International Lawsuits and the
Federal Doctrine of Forum Non Conveniens

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The doctrine of forum non conveniens is an equitable doctrine that allows a trial court to decline jurisdiction over transitory causes of action that can more fairly be tried in another state or country. However, it raises issues concerning the federal court’s obligations to American and foreign parties that may significantly frustrate the overall trial process, and exacerbate political tensions between countries. This article gives historical context to the federal judiciary and considers the impact of the doctrine on international civil litigation, and analyzes constitutional foundations.

“Law is not theoretical. Beware of fixed rules that look appealing... that can be a trap rather than an aid for judges.”

Justice Stephen G. Breyer
(July, 1994)

Introduction

The doctrine of forum non conveniens is an equitable doctrine that may cause a trial court to decline jurisdiction over a “transitory cause of action” when it believes the action may more efficiently and fairly be tried elsewhere. The aim is to insure fundamental fairness at trial by deciding controversy under standards of the community most affected and interested in the action. Long recognized, the doctrine now provokes more intense controversy because of the expanding dimensions of national court jurisdiction and the increasing frequency of international commercial and product liability lawsuits.

The doctrine, applicable in both domestic and international cases, also raises new tensions between federal and state courts, and frustrates litigants because of the surrounding trial site and heightened complexities of pretrial issues. The forum non conveniens doctrine also raises issues concerning the nature of the federal court’s obligations to foreign parties, the scope of the separation of powers doctrine, and the nature of the federal common law.

Such inquiries are especially time consuming when the facts and issues 1) affect the global operations of multinational corporations, and the financial and professional capabilities of law and accounting firms, and 2) require the application of simplistic legislation to increasingly complex international litigation.

Part one of this paper considers the constitutional design of the federal judiciary, in part, through an analysis of selected essays of the Federalist Papers. Part two assesses the origins and development of the judiciary’s “diversity of citizenship” jurisdiction. Part three analyzes the evolution of the doctrine of forum non conveniens, and considers the judicial criteria for weighing the public and private interests, as illuminated in the U.S. Supreme Court’s American Dredging (1994) decision.

[Editor’s note: due to space limitations, the author’s extensive and informative citations and endnotes could not be reproduced. They are, however, available from the author.]
Constitutional History and Text

Those who formed the nation had cherished ideals that were inspired by an imperfect vision. But experience teaches. The Articles of Confederation established a federal government that lacked a judiciary and chief executive, intensified conflicts between the states, and destined many statesmen of the era to question the wisdom of a pervasive national government.

Therefore, it is remarkable that the loosely assembled and rambunctious sovereign states of the 1780s could, by the end of that decade, be forged as “one”. Many momentous issues were addressed including: interstate and foreign commerce; territorial borders; discriminative practices by local courts against residents of other states; domestic and foreign claims; and constant risks of inter-necine wars. What is more, the absence of a fully empowered national court made such an eventuality.

It was conflicts of this sort that the Constitution’s drafters (and the First Senate Judiciary Committee) sought to avoid, while facilitating the commercial advancement and joint protection of all the states. Clearly, the responsibilities for balancing the national and state interests required artful, delicate, and careful delineation. The Federalists sought to create the constitutional bases the national government needed for substantial powers, while the anti-federalists resisted the infringements of individual and states’ liberties. These conflicting aims are reflected in the structure and jurisdictional designs of the federal judiciary.

The new constitution stirred emotions. Many anti-federalists doubted the wisdom of establishing a national court system, and distrusted the powers that federal judges might wield. But, what is more, the concerned citizenry had a clouded vision. Since no efficient court model had existed within any of the states, the usefulness, compatibility, and potential efficiencies of a national court system could not be easily imagined. Thus, during the interim period prior to the Constitution’s ratification by the influential New York legislature, the Federalist Papers were published to prompt a clarified vision. These essays opened the constitutional debate and explained the Framer’s intentions.

In March 1789, the First Congress met to promulgate judicial legislation, and specifically determine the nature of the court system, the terms of federal judicial service, and methodologies for deciding cases. Congressional effort was unprecedented. No efficient state court models existed. Moreover, the states ordinarily had no established requirements or qualifications for their judicial personnel, and commonly judicial officers were allowed to contemporaneously serve in both legislative and judicial roles (in part because the highest state courts were commonly branches of the state legislatures).

What is more, states usually had two-tiered court systems and allowed full jury trials at both levels. They decided issues of law and fact, sometimes on inconsistent advice from state judicial panels. And, lacking their own bodies of law, these courts frequently adopted unclassified principles pre-revolution English common law to fill gaps in the justice records of America’s colonies. This practice continued until after 1804, when the court record-keeping was systematized.

Inexactness typified America’s 18th Century judicial practices. Judges endeavored to “find” and declare the laws existence, rather than follow carefully considered precedents or “make” and write about such law.

Today’s judicial emphasis on writing carefully analyzed opinions, or “making law”, is a modern American legal conception. Eighteenth Century American judges usually “found” the
law through a quorum process, and by weighing the opinions of multi-judge panels sitting on both lower and higher level courts, whose members would each voice his own legal views to the juries. This leads to several points of inquiry.

Questions

In 1789, a three-member Senate Judiciary Subcommittee was instructed to design the national judicial system. The two most fundamental questions were:

1. What should be the relationship between the national and state courts? and between national law and state law? and

2. How should lawsuits between citizens of different states and of foreign countries be decided? And what standard of “fairness” should apply?

These questions bore deeply because of the indefinite character of existing state courts. And because of the ambiguities of “the state law,” they also underscored the wide latitude that the Subcommittee had under Article III in designing a federal court system.

Within a few months, the Senate Judiciary Committee forwarded a bill, “An Act to Establish the Judicial Courts of the U.S.: The Judiciary Act of 1789” for Congressional action. The Act was passed by the House of Representatives on July 20, 1789, with light amendments, received by the Senate’s Ad Hoc Committee days later, and signed into law by President Washington on September 24, 1789. Surprisingly, through the force of debates, the anxieties of the Act’s principal opponents, the anti-federalists, were much diminished, due largely to James Madison’s presentment to Congress of nine constitutional “bill of rights” amendments.

In over 200 years of federal court history only one provision has increasing relevance to a determination of the Court’s international jurisdiction. That provision, Section 34, which is cited as a basis for the application of state law in federal diversity (of citizenship jurisdiction) cases, is also the most interpreted. The shortest, and near-last, provision of the Judiciary Act, states:

“That the laws of the several states, except when the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision, in the Courts of the United States in cases where they apply.”

[Emphasis added]

Modern interpretations and applications of this “rule of decision” have provoked several questions and countless scholarly articles concerning the intended relations between the federal and state courts. However, sure interpretations must be broad enough to reflect the “web of legal and political culture” that existed in the states in 1789.

The Federalist Papers

The eighty-five essays known collectively as the Federalist Papers, were principally authored by Alexander Hamilton (the sole New York delegate to the Constitutional Convention), and by James Madison and John Jay, who all published under the pseudonym “Publius.” The essays appeared in New York City newspapers from October, 1787 through August, 1788, and explained—from the perspectives of their essayists—the nature and purposes of the then-proposed U.S. Constitution.
Essays 78 through 83 are the most directly relevant to an interpretation of Article IV. These essays discuss the uses of federal courts, the establishment the qualifications of its judges, and the nature of their decisional processes. Essay No. 78 is the most significant to this discussion because it concerns the operations of “the judiciary department under the proposed government”, and presents ideas about the appropriate uses of judicial direction and the nature of judicial review. In particular, No. 78 discusses the needed quality of the federal judicial action and explains why it should rise above that of state judicial action. It advocates importance of life tenure for federal judges and judicial fidelity to the constitution, and the need for strict rules and precedents to define the judges “duty in every particular case”.

Moreover, No. 78 states:

“It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.”

Hamilton’s view and, presumably, that of his contributing authors, Jay and Madison, as well was that the federal judiciary should be firmly guided by “strict rules and precedents... in every particular case,” including those involving diversity citizens (e.g., “citizens” of different states, or of different countries). As a prominent New York trial lawyer and statesman, Hamilton understood the risks of injustice in the state courts, because of their uneven use of case law (there were relatively few statutes in force at the time). Thus, he advocated the maintenance of a federal court system that would improve standards for all the nations courts, in accordance with the federal judiciary’s mandate to “find” the law in diversity cases from that existing in the “federal” states without restriction to the particular decisional law of within a state.

Essays No. 3 and 11 aid our understanding of the framers intentions. In Essay No. 3, John Jay, the first Secretary of State, explained the national government’s overriding interests in foreign policy and affairs:

“It is of high importance to the peace of America that she observe the laws of nations... and this will be more perfectly and punctually done by one national government than it could by... Thirteen separate States... [emphasis added]

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“When once an efficient national government is established, the best men in the country will... serve *** and the judicial decisions of the national government will be more systematical and judicious than those of the individual States, and consequently more [satisfaction will result] with respect to others nation...”

In No. 11, Hamilton states “the importance of domestic and foreign commerce to the nation and the need for uniformity in the presentation of the national character and in so doing amplified the purposes of the Commerce Clause (See Article I, Section 8, Paragraph 3):

“The importance of the Union, in a commercial light, is one of those points about which there is least room to entertain a difference of opinion... [and] it applies as well to our intercourse with foreign countries as with each other. There are appearances to authorize a supposition that the adventurous spirit, which
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distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. * * * Impressions of this kind will naturally indicate the policy of fostering divisions among us." [emphasis added]

In extolling the need for an ordered national commercial policy Hamilton also signified the need for clear judicial calculations and uniformity in all measures of law.

Federal Court Jurisdiction and the Doctrine of Forum Non Conveniens

“The superstructure of federal law and institutions..., which operates in relation to state law, assumes and accepts the basic responsibility of the states, and seeks simply to regulate the exercise of state authority.”

Hart, “The Relations Between State and Federal Law” (1953)

The 1787 Philadelphia Constitutional Convention was a fractious historical phenomenon. Inflammatory debates questioned whether the new government should assume all routine state judicial functions, even though it had already been decided that the Supreme Court would be the nation’s constitutional court. Moderate delegates were deeply divided because they feared that even a limited federal judiciary would stifle the state courts. Others were repulsed by the concept of a powerful, “elitist” national court, which might favor the wealthy and demean the poor. Yet, some objections were withdrawn, important compromises were made, and the document that took three months to draft was presented to the states for ratification.

In 1789, the first Chief Justice, Oliver Eldridge, the Judiciary Act of 1789’s principal draftsman, revised his product. The state courts were reserved general (including concurrent) jurisdiction to decide any case not within the “limited” province of the federal courts. But in practice, the federal judiciary prompted numerous positive developments. These developments raised new controversies over unsettled issues: principally, what is the extent of the federal court’s “limited” jurisdiction in diversity cases?

Nevertheless, its authority, influence, and contributions increased and its innovations spread. In the mid-1850’s, New York’s reformation of its civil procedure – The Field Code – inspired like changes in the procedural laws of other states and of the federal judiciary. Later, through the Civil War Amendments [the 13th in 1865 and 14th in 1868, fortified by their “enforcement clauses” (“Section 2” and “Section 5,” respectively)] and through the application of the “Due Process” and “Equal Protection” clauses, the civil procedure models of the states were federalized.

In 1875, Congress expanded the Federal question jurisdiction of federal courts by denoting its jurisdiction as that in “civil cases” instead of as previously denoted by the expression “common law.” In the 1880’s, the American Bar Association began to address the confusion caused by the diverse procedures in the nation’s District courts and advocated uniform federal civil procedures. In 1933 an enabling act was passed that authorized the Supreme Court to make uniform rules of civil procedure; in 1938 the comprehensive Federal Rules of Civil Procedure was issued. As has occurred throughout American legal history, the state courts were guided and inspired, and have since significantly conformed their procedural laws.
**Forum non conveniens** is a judge-made doctrine that is recognized by some courts (state and federal) as a check on inappropriate forum selection. To invoke the doctrine, an alternative forum must exist, and the reviewing court must balance the parties’ private convenience and the publics’ interest. The case should be dismissed in favor of the alternative forum if the balance favors litigation there.

**Forum non conveniens** issues often arise in federal diversity cases, involving both parties of different states (“domestic diversity”) and parties of the United States and one or more foreign countries (“foreign diversity”). However, in domestic diversity cases, applicability of the doctrine is determined under a statutorily-prescribed balancing test – 28 U.S.C. 1404(a) – which is a venue provision authorizing horizontal “transfers” within the federal system.

Most federal district courts recognize the doctrine. But where there is discretion—as there is in foreign diversity cases—the doctrine is applied (if at all) in various ways, although persuasive arguments suggest that a uniform rule should apply in all such cases. Moreover, state courts are not compelled by federal law to recognize the doctrine, or adhere to any standards in deciding whether a more convenient forum for trial exists, even in cases involving significant issues concerning the interests of foreign parties.

For these reasons, jurists and legal scholars frequently question: 1) whether Congress is “obligated” to enact a statute that will make a uniform **forum non conveniens** doctrine binding in both state and federal courts, and 2) whether federal courts have sufficient constitutional grounds to establish a common law **forum non conveniens** doctrine that would be binding on the federal and state courts in foreign diversity cases. Opponents have raised serious challenges to both propositions, but there are several constitutional bases to support such actions by the legislature and the federal courts.

### Contours of the Doctrine

The doctrine has a long history in Scottish, English, and American law. First recognized and clarified in admiralty cases (because they involved unique economic trading interests at the beginning of the industrial era, and because alternative legal forums existed), the doctrine became generally applicable in tort and commercial cases. However, the strength of the doctrine in such cases has diminished with modern advancements in alternative transportation methods and in communications technologies.

**Gulf Oil to Piper Aircraft**

In 1929, a law review article introduced the expression “**forum non conveniens,**” but it was in *Gulf Oil v. Gilbert* and *Koster v. Lumberman’s Mutual Assurance Co.*, companion cases decided in 1947, that the Supreme Court clarified and extended the doctrine beyond admiralty.

*Gulf Oil* was a diversity action for damages resulting from negligence. The Court, in referencing *Canada Malting*, and other admiralty cases, held that the doctrine was applicable in federal courts to resist imposition upon (their) jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. In explaining the doctrine, the Court noted that it “pre-supposed at least two forums in which the defendant is amenable to process.” The Court also described the private and public interest factors that were to be considered.

Private factors concerned the plaintiff’s access to sources of proof and witnesses, costs of suit, the availability of compulsory processes, and other practical concerns. Further, the Supreme Court indicated that invocation of the doctrine should turn on whether the plaintiff’s
chosen forum is so inconvenient as to “vex,” “harass,” or “oppress” the defendant. The Court concluded, however, that “the plaintiff's choice of forum should rarely be disturbed.”

In 1948, Section 1404(a) of Title 28, a federal venue transfer provision, was revised to permit application of the Gulf Oil factor analysis in federal civil actions. Interpreting the section, Van Dusen v. Barrack (1964) held that it “reflects an increased desire to have federal civil suits tried in the federal system at the place called for . . . by considerations of convenience and justice.” The Van Dusen court also decided that a transfer does not affect the choice of law.

Application of the doctrine in state courts has significantly increased since the Gulf Oil decision, but these decisions are inconsistent. Nonetheless, refinements but the federal courts has continued. In deciding Piper Aircraft Co. v. Reyno (1981), a foreign diversity case, the Court extended the factors test that was outlined in Gulf Oil. Piper was filed in California by a probate administratrix on behalf of six Scotsmen whose relatives had died in an airplane crash in Scotland. The Court decided that the public interests of Scotland, England, and America were affected, but that the forum non conveniens doctrine was applicable and favored continuation of the case in Scotland (which was clearly the most convenient forum upon consideration of all private factors), although the plaintiffs' strict liability cause of action was not an available remedy in the alternate forum.

Further, the Court stated that the doctrine “is designed in part to help courts avoid conducting complex exercises in comparative law” and that “an unfavorable change in law should never be a relevant consideration in a forum non conveniens inquiry.” (Emphasis added.) Moreover, while reaffirming that “there ordinarily is a strong presumption in favor of plaintiff’s choice of forum”; the court indicated that although a distinction between resident or citizen plaintiffs and foreign plaintiffs is justified, “* * * the forum non conveniens determination may only be reviewed where there has been a clear abuse of discretion.” Finally, the Court, in considering the relevant private and public interest, held that the doctrine pointed towards Scotland and cited its “very strong interest in (the) litigation,” and quoted the Gilbert Court stating “there is a ‘local interest in having localized controversies decided at home.’

American Dredging distinguished

Recently, the Supreme Court, in an opinion authored by Justice Scalia, held that the forum non conveniens doctrine does not preempt state law, and is “procedural” and “nothing more or less than a supervening venue provision.” The Court’s characterization is curious. And its casual slight seems to demean a doctrine whose aura was brightening. American Dredging was a domestic maritime diversity case whose holding intensifies the controversy concerning the firmness of the doctrine in, perhaps, the significantly more important foreign diversity sphere.

American Dredging did not overrule Piper and, in fact, reaffirms it backhandedly. Proponents of the doctrine cite the “special federal question” factors that are present in most foreign diversity cases, and argue that there is a sufficient basis—even without enactment of forum non conveniens legislation—to support the mandatory application of the federal doctrine in state courts. Thus, the Court’s characterization of the doctrine as “procedural” and “nothing more or less than a supervening provision” apparently extends the shadows of the Erie Doctrine.

In Erie the U.S. Supreme Court held there is no “general federal common law.” But it did not hold that there is no “specific federal common law,” or that none can arise in support of substantial national interest. Nonetheless, legal scholars and jurists accept the notion of federal common law as an aid to legislation (or interstitial gap-filler). Hence, federal common
law can be crafted to support of clear constitutional Powers consistent with the premise of “original intent”. The result would be—and still is—federal judiciary common lawmaking authority that is broad enough to ensure the efficient workings of the national, and by the federal force of the supremacy clause, state courts as well. Thus, the federal courts could by their own strokes preempt the state courts, in furtherance of the national interest.

Proponents of a federal forum non conveniens common law rule in foreign diversity cases were also dismayed because American Dredging arise in an admiralty context, where for 150 years courts have invoked the doctrine, and where throughout Anglo-American jurisprudence such cases seemed to reflect their special importance. Maritime cases seemed historically ripe for the mantle of federal common law. (Hart & Wechsler have noted that in 1789 admiralty was considered a distinct body of law, “quasi-international law in character.”)

So the ruling in American Dredging deflates the aspirations of those who believe the forum non conveniens doctrine in foreign diversity was next up: But maritime cases have lost their lustre, and foreign diversity cases have multiplied (in number of filings, in complexity, and in number of inharmonious state court opinions). Such cases should ripen into federal common law.

Justice Kennedy (joined by Justice Thomas) forcefully dissented in American Dredging, stating:

“The forum non conveniens problem . . . is inescapably connected with the substantive rights of the parties in any given type of suit . . .

* * *

Procedure or substance, the forum non convenience defense promotes comity and trade. The states are not free to undermine these goals. The Court ought to face up to the consequences of its rule in this regard.”

The allusions are clear. Bona fide national interests will be impacted by the Court’s decision at a time when increased tensions are already anticipated from the effects of NAFTA, the evolution of GATT (and the creation of the World Trade Organization), expansion of the European Union, and increase American trade with China (whose balance of payments surplus is rising). These trade and interrelated political and social effects developments will impel judicial action. However, past lessons can be learned: James Madison (in 1789) commented:

“The necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed.”

The majority’s decision in American Dredging does not comport with traditional legal notions that appeared well-placed in admiralty. And there are similar, albeit stronger, notions at play in foreign diversity cases today. A federal common law rule governing foreign cases should be found.

The Federal Courts

The federal judiciary is a superstructure designed hierarchically to bring order to the nation’s court systems. In Article III, the Constitution provides for a Supreme Court to share
the diffused powers that are required to govern the United States. The Supreme Court’s power is, however unlike that of the other branches, emphatically the power of judgment. And the power, such as it is, should be exercised pragmatically and with a view toward promotion of the national interests in an ordered and efficient way. Thus, where the Court has the power to decide a justiciable issue, there must be a corresponding duty that bears on the exercise of the power.

Justice Cardoza, in *Palsgraf v. Long Island Railroad Co.*, turned tort law forever by poignantly evoking: “The risk reasonably to be perceived defines the duty to be obeyed.” He was speaking to individuals, but the force of his logic should apply as much to public institutions, even those beyond sanction.

The Supreme Court has this nation’s supreme judgment power. And as Justice Kennedy declared in his dissent to *American Dredging*,

> “the forum non conveniens problem . . . is [inescapable]. The Court ought to face up to the consequences of its [majority] rule in this regard.” [Emphasis added].

Justice Kennedy clearly alluded to the foreseeable risks of a continued fractious approach to application of the forum non conveniens doctrine in foreign party cases. And it is equally clear that the risks of harm will be borne ultimately by the nation, the states, and by the international community. Justice Kennedy was right, “the Court ought . . . . It had [has] a duty.”

“In international law is part of our law.”

In 1895, the Supreme Court decided *Hilton v. Guyot*, and relied on international comity as a basis for enforcement of a foreign judgment. In 1990, the Supreme Court, wearing the same lens, held that “international law is part of our law,” and in so doing accorded respect to “customs and usages of civilized nations,” as decided in the *Paquette Habana* case. Years later, in 1964, the Court decided *Banco Nacional de Cuba v. Sabbatino* and articulated the Act of State doctrine, which confirms international conception of state sovereignty and equality without regard to economic or political power. Thus, without the support of a enabling statute, the Supreme Court established an American federal common law doctrine grounded on the principle of international comity. It held that America’s “constitutional underpinnings” support judicial recognition of the legitimate “public acts of foreign nations” performed on their own soil.

The Act of State Doctrine radiates domestically as federal common law, devised in support of foreign relations interests committed by the Constitution to the executive and legislative branches. This doctrine, like that of *forum non conveniens*, promotes prudent abstentionism by the courts, and in so doing seeks to have the country speak on some issues with “one voice.”

**Stangvik: A Forum Non Conveniens Federal Common Law Model**

The President and Congress share constitutional powers related to foreign affairs, and commerce (under the “Commerce Clause,” Article 1, Section 8, paragraph 3, and buttressed by the “Elastic” or “Necessary and Proper Clause,” which is within the same article). Consequently, these powers are broad. And because of the federal judiciary’s unique role in the federal system, the strength of the American economy and expansiveness of American law, foreign nations and their citizens are affected by American court decisions. And certain case decisions, if properly cast, are wont to have significant impact. *Stangvik v. Shiley, Inc.*, a California product of *Piper Aircraft* may become such a case.
Stangvik was a product liability case involving a California heart valve manufacturer and Swedish and Norwegian plaintiffs. A forum non conveniens motion was filed by the defendants and the state court balanced the interests. The private factors included those that had been previously clarified in Gulf Oil and Piper Aircraft, including those such as the requirements of pretrial discovery, demands of trial practices in the alternate forum, and the enforceability of foreign judgments. However, in enumerating the so-called “public factors,” the Supreme Court showed its enlightenment. The decision extended Gulf Oil, and clarified Piper Aircraft. And it incidentally reversed a 1984 California case, Holmes v. Syntex Labs, which had definitively rejected the application of the federal forum non conveniens doctrine, as presented in Piper Aircraft.

The “public factors” are:

1. **Court Congestion:** the time and resources to be expended by the court in deciding the foreign party would be factored;

2. **Regulatory Interests:** of both forums should be evaluated to determine the strength of deterrent effects that would occasion the court’s exercise of jurisdiction;

3. **Deference:** to the law and policies of the affected forums;

4. **Impact on local business competition:** and

5. **Relationship of the defendant to the state,** to determine the character and weight of the national interest in deciding the base.

The Stangvik is special because it collects both private and public factors that may have been expressed or implied in various cases that invoked the doctrine, refolded them in the blanket of Piper Aircraft and clarified them. And in so doing has, perhaps, propounded an improved forum non conveniens model to the federal courts from which a common law rule can be devised.

**Conclusions**

While the text of the U.S. Constitution and 1789 Judiciary Act are our primary guides, the shadows and radiance of history trenchant are as vitally instructive. Thus, only through careful historical examination of both the precepts and constitutional underpinnings do we gain rich insights. The Constitution, a magnificent, but imperfect document, memorialized compromises that provide important thrusts for judicial, and jurisdictional analyses. Moreover, it is the Judiciary Act of 1789 (and especially its Rules of Decision Act—Section 34) that adds the radiance. Yet, we know that these documents still conceal as much as they reveal for the auras are there. The letters in 1789 of Madison and Attorney General Bedford are proofs; and the Federalist Papers, in particular essays 78, 3, 11, and 45 by Hamilton and Jay, are persuasive joiners. Moreover, the raucous predicaments of the undisciplined colonial state courts provided the scandalous, and often furtive, background. Undoubtedly, much of the historical color is lost because of the pre-1804 American judicial practice of not documenting decisions.

Still, evidence tells what must have been intended: that the federal judiciary has inherent authority to "make" or "find" common law when tied to enumerated constitutional functions. In this fashion the doctrine of forum non conveniens has become a standard in federal law and should be made definitively binding by the courts as pragmatists inevitably reconstrue the decisions of American Dredging and Piper Aircraft.