³ Dow Chemical Company ("Dow") and Shell Oil Company ("Shell"), U.S. corporations, both manufactured the pesticide.¹⁰⁴ Shell's world headquarters are located in Houston, Texas.¹⁰⁵ Dow maintains its headquarters in Michigan but conducts much of its business through its Houston office and operates its largest chemical plant in Texas.¹⁰⁶

The defendants contested the jurisdiction of the trial court and argued, in the alternative, for a *forum non conveniens* dismissal.¹⁰⁷ The trial court found jurisdiction under the Texas Statute but summarily granted the *forum non conveniens* dismissal.¹⁰⁸ The court of appeals reversed the decision of the trial court, holding that the Texas Statute abolished the doctrine of *forum non conveniens* in cases brought under the Texas Statute.¹⁰⁹ The Texas Supreme Court affirmed the decision of the appellate court in a five to four decision.¹¹⁰

B. *The Majority Opinion*

The majority opinion, written by Justice Ray, rested upon three basic premises.¹¹¹ The first premise of the majority opinion maintained that the Act of 1913 may have superseded the

103. *Id.* at 675. The plaintiffs' employer, Standard Fruit Company, a U.S. corporation, purchased the pesticide, dibromochloropropane ("DBCP") from Dow Chemical Company ("Dow"). *Id.*

104. *Id.* Dow shipped DBCP to Costa Rica after the U.S. Environmental Protection Agency banned domestic use of DBCP in 1977. *Id.* at 681 (Doggett, J., concurring).

105. *Id.* In fact, Shell's headquarters are located three blocks from the courthouse where the *Castro Alfaro* case was filed. *Id.*

106. *Id.*

107. *Id.* at 675. The defendants made this motion almost three years after the filing of the suit. *Id.* Prior to this motion, Dow and Shell attempted unsuccessfully to remove the suit to federal district court. *Id.* Justice Doggett, in his concurrence, noted that no clear basis existed for federal jurisdiction and that the federal district court, "in remanding the case, labelled Shell and Dow's efforts to distinguish plainly controlling authority against removal 'specious.'" *Id.* at 682 n.4 (Doggett, J., concurring).

108. *Id.* Justice Hecht noted in his dissent that "[t]he trial court in the present case did not provide this essential basis [the reasons and factors it considered in dismissing the case] for its decision to dismiss this case." *Id.* at 708 (Hecht, J., dissenting).

109. *Castro Alfaro v. Dow Chem. Co.*, 751 S.W.2d 208 (Tex. App. 1988), *aff'd*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

110. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

111. *Id.* at 674-79.

doctrine of *forum non conveniens* in wrongful death cases.¹¹² Relying on Texas case law and commentaries, Justice Ray concluded that the doctrine existed prior to the Act of 1913.¹¹³ The majority found that Texas courts, as well as U.S. federal courts, applied the doctrine of *forum non conveniens* in principle, if not by name, prior to 1913.¹¹⁴ The majority concluded that because *forum non conveniens* existed in Texas prior to 1913, the legislature thus could have abolished *forum non conveniens* by the Act of 1913.¹¹⁵

The second rationale of the majority opinion stated that the Texas Statute confers compulsory jurisdiction on Texas courts.¹¹⁶ In reaching this conclusion, the majority focused on the Texas Statute's wording that an action may be enforced.¹¹⁷ The court interpreted this wording as mandatory rather than permissive.¹¹⁸ Thus, the court concluded that the Texas Statute's wording barred a *forum non conveniens* dismissal.¹¹⁹

Finally, the court recognized the *Allen* decision as valid precedent.¹²⁰ The majority noted that, in *Allen*, the Texas

112. *Id.* at 676.

113. *Id.* at 676-77. The majority relied on several cases and commentators. *Id.*; see *Baltimore and Ohio R.R. Co. v. Kepner*, 314 U.S. 44 (1941); *Rogers v. Guaranty Trust Co. of N.Y.*, 288 U.S. 123 (1933); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413 (1932); *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515 (1930); *Mexican Nat'l R.R. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896); *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890); *Missouri, Kan. and Tex. Ry. Co. of Tex. v. Godair Comm. Co.*, 39 Tex. Civ. App. 298, 87 S.W. 871, 872 (1905); *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S.W. 135 (1896); *Blair*, *supra* note 12; *Barrett*, *supra* note 13.

The majority noted that "although Justice Gonzalez is correct that the first reported case using the term 'forum non conveniens' is *Garrett v. Phillips Petroleum Co.*, the doctrine itself was effectively established in Texas before the enactment of article 4678 [the Texas Statute] by the legislature in 1913." *Castro Alfaro*, 786 S.W.2d at 677 (citation omitted).

114. *Castro Alfaro*, 786 S.W.2d at 677; see *supra* note 113 (containing cases relied on by *Castro Alfaro* court).

115. *Castro Alfaro*, 786 S.W.2d at 679.

116. *Id.* at 674.

117. *Id.* at 675. For text of the Texas Statute, see *supra* note 91.

118. See *id.* at 679-80 (Hightower, J., concurring).

119. *Id.* at 679.

120. *Id.* at 678; see *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932), *writ ref'd* (Tex.). *Allen* held that the Texas Statute prevented Texas courts from declining jurisdiction of cases arising under the Texas Statute. *Id.* Justice Ray located the court's approval of *Allen* in its refusal to hear the *Allen* defendant's appeal. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 678 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991); see *supra* note 96 (discussing facts of *Allen*).

Court of Civil Appeals held that the Texas Statute gave a plaintiff an absolute right to maintain an action under the Texas Statute.¹²¹ The Texas Supreme Court subsequently denied the defendant's Writ of Error.¹²² The *Castro Alfaro* court interpreted this rejection as a manifestation of the Texas Supreme Court's tacit approval of the *Allen* decision.¹²³ Based on this terse interpretation of the Texas Statute and *Allen*, the *Castro Alfaro* court concluded that the Texas Statute abolished the doctrine of *forum non conveniens* as a defense in wrongful death actions brought under the Texas Statute.¹²⁴

C. The Concurring Opinions

Justices Hightower and Doggett each filed separate concurring opinions.¹²⁵ The two concurring opinions diverged from the majority opinion and from each other.¹²⁶ Justice Hightower, in his concurrence, supported the majority's inter-

121. *Castro Alfaro*, 674 S.W.2d at 678-79. The majority quoted the *Allen* holding that "article 4678 [the Texas Statute] opens the courts of this state to citizens of a neighboring state and gives to them an *absolute right* to maintain a transitory action of the present nature and to try their cases in the courts of this state." *Id.* at 678 (quoting *Allen*, 47 S.W.2d at 427) (emphasis in original).

122. *Castro Alfaro*, 786 S.W.2d at 679. A writ of error is a writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, in order that examination may be made of certain errors alleged to have been committed, and that the judgment may be reversed, corrected, or affirmed, as the case may require. It is brought for supposed error in law apparent on record and takes case to higher tribunal, which affirms or reverses. It is commencement of new suit to set aside judgment, and is not continuation of suit to which it relates.

BLACK'S LAW DICTIONARY 1610 (6th ed. 1990). In Texas, a litigant appeals an appellate court decision by filing an application for a writ of error to the Supreme Court. See TEX. GOV'T CODE ANN. §§ 22.001, 22.007 (Vernon 1986).

123. *Castro Alfaro*, 786 S.W.2d at 679. The court noted that the petitioner in *Allen* made an argument for the application of *forum non conveniens* similar to the arguments defendants made for its application in *Castro Alfaro*. *Id.* at 678. The Texas legislature, however, has distinctly stated that "[t]he refusal or dismissal of an application [for writ of error] shall not be regarded as a precedent or authority." TEX. GOV'T CODE ANN. § 22.007 (Vernon 1986).

124. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991). The majority stated that "the legislature has statutorily abolished the doctrine of *forum non conveniens* in suits brought under section 71.031 [the Texas Statute]." *Id.*

125. *Id.* at 679 (Hightower, J., concurring); *id.* at 680 (Doggett, J., concurring).

126. Compare *id.* at 679 (Hightower, J., concurring) with *id.* at 680 (Doggett, J., concurring).

pretation of the Texas Statute but recommended a change in the statute to accommodate a *forum non conveniens* dismissal.¹²⁷ Justice Doggett, however, supported the majority decision but expanded upon it, addressing issues raised by the dissent and generally criticizing the doctrine of *forum non conveniens*.¹²⁸

Justice Hightower agreed that the legislature's enactment of the Texas Statute abolished *forum non conveniens*.¹²⁹ In support of this conclusion, Justice Hightower found the wording of the Texas Statute to be mandatory rather than permissive.¹³⁰ Nevertheless, Justice Hightower supported the codification of *forum non conveniens* as a procedural aid,¹³¹ and urged the legislature to clarify its intent in regard to the Texas Statute.¹³²

Justice Doggett's concurrence reinforced the majority opinion.¹³³ He relied on *Allen* to state that the Act of 1913 abolished *forum non conveniens* in wrongful death actions in Texas.¹³⁴ Justice Doggett, however, then engaged in a broad discussion of *forum non conveniens*.¹³⁵

Justice Doggett's opinion criticized the doctrine of *forum non conveniens* on grounds of international public policy and justice.¹³⁶ Justice Doggett noted that a *forum non conveniens* dis-

127. *Id.* at 679-80 (Hightower, J., concurring).

128. *Id.* at 680-89 (Doggett, J., concurring).

129. *Id.* at 679 (Hightower, J., concurring). Justice Hightower noted that "the Texas legislature statutorily abolished the doctrine of *forum non conveniens* when it enacted the predecessors of section 71.031." *Id.*

130. *Id.*

131. *Id.* Justice Hightower stated that the doctrine is "a useful tool of judicial administration," but "the wording of section 71.031 is clear and we must respect what the legislature has done." *Id.* at 679 & 680 (Hightower, J., concurring).

132. *Id.* at 680 (Hightower, J., concurring).

133. *Id.* at 680 (Doggett, J., concurring).

134. *Id.* at 682 (Doggett, J., concurring).

135. *Id.* at 680-89 (Doggett, J., concurring). Justice Doggett remarked that "the 'doctrine' . . . has nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad." *Id.* at 680-81 (Doggett, J., concurring).

136. *Id.* Justice Doggett's recitation of the facts of the case stressed the dominant U.S. activity of the tort in question, highlighting the tendency of the *forum non conveniens* doctrine to shield international corporations from accountability for such conduct. *Id.* Justice Doggett noted that

[t]he banana plantation workers allegedly injured by DBCP were employed by an American company on American-owned land and grew Dole bananas for export solely to American tables. The chemical allegedly rendering the workers sterile was researched, formulated, tested, manufactured, labelled

missal is often outcome determinative.¹³⁷ Thus, a *forum non conveniens* dismissal often results in defeat for the plaintiff because litigation in the alternative forum is impossible or impractical.¹³⁸ In addition, Justice Doggett noted that the application of the private interest factors set forth by the U.S. Supreme Court in *Reyno* and *Gilbert* tended to help defendants obtain results contrary to international public policy rather than fair and convenient results.¹³⁹

Moreover, Justice Doggett addressed the public interest factors weighed in the *forum non conveniens* analysis. Justice Doggett argued that a comprehensive and rigorously applied due process analysis of personal jurisdiction adequately covered public concerns.¹⁴⁰ According to him, abolishing *forum non conveniens* would not lead to a flood of litigation brought by foreign plaintiffs because other U.S. states that do not employ the doctrine do not show an increase in foreign litigation.¹⁴¹

and shipped by an American company in the United States to another American company. The decision to manufacture DBCP for distribution and use in the third world was made by these two American companies in their corporate offices in the United States.

Id. at 681 (Doggett, J., concurring). Justice Doggett later noted that “[b]oth as a matter of law and of public policy, the doctrine of *forum non conveniens* is without justification.” *Id.* at 682 (Doggett, J., concurring).

137. *Id.* at 682-83 (Doggett, J., concurring).

138. *Id.*; see *Irish Nat’l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91 (2d Cir. 1984); Robertson, *Forum Non Conveniens in America and England: “A Rather Fantastic Fiction”*, 103 L.Q. R. 398, 409 (1987). Foreign courts may limit recovery either by awarding inadequate compensation or by not recognizing certain causes of action. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991).

139. *Castro Alfaro*, 674 S.W.2d at 683 (Doggett, J., concurring). Justice Doggett noted the intention of Texas venue law to afford defendants the privilege of a home forum. *Id.* at 684 (Doggett, J., concurring). He further noted that “[a]dvances in transportation and communications technology have rendered the private factors largely irrelevant.” *Id.*

140. *Id.* at 684-85 (Doggett, J., concurring). Justice Doggett attacked Justice Cook’s argument that *forum non conveniens* fills the gaps in the constitutional analysis of jurisdiction. *Id.* He pointed out that *forum non conveniens* cannot be examined until jurisdiction is ascertained and that it should not be, as it often is, used by courts to counteract an inadequate due process analysis. *Id.* at 685 n.8 (Doggett, J., concurring). Justice Doggett also noted that Texas had a strong interest to adjudicate this case in light of defendants’ extensive operations in Texas. *Id.* at 686 (Doggett, J., concurring); see *infra* notes 236-45 and accompanying text (discussing due process analysis of personal jurisdiction).

141. *Id.* at 686 (Doggett, J., concurring); see J. GOERDT, C. LOMVARDIAS, G. GALAS & B. MAHONEY, *EXAMINING COURT DELAY—THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS*, 1987, 20 & 22 (1989). Justice Doggett also noted that despite the

Regarding judicial comity,¹⁴² Justice Doggett argued that comity would be best achieved by rejecting *forum non conveniens*, thus protecting the citizens of the foreign forum.¹⁴³ Noting that the contemporary global market makes *forum non conveniens* obsolete, Justice Doggett concluded that the demise of *forum non conveniens* would provide a much-needed deterrent against civil law violations by multinational corporations.¹⁴⁴

D. *The Dissenting Opinions*

Four justices dissented in *Castro Alfaro*, revealing the depth of the court's disagreement.¹⁴⁵ Chief Justice Phillips stated that the Texas Statute does not preclude a *forum non conveniens* dismissal.¹⁴⁶ Justice Gonzalez argued that the Texas Statute did not abolish *forum non conveniens*.¹⁴⁷ Justice Cook found that courts need *forum non conveniens* to supplement the personal jurisdiction due process analysis in achieving goals of fairness and justice.¹⁴⁸ Finally, Justice Hecht considered the Texas

Texas Statute and its predecessors granting foreign citizens the right to sue, no flood of foreign litigation has occurred in Texas. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 686 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991). In addition, Justice Doggett noted that *forum non conveniens* itself increases litigation. *Id.* at 687 (Doggett, J., concurring); see Robertson, *supra* note 138, at 414 & 426.

142. See *supra* note 53 and accompanying text (discussing comity).

143. *Castro Alfaro*, 786 S.W.2d at 687 (Doggett, J., concurring). Justice Doggett noted that "[c]omity is not achieved when the United States allows its multinational corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions." *Id.*

144. *Id.* at 688-89 (Doggett, J., concurring); see Note, *An Economic Approach to Forum Non Conveniens Dismissals*, 22 GEO. WASH. J. INT'L L. & ECON. 235, 241 (1985). Justice Doggett quoted the senior vice-president for environmental affairs at Monsanto who stated that "[t]he realization at corporate headquarters that liability for any [industrial] disaster would be decided in the U.S. courts, more than pressure from Third World governments, has forced companies to tighten safety procedures, upgrade plants, supervise maintenance more closely and educate workers and communities." *Castro Alfaro*, 786 S.W.2d at 687 n.10; see *Foreign Firms Feel the Impact of Bhopal Most*, Wall St. J., Nov. 26, 1985, § 1, at 22, col. 4.

145. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689-708 (Tex. 1990) (Phillips, C.J., Gonzalez, J., Cook, J., Hecht, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991).

146. *Id.* at 689 (Phillips, C.J., dissenting); see *infra* notes 150-52 and accompanying text (discussing Chief Justice Phillips's dissent).

147. *Castro Alfaro*, 786 S.W.2d at 690 (Gonzalez, J., dissenting); see *infra* notes 153-63 and accompanying text (discussing Justice Gonzalez's dissent).

148. *Castro Alfaro*, 786 S.W.2d at 697-702 (Cook, J., dissenting); see *infra* notes 164-71 and accompanying text (discussing Justice Cook's dissent).

Statute permissive in allowing wrongful death actions by foreign plaintiffs, labeled *Allen* an erroneous ruling, and deemed *forum non conveniens* a necessary doctrine to protect courts from exercising jurisdiction that would be unfair to the defendants and the public.¹⁴⁹

Chief Justice Phillips's dissent stated that the Texas Statute does not prohibit common law procedural defenses such as *forum non conveniens*.¹⁵⁰ The Chief Justice would thus overrule *Allen*.¹⁵¹ Chief Justice Phillips recommended that the *Castro Alfaro* case be remanded for a full *forum non conveniens* analysis.¹⁵²

Similarly, Justice Gonzalez disagreed with the majority's argument that the legislature statutorily abolished *forum non conveniens*.¹⁵³ He contended that *forum non conveniens* did not appear in Texas until after the Acts of 1913 and 1917 and that therefore these Acts could not have abolished the doctrine.¹⁵⁴ In addition, Justice Gonzalez argued that, in enacting the Texas Statute, the legislature sought to counteract the dissimilarity doctrine¹⁵⁵ rather than *forum non conveniens*.¹⁵⁶

149. *Castro Alfaro*, 786 S.W.2d at 702-08 (Hecht, J., dissenting); see *infra* notes 172-80 and accompanying text (discussing Justice Hecht's dissent).

150. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990) (Phillips, C.J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991).

151. *Id.*

152. *Id.* at 690 (Phillips, C.J., dissenting). Chief Justice Phillips expressed "no intimation as to whether or not the doctrine of *forum non conveniens* would be appropriate under the facts of this particular case." *Id.*

153. *Id.* at 691-93 (Gonzalez, J., dissenting).

154. *Id.* at 691 (Gonzalez, J., dissenting). Justice Gonzalez questioned the court's reliance on a commentator's article and on the commentator's conclusion of the early use of *forum non conveniens* in state courts. *Id.* at 692 (Gonzalez, J., dissenting); see Blair, *supra* note 12; Stein, *supra* note 15, at 796 n.43. Justice Gonzalez simply did not believe that the legislature was acquainted with the doctrine in order to abolish it. *Castro Alfaro*, 786 S.W.2d at 692 (Gonzalez, J., dissenting). Justice Gonzalez did not, however, discuss the cases cited by the majority in support of its conclusion that Texas courts applied the doctrine in principle prior to 1913. *Id.*

155. See *supra* notes 51-52 and accompanying text (discussing dissimilarity doctrine).

156. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 693 (Tex. 1990) (Gonzalez, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991). Justice Gonzalez maintained that the legislature enacted the Texas Statute "to give Texas citizens the right to maintain a cause of action in the courts of this State free from the threat of a dismissal under the dissimilarity doctrine." *Id.* at 692 (Gonzalez, J., dissenting) (citing Act of 1913); see *supra* notes 51-52 and accompanying text (discussing dissimilarity doctrine). Justice Gonzalez pointed to the caption of the Texas Statute and subsection 2 to support his argument. *Castro Alfaro*, 786 S.W.2d at 692; see Act of April 8, 1913, ch. 161, § 1, 1913 Tex. Gen. Laws 338; *supra* note 92 (setting forth text of 1913 act).

Additionally, Justice Gonzalez criticized the majority's reliance on *Allen*.¹⁵⁷ He noted that subsequent Texas Supreme Court decisions held that the status of *forum non conveniens* under the Texas Statute remained undetermined.¹⁵⁸ In addition, Justice Gonzalez argued that the dismissal reversed by *Allen* was based on comity considerations rather than *forum non conveniens*.¹⁵⁹ He also reasoned that the *Allen* decision granted an absolute right to maintain an action only to citizens of other states, not to foreign plaintiffs.¹⁶⁰

Justice Gonzalez feared that the *Castro Alfaro* decision would attract mass disaster lawsuits to Texas, overburdening already overcrowded courts.¹⁶¹ Rather than abolish *forum non conveniens*, Justice Gonzalez would direct courts to utilize the doctrine in a restricted manner.¹⁶² Justice Gonzalez concluded by noting that the social policy changes advocated by Justice Doggett require legislative, not judicial, action.¹⁶³

Justice Cook analyzed the *forum non conveniens* issue in connection with concerns relating to the due process analysis of personal jurisdiction.¹⁶⁴ He argued that abolishing *forum non conveniens* would lead to assertions of jurisdiction violative of

157. *Castro Alfaro*, 786 S.W.2d at 693-95 (Gonzalez, J., dissenting).

158. *Id.* at 694 (Gonzalez, J., dissenting); see *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962); *Couch v. Chevron Int'l Co.*, 682 S.W.2d 534 (Tex. 1984) (per curiam); *supra* note 99 (discussing *Flaiz* and *Couch*).

159. *Castro Alfaro*, 786 S.W.2d at 694 (Gonzalez, J., dissenting). Justice Gonzalez argued that the *Allen* decision did not consider, let alone abolish, *forum non conveniens*. *Id.*

160. *Id.* at 695 (Gonzalez, J., dissenting).

161. *Id.* at 690 (Gonzalez, J., dissenting). Justice Gonzalez painted a negative portrait of the plaintiffs as greedy forum shoppers, in contrast to Justice Doggett's portrayal of the defendant corporations as avoiders of corporate accountability and legal, as well as moral, duties. *Id.* at 690-91 (Gonzalez, J., dissenting); *id.* at 680 (Doggett, J., concurring). In fact, other suits involving some of the same plaintiffs and defendants were filed in both Florida and California and were dismissed on the ground of *forum non conveniens*. *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), *aff'd in part, rev'd in part*, 883 F.2d 1553 (11th Cir. 1989); *Aguilar v. Dow Chem. Co.*, No. 86-4753 JGD, slip op. (C.D. Cal. Dec. 12, 1986).

162. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 690 (Tex. 1990) (Gonzalez, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991). Justice Gonzalez "would provide guidelines and set parameters for its use." *Id.*

163. *Id.* at 697 (Gonzalez, J., dissenting).

164. *Id.* at 697-702 (Cook, J., dissenting).

due process.¹⁶⁵ Justice Cook observed that even if a court has personal jurisdiction verified by a due process analysis,¹⁶⁶ that analysis might not take into consideration all of the defendant's interests, leaving a gap to be filled by a *forum non conveniens* analysis.¹⁶⁷ In applying the current due process analysis, including an evaluation of fairness factors, Justice Cook argued that a court may exercise jurisdiction that is constitutional, yet unfair and unreasonable because it results in inconvenience to the defendant.¹⁶⁸

Justice Cook found additional problems with the majority's opinion. He argued that extending U.S. law beyond its borders violates comity.¹⁶⁹ Additionally, Justice Cook noted that the possible application of Costa Rican law to the *Castro Alfaro* case would weaken Texas interest in the litigation.¹⁷⁰ Finally, Justice Cook argued that by abolishing *forum non conveniens*, the court was opening the state courts to plaintiffs with little relationship to the state.¹⁷¹

Justice Hecht found the language of the Texas Statute plainly permissive and the reasoning of *Allen* flawed.¹⁷² He contended that the Texas Statute simply prohibits dismissing an action on the sole ground that plaintiffs are foreigners, or because the cause of action arises in another state or coun-

165. *Id.* at 697 (Cook, J., dissenting).

166. *See supra* notes 77-79 and accompanying text (discussing personal jurisdiction).

167. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 699 (Tex. 1990) (Cook, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991). Justice Cook noted that after *Gulf Oil Corporation v. Gilbert* and *International Shoe*, "[f]orum non conveniens, although not explicitly dealt with in the jurisdictional analysis, was still the bridge that transversed the gap between constitutional doctrines of jurisdiction and problems arising from inconvenient forums." *Id.*

168. *Id.* at 701-02 (Cook, J., dissenting); *see supra* notes 18-32 and accompanying text (discussing factors of inconvenience in utilizing doctrine of *forum non conveniens*).

169. *Castro Alfaro*, 786 S.W.2d at 701 (Cook, J., dissenting). Justice Cook asked "[s]hould we not stop to consider . . . the possible effects of extending our laws beyond the shores of the United States?" *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 704-06 (Hecht, J., dissenting). Justice Hecht noted that in dealing with a statute similar to the one at issue in *Castro Alfaro*, the Alabama "legislature chose to change its law to ensure recognition of the rule of *forum non conveniens* [and] changed 'shall be enforceable' to 'may be enforceable'. The Texas Legislature's use of 'may' in the same context is no less permissive and no more mandatory." *Id.* at 705 (Hecht, J., dissenting).

try.¹⁷³ Justice Hecht admitted that the Texas Statute is unclear and found no adequate rationale in *Allen* to resolve the ambiguity.¹⁷⁴ Justice Hecht viewed *Allen* as an aberration of jurisprudence that the court should overrule.¹⁷⁵

Justice Hecht's opinion concluded by urging the courts to recognize the doctrine of *forum non conveniens*.¹⁷⁶ According to Justice Hecht, *forum non conveniens* protected the citizens of Texas from facing greater liability at home than they would face abroad for alleged wrongs committed abroad.¹⁷⁷ In addition, Justice Hecht argued that the absence of *forum non conveniens* in Texas would discourage businesses from operating in Texas.¹⁷⁸ Justice Hecht also contended that *forum non conveniens* keeps courts free from litigation that has no relation to the state.¹⁷⁹ Finally, Justice Hecht agreed with Justice Cook that *forum non conveniens* currently fills in gaps in the due process analysis of personal jurisdiction, even though the private interest factors of the *forum non conveniens* analysis are less crucial today in view of current transportation and communication technology.¹⁸⁰

The majority opinion, two concurring opinions, and four

173. *Id.* at 704 (Hecht, J., dissenting). Justice Hecht noted that other state supreme courts have interpreted similar wording as permissive. *Id.* at 705 (Hecht, J., dissenting) (citing *Silversmith v. Kenosha Auto Transp.*, 301 N.W.2d 725, 727 (Iowa 1981) (finding "may be brought" to be permissive); *Central of Ga. Ry. v. Phillips*, 286 Ala. 365, 240 So. 2d 118 (Ala. 1970) (finding "shall be enforceable" to be mandatory); *Gonzalez v. Atchison, Topeka & Santa Fe Ry.*, 189 Kan. 689, 371 P.2d 193 (Kan. 1962) (finding "may be sued" to be permissive)). Justice Hecht also noted that the Alabama legislature amended the wording of its statute to "may be enforceable" to authorize the rule of *forum non conveniens*. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 705 (Tex. 1990) (Hecht, J., dissenting) (citing ALA. CODE § 6-5-430 (1987)), *cert. denied*, 111 S. Ct. 671 (1991).

174. *Castro Alfaro*, 786 S.W.2d at 705 (Hecht, J., dissenting).

175. *Id.* at 706 (Hecht, J., dissenting). Justice Hecht suggested that the case had never been followed by another court, that several cases expressly rejected it, and that several cases disapproved *Allen* "without even bothering to cite it." *Id.*; see *Couch v. Chevron Int'l Co., Inc.*, 682 S.W.2d 534 (Tex. 1984) (per curiam); *Flaiz v. Moore*, 359 S.W.2d 872 (Tex. 1962); *McNutt v. Teledyne Indus., Inc.*, 693 S.W.2d 666 (Tex. Civ. App. 1985); *Forcum-Dean Co. v. Missouri Pac. R.R. Co.*, 341 S.W.2d 464 (Tex. Civ. App. 1960), *writ dismissed*.

176. *Castro Alfaro*, 786 S.W.2d at 706-08 (Hecht, J., dissenting).

177. *Id.* at 706 n.10 (Hecht, J., dissenting).

178. *Id.* at 707 (Hecht, J., dissenting).

179. *Id.*

180. *Id.* Justice Hecht conceded that "[t]he relative importance of private factors as compared with public factors may have shifted since *Gulf Oil*. Ease of travel and communication, availability of evidence by videotape and facsimile transmission,

dissenting opinions presented a limited number of issues, despite their differing views. The key issues remain the interpretation of the Texas Statute *vis-à-vis forum non conveniens* dismissals, the adequacy of *forum non conveniens* in achieving fairness and convenience to all parties to the litigation,¹⁸¹ and the very necessity of the doctrine at all.¹⁸² The Texas Supreme Court addressed the first issue by holding that the Texas Statute precludes *forum non conveniens* dismissals. The other issues regarding *forum non conveniens*, however, remain unresolved.¹⁸³

III. DOW CHEMICAL CO. V. CASTRO ALFARO: A GOOD DECISION FOR INTERNATIONAL TORT LITIGATION

The diversity of opinion in this case, the contention between members of the Texas Supreme Court, and the impassioned rhetoric of some parts of the opinion reveal a controversial legal issue.¹⁸⁴ Nevertheless, the majority's decision is sound.¹⁸⁵ The majority opinion constitutes valid statutory interpretation, and the concurring opinion of Justice Doggett presents a strong jurisdictional analysis and cogent international policy arguments.¹⁸⁶

A. *The Court's Interpretation of the Wrongful Death Statute Is Proper*

The Texas Supreme Court correctly interpreted the Texas Statute as conferring compulsory jurisdiction on Texas courts.¹⁸⁷ Similarly, its use of *Allen* as precedent for its interpretation rests on valid grounds.¹⁸⁸ Moreover, the dissenting

and other technological advances have reduced the significance of some private inconvenience factors." *Id.* at 708 (Hecht, J., dissenting).

181. *See id.* at 680 (Doggett, J., concurring); *id.* at 706-08 (Hecht, J., dissenting).

182. *Id.* at 689 (Doggett, J., concurring); *id.* at 706-08 (Hecht, J., dissenting).

183. *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990) (Hightower, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991); *id.* at 680 & 689 (Doggett, J., concurring); *id.* at 706-08 (Hecht, J., dissenting).

184. *See supra* notes 181 & 182 (discussing unresolved issues).

185. *See infra* notes 187-214 and accompanying text (discussing majority opinion).

186. *See infra* notes 190-203 (discussing interpretation of Texas Statute); *infra* notes 215-70 (discussing jurisdiction and international policy).

187. *See infra* notes 190-203 and accompanying text (discussing language and purpose of Texas Statute).

188. *See infra* notes 205-14 and accompanying text (discussing *Allen*).

arguments regarding the interpretation of the Texas Statute and *Allen* are flawed.¹⁸⁹

The wording and purpose of the Texas Statute support the court's finding that the Texas Statute conveys an absolute right on the plaintiff to bring a case in a Texas court.¹⁹⁰ The Texas Statute states that a wrongful death or personal injury action may be enforced in Texas state courts, even if the tort or injury took place in a foreign country, if three conditions are met.¹⁹¹ First, the law of Texas or the place where the injury occurred must recognize the cause of action.¹⁹² Second, the plaintiff must bring the action in Texas within the period set by the Texas statute of limitations.¹⁹³ Third, if the plaintiff is a foreign citizen, the plaintiff's country must have equal treaty rights with the United States on behalf of its citizens.¹⁹⁴ In addition, Texas law governs all matters of procedure relating to the case.¹⁹⁵ Finally, the Texas Statute directs the court to apply the substantive law that is appropriate to the facts of the case.¹⁹⁶ The *Castro Alfaro* trial court found that the case met the requirements of the Texas Statute because Texas recognizes the personal injury cause of action, the plaintiffs brought suit within the period set by the statute of limitations, and Costa Rica and the United States have equal treaty rights on behalf of their citizens.¹⁹⁷

In interpreting the Texas Statute in relationship to *forum non conveniens*, the crucial words are that "an action . . . may be

189. See *infra* notes 207-14 and accompanying text (discussing arguments set forth by dissenting justices).

190. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991); *supra* note 91 (setting forth text of Texas Statute). In statutory interpretation, one looks not just to the language of the statute but also to the legislature's intention and the statute's history. See, e.g., *Lewis v. Jacksonville Bldg. & Loan Ass'n*, 540 S.W.2d 307 (Tex. 1976). The *Lewis* court noted that in interpreting statutory language, "[t]he prime object is to ascertain and give effect to the intent of the rule or regulation. Although the word 'shall' is generally construed to be mandatory, it may be and frequently is held to be directory." *Id.* at 310.

191. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 1986); see *supra* note 91 (containing text of the Texas Statute).

192. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a)(1) (Vernon 1986).

193. *Id.* § 71.031(a)(2).

194. *Id.* § 71.031(a)(3).

195. *Id.* § 71.031(b).

196. *Id.* § 71.031(c).

197. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 n.2 & 681 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

enforced in the courts of this state although the wrongful act or injury takes place in a foreign state or country"¹⁹⁸ One can interpret "may be enforced" as mandatory rather than permissive.¹⁹⁹ U.S. courts have specifically stated that the interpretation of "may" as mandatory or permissive depends on the context in which it occurs.²⁰⁰ In addition, the Texas Statute

198. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 1986). For the complete text of the Texas Statute, see *supra* note 91.

199. The Oxford English Dictionary, in its entry for the word "may" under the category of "Law," notes that

[i]n the interpretation of statutes, it has often been ruled that *may* is to be understood as equivalent to *shall* or *must*. There is no doubt that *may*, in some instances, especially where the enactment relates to the exercise of judicial functions, has been construed to give a power to do the act, leaving no discretion as to the exercise of the power.

IX THE OXFORD ENGLISH DICTIONARY 501 (2d ed. 1989) (citations omitted). Black's Law Dictionary also notes that

courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar. However, as a general rule, the word "may" will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense. [T]he context in which the word appears must be [the] controlling factor.

BLACK'S LAW DICTIONARY 979 (6th ed. 1990) (citations omitted).

The U.S. Supreme Court interpreted a similarly worded statute as conveying an absolute right to bring a case. See *Baltimore and Ohio R.R. v. Kepner*, 314 U.S. 44 (1941). The *Kepner* Court noted that "[a] privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated [by *forum non conveniens*] for reasons of convenience or expense." *Id.* at 54. Montana and Georgia follow *Kepner* by refusing to employ *forum non conveniens* to dismiss actions brought under FELA. See *Brown v. Seaboard Coast Lines R.R. Co.*, 229 Ga. 481, 192 S.E.2d 279, 283 (1972); *Labella v. Burlington N. Inc.*, 182 Mont. 202, 595 P.2d 1184, 1187 (1979).

A Texas appellate court, in the first case to use the term *forum non conveniens* in Texas, held that a venue statute that said a case "may be brought" conferred a legal right on the plaintiff to bring and maintain a suit "notwithstanding the defendant's objections [T]he plaintiff has the choice and our courts are not at liberty to deny him his legal right." *Garrett v. Phillips Petroleum Co.*, 218 S.W.2d 238, 240 (Tex. Civ. App. 1949), *writ dismissed* (citations omitted); see *Castro Alfaro*, 786 S.W.2d at 691-92 (Gonzalez, J., dissenting). *Allen* had previously interpreted the Texas Statute as mandatory and the Texas Supreme Court denied the defendant's Writ of Error. *Allen v. Bass*, 47 S.W.2d 426 (Tex. Civ. App. 1932), *writ ref'd*; cf. *Van Winkle-Hooker Co. v. Rice*, 448 S.W.2d 824 (Tex. Civ. App. 1969) (reversing lower court's dismissal of breach of contract case brought in Texas under specific jurisdiction statute and viewing dismissal as violative of public policy).

200. See *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (stating that "may" is not invariably discretionary and depends on legislative intent and context); *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 689 n.53 (1978) (noting that "may" can mean "shall"); *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991) (stating that "will" and "must" are not necessarily mandatory); *Duncan v. Rolm Mil-Spec*

uses the term "enforced," not "brought," implicitly directing the court to maintain the case through judgment.²⁰¹ Finally, the Texas Statute encompasses foreign torts and foreign plaintiffs.²⁰² By allowing foreign plaintiffs and foreign torts since 1913, the Texas Statute directly counteracts the doctrine of *forum non conveniens* and its principles as utilized by Texas courts prior to 1913.²⁰³

The doctrine of *forum non conveniens* existed prior to the enactment of the Texas Statute in 1913, and thus the legislature may have sought to abolish its use as a defense to wrongful death actions.²⁰⁴ Moreover, the legislature kept the right to maintain an action for foreign plaintiffs and torts in all revisions of the Texas Statute, even after the *Allen v. Bass* decision.²⁰⁵ If the Texas legislature viewed *Allen* as an erroneous decision, presumably it would have amended the Texas Statute, as the U.S. Congress enacted the change of venue statute after the U.S. Supreme Court decision in *Baltimore and Ohio*

Computers, 917 F.2d 261, 265 (6th Cir. 1990) (stating that legislative intent makes "may" mandatory); *Dalton v. United States*, 816 F.2d 971, 973 (4th Cir. 1987) (stating that "may" is mandatory if legislative intent so indicates); *United Hosp. Center, Inc. v. Richardson*, 757 F.2d 1445, 1453 (4th Cir. 1985) (noting that "may" is mandatory or discretionary based on context and legislative intention); *United States v. Cook*, 432 F.2d 1093, 1098 (7th Cir. 1970) (finding that meaning of "may" as mandatory or permissive is controlled by context), *cert. denied*, 401 U.S. 996 (1971); *United States v. Reeb*, 433 F.2d 381, 383 (9th Cir. 1970) (stating that meaning of "may" and "shall" depends upon background circumstances, context, and legislative or administrative intent), *cert. denied*, 402 U.S. 912 (1971); *Wilshire Oil Co. v. Costello*, 348 F.2d 241, 243 (9th Cir. 1965) (stating that "may" is mandatory depending on statute); *Curry v. Block*, 541 F. Supp. 506, 515-16 (S.D. Ga. 1982) (indicating that "may" is not necessarily permissive), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *Koch Ref. Co. v. United States Dep't of Energy*, 504 F. Supp. 593, 596 (D. Minn. 1980) (noting that "may" is mandatory depending on context), *aff'd and remanded*, 658 F.2d 799 (Em. Ct. App. 1981).

201. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.031(a) (Vernon 1986).

202. *Id.*

203. See Act of April 8, 1913, ch. 161 § 1, 1913 Tex. Gen. Laws 338; *supra* note 92 (setting forth Act of 1913); *supra* notes 50-60 and accompanying text (discussing *forum non conveniens* in Texas prior to 1913).

204. See *Mexican Nat'l R.R. Co. v. Jackson*, 89 Tex. 107, 33 S.W. 857 (1896); *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S.W. 228 (1890); *Missouri, Kan. & Tex. Ry. Co. of Tex. v. Godair Comm'n Co.*, 39 Tex. Civ. App. 298, 87 S.W. 871 (1905); *Southern Pac. Co. v. Graham*, 12 Tex. Civ. App. 565, 34 S.W. 135 (1896).

205. See Act of April 8, 1913, ch. 161 § 1, 1913 Tex. Gen. Laws 338; Act of March 30, 1917, ch. 156 § 1, 1917 Tex. Gen. Laws 365; Act of June 19, 1975, ch. 530 § 2, 1975 Tex. Gen. Laws 1381, 1382; TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986).

R.R. Co. v. Kepner.²⁰⁶

The dissenting arguments regarding the Texas Statute and *Allen* are inadequate. The argument that the Texas Statute's purpose was to counteract the dissimilarity doctrine²⁰⁷ overlooks the specific language of the Acts of 1913 and 1917 that accommodates foreign plaintiffs and foreign injuries pursuant to certain qualifications and that does not include *forum non conveniens* factors.²⁰⁸ In addition, Justice Gonzalez disregarded the facts that the Acts of 1913 and 1917 did not make any reference to the application of foreign substantive law that lies at the heart of the dissimilarity doctrine,²⁰⁹ and that the Texas Supreme Court did not lay the dissimilarity doctrine to rest until 1979.²¹⁰ Justice Gonzalez's assertion that *forum non conveniens* did not exist in Texas and thus could not have been

206. 314 U.S. 44 (1941); 28 U.S.C. § 1404 (1988); see Stein, *supra* note 15, at 806. Professor Stein notes that "[a]lthough the rationale of the *Kepner* decision was bottomed on deference to legislative intent, the decision met with extreme congressional disapproval." *Id.* He also notes that "Congress expressly responded to the *Kepner* case by passing 28 U.S.C. § 1404, the transfer provision for federal courts." *Id.* at 807. Nevertheless, the U.S. Supreme Court has stated that "[i]t is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (citing *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)). In *Johnson*, the Court had noted, however, that "[a]ny belief in the notion of a dialogue between the judiciary and the legislature must acknowledge that on occasion an invitation declined is as significant as one accepted." *Id.* at 630 n.7.

207. See *supra* notes 154-56 and accompanying text (discussing Justice Gonzalez's dissent).

208. Act of 1917, ch. 156 § 1, 1917 Tex. Gen. Laws 365; see *supra* note 94 (setting forth text of Act of 1917). The predecessors of the Texas Statute and the current Texas Statute itself convey a right, whether absolute or not, to foreign plaintiffs to bring an action in Texas. Moreover, the legislature maintained the wording conveying this right through subsequent changes of the statute. See Act of 1913, ch. 161 § 1, 1913 Tex. Gen. Laws 338; Act of 1917, ch. 156 § 1, 1917 Tex. Gen. Laws 365; Act of 1975, ch. 530 § 2, 1975 Tex. Gen. Laws 1381, 1382; TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986); *supra* note 91 (setting forth text of current Texas Statute); *supra* note 92 (setting forth text of Act of 1913); *supra* note 94 (setting forth text of Act of 1917); *supra* note 98 (setting forth text of Act of 1975).

209. See *supra* notes 92-94 (setting forth texts of Act of 1913 and Act of 1917).

210. See *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979). The *Gutierrez* court noted that the Texas Statute, then article 4678, did "not dictate any conflict of laws rules to be applied by the court." *Id.* at 314. If the legislature had intended to counteract the dissimilarity doctrine, the Texas courts would not have continued to apply the doctrine after 1913 contrary to legislative policy. See *supra* note 60 (discussing Texas courts applying dissimilarity doctrine after 1913).

abolished²¹¹ neglected the cases in which Texas courts declined to exercise the jurisdiction they clearly possessed.²¹²

Similarly, in attempting to disparage *Allen v. Bass* as precedent, the dissent did not acknowledge the fact that the Texas Supreme Court never overruled *Allen*.²¹³ In addition, the dissent avoided the fact that the Texas Supreme Court was not faced with the need to interpret the Texas Statute until the present case.²¹⁴ Thus, *Allen* remains satisfactory precedent for the court's current interpretation of the Texas Statute.

B. *The Due Process Analysis of Personal Jurisdiction Satisfies the Forum Non Conveniens Goals of Fairness and Justice*

The dissenting justices erroneously insist that *forum non conveniens* is required to fill in gaps in the due process analysis of personal jurisdiction.²¹⁵ The U.S. Supreme Court tailored the parameters of personal jurisdiction in compliance with the due process requirements of the U.S. Constitution.²¹⁶ In so doing, the Court included a number of fairness factors in the

211. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 691 (Tex. 1990) (Gonzalez, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991); *see supra* note 154 and accompanying text (discussing Justice Gonzalez's dissent).

212. *See supra* notes 50-60 and accompanying text (discussing *forum non conveniens* in Texas prior to 1913). The prerogative of a trial court to decline otherwise valid jurisdiction—an early manifestation of what was later to be called *forum non conveniens*—existed in Texas prior to 1913. *See supra* note 55 (discussing Texas courts' declining to exercise jurisdiction prior to 1913).

213. *Castro Alfaro*, 786 S.W.2d at 679 (discussing court's approval of *Allen*); *id.* at 694-97 (Gonzalez, J., dissenting); *see supra* notes 158-63 and accompanying text (discussing Justice Gonzalez's dissent). Justice Doggett in his concurring opinion responded to the dissent by stating that

[Justice Hecht] adopts a strange new reading of opinions, stating that '*Couch* and *Flaiz* unmistakably disapproved of *Allen v. Bass* without even bothering to cite it.' In Texas, we have not subscribed to the theory that opinions may be overruled without even informing anyone of such action. The doctrine of *stare decisis* is not usually discarded in such a cavalier manner through rejection of long standing precedent by mere implication. Nothing said by the court in *Couch* is at all inconsistent with *Allen*.

Castro Alfaro, 786 S.W.2d at 682 n.3 (Doggett, J., concurring); *see id.* at 679.

214. Justice Doggett also noted that "[t]his court never reached the issue of *forum non conveniens* in *Couch* . . . or *Flaiz*." *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 682 n.3 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991).

215. *See supra* notes 164-68 and accompanying text (discussing Justice Cook's dissent concerning *forum non conveniens* and personal jurisdiction).

216. *See supra* notes 77-79 and accompanying text (discussing due process analysis of personal jurisdiction).

jurisdiction analysis.²¹⁷ The alleged gap in this analysis pointed to by the *Castro Alfaro* dissent²¹⁸ thus implies inadequacy of the U.S. Supreme Court's tests, or a failure of the court performing the analysis.²¹⁹ If the court, however, properly employs the minimum contacts analysis and fairness factors,²²⁰ *forum non conveniens* becomes a redundant litigation tactic to defeat the plaintiff permanently.²²¹

A comparison of the due process fairness factors involved in the complete personal jurisdiction analysis and the *forum non conveniens* factors reveals the redundancy of the latter.²²² The *forum non conveniens* factors that address obstacles to a fair trial²²³ duplicate the due process goals of fairness and jus-

217. *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102, 113 (1987). The *Asahi* Court noted that

[w]e have previously explained that the determination of the reasonableness of the exercise of jurisdiction in each case will depend on an evaluation of several factors. A court *must* consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in further fundamental substantive social policies."

Id. at 113 (emphasis added); *see supra* note 79 and accompanying text (discussing fairness factors).

218. *Castro Alfaro*, 786 S.W.2d at 697-702 (Cook, J., dissenting).

219. *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 685 n.8 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991); *see also* Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986) (calling for elimination of *forum non conveniens*). Professor Stewart, who is quite critical of the doctrine, notes that "[w]hen the jurisdictional inquiries are conducted properly, it becomes apparent that the doctrine of *forum non conveniens* has outlived its usefulness." *Id.* at 1263.

220. *See supra* notes 78-79 and accompanying text (discussing minimum contacts analysis and fairness factors).

221. *Castro Alfaro*, 786 S.W.2d at 682-83 (Doggett, J., concurring). Justice Doggett noted that "less than four percent of cases dismissed under the doctrine of *forum non conveniens* ever reach trial in a foreign court." *Id.* at 683; *see* Robertson, *supra* note 138, at 409. Justice Doggett concluded that "[a] *forum non conveniens* dismissal is often, in reality, a complete victory for the defendant." *Castro Alfaro*, 786 S.W.2d at 683 (Doggett, J., concurring). A commentator notes that "[w]hat has happened in American jurisprudence is a form of 'buck passing' whereby the vague and amorphous '*forum non conveniens*' doctrine has come to accommodate the collective shortcomings and excesses of modern rules governing jurisdiction, venue, and choice of law." Robertson, *supra* note 138, at 424 (citations omitted).

222. *See supra* notes 77-79 and accompanying text (discussing due process analysis of personal jurisdiction); *supra* notes 18-34 and accompanying text (discussing *forum non conveniens*).

223. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

tice.²²⁴ The *forum non conveniens* factors that deal with the accessibility of witnesses and evidence²²⁵ parallel the due process considerations of the reasonableness of the forum²²⁶ and the efficient resolution of the litigation.²²⁷ The *forum non conveniens* objective to eliminate delay, difficulty and expense²²⁸ duplicates the due process objective of efficient resolution of the litigation.²²⁹

Furthermore, the *forum non conveniens* factors of overcrowded courts, burden to the community, and the forum's interest in the litigation²³⁰ duplicate the due process considerations of the state's interest in the litigation,²³¹ the efficient resolution of the litigation,²³² and the fundamental social policy issues of the states (or countries) involved in the litigation.²³³ Finally, the choice of law element of *forum non conveniens*²³⁴ overlaps the due process concerns of the state's interest in the litigation, the efficient resolution of the litigation, and fundamental social policy issues,²³⁵ even though the due process analysis does not explicitly cover choice of law. A comprehensive due process analysis of personal jurisdiction would thus make a *forum non conveniens* analysis unnecessary and render the doctrine obsolete.

Courts, however, often do not consider the forum's interest in the litigation and attendant factors in their due process analysis of personal jurisdiction.²³⁶ The U.S. Supreme Court

224. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

225. See *Gilbert*, 330 U.S. at 508.

226. See *World-Wide Volkswagen*, 444 U.S. at 292; *International Shoe*, 326 U.S. at 317.

227. See *World-Wide Volkswagen*, 444 U.S. at 292; *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978).

228. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947).

229. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Kulko*, 436 U.S. at 93.

230. See *Gilbert*, 330 U.S. at 508-09.

231. See *World-Wide Volkswagen*, 444 U.S. at 292, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

232. See *World-Wide Volkswagen*, 444 U.S. at 292, *Kulko v. Superior Court*, 436 U.S. 84, 93 (1978).

233. See *World-Wide Volkswagen*, 444 U.S. 286 (1980); *Kulko*, 436 U.S. at 93.

234. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

235. See *supra* notes 229-30, 232-34 and accompanying text (discussing due process analysis).

236. See Stein, *supra* note 15, at 795. Professor Stein states that courts use the

has itself changed the role these factors should play in determining personal jurisdiction.²³⁷ Some commentators state that these factors should play no part in the due process analysis because the factors reflect concerns of state sovereignty rather than due process.²³⁸ Other commentators, however, consider such factors a valid part of the due process analysis of personal jurisdiction.²³⁹ A comprehensive due process analysis that in-

forum non conveniens analysis to scrutinize the forum's interest in the litigation rather than consider this factor in the due process analysis of personal jurisdiction. *Id.* Professor Stein also notes that "personal jurisdiction has come to mean power over the defendant for the purpose of a particular lawsuit, a meaning divorced from mere physical power over the defendant or her property." *Id.* at 843.

237. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating that trial court should consider forum state interest in litigation); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982) (stating that personal jurisdiction requirements protect individual liberty, not sovereignty and federalism concerns); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (stating that trial court must consider interests of forum state); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (stating that due process clause restricts power of courts in terms of individual liberty, not sovereignty).

238. See Lewis, *The Three Deaths of "State Sovereignty" and the Curse of Abstraction in the Jurisprudence of Personal Jurisdiction*, 58 NOTRE DAME L. REV. 699 (1983). Professor Lewis notes that "[a]s a matter of constitutional law, it should be apparent after *Ireland* that the individual rights determined by the personal jurisdiction dispute need not be compromised in the name of sovereign interests proclaimed by a self-interested forum." *Id.* at 737. In another article, Professor Lewis states that "[t]hese governmental interest doctrines have impeded the development of uniform standards for deciding jurisdictional questions by turning *International Shoe's* minimum contacts analysis into a helter-skelter balancing process." Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 8 (1984). He also notes that "a forum unfair to the parties does not become fair simply because that forum has an interest in deciding the case." *Id.* In an earlier article, Professor Lewis noted that "[t]he effect of giving sway to a forum's interests may be to lower the threshold of fairness to which the defendant is constitutionally entitled." Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 MERCER L. REV. 769, 826 (1982); see Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112, 1121 (1981) (stating that issues of sovereignty are not related to due process).

239. Stein, *supra* note 15, at 791-92. Professor Stein states that the doctrine of constitutional personal jurisdiction calls for

considering whether the forum's relationship to the particular controversy in question justifies assertion of the forum's judicial power beyond its border, that is, whether the state has a sufficient regulatory stake in the activity in question to justify the extraterritorial reach of its judicial power. Implicit in that consideration is a theory of how sovereign power is properly allocated among the states. The due process clause is a relevant consideration even when the defendant would experience no hardship in coming into the jurisdiction and has no application to assertions of jurisdiction over defendants within the forum even when it would be unfair and inconvenient to

cludes forum interest factors remains a superior test of fair and just jurisdiction as opposed to the *forum non conveniens* analysis.²⁴⁰

A problem arises when courts often forego the more rigorous jurisdictional analysis in favor of the *forum non conveniens* analysis.²⁴¹ Theory and practice regarding jurisdiction and venue being in disarray, courts tend to rely on *forum non conveniens* as a final filter to prevent unjust litigation.²⁴² In addition, unlike decisions regarding jurisdiction and venue, the *forum non conveniens* decision is not reviewable absent a clear

drag a defendant across a large state. Personal jurisdiction thus reflects institutional concerns about the proper allocation of authority among sovereigns in much the same way that subject-matter jurisdiction addresses the proper allocation of authority among courts.

Id.; see Stewart, *supra* note 219 (supporting more comprehensive due process analysis of personal jurisdiction).

240. Stein, *supra* note 15, at 843-44. In addition, some states provide long-arm statutes that place requirements on jurisdiction over nonresident defendants, adding additional protection to the constitutional requirements. See *supra* note 82 and accompanying text (discussing long-arm statutes). Thus, the presence of state long-arm statutes that place more stringent jurisdictional requirements on top of constitutional requirements reinforces the superfluous nature of *forum non conveniens*. See *supra* notes 81-82 and accompanying text (discussing long-arm statutes).

241. Stein, *supra* note 15, at 793-94. Professor Stein notes that "[t]he significance of this overlap is that most of the policies addressed in decisions about jurisdiction and venue are also addressed in the context of *forum non conveniens*, a doctrine practically devoid of hard rules, vested in the discretion of the trial court, and beyond effective appellate review." *Id.*; see Note, Forum Non Conveniens and Foreign Plaintiffs: Addressing the Unanswered Questions of Reyno, 6 *FORDHAM INT'L L.J.* 577, 609 (1983) (observing that U.S. courts have not applied *Reyno* consistently to foreign plaintiffs).

242. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 (1984) (finding personal jurisdiction over defendant magazine in state in which it was sold even though plaintiff availed herself of such forum because it was only state in which statute of limitations had not run). *Contra Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 (1984) (holding that defendant in action arising from helicopter crash in Peru lacked sufficient contacts with forum state even though defendant negotiated contract in forum, purchased helicopters and equipment in forum, and sent employees to forum for training). See Stein, *supra* note 15, at 783-85 (noting confusion in jurisdiction, venue, and choice of law jurisprudence). Professor Stein notes that

[i]n the last forty years, an upheaval in the procedural law of private international and interstate disputes has occurred. Every doctrine used to mediate between jurisdictions competing to resolve lawsuits having interstate connections—jurisdiction, venue, and choice of law—has undergone dramatic change. Both jurisdiction and venue have been greatly expanded, and the conflicts rules have become more diverse and manipulable.

Id. at 783; see *id.* at 784 & 789-90. Professor Stein concludes that "*forum non conveniens* doctrine has come to accommodate the collective shortcomings and excess of modern rules governing jurisdiction, venue, and choice of law." *Id.* at 785.

showing of abuse of discretion by the trial court.²⁴³ Thus, *forum non conveniens* obscures legitimate jurisdiction and venue issues rather than resolving them.²⁴⁴ The best solution remains a stable, complete due process analysis of personal jurisdiction rather than reliance on an unstable, unreviewable *forum non conveniens* analysis.²⁴⁵

If a court possesses jurisdiction over a case and the defendant through a statute, as in *Castro Alfaro*, the court's jurisdiction must still satisfy due process requirements.²⁴⁶ Furthermore, a court must have jurisdiction before considering a *forum non conveniens* argument.²⁴⁷ Justice Doggett pointed out that if the jurisdiction analysis is properly executed, no gap exists requiring a further *forum non conveniens* analysis.²⁴⁸ The court either has jurisdiction or it does not. If the court determines that it has jurisdiction by considering the fairness and justice factors included in the U.S. Supreme Court's due process analysis of personal jurisdiction, the court will sufficiently safeguard the parties' rights.²⁴⁹

If any of the *forum non conveniens* factors exist, the court will thus consider them in its careful personal jurisdiction due process analysis.²⁵⁰ If those factors are strong enough to violate

243. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); see *supra* notes 40-48 (discussing *Reyno*).

244. Stein, *supra* note 15, at 785. Professor Stein finds that the use of *forum non conveniens* has resulted in a "crazy quilt of ad hoc, capricious, and inconsistent decisions." *Id.*

245. See Stewart, *supra* note 219, at 1321-24. Professor Stein, however, advocates maintaining the doctrine, but he also calls for the development of rules "embodied in formal doctrine . . . assertable in a lawsuit and subject to appellate scrutiny to the same extent as other court-access doctrines." Stein, *supra* note 15, at 844. He also advocates an improvement in jurisdictional rules to decrease the need for *forum non conveniens* dismissals. *Id.*

246. See *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). The *Gray* court noted that "[t]he questions in this case are (1) whether a tortious act was committed here, within the meaning of the statute . . . and (2) whether the statute, if so construed, violates due process of law." *Id.* at 435, 176 N.E.2d at 762.

247. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504 (1947).

248. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 685 n.8 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991).

249. See *supra* note 79 (setting forth fairness factors); Stewart, *supra* note 219, at 1264. Professor Stewart maintains that the personal jurisdiction analysis should include private and public *forum non conveniens* factors. *Id.* Professor Stewart also asserts that any inconvenience should be part of the due process analysis. *Id.* at 1288.

250. See *Castro Alfaro*, 786 S.W.2d at 685-86 (Doggett, J., concurring).

the U.S. defendant's right to due process, the court must find it has no jurisdiction over that defendant.²⁵¹

Forum non conveniens, which the trial court can apply quite loosely in its discretion,²⁵² can thus eliminate an otherwise proper and constitutionally sound finding of jurisdiction.²⁵³ Commentators suggest that allowing an obscure doctrine, based on factors which no longer apply in today's technological age, to defeat a more carefully constructed set of principles makes little sense.²⁵⁴ A careful consideration of due process and a legislature's desire to empower its courts to hear certain cases should override a possibly useless but potentially harmful doctrine such as *forum non conveniens*.

C. The Court's Decision Reflects Sound International Public Policy

The court's refusal to uphold the *forum non conveniens* dis-

251. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987) (finding lack of personal jurisdiction despite minimum contacts). The trial court's exercise of jurisdiction in *Castro Alfaro* did not violate the defendants' right to due process. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 685-86 (Tex. 1990) (Doggett, J., concurring) (noting Texas's substantial interest in case), *cert. denied*, 111 S. Ct. 671 (1991). Application of due process fairness and forum interest factors to the *Reyno* case could result in a finding of a lack of personal jurisdiction because Scotland had the primary interest in the litigation; Scotland was the most efficient forum; Scotland was the forum most convenient to the plaintiff; and Scotland was the most reasonable forum considering the location of all pertinent evidence. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *supra* notes 40-48 and accompanying text (discussing *Reyno*).

252. *Reyno*, 454 U.S. 235. The *Reyno* Court held that the "*forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion." *Id.* at 257.

253. *E.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987); see Robertson, *supra* note 138, at 424. Robertson maintains that "[i]ssues going to the existence of jurisdiction are conceptualized as turning on rules and principles which, however flexible and open textured, lend an element of solidity that is wholly lacking for discretionary decisions to decline to exercise jurisdiction." *Id.*

254. See Stein, *supra* note 15, at 781-85 (criticizing current court use of *forum non conveniens*); Stewart, *supra* note 219, at 1264 (criticizing doctrine of *forum non conveniens*). Professor Stewart also points out that the defendant's home forum will be inconvenient only when the forum is in the state of incorporation and that in such instances, the state does have an interest in the litigation. *Id.* at 1288. If the forum is the defendant's principal place of business, jurisdiction should never be unfair. *Id.* If jurisdiction is based on defendant's contact with the forum and those contacts are not related to the litigation, any inconvenience analysis should be part of the due process analysis. *Id.* Even Justice Hecht in his dissent admitted that the private inconvenience factors no longer applied. *Castro Alfaro*, 786 S.W.2d at 708 (Hecht, J., dissenting); see *supra* note 180 (quoting Justice Hecht).

missal supports international public policy. The court's holding was proper because elements of the *Castro Alfaro* litigation relate strongly to the interests of the state of Texas.²⁵⁵ Despite the dissent's assertion to the contrary,²⁵⁶ Texas has an interest in this litigation because the litigation concerns the manufacture of dangerous goods by corporations that have extensive operations in Texas.²⁵⁷

U.S. corporations design and make many products like the pesticide dibromochloropropane in the United States for sale abroad.²⁵⁸ In addition, the U.S. corporations manufacturing such products and technologies utilize their profits in the United States.²⁵⁹ Thus, U.S. state and federal courts have an interest in international tort litigation arising from such products and technologies.

In addition, a decision such as *Castro Alfaro* supports international public policy by preventing international tortfeasors

255. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 684-86 (Tex. 1990) (Doggett, J., concurring) (discussing Texas interest in litigation), *cert. denied*, 111 S. Ct. 671 (1991).

256. *Id.* at 706-08 (Hecht, J., dissenting).

257. See *supra* notes 103-05 and accompanying text (discussing facts of *Castro Alfaro*).

258. See Schneider, *Pesticide Makers Fight Export Curb*, N.Y. Times, Aug. 26, 1990, § 1, pt. 1, at 30, col. 1. The reporter noted that two pesticides of the twelve banned by the U.S. government since 1972 are currently exported, in addition to other pesticides rejected as unsafe by the U.S. Environmental Protection Agency (the "EPA"). *Id.* The EPA does not know, nor will chemical industry officials state, how many chemicals are exported each year. *Id.* Manufacturers have mentioned sales around US\$100 million of eight chemicals used in farming. *Id.* Environmental groups consider this a low estimate. *Id.* World pesticide sales have doubled since the early 1970s to nearly US\$18 billion a year. See Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col. 1. The World Health Organization estimates that nearly one million people suffer from pesticide poisoning, with approximately 20,000 deaths per year. *Id.* Simons states that the "U.S. annually exports about 500 million pounds of pesticides that are banned, restricted, or not licensed for domestic use." *Id.* The problem is not limited to the United States. *Id.* West Germany, France, and Switzerland, along with the United States, are leading exporters of pesticides to the Third World. *Id.* An intense debate over exportation of hazardous pesticides is dividing the European Community. *Id.* The U.S. debate, however, reached an impasse on October 16, 1990, when the U.S. Congress dropped a proposed export ban from a farm bill. See Schneider, *The Budget Battle*, N.Y. Times, Oct. 17, 1990, at A24, col. 4. The reporter noted that "[t]he White House, the Environmental Protection Agency and the Department of Agriculture agreed with the pesticide industry that [the ban] was unnecessary and would cost hundreds of jobs." *Id.*

259. See *Castro Alfaro*, 786 S.W.2d at 686, 689 (Doggett, J., concurring).

from escaping liability due to inadequate remedies provided by alternative fora.²⁶⁰ By shipping dangerous products such as dibromochloropropane to Third World nations, the *Castro Alfaro* defendants and other U.S. companies avoid the threat of domestic litigation.²⁶¹ Often, export to Third World countries occurs when U.S. corporations can no longer market hazardous products domestically.²⁶² Government attempts to regulate such export, in turn, are inadequate.²⁶³ Injured Third

260. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 689 (Tex. 1990) (Doggett, J., concurring), cert. denied, 111 S. Ct. 671 (1991).

261. See McGarity, *Bhopal and the Export of Hazardous Technologies*, 20 TEX. INT'L L.J. 333 (1985). According to this commentator, corporations "'forum shop' for countries with lax health and environmental laws, where workers are forced by day-to-day economic exigencies to work without risk premiums." *Id.* at 333. The *New York Times* reported that Third World farmers use empty pesticide containers to store water and food, handle pesticides without protective clothing due to the hot climate, and wash their children's hair with pesticides in order to kill lice. Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col 1. The *Bhopal* case and these other situations raise questions of U.S. paternalism and the propriety of U.S. legislatures and courts protecting Third World populations arguably capable of protecting themselves. Note, *Tom Sawyer's Apology: A Reevaluation of United States Export Policy*, 8 HAST. INT'L & COMP. L. REV. 61, 82 (1984). Economics, however, controls the lack of regulation in such nations. *Id.* In turn, U.S. corporations find opportunities in a regulation-free environment. *Id.* Exercise of jurisdiction by U.S. courts and legislatures over the manufacturing and export of toxic substances by U.S. corporations is not paternalistic. See Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col. 1. In this article, Arif Jamal, a Sudanese agronomist, asks, "'How can a country forbid a poison at home and yet manufacture it and sell it to other countries? . . . Where is the morality of this?'" *Id.* Ultimately, the food sprayed with banned pesticides returns to U.S. tables for consumption, completing what two writers have named the "circle of poison." D. WEIR & M. SCHAPIRO, *CIRCLE OF POISON: PESTICIDES AND PEOPLE IN A HUNGRY WORLD* 3 (1981).

262. *Castro Alfaro*, 786 S.W.2d at 688 (Doggett, J., concurring). Justice Doggett pointed out that "after the United States imposed a domestic ban on the sale of cancer-producing TRIS-treated children's sleepwear, American companies exported approximately 2.4 million pieces to Africa, Asia, and South America. A similar pattern occurred when a ban was proposed for baby pacifiers that had been linked to choking deaths in infants." *Id.* (citations omitted).

263. See Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col. 1. The EPA estimates that only ten percent of documents on exports are filed, with most exporters claiming exemptions under EPA policy. *Id.* The Federal Insecticide, Fungicide and Rodenticide Act requires that all pesticides used in the United States be registered with the EPA. See 7 U.S.C. § 136a (1988). Foreign purchasers must furnish a statement acknowledging that the pesticide is unregistered and not for sale in the United States. *Id.* A copy of such statement must be sent by the EPA to an appropriate official of the foreign country. *Id.* § 136o(a)(2). If a pesticide is canceled or registration suspended, the foreign government must be notified. *Id.* § 136o(b). Such legislation has not halted the flow of

World plaintiffs, such as the plaintiffs in *Castro Alfaro*, attempting to reach the manufacturers and purveyors of products that cause their injuries, would most likely be thwarted by the doctrine of *forum non conveniens*.²⁶⁴ The Texas Supreme Court addressed this concern by removing the barrier of *forum non conveniens*.

Because international torts often involve significant U.S. activity, alleged U.S. tortfeasors should not be allowed to argue that suit in a U.S. court would inconvenience them.²⁶⁵ U.S. corporations actively seek international markets for their products, yet argue inconvenience when they must defend their actions in these international markets.²⁶⁶ U.S. corporations use *forum non conveniens* to avoid damages awarded by U.S. courts, rather than to avoid non-monetary "inconvenience."²⁶⁷

unregistered pesticides, which has to the contrary increased. See Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col. 1; Note, *supra* note 261, at 81. Many countries do not know of these regulations, and the United States does not notify foreign governments until after shipments have begun. *Id.* at 78. In addition, purchasers are often foreign subsidiaries of U.S. exporters who sell the pesticide without regard for safety. *Id.* In *Castro Alfaro*, the purchaser was Standard Fruit. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 675 (Tex. 1990), *cert. denied*, 111 S. Ct. 671 (1991).

264. See Note, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations*, 48 HARV. INT'L L.J. 202, 209 (1987). Multinational corporate defendants often use *forum non conveniens* to delay litigation, and if litigation commences in a foreign forum, to limit liability. *Id.* Subsequent litigation after a *forum non conveniens* dismissal is rare because dismissal is usually outcome determinative. See *supra* note 138 (discussing results of *forum non conveniens* dismissals).

265. *Castro Alfaro*, 786 S.W.2d at 689 (Doggett, J., concurring). Justice Doggett noted that "[w]hen a court dismisses a case against a United States multinational corporation, it often removes the most effective restraint on corporate misconduct." *Id.* In addition, many of the private inconvenience factors have been removed. See *supra* note 254 (discussing Justice Hecht's dissent).

266. Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674, 682 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991). Justice Doggett addressed the defendants' inconvenience arguments:

Over three years after the plaintiffs filed this lawsuit in Houston, Shell & Dow obtained a dismissal of the action on *forum non conveniens* grounds. Extensive discovery had already been completed, interrogatories had already been answered by the individual plaintiffs and the individual plaintiffs had already agreed to appear in Houston for medical examinations and depositions. Many of the so-called 'convenience' problems had already been resolved in this litigation prior to the dismissal under *forum non conveniens*.

Id. at 682 n.4 (Doggett, J., concurring).

267. *Id.* at 682-83 (Doggett, J., concurring). Justice Hecht stated in his dissent that "it also seems plain to me that the Legislature would want to protect the citizens

Allowing U.S. corporations to hide from U.S. litigation permits them to take advantage of lax regulations and cheap labor in Third World countries.²⁶⁸ Furthermore, permitting U.S. corporations to circumvent U.S. litigation frequently allows them to remain immune from liability due to the inadequate fora of the same countries.²⁶⁹ Thus, the doctrine of *forum non conveniens*, particularly in cases such as *Castro Alfaro*, allows U.S. corporations to victimize Third World populations without penalty.²⁷⁰ The Texas Supreme Court in *Castro Alfaro* correctly interpreted the state's Wrongful Death Statute. The *Castro Alfaro* court appropriately abolished an antiquated doctrine rendered unjust and unnecessary by contemporary business practices and structures.

CONCLUSION

In *Dow Chemical Co. v. Castro Alfaro*, the Texas Supreme

of this state, its constituents, from greater exposure to liability than they would face in the country in which the alleged wrong was committed. This would be incentive for the Legislature *not* to abolish the rule of *forum non conveniens*." *Id.* at 706 n.10 (Hecht, J., dissenting) (emphasis in original).

268. See McGarity, *supra* note 261 (discussing U.S. export of hazardous materials and technologies to Third World nations); Note, *supra* note 261 (discussing U.S. export of hazardous materials and technologies).

269. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 681 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 671 (1991). Justice Doggett noted that "[t]he decision to manufacture DBCP for distribution and use in the third world was made by these two American companies in their corporate offices in the United States. Yet now Shell and Dow argue that the one part of this equation that should not be American is the legal consequences of their actions." *Id.*

270. See Schneider, *Pesticide Makers Fight Export Curb*, N.Y. Times, Aug. 26, 1990, § 1, pt. 1, at 30, col. 1. U.S. manufacturers argue that regulations preventing pesticide exports would aid foreign competitors. *Id.* Additionally, a vice-president of Du Pont noted that further regulation "would drive manufacturers to transfer some production and research activities overseas." *Id.* Justice Hecht also expressed concern that the *Castro Alfaro* decision would inhibit business in Texas. *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 707 (Tex. 1990) (Hecht, J., dissenting), *cert. denied*, 111 S. Ct. 671 (1991). The conflict between the understandable needs of corporations and the protection of the world's population, as well as the environment, continues. See, e.g., Schneider, *Pesticide Makers Fight Export Curb*, N.Y. Times, Aug. 26, 1990, § 1, pt. 1, at 30, col. 1; Simons, *Concern Rising Over Harm From Pesticides in Third World*, N.Y. Times, May 30, 1989, at C4, col. 1; *Regulations of Pesticides: Hearings Before the Subcomm. on Department Operations, Research, and Foreign Agriculture of the House Comm. on Agriculture*, 98th Cong., 1st Sess. 1, vol. II (1983) (containing statements from public interest groups and chemical industry representatives regarding the export of pesticides). The Texas Supreme Court, in *Castro Alfaro*, has moved U.S. law one step closer to a resolution of this conflict by holding U.S. corporations accountable for international torts. *Castro Alfaro*, 786 S.W. 2d at 679.

Court held that a Wrongful Death Statute conferring jurisdiction on a foreign plaintiff precluded a *forum non conveniens* defense. The court thus abolished the doctrine in Texas for cases brought under the Texas Statute. The conclusion is valid, both as an interpretation of the Texas Statute and as an administration of justice. The doctrine of *forum non conveniens*, once valid due to inadequacy of communication and transportation, has become obsolete, except as a tool for multinational corporations to avoid litigation over torts committed abroad. Other jurisdictions should consider a similar reevaluation of the *forum non conveniens* doctrine to remove an unnecessary barrier to international tort litigation.

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