NOTES

FEDERAL PROCEDURE: ERIE-HANNA RULE HELD NOT TO COMPEL FEDERAL APPLICATION OF STATE INTERNAL AFFAIRS DOCTRINE

In the instant decision the federal district court determined that it was not bound by a state rule which directed dismissal of actions involving the internal affairs of foreign corporations. In light of the "equal protection" guidelines laid down by Erie R.R. v. Tompkins *and* Hanna v. Plumer *in order to ascertain the applicability of state law in diversity cases, significant questions are raised by the court's "substance-procedure" approach and its assertion that the area covered by the state rule had been pre-empted by the federal doctrine of "forum non conveniens" embodied in section 1404(a) of the Judicial Code.*

A RECENT MANIFESTATION of the conceptual difficulties produced by *Erie R.R. v. Tompkins*[1] and its progeny is *Lapides v. Doner*,[2] in which a Michigan federal district court held that it was not compelled to follow a relevant state forum non conveniens rule. To reach this result, the court determined that state principles of forum non conveniens are not rules of "substantive law binding on Federal Courts under the *Erie* doctrine."[3] Therefore, although a different outcome would have resulted had the suit been brought in a Michigan state court, "this 'outcome determination' approach was discredited in the recent case of *Hanna v. Plumer*"[4] and therefore

[1] 304 U.S. 64 (1939).

[2] 248 F. Supp. 883 (E.D. Mich. 1965).

[3] *Id.* at 891-92.

[4] *Id.* at 890. In Hanna v. Plumer, 380 U.S. 460 (1965), the Supreme Court was faced with a conflict between the operation of FED. R. CIV. P. 4(d)(1), which allows service of process to be made by delivery of the summons and complaint to the defendant's usual place of abode, and a Massachusetts statute which requires in-hand delivery of process where the defendant is executor or administrator of an estate. In holding that service according to the provisions of rule 4(d)(1) did not violate the limitations imposed upon the federal courts by *Erie R.R. v. Tompkins,* the Court redefined the implications of *Erie* and explained as follows the interpretation purportedly laid down by Guaranty Trust Co. v. York, 326 U.S. 99 (1945):

"'Outcome-determination' analysis was never intended to serve as a talisman. . . . Indeed, the message of *York* itself is that choices between state and federal law are to be made not by application of any automatic, 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." 380 U.S. at 466-67.

would not be controlling. Furthermore, the court held[5] that local forum non conveniens rules had been largely pre-empted for federal court purposes by the enactment of section 1404(a) of the Judicial Code.[6] Significant questions are raised by the court's reliance upon *Hanna,* for there, while the Supreme Court asserted that Congress may enact any rule of federal practice rationally classifiable as procedural,[7] the conflicting state and federal rules were deemed to be "of scant, if any, relevance to the choice of the forum."[8] Underlying *Hanna,* therefore, is a vital concern related to the discouragement of forum-shopping, precisely the type of forum-shopping which would be provoked by application of the disparate rules of forum non conveniens within the state and federal courts of Michigan.

In *Lapides* a stockholder's derivative action was brought in Michigan against an Ohio corporation doing extensive business in Michigan and five of its directors. The suit involved certain questions of control and managment of the internal affairs of the corporation,[9] and both declaratory and injunctive relief were prayed for. On a motion to dismiss, defendant invoked Michigan's strict internal affairs rule, under which the state courts will not entertain suits wherein they are called upon to exert visitorial control over the internal operations of a foreign corporation.[10] The district court

[5] 248 F. Supp. at 892.

[6] "For 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) (1964).

[7] "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. at 472.

[8] *Id.* at 469. "We cannot seriously entertain the thought that one suing an estate would be led to choose the federal court because of a belief that adherence to Rule 4(d)(1) is less likely to give the executor actual notice than § 9 [the Massachusetts service rule], and therefore more likely to produce a default judgment. Rule 4(d)(1) is well designed to give actual notice, as it did in this case." *Id.* at 469 n.11.

[9] The action was brought by three individual directors and a minority shareholder against the corporation and five directors for a declaratory judgment that a meeting of DWG Cigar Corporation of Ohio be declared null and void. At the meeting in question, one of the plaintiffs was removed as chairman of the board and of the executive committee; another was replaced as vice-chairman of the board and his position on the executive committee was eliminated; one of the defendants was elected chairman of the board; and the counsel of the corporation was changed. In addition, the plaintiffs sought to enjoin the individual defendants from exercising the powers of the offices to which they had been elected at the meeting. 248 F. Supp. at 885.

[10] "[I]t would seem that if this Court were to follow the Michigan [internal affairs]

rule stated in Wojtczak [v. American United Life Ins. Co., 293 Mich. 449, 292 N.W. 364 (1940)], it would be obliged to decline jurisdiction of the instant case." 248 F. Supp. at 886. "[The internal affairs doctrine] appears to be a Michigan rule of *forum non conveniens* in the limited class of cases involving control and management of the internal affairs of foreign corporations." *Id.* at 887.

The rule that a court will refuse to exercise jurisdiction in suits involving the management by the court of the internal affairs of a foreign corporation has been generally accepted in American jurisprudence. See, *e.g.*, Allen v. Montana Ref. Co., 71 Mont. 105, 227 Pac. 582 (1924); Lewisolin v. Anaconda Copper Mining Co., 26 Misc. 613, 56 N.Y. Supp. 807 (Sup. Ct. 1899); National Baptist Convention v. Taylor, 402 Pa. 501, 166 A.2d 521 (1961); EHRENZWEIG, CONFLICT OF LAWS § 146, at 413 (1962); STUMBERG, CONFLICT OF LAWS 450-53 (3d ed. 1963); Latty, *Pseudo-Foreign Corporations,* 65 YALE L.J. 137, 143-44 (1955). The doctrine has apparently been applied in at least twenty-eight states and the District of Columbia. See 17 FLETCHER, PRIVATE CORPORATIONS § 8425 (rev. ed. 1960) (cited by the Michigan Supreme Court in *Wojtczak*).

In its earliest development the internal affairs rule was not considered to be discretionary but rather was phrased in terms of lack of jurisdiction. Comment, 31 MICH. L. REV. 682 (1933); Note, 33 COLUM. L. REV. 492 (1933); see, *e.g.*, Kahn v. American Cone & Pretzel Co., 365 Pa. 161, 74 A.2d 160 (1950); Taylor v. Mutual Reserve Fund Life Ass'n, 97 Va. 60, 33 S.E. 385 (1899); STUMBERG, *op. cit. supra* at 450-51. This attitude may have been a result of the early belief that corporations were the creation of the state of incorporation and had no legal existence outside the incorporating state, see, *e.g.*, Royal Fraternal Union v. Lunday, 51 Tex. Civ. App. 637, 640, 133 S.E. 185, 187 (1908); 17 FLETCHER, *op. cit. supra,* § 8427 & n.76; or a consequence of the notion that courts of the state of incorporation should exercise all of the jurisdiction which they possess, local courts thus abstaining regardless of countervailing local policy considerations. See Note, 33 COLUM. L. REV. 492, 495-96 (1933). The prevailing view today, however, is that the rule is a discretionary matter based upon considerations of the effectiveness of the relief which might be granted by the court, the difficulties of applying the corporation law of the incorporating state, and the possibility of conflicting decrees being rendered by the incorporating state. *E.g.*, State *ex rel.* Weede v. Iowa So. Util. Co., 231 Iowa 784, 818-27, 2 N.W.2d 372, 391-95 (1942); Koster v. Shenandoah Corp., 258 App. Div. 1079, 18 N.Y.S.2d 38 (1940); see, *e.g.*, Williamson v. Missouri-Kansas Pipe Line Co., 56 F.2d 503, 508 (7th Cir. 1932); American Creosote Works v. Powell, 298 Fed. 417, 419-20 (5th Cir.), *cert. denied,* 265 U.S. 595 (1924); STUMBERG, *op. cit. supra* at 450-53; Latty, *supra* at 144; Note, 46 COLUM. L. REV. 415, 416 (1946); 18 MINN. L. REV. 192, 200-03 (1934).

Because these policy objectives were not always served by dismissal of cases involving the management of the internal affairs of a foreign corporation, a number of exceptions to the doctrine were developed. Thus, courts have exercised jurisdiction where the decree could be effectively managed by the court, see, *e.g.*, Lydia E. Pinkham Medicine Co. v. Gove, 298 Mass. 53, 9 N.E.2d 573 (1937); Sharp v. Big Jim Mines, 39 Cal. App. 2d 435, 103 P.2d 430 (1940); where a large proportion of the corporation's assets were present in the forum state or where the directors, officers, or books of the corporation resided in the forum state. See, *e.g.*, Babcock v. Farwell, 245 Ill. 14, 91 N.E. 683 (1910); 17 FLETCHER, *op. cit. supra,* § 8427 n.92; Latty, *supra* at 144; Comment, 31 MICH. L. REV. 682, 684 n.12, 685 n.13 (1933).

The federal courts adopted the internal affairs rule in Rogers v. Guaranty Trust Co., 288 U.S. 123, 130-31 (1933), wherein the Court stated:

"It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with . . . the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile . . . . Obviously no definite rule of general application can be formulated . . . but it

in denying the motion, on the basis of its own substance-procedure analysis, rejected the notion that the internal affairs rule was binding on it and asserted that this particular embodiment of the forum non conveniens concept[11] had been superseded by section 1404 (a).[12]

safely may be said 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."

Since it was generally felt that the decision in *Rogers* did not serve "considerations of convenience, efficiency and justice," the decision was regarded as an adoption of a strict internal affairs rule. See Comment, 31 MICH. L. REV. 682, 694-95 (1933); 18 MINN. L. REV. 192, 199-200 (1934). In Williams v. Green Bay & W.R.R., 326 U.S. 549, 554-57 (1946), the Supreme Court clarified the criteria to be used by federal judges in refusing such cases when acting within their own discretion: "We mention this . . . to put the rule of *forum non conveniens* in proper perspective. It was designed as an 'instrument of justice.' Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive . . . . The relief sought against a foreign corporation may be so extensive or call for such detailed and continuing supervision that the matter could be more efficiently handled nearer home. The limited territorial jurisdiction of the federal court might indeed make it difficult for it to make its decree effective. But where in this type of litigation only a money judgment is sought, the case normally is different. The fact that the claim involves complicated affairs of a foreign corporation is not alone a sufficient reason for a federal court to decline to decide it. The same may be true even where an injunction is sought." (Footnotes omitted.)

The Court in *Williams* thus integrated some of the policies behind the internal affairs rule with the normal considerations of the "vexation and harassment" aspect of forum non conveniens (see note 11 *infra*), thus making it nearly indistinguishable from the general rule of forum non conveniens which would be enunciated in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). See notes 14-17 *infra* and accompanying text. In many jurisdictions, however, "strict application of the internal affairs rule will often reach a result diametrically opposed to the doctrine of *forum non conveniens* . . . ." Note, 46 COLUM. L. REV. 413, 415 (1946). Despite the dissimilarity in motivating policies and sometimes in result, the internal affairs rule has been regarded as a type of forum non conveniens rule (see Latty, *supra* at 144) ever since the landmark article by Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1 (1929), wherein it was argued that refusal of jurisdiction should be used in American jurisprudence as an instrument of justice.

[11] For purposes of analysis, various manifestations of the forum non conveniens concept may be described as follows: (1) those rules which attempt to neutralize the plaintiff's efforts to vex and harass the defendant by the selection of an inappropriate forum; (2) procedures whereby a state may refuse to exercise jurisdiction in an action between nonresidents for nonstatutory torts arising outside the state based upon the notion of insufficient "contacts" between the parties or the cause of action and the state, see, *e.g.*, Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64-65 (4th Cir. 1965); Gregoris v. Philadelphia & Reading Coal & Iron Co., 235 N.Y. 152, 139 N.E. 223 (1923); (3) the internal affairs rules, similar to the one adopted by Michigan, note 10 *supra*. It was the first of these forms, namely that relating to vexation and harassment, which predominated in the federal court system prior to the enactment of § 1404(a). See Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947); Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947). See generally Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947); Blair, *supra* note 10; Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Dainow, *The Inappropriate Forum*, 29 ILL. L. REV. 867 (1935); Foster,

Assuming *arguendo* that the characterization of the state rule as one of forum non conveniens is correct, the court should have reached the question unexplored by *Hanna*—namely, whether Congress may direct the application of a rule of practice when it so affects the result of litigation as to provoke forum-shopping and a concomitant unequal administration of justice. If Congress has this power, *Hanna* would appear to call for an "arguably procedural" analysis with respect to section 1404 (a). Neither of these steps subsequent to the characterization of the Michigan rule was in fact taken by the *Lapides* court.

In order to determine in the first instance if there is indeed a collision between the relevant state and federal rules as interpreted and applied by the court in *Lapides,* it is necessary to consider the appropriateness of the designation of the internal affairs doctrine and section 1404 (a) as rules in the nature of forum non conveniens. In this connection the Reviser's comments state that section 1404 (a) was "drafted in accordance with the doctrine of forum non conveniens" with transfer substituted for dismissal.[13] The contours of this doctrine were not delineated, although the leading exposition of federal forum non conveniens, the Supreme Court decision in *Gulf Oil Corp. v. Gilbert,*[14] is frequently consulted as a reliable guide to legislative intent with respect to section 1404 (a).[15] In *Gulf*

Place of Trial—Interstate Application of Intrastate Methods of Adjustment, 44 HARV. L. REV. 41 (1930).

[12] 248 F. Supp. at 891-94.

[13] *Reviser's Note,* following 28 U.S.C. 1404 (a) (1964); H.R. REP. NO. 308, 80th Cong., 1st Sess. A132 (1947). See Currie, *Change of Venue and the Conflict of Laws,* 22 U. CHI. L. REV. 405, 418 (1955). The Reviser's note has been accepted as authoritative by the Supreme Court. United States v. National City Lines, 337 U.S. 78, 81 (1949).

[14] 330 U.S. 501 (1947).

[15] *E.g.,* Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir.), *cert. denied,* 340 U.S. 851 (1950); Foster-Milburn Co. v. Knight, 181 F.2d 949, 952-53 (2d Cir. 1950). The legislative history of § 1404 (a) sheds little light on the extent to which the statute was intended to pre-empt the area of designation of the appropriate forum. The rule was promulgated after a letter from Professor Moore to the Revisers on March 7, 1945, prompted by the decision in Baltimore & O.R.R. v. Kepner, 314 U.S. 44 (1941), which held that courts could not enjoin the prosecution of Federal Employers' Liability Act cases in other jurisdictions. Professor Moore suggested that this holding be vitiated by statutory provisions allowing transfer of cases where venue is both proper and improper. Sections 1404 (a) and 1406 (a) were thereupon included in the second draft of Title 28 of the United States Code considered May 28-30, 1945, by the Advisory Committee of the House Committee on the Revision of the Laws. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 205-06 (1949). The *Kepner* case, in conjunction with decisions holding that courts lacked power to dismiss actions brought under the special venue provisions of the FELA,

Oil the Court listed nine factors incident to a forum non conveniens determination,[16] two of which were the necessity of handling problems in law foreign to the forum court and the possible ineffectiveness of the forum to administer the relief sought.[17] These two particular factors had long been an integral part of the forum non conveniens concept;[18] it is therefore inconceivable that they did not fall within the ambit of the principle of forum non conveniens introduced into federal civil practice by the passage of section

see, *e.g.*, Leet v. Union Pac. R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944), led to a nation-wide practice of ambulance chasing in FELA suits against railroads. See generally *Hearings on H.R. 1639 Before Subcommittee No. 4, House Committee on the Judiciary*, 80th Cong., 1st Sess., ser. 4 (1947). Section 1404(a) was, therefore, a direct response to the abuses which had surrounded selection of "oppressively inappropriate forums" in FELA cases. Currie, *supra* note 13, at 418.

Subsequent to the incorporation of § 1404(a) into the proposed revision of Title 28, but prior to the actual enactment of that section, the Supreme Court explored the doctrine of forum non conveniens in the federal court system in Gulf Oil Corp. v. Gilbert, *supra* note 14. This decision was construed by many courts to indicate the proper application of § 1404(a), thus limiting transfers to those cases where the defendant could show such inconvenience as to demonstrate vexation and harassment. Currie, *supra* note 13, at 419 n.41, 435-36; see, *e.g.*, Ford Motor Co. v. Ryan, *supra*. The Supreme Court, however, foreclosed such an interpretation in Norwood v. Kirkpatrick, 349 U.S. 29 (1955), by holding that § 1404(a) gave discretion to transfer even though the case would not have been dismissed under a forum non conveniens theory.

The import of the congressional history can be summarized by the observation that § 1404(a) was primarily designed to prevent litigation in inconvenient forums. However, its precise relationship to state rules of forum non conveniens was never defined. It would seem that if the application of § 1404(a) precluded dismissals in the federal courts, as has been contended by some commentators (see 1A MOORE, FEDERAL PRACTICE ¶ 0.317 (2d ed. 1959); Currie, *supra* note 13, at 437), state rules of forum non conveniens could no longer be effective vehicles to grant dismissals in federal courts. Doubt is cast on this conclusion, however, by the fact that federal courts have continued to grant dismissals of cases which might have been transferred within the United States. See, *e.g.*, Simons v. Simons, 187 F.2d 364 (D.C. Cir.), *cert. denied*, 341 U.S. 951 (1951); Sheridan v. American Motors Corp., 132 F. Supp. 121 (E.D. Pa. 1955); *cf.* 46 CORNELL L.Q. 318 (1961) (advocating conditional dismissals where § 1404(a) could not be utilized); 24 GEO. WASH. L. REV. 208 (1955) (advocating dismissal where the plaintiff has abused his privilege to choose a forum by harassing the defendant).

[16] 330 U.S. at 508-09.

[17] Among the additional factors mentioned by the Court were "the relative ease of access to sources of proof; availability of compulsory process . . . , the cost of obtaining attendance of . . . witnesses; possibility of view of premises . . . , [and] administrative difficulties . . . when litigation is piled up in congested centers instead of being handled at its origin." *Ibid.*

[18] See Rogers v. Guaranty Trust Co., 288 U.S. 123, 130-32 (1933); Williams v. Green Bay & W.R.R., 326 U.S. 549, 555-57 (1946). The problem of interpreting foreign law and the possible ineffectiveness of a decree of the forum court were elements specifically enumerated by Blair in his 1929 article which made the term "forum non conveniens" current in this country. See Blair, *supra* note 10, at 22, 27-29.

1404 (a).[19]

Similarly, the Michigan rule involved in *Lapides* calls for automatic dismissal upon a showing that the action involves the control or management of a foreign corporation precisely because this procedure obviates the necessity to apply foreign law and avoids the possibility that the court will be unable to enforce the appropriate decrees.[20] In short, the Michigan internal affairs doctrine is a forum non conveniens rule composed of only two operative factors, both of which in turn are part of the forum non conveniens concept that underlies section 1404 (a). Thus it is at least arguable that section 1404 (a), by the incorporation of the two elements which underpin the Michigan rule, leaves little room for an independent application of this internal affairs doctrine in the federal courts.[21]

The Supreme Court has never determined whether consistent application of the *Erie-Hanna* standards compels the federal courts to respect any of the state rules of forum non conveniens, in particular the internal affairs variation.[22] Prior to the passage of section

[19] While the Court in Norwood v. Kirkpatrick, 349 U.S. 29 (1955), asserted that § 1404 (a) is not a codification of the doctrine of forum non conveniens, it emphasized that the purpose in drawing a distinction "is not to say that the relevant factors have changed . . . but only that the discretion to be exercised [by the district judge] is broader." *Id.* at 32. See Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F.R.D. 595, 598, 605 (1951). Compare Currie, *supra* note 13, at 418. See generally MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 204-06 (1949); 1A MOORE, FEDERAL PRACTICE ¶ 0.317 (2d ed. 1959); WRIGHT, FEDERAL COURTS § 44 (1963); Kaufman, *Further Observations on Transfers Under Section 1404(a),* 56 COLUM. L. REV. 1 (1956).

[20] Wojtczak v. American United Life Ins. Co., 293 Mich. 449, 292 N.W. 364 (1940); see 248 F. Supp. at 886.

[21] The doctrine of pre-emption is not limited to those situations in which state and federal laws are found to be in direct and obvious conflict; rather, when operation of the state law effects a different result or otherwise intrudes into an area dealt with by Congress, the supremacy clause, U.S. CONST. art. VI, dictates that the state rule give way. See, *e.g.,* Hines v. Davidowitz, 312 U.S. 52 (1941). By considering various factors, including the two of crucial importance in the Michigan rule, Congress in passing section 1404 (a) in effect set forth a test by which the federal courts were permitted to allow a suit to be heard in the most convenient forum available in lieu of dismissal. See Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); Currie, *supra* note 13, at 418. It is therefore arguable that since Congress has indicated that federal courts are not to dismiss when considering these factors in conjunction with several others, a rule requiring such courts to dismiss by virtue of these two factors alone must necessarily interfere with the operation of the rule as prescribed by Congress.

[22] See 248 F. Supp. at 891-92. The court in *Lapides* noted that the Supreme Court had reserved decision on the issue of the application of state forum non conveniens rules in the federal courts in Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947), and Williams v. Green Bay & W.R.R., 326 U.S. 549 (1946). Nevertheless, the court reasoned that the Supreme Court has implicitly rejected

1404 (a), the Court avoided this issue by holding that the disposition of the particular cases would have been identical under either federal forum non conveniens or the state rules;[23] the lower federal courts have split when confronted with the proposition that section 1404 (a) pre-empts the internal affairs rule.[24] However, the *Hanna*

the position that the state rules were binding, expressing its views in the following manner: "However, in both Koster and Williams, the Supreme Court gave strong indications that if it were compelled to decide the question, it would hold that Federal Courts are not obliged to follow a state rule declining jurisdiction in cases involving internal affairs of foreign corporations . . . . The Court in both cases clearly rejected the general principle that jurisdiction must be declined in cases involving the internal affairs of foreign corporations. Having rejected the general principle, the Court only then went on to note in both cases that state law, *if applicable,* would not require any different result. But if the Court had felt compelled to follow state law, the proper procedure would have been to discuss state law first and apply it rather than to discuss the general principle first and then note parenthetically that state law would lead to the same result." 248 F. Supp. at 890-91. (Emphasis in original.)

It would seem, however, that the Supreme Court in rejecting the general internal affairs rule was addressing itself solely to the question of when federal judges could within their discretion decline to exercise jurisdiction regardless of the state rule. If a state court would not dismiss but the federal court chooses to do so under a federal rule of forum non conveniens there is no question but that the court is proceeding within the proper boundaries of the discretion accorded by *Williams* and *Gulf Oil* and is "acting within its autonomous administration of the discharge of its own judicial duties." 32 MINN. L. REV. 633, 636 (1948). *Contra,* Braucher, *supra* note 11, at 928. The only area where a conflict between the state and federal rules would raise an *Erie* question would be where the state rule dictates dismissal but the federal rule does not. Traditional notions of judicial restraint would appear to demand that the Supreme Court in *Williams* and *Koster* first apply the federal standards for discretionary dismissals in order to determine if there is such a conflict before it embarks on resolving the difficult constitutional question relating to whether federal courts are compelled to follow the state internal affairs rule.

[23] *Gulf Oil* and *Williams* have been criticized for avoiding the *Erie* question. The commentators have felt that the state rules of forum non conveniens involved in each of the decisions, properly interpreted, would have produced different results than those which the Supreme Court attributed to them. Braucher, *supra* note 11, at 928; Note, 46 COLUM. L. REV. 413, 425 & n.66 (1946).

[24] Prior to *Lapides,* federal courts generally respected state internal affairs rules by either dismissing or transferring. Thus, before passage of § 1404 (a) Judge Learned Hand held in Weiss v. Routh, 149 F.2d 193 (2d Cir. 1945), that federal courts were bound by state internal affairs doctrines. *Contra,* Hall v. American Cone & Pretzel Co., 71 F. Supp. 266 (E.D. Pa. 1947). Subsequent to the enactment of § 1404 (a), federal courts have still respected such rules. Sheridan v. American Motors Corp., 132 F. Supp. 121 (E.D. Pa. 1955) (dismissal); Josephson v. McGuire, 121 F. Supp. 83 (D. Mass.) (granting transfer), *petition for writ of mandamus dismissed,* 218 F.2d 174 (1st Cir. 1954). In *Josephson* the court stated "though it *may* be that this state rule does not govern a federal court sitting in Massachusetts, the policy expressed in State decisions ought not to be regarded as entirely without weight in the exercise of this Court's discretion." 121 F. Supp. at 84. (Emphasis in original.)

The commentators are generally split as to whether *Erie* compels federal courts to follow state rules of forum non conveniens. See Note, 46 COLUM. L. REV. 413, 428-29 (1946) (applying the outcome test); 32 MINN. L. REV. 633, 635 (1948) (irrespective of

opinion, despite extensive discussion concerning uniform application of rules in the state and federal courts to avoid forum-shopping, manifests a decided propensity to give effect to federal rules which "really regulate procedure."[25]

In view of the Supreme Court's silence on the particular issue, it may be queried whether the pre-empting of the Michigan rule is constitutionally allowable, that is, whether disparate treatment of a forum-state litigant by state and federal courts may be objectionable on grounds of fundamental unfairness. Although it is far from being explicitly stated in *Hanna,* it has been argued that some limitation upon Congress' power to effect a different outcome in the federal courts from that which is anticipated in the respective state courts is probably imposed by the due process clause of the fifth amendment.[26] Furthermore, it has been recently pointed out in this connection that the "fairness" requirements of the due process clause might well contain the rudiments of equal protection;[27] that is to say, a forum-state litigant may have an affirmative right, protected by the due process clause, to receive treatment in the federal courts similar to that which would obtain in a state court, unless the policy considerations underlying the state rule should be outweighed by an interest grounded in a need for uniform federal procedure, by the policy rationale of the federal rule,[28]

classification as substance or procedure, convenience should govern); STAN. INTRA. L. REV. 28, 31-32 (1948) (forum non conveniens rules representing considerations as to the workload of state courts should not be respected). Some authorities have taken the position that federal application of state forum non conveniens rules is probably not compelled. MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE 330-31 (1949); Barrett, *supra* note 11, at 399; 14 U. CHI. L. REV. 97 (1946). *But see* Braucher, *supra* note 11, at 928-30 (*Erie* compels respect of internal affairs rules but not other state rules of forum non conveniens).

[25] 380 U.S. at 464, quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941). See 380 U.S. at 469-71.

[26] When the Court in *Hanna* states that *Erie* deals with "equal protection problems" arising from material differences in the result of litigation depending upon whether it is commenced in a state or federal court, *id.* at 467-68, the primary question arises concerning the status to be assigned to the Court's enunciations. It has been strenuously asserted that the Court has promulgated constitutional doctrine requiring some degree of uniformity in the total course of litigation in the state and federal courts. See Comment, 1966 DUKE L.J. 142, 152-55. Other authority, however, indicates that *Hanna* represents no more than a redefinition of the *Erie* policy of uniformity. See McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape,* 51 VA. L. REV. 884, 890 (1965). For purposes of this discussion, the former view has been adopted.

[27] Comment, 1966 DUKE L.J. 142, 152-55.

[28] There may be some question as to whether the policies which the act of Congress was attempting to further—in the instant case with the enactment of

or by a federal concern with particular interstate litigation.[29]

As has been suggested, the policy considerations underlying Michigan's internal affairs rule relate to the convenience of the court, saving it the rude task of having to interpret a sister state's law and the possible embarrassment of being powerless to render an effective injunctive decree.[30] Likewise the parties litigant are bene-

§ 1404(a)—will also be weighed against the degree of discrimination against the forum-state defendant. In *Hanna* the Court utilized the policy behind rule 4(d)(1) to demonstrate that the defendant had not been denied effectuation of the policies of the state rule:

"The purpose of this part of the [Massachusetts] statute, which *is* involved here, is, as the court below noted, to insure that executors will receive actual notice of claims . . . . Actual notice is of course also the goal of Rule 4(d)(1); however, . . . by a method less cumbersome than that prescribed in § 9." 380 U.S. at 463 n.1. (Emphasis in original.)

If the policies had not been identical, however, it is not entirely clear whether the policy of the federal rule would have been used in addition to Congress' interest in uniform procedure in the federal courts to balance against the denial to the home-state defendant of the state policy determination. Some insight into this problem may be supplied by Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958), in which the Supreme Court actively balanced the "strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts," *id.* at 538, against the discrimination resulting from allowing a federal jury to decide a question which South Carolina law reserved to the judge. This, however, might be a special case since the courts were skirting the edge of the seventh amendment.

The lower court decisions split after *Byrd* on the issue of which countervailing interests would be balanced against the denial of the effectuation of state policies. Some cases have put only the federal policy of procedural uniformity on the scales, see, *e.g.*, Monarch Ins. Co. of Ohio v. Spach, 281 F.2d 401, 408 (5th Cir. 1960), while others have placed heavy emphasis upon the policies behind the particular federal rule. See, *e.g.*, Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65-66 (4th Cir. 1965); Allstate Ins. Co. v. Charneski, 286 F.2d 238 (7th Cir. 1960); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959).

The use in *Hanna* of strong language in favor of the Federal Rules, see note 7 *supra* and accompanying text, might constitute a predetermination by the Court of the weight to be given the need for uniform federal procedures and any discrimination caused by the use of the rules will not be invidious when balanced against this interest alone. Such an analysis would seem premature, however, in that any discrimination in *Hanna* seemed very slight, see note 8 *supra* and accompanying text, and not at all indicative of possible conflicts between state policies and the Federal Rules. The most tenable explanation would seem to be that the Court was attempting to resolve the apparent conflict in the lower courts as to the weight to be given to the need for procedural uniformity in the federal courts.

[29] Where uniformity is sought for the benefit of "federal fiscal concerns, interstate waterways, patent and copyright law and federal statutes in general, federal decisional law has bourgeoned." Comment, 1966 DUKE L.J. 142, 148 & nn.32-38. The *Erie* decision, however, implicitly negates the extension of uniformity into the application by federal courts of non-procedural law where there is no *special federal interest.* See Erie R.R. v. Tompkins, 304 U.S. 64, 74-75 (1938).

[30] See note 20 *supra* and accompanying text. There has been considerable question whether the full faith and credit clause includes injunctive decrees within its scope. See Fall v. Eastin, 215 U.S. 1, 12-14 (1909); McQuillen v. Dillon, 98 F.2d

fited equally by Michigan's rule to the extent that they are interested in an efficaciously administered disposition of their legal dispute.

After the rationale of the conflicting state rule is ascertained, it is necessary to determine the degree to which application of the federal standard frustrates the state's policy. Assuming that the federal court would apply the law of a foreign jurisdiction,[31] it would appear that Michigan's policies would be effectuated, rather than frustrated, by adjudication in a federal court[32] in view of the fact that the federal court had determined that it was in a position to administer effective relief.[33] This conclusion is further supported

726, 729 (2d Cir. 1938); Burke v. Burke, 32 Del. Ch. 320, 86 A.2d 51 (Ch. 1952); STUMBERG, *op. cit. supra* note 10, at 120-27; RESTATEMENT (SECOND), CONFLICT OF LAWS, § 434b, comment *c* (Tent. Draft No. 10, 1964). Such a decree, therefore, may be a futile gesture, to the extent that it is directed toward parties not personally before the forum-state's court.

[31] The traditional choice of law rule with respect to the governance of the internal affairs of a corporation has dictated application of the law of the state of incorporation. See EHRENZWEIG, *op. cit. supra* note 10, § 145, at 411-12; STUMBERG, *op. cit. supra* note 10, at 450-53; Latty, *supra* note 10, at 148-49. This choice of law rule is incorporated into Michigan's internal affairs doctrine. See note 52 *infra* and accompanying text. Thus, no policy of Michigan would be frustrated by the mere fact of application of the law of the state of incorporation in the federal courts.

[32] The conclusion that Michigan's policy determinations are not thwarted by the very fact of adjudication in the federal courts is based upon an examination of the two policy considerations underlying the internal affairs rule as enunciated by the Michigan Supreme Court in the *Wojtczak* case. However, a more critical analysis may well bring to light other state policies which may be affected by federal action. For example, it is arguable that Michigan desires to encourage foreign corporations to do business in the state and to this end will not burden such corporations by attempting to control their internal affairs. Indeed, the Michigan Corporation Code states that "nothing in this act shall be construed to authorize the regulation of the organization or internal affairs of any foreign corporation heretofore or hereafter admitted to this state." MICH. STAT. ANN. § 21.95 (1963). Furthermore, Michigan may wish to insulate the corporation from the possibility of conflicting decrees in that state and the state of incorporation. On the other hand, it may be cogently argued that to the extent that it is in the best interest of a corporation to have its internal disputes resolved and to the extent that it is undesirable for a state to close its courts to nonresidents, a state rule which categorically excludes consideration of the internal affairs of foreign corporations is nevertheless unwarrantedly discriminatory and should not be followed by the federal court. See notes 38-44 *infra* and accompanying text; *cf.* Szantay v. Beech Aircraft Corp., 349 F.2d 60, 64-66 (4th Cir. 1965).

[33] Since all parties necessary to a complete disposition of the suit were apparently present in Michigan, presumably either a state or federal court could have rendered effective relief in the instant case. This fact demonstrates that the full sweep of the Michigan rule as interpreted by the *Lapides* court is over-inclusive, at least insofar as it is premised upon the enforceability-of-judicial-decrees policy argument. That is to say, although it may be true *generally* that full and effective relief is not available when the internal affairs of a foreign corporation are in issue, there are exceptional circumstances when such is not the case. Indeed, the more flexible

by the presumption that federal courts are competent to apply any state's laws[34] and by the observation that they have more experience in doing so as a result of hearing cases arising under diversity jurisdiction.

An informative contrast to the factual circumstances of *Lapides* with respect to the effect which frustration of state policy may have upon the applicable law is presented by the situation involved in *Woods v. Interstate Realty Co.*[35] *Woods* concerned a Mississippi statute which closed the doors of that state's courts to suits brought by foreign corporations that had not qualified to do business in Mississippi. The question raised was whether a federal court sitting in Mississippi could entertain a suit instituted by a corporation which had not qualified pursuant to Mississippi law. The Supreme Court held that it could not, noting that a "contrary result would create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts."[36] Here the underlying state policy was the undeniably legitimate one of encouraging qualification by foreign corporations before doing business in Mississippi,[37] a policy which would have been frustrated were the federal courts in Mississippi not required to abstain from assuming jurisdiction.[38]

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renditions of the internal affairs rule make provisions for the assertion of jurisdiction when relief may be effectively administered by the forum court. See note 10 *supra*.

[34] *E.g.*, Lamar v. Micou, 114 U.S. 218, 223 (1885); Owings v. Hull, 34 U.S. (9 Pet.) 607, 624-25 (1835); Strickland v. Humble Oil & Ref. Co., 140 F.2d 83, 86 (5th Cir. 1944). The combination of *Erie*, Van Dusen v. Barrack, 376 U.S. 612 (1964), and § 1404(a) imposes upon the federal courts the responsibility to apply the laws of all fifty states.

[35] 337 U.S. 535 (1949).

[36] *Id.* at 538.

[37] It may also be noted that Mississippi did not discriminate against foreign corporations by summarily closing its courts to them without legitimate policy motivation. Rather, the ability to invoke the judicial power of the state was merely conditioned upon submission by the corporation to certain regulatory procedures designed for the protection of the local citizenry. Such regulation as the state may exercise over the operations of foreign corporations tends to place these entities on a par with domestic corporations, which of course are likewise subject to local control. See, *e.g.*, Neuchatel Asphalte Co. v. Mayor of New York, 155 N.Y. 373, 377, 49 N.E. 1043 (1898); William L. Bonnell Co. v. Katz, 23 Misc. 2d 1028, 1031, 196 N.Y.S.2d 763, 768 (Sup. Ct. 1960); discussion of *Woods* in Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 835 (S.D.N.Y. 1957).

[38] Another relevant case, Angel v. Bullington, 330 U.S. 183 (1947), involved a purchase money mortgage given to a Virginia resident on Virginia land by a North Carolina resident, and a North Carolina statute which precluded recovery of a

Of course, even if no positive state policy to protect forum-state litigants were discerned from Michigan's rule, it nevertheless remains that the defendant has been denied the effect of the internal affairs doctrine in such a manner as to give rise to forum-shopping.[39] Because in the instant case the individual defendants were not subject to service of process in the state of incorporation,[40] the unconditional dismissal of the action by a Michigan state court would quite conceivably have ended the litigation.[41] The upshot is that

deficiency judgment in a North Carolina court. When the question arose whether a North Carolina federal court's jurisdiction was burdened with the same limitations as those placed upon the state courts, the Supreme Court held in the affirmative, concluding that "availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens." *Id.* at 192. Here the nondiscriminatory state policy, relating to the protection of vendees who executed purchase money mortgages, would have been frustrated by occasional suits in North Carolina federal courts, with a disparity in treatment falling upon certain citizens of North Carolina as a result of an accident of diversity of citizenship, and with the furtherance of no counterbalancing federal policy.

[39] "[T]he twin aims of the *Erie* rule [are] . . . discouragement of forum-shopping and avoidance of inequitable administration of the laws." Hanna v. Plumer, 380 U.S. at 468.

Forum-shopping in the present context appears to be a shorthand reference to a decree of discrimination which is likely to recur and will affect the plaintiff's choice of forum in any succeeding cases where the cause of action is similar. Of course, forum-shopping is not inherently evil, for the federal courts are resorted to every day in order to obtain the benefit of the Federal Rules. Furthermore, the original purpose of diversity jurisdiction was to provide out-of-state litigants with an alternative forum to avoid apprehended discrimination by state courts. Thus, Professor McCoid has concluded that the prevention of forum-shopping is not apposite to the aims of *Erie-Hanna*. McCoid, *supra* note 26, at 888-89, 896; *cf.* Comment, 1966 DUKE L.J. 142, 162-63 n.85, 164 n.89.

Perhaps, however, a distinction may be drawn between the effect of a federal procedural device which fortuitously produces disparate consequences in the state and federal courts in an individual circumstance and a hypothetical rule which would, upon the accrual of a cause of action, indicate to the plaintiff a decided advantage were he to select one forum as opposed to the other. Thus, the need for uniform procedures in the federal court may outweigh an isolated case of disparate treatment but not necessarily a predictable pattern of discrimination.

[40] 248 F. Supp. at 894.

[41] The court in *Lapides* strictly construed the rule of *Wojtczak* as not allowing for the widespread exceptions commonly found incorporated into internal affairs rules, see note 10 *supra*, and as not permitting dismissals conditioned upon the defendants subjecting themselves to suit in another jurisdiction. See generally Vargas v. A. H. Bull S.S. Co., 44 N.J. Super. 536, 131 A.2d 39, *aff'd per curiam*, 25 N.J. 293, 135 A.2d 857 (1957), *cert. denied*, 355 U.S. 958 (1958), where the court conditioned dismissal on the defendant's consent to appear in the appropriate forum even though he would not be amenable to process there, to waive the statute of limitations of the jurisdiction deemed appropriate, and to agree to pay the fees incurred by the plaintiff in suing in New Jersey. The use of such conditional dismissals has long been advocated as a means of best using rules of forum non conveniens as an instrument of justice. See generally Currie, *supra* note 13, at 449;

the mechanical application of the state rule would have rendered the plaintiff without a forum in which to pursue his valid cause of action. Furthermore, the Michigan rule would seem to disadvantage the corporation solely because of its place of incorporation, insofar as it is in the interest of the corporation to have its internal disputes resolved. Thus, a refusal to apply the state rule can be constitutionally defended on the theory that the provision for diversity jurisdiction in the federal courts[42] necessarily entails a certain minimal deviation from state practice in order to prevent discrimination against the non-forum-state litigant.[43] Even apart from its application in the federal court, there is some question whether the Michigan rule as interpreted by the *Lapides* court would not be vulnerable to attack on the theory that the state may not arbitrarily bar a suit brought at the instance of a nonresident when no legitimate state policy is thereby served. Certainly the operation of the Michigan rule could be subjected to challenge when the most convenient forum, indeed perhaps the only available forum, is closed to the litigants, particularly if the asserted policy rationale behind Michigan's rule does not support this result.[44]

Foster, *supra* note 11, at 50; Note, 46 COLUM. L. REV. 413, 430 (1946); 43 MINN. L. REV. 1199 (1959) (approving the result of *Vargas*).

The narrow interpretation propounded by the *Lapides* court is somewhat surprising in view of the observation that it is difficult to characterize the holding in one decision which relied largely on authority in a great number of states as defining a mechanical rule to be applied universally without reference to the policies behind it. Thus, the court might well have speculated that had the state courts been confronted with the factual situation of *Lapides* they would have adopted a more flexible version of the internal affairs rule.

[42] "The judicial power of the United States . . . shall extend to . . . controversies between . . . citizens of different States . . . ." U.S. CONST. art. III.

[43] "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State." *Erie R.R. v. Tompkins*, 304 U.S. at 74. "There is a much more fundamental reason, however, for federal courts in diversity cases to refuse to apply any state rule like this which discriminates against non-residents in allowing resort to its courts. The purpose of the diversity jurisdiction is to avoid the results of state discrimination against non-residents . . . . On that subject it is essential that the federal courts be free to make their own decisions despite the views of any state." Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 835 (S.D.N.Y. 1957). See Szantay v. Beech Aircraft Corp., 349 F.2d 60, 65 (4th Cir. 1965).

[44] In Hughes v. Fetter, 341 U.S. 609 (1951), the Supreme Court held that Wisconsin was forbidden by the full faith and credit clause (U.S. CONST. art. IV, § I) from closing its courts to a resident plaintiff suing a citizen of Wisconsin under a foreign wrongful death statute. To the same effect, see First Nat'l Bank v. United Air Lines, 342 U.S. 396, 398 (1952). It has been cogently argued that the actual basis of the decision rests upon equal protection grounds; that is to say, a state may not arbitrarily discriminate against some of its own citizens by closing its courts

It might be thought that, instead of employing a due process-equal protection analysis directed toward determining whether notions of basic fairness to the respective litigants require the application of a particular state rule, a court could discern the underlying rationale of state law and policy by means of a simple substance-versus-procedure approach. Indeed, the *Lapides* court used essentially this latter method to distinguish the *Woods* decision from the facts of the instant case.[45] However, it is questionable whether the employment of such amorphous terms as "substance" and "procedure" will adequately bring into focus the elements of state policy,[46] nondiscriminatory in nature, which would be significantly frustrated by application of the federal, rather than the state, rule and which are not outweighed by some legitimate countervailing federal interest. In the case of section 1404(a), the federal statute allows each party to an action in a federal court to petition the court to have that suit litigated in the most convenient forum permissible. This procedure is primarily designed to eliminate harassment of the defendant and to promote the dispensing of justice, without entailing the hardships consequent to dismissal.[47] It is entirely possible that this federal interest might outweigh some state laws and policies but not others, depending upon the nature of the state policy and the degree to which the application of the federal statute causes the result to stray from a comparable course of litigation in the state courts.[48] Thus, in the instant case, although the result reached was diametrically opposed to that which would

to them merely because of the fortuity that their cause of action arose outside the state. In similar circumstances, the failure to provide a forum for nonresidents "may be a denial of the privileges and immunities of state citizenship." See CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 308 (1963). See generally Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 36, 268 (1959).

[45] 248 F. Supp. at 893-94.

[46] The definitional problem inherent in the utilization of the "substance-procedure" dichotomy has been frequently recognized. See, *e.g.*, Sampson v. Channell, 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 651 (1940); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 138, at 592-93 (Wright ed. 1960); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L. REV. 228, 231-32 (1964); Comment, 1966 DUKE L.J. 142, 144 & n.5.

[47] See notes 13, 21 *supra* and accompanying text.

[48] See *Hanna v. Plumer*, 380 U.S. at 473: "Thus, though a court, in measuring a Federal Rule against the standards contained in the Enabling Act and the Constitution, need not wholly blind itself to the degree to which the Rule makes the character and result of the federal litigation stray from the course it would follow in the state courts, . . . it cannot be forgotten that the *Erie* rule, and the guidelines suggested in *York*, were erected to serve another purpose altogether."

have obtained in a state court, it is probable that the disposition was proper in view of the federal interest in providing a convenient forum, an interest which could be pursued without the frustration of a valid state policy.[49]

Once it is determined that the application of section 1404(a) to the exclusion of a particular state forum non conveniens rule does not exceed the limitations imposed by the due process clause

[49] A result similar to that in *Lapides* was reached by the Fourth Circuit Court of Appeals in Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965), 66 COLUM. L. REV. 377 (1966), wherein the court stated that a "restriction [imposed by a state rule of forum non conveniens] would not be binding on the federal court since federal cognizance of the case would in no way frustrate state policy." 349 F.2d at 65. In *Szantay* the federal courts refused to consider themselves bound by a state statute which denied state courts jurisdiction over suits brought by nonresidents against foreign corporations on foreign causes of action. Adopting the balancing approach of *Byrd v. Blue Ridge*, see note 28 *supra*, the court of appeals could discern no state policy which would have been frustrated by application of a disparate federal rule. 349 F.2d at 65. On the other hand, "countervailing federal considerations" were found to be "explicit" and "numerous" and manifested primarily in the federal policy to avoid discrimination against nonresidents, inherent in the grant of diversity jurisdiction, in the policy of the full faith and credit clause "looking toward maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states . . . ," and in the federal interest in providing a convenient forum for litigation. *Id.* at 65-66. The court distingnished *Woods* and *Angel* on the grounds that federal adjudication in either of those cases would have frustrated a valid state policy, that the respective state rules were nondiscriminatory in relation to nonresidents, and that no strong federal policy considerations were present to swing the balance. *Id.* at 66.

In a sense *Szantay* was a more difficult case than *Lapides* because in the former decision a state statute was directly involved, whereas in *Lapides* decisional law of Michigan and a federal *statute* were implicated. Nevertheless, *Szantay* manifests a decided bias in favor of the application of federal law. This propensity is explained in part by the fact that the court did not adopt the notion that a certain uniformity of outcome was required by the due process clause of the fifth amendment under the circumstances of that case. See *id.* at 64; compare notes 26-29 *supra* and accompanying text. Rather, the court took the position that "if the state procedural provision is not intimately bound up with the right being enforced," then as a matter of *comity* the state rule should be applied if the outcome would be thereby affected, "unless there are affirmative countervailing federal considerations." 349 F.2d at 64.

Furthermore, the rather abrupt dismissal by the *Szantay* court of the state's forum non conveniens rule may relate to the fact that the state rule fell into the tort "contacts" classification, see note 11 *supra*. It has rather consistently been asserted in cases involving this form of state forum non conveniens doctrine that the federal courts would not be bound by the state rule either because no state policy would be frustrated by adoption of an independent federal rule, see Szantay v. Beech Aircraft Corp., *supra* at 64-65, or because § 1404(a) had pre-empted the forum non conveniens area. See Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955); *cf.* Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 833, 835 (S.D.N.Y. 1957) (dictum). The foregoing rationale, however, does not speak directly to those instances involving other manifestations of state forum non conveniens concepts, such as the internal affairs rule, which may involve viable state policies, nor does it consider the *power* of Congress summarily to effect divergent results in the state and federal courts. Compare notes 26-29 *supra* and accompanying text.

when no valid state policy is thereby frustrated, it remains only to be shown that it was within Congress' delegated powers to declare such a rule. As long as section 1404 (a) operates wholly within the sphere of providing the most convenient forum for litigation, without affecting the law which is to be applied to the facts of the case, it would seem to fall within Congress' article III powers.[50] Furthermore, since *Van Dusen v. Barrack*[51] established that the law to be applied in the transferee court is that of the transferor court, including its choice of law rules, section 1404 (a) appears not to exceed its permissible boundaries. However, in *Lapides* the pre-empting of the Michigan internal affairs rule has created a novel problem: what choice of law rule should be utilized in view of the fact that the Michigan courts have never been able to address themselves to the formulation of an applicable guideline because of the very rule in question. Nevertheless, in light of the requirement that section 1404 (a) shall not effect substantive changes in the law of the case, it seems likely that the court in *Lapides* would be required to apply that state's law which is consistent with the underlying rationale of the Michigan rule, namely, the law of the state of incorporation.[52]

This general due process-equal protection approach as yet remains untested, having been merely suggested by some of the Court's language in such cases as *Erie, Hanna,* and *Woods.* Further, it cannot be denied that there exists substantial authority for the proposition that state forum non conveniens rules now can be completely ignored since the passage of section 1404 (a).[53] Nevertheless,

[50] See Hanna v. Plumer, 380 U.S. 460, 471-72 (1965).

[51] 376 U.S. 612 (1964).

[52] It is obvious from the *Wojtczak* decision that Michigan considers the applicable law to be that of the state of incorporation, a determination which comports with traditional choice of law notions. See notes 10, 31 *supra.* Indeed, it is initially necessary to determine that foreign law is applicable before jurisdiction may be declined on the theory that the forum state is not competent to interpret and apply foreign law.

Thus it appears that the Michigan internal affairs doctrine contains within itself a choice of law rule directing the application of the law of the state of incorporation. Presumably, then, the federal courts would be compelled to follow this submerged choice of law rule under the authority of Klaxon Co. v. Stentor Elec. Mfg. Co., 312 U.S. 674 (1941).

[53] Willis v. Weil Pump Co., 222 F.2d 261 (2d Cir. 1955); Shulman v. Compagnie Generale Transatlantique, 152 F. Supp. 823, 835 (S.D.N.Y. 1957); Ultra Sucro Co. v. Illinois Water Treatment Co., 146 F. Supp. 393, 396 (S.D.N.Y. 1956); Ciprari v. Aereos Cruzeiro do Sul, S.A., 232 F. Supp. 433, 442 (S.D.N.Y. 1964) (dictum); I BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.3 (Wright ed. 1960); Kaufman, *Further Observations on Transfers Under Section 1404(a),* 56 COLUM. L. REV. 1, 12 (1956).

the bald assumption that section 1404(a) constitutionally can pre-empt the whole region of forum non conveniens, without any further investigation into the effect of such pre-emption upon legitimate state policy, is disquieting, to say the least. In the final analysis, it seems inevitable that courts will on occasion be faced with more basic state policies clothed in forum non conveniens terms, and in that circumstance those courts will be impelled to delve into the state interests behind the given rule, noting whether they are discriminatory and whether the federal practice significantly frustrates their operation.

A leading case in support of the contention that state forum non conveniens rules have been pre-empted by § 1404(a) is Willis v. Weil Pump Co., *supra*. There the Second Circuit Court of Appeals held, in an action dismissable under the New York tort "contacts" rule (see note 11 *supra*), that "a state rule of forum non conveniens . . . does not control a federal court, since Congress has explicitly legislated in that field . . . ." 222 F.2d at 261. *But see* note 49 *supra*.