

FOREIGN FORUM-SELECTION FRUSTRATIONS: DETERMINING CLAUSE VALIDITY IN FEDERAL DIVERSITY SUITS

Rachel Kincaid*

ABSTRACT

In Atlantic Marine Construction Co. v. U.S. District Court, the Supreme Court clarified the proper mechanism for transferring a case with a valid forum-selection clause that designates a forum other than the federal court in which the suit was brought. If the chosen forum is another federal forum, a transfer of venue motion (under 28 U.S.C. § 1404(a)) is required. If the designated forum is a foreign jurisdiction, the proper mechanism is forum non conveniens dismissal. The Court assumed the existence of a valid forum-selection clause. In a previous case, the Court held that in the § 1404 transfer context clause validity is governed by federal law. However, the Court has never articulated whose law applies in a diversity case to determine whether a forum-selection clause that designates a non-federal forum is valid and enforceable in the first instance. This Article takes up that question with respect to foreign forum-selection clauses (as opposed to clauses designating domestic non-federal courts).

There are two legitimate routes for determining whose law to apply in this context: a vertical choice-of-law Erie analysis, or the creation of federal common law on point. I argue that an Erie analysis is the most straightforward way to make this determination, and that Erie dictates the application of state law to clause validity. I contend that precedent does not support the use of federal substantive common law to govern clause validity in place of an Erie analysis. But I also recognize that the Supreme Court could hold that federal procedural common law governs clause validity—preempting Erie—

* Law Clerk to the Honorable Raymond Kethledge. J.D. 2015, University of Virginia School of Law. I extend my sincerest appreciation to Professor Michael Collins for fostering my love of civil procedure and giving me his invaluable guidance, advice, and comments throughout the completion of this Article. Professor Collins has shaped the lens through which I view civil procedure. I would also like to thank Thomas Johnson and Dennis Kincaid for their comments on countless drafts. Finally, my thanks to the members of the *Stanford Journal of Complex Litigation* for their helpful feedback and edits.

especially given that the majority of federal appellate courts have held that federal law should govern in this context (after questionable analysis). In an increasingly globalized world, this is an important question for courts and one that has yet to be answered adequately by either judges or scholars.

ABSTRACT.....	131
INTRODUCTION.....	133
I. SUPREME COURT GUIDANCE.....	135
A. <i>Stewart v. Ricoh Corp.</i> : Federal Law Governs Validity of Forum- Selection Clauses in § 1404(a) Context	136
B. International Concerns and the Primacy of Federal Law	139
C. Foreign Forum-Selection Clause Validity Is Left Unanswered.....	140
II. FEDERAL APPELLATE GUIDANCE.....	141
A. Federal Law as Controlling	141
B. Nonfederal Law as Controlling	143
C. Undecided Circuits	144
D. Appellate-Court Summary	145
III. <i>ERIE</i> AND FORUM-SELECTION CLAUSE VALIDITY	145
A. <i>Erie</i> Doctrine.....	146
B. <i>Erie</i> 's Application to a Hypothetical.....	148
1. <i>Hanna v. Plumer</i> : Forum Shopping and Inequitable Administration of the Law	149
2. <i>Byrd</i> Balancing	150
3. <i>Erie</i> Outcome	152
4. A Modified Hypothetical.....	152
C. The Academic Literature.....	153
D. Benefits and Weaknesses of Using <i>Erie</i> to Determine Clause Validity	156
IV. THE <i>ERIE</i> ALTERNATIVE: FEDERAL JUDGE-MADE LAW	156
A. Substantive Common Law	158
1. The Foreign-Relations Enclave	159
2. Scholars Arguing for the Enclave's Applicability	160
3. Analysis	162
B. Procedural Common Law.....	162
CONCLUSION.....	164

INTRODUCTION

In *Atlantic Marine Construction Co. v. U.S. District Court*,¹ the Supreme Court articulated the correct mechanism for transferring a case involving a valid forum-selection clause when the original federal court is a proper venue for the action.² The Court said that a valid forum-selection clause does not render an otherwise proper venue improper; therefore, a motion to dismiss for improper venue is inappropriate.³ If the designated forum is another federal forum, a transfer-of-venue motion under 28 U.S.C. § 1404(a) is proper.⁴ And if the designated forum is a foreign or state jurisdiction, a motion for *forum non conveniens* dismissal is the correct way to enforce the clause.⁵ The Court stated that “a valid” forum-selection clause is given near conclusive weight in the balancing of conveniences associated with both of these motions.⁶

However, the Court assumed the existence of a valid forum-selection clause for the purposes of its opinion.⁷ The Court failed to articulate whose law applies in determining whether a forum-selection clause is valid and enforceable in the first instance.

When parties to a diversity suit have a forum-selection clause, but the designated forum is another federal one, the Court has held that federal positive law—specifically the federal transfer of venue statute, 28 U.S.C. § 1404(a) which allows transfer between federal forums that are both proper venues—speaks to the question. Section 1404(a) therefore displaces state law hostile to the enforcement of forum-selection clauses in federal court. This displacement pretermits an *Erie*⁸ vertical choice-of-law analysis.⁹ Instead of having to wade

1. 134 S. Ct. 568 (2013).

2. The Court held that whether venue is proper is determined solely by whether the requirements of 28 U.S.C. § 1391 (2012) are met. *Id.* at 578. That is, the presence of a valid forum-selection clause pointing to another forum does not render the venue of the federal court in which an action was filed improper if it otherwise satisfies the requirements of Section 1391. *Id.*

3. *Id.* at 578.

4. *Id.* at 579. Section 1404(a) allows transfer between two federal forums, both of which are proper venues “for the convenience of parties and witnesses.” 28 U.S.C. § 1404(a).

5. *Atl. Marine*, 134 S. Ct. at 580.

6. *Id.* at 580-81 (“[B]ecause both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum. . . . When the parties have agreed to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.”).

7. *Id.* at 576 (“[T]here was no dispute that the forum-selection clause was valid.”); see also Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 800 (2015) (“[T]he *Atlantic Marine* opinion itself places no restrictions on a court’s assessment of contractual validity in the first instance.”).

8. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

into “*Erie*’s murky waters”¹⁰—balancing federal and state interests and trying to prevent forum shopping and the inequitable administration of the law—federal courts simply apply § 1404(a) to clause validity and disregard any contrary state law.

The Supreme Court has not addressed, however, even in dictum, whose law applies to determine the validity of a forum-selection clause designating a foreign or state forum. *Forum non conveniens*—the proper mechanism for transferring such cases if the forum-selection clause is valid—is judge-made law that gives courts discretion to dismiss a case if another forum is better-suited to hear it. Because no federal positive law governs *forum non conveniens* practice in federal courts, the vertical choice-of-law question is not pretermitted as it is in the federal transfer of venue context.

This Article analyzes the validity question¹¹ in the foreign forum-selection clause context in a way that no federal appellate opinion or academic work to date has done. The two viable methodologies for deciding whose law applies are a vertical choice-of-law *Erie* analysis (choosing between state and federal law for the purposes of diversity suits) or the creation of federal common law. (Procedural federal common law would apply only in federal courts and substantive federal common law would apply in both federal and state courts under the Supremacy Clause.) Nowhere in an appellate court opinion or the academic literature has anyone recognized that these are the two possibilities for answering this question and performed a concise analysis of both.

Currently, contracting parties must attempt to guess how the Court would decide this question. No national consensus exists on the treatment of foreign forum-selection clauses. Some states are reluctant to find forum-selection clauses valid. Other states are more open to enforcement. Federal law, applied by federal courts in, for example, admiralty and federal question cases, is more hospitable to forum-selection clause enforcement. This vertical choice-of-law question therefore matters for contracting parties. If a federal court decides that it must use state law, and the state in which the federal court sits would apply a law that is hostile to enforcement, the forum-selection clause will not be enforced; this bargained-for clause in the parties’ contract will be disregarded. And the non-filing party will be forced to litigate in the forum the plaintiff chose, in spite of their contractual agreement to the contrary. But if a federal

9. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). Vertical choice of law refers to the choice between federal and state law, whereas horizontal choice of law is the choice between different state laws.

10. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

11. I work only in the context of the initial federal court considering a forum-selection clause. It might be that if such a clause is found valid and then enforced, the second (selected) forum will have the chance to make its own determination on clause validity. It is not clear what would happen if the second forum concluded, contrary to the initial federal court, that the forum-selection clause was not valid.

court uses federal law, a foreign forum-selection clause is likely to be enforced.¹²

As the number of international contracts continues to rise, this ambiguity is increasingly problematic. Nonenforcement of a forum-selection clause could have huge financial costs and cause serious inconvenience. Uncertainty about enforcement creates a barrier to efficient contracting, which ultimately costs parties money.

This Article provides a guide to courts for answering this question. It begins with a brief overview of relevant Supreme Court decisions in Part I. Then it proceeds to a summary of the confusing federal appellate court jurisprudence on this question in Part II. Part III evaluates this question using an *Erie* analysis. Part IV evaluates the alternative of using either substantive or procedural federal common law. And Part V concludes that although an *Erie* analysis dictates the use of state law to govern clause validity, the Supreme Court might hold that federal procedural common law governs instead.

I. SUPREME COURT GUIDANCE

The Supreme Court has not directly addressed this particular choice-of-law question. However, it has decided cases on related issues. These opinions give some hints about how the Court would address the validity of a foreign forum-selection clause.

In *Atlantic Marine*, the Court said that “[s]ection 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system.”¹³ It also held that “because both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same balancing-of-interests standard, courts should evaluate a forum-selection clause pointing to a nonfederal forum in the same

12. In Part III.B, I present a hypothetical that may illuminate what my theoretical discussion of the stakes at issue fails to make clear: Consider a forum-selection clause in a state court in a state that is hostile to forum-selection clauses. Assume that the forum-selection clause was freely bargained for and represents the parties’ wishes. The parties to the contract are two companies, one headquartered in Idaho, the other in the United Kingdom. They entered into the contract in Idaho for performance in Idaho but designated London as the only allowable forum for disputes under the contract. Idaho has a strong public policy against forum-selection clause enforcement. It is unlikely, therefore, that an Idaho state court would enforce this contract’s forum-selection clause. So a federal court hearing this case and applying Idaho state law would likewise refuse to dismiss the case and would render a binding decision in Idaho. If the federal court instead applied federal law, it would dismiss the case and the parties would have to refile in the United Kingdom.

13. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013). *But see* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981) (“Although the statute was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law. District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.” (internal citations omitted)).

way that they evaluate a forum-selection clause pointing to a federal forum.”¹⁴ If the Supreme Court had not placed so much emphasis in cases subsequent to *Erie* (and before *Atlantic Marine*) on the existence of a federal statute or rule (as opposed to judge-made law) on a particular subject for the purposes of determining whether federal or state law governs,¹⁵ this holding could be viewed as an indication that *forum non conveniens* cases are governed by the same standard as § 1404(a) cases. That would make this question easy, but alas, the situation is far from that simple.

As it stands, it is highly significant that a federal statute—§ 1404(a)—governs transfer of venue between federal forums, and federal judge-made law likely governs *forum non conveniens* dismissal—used when the transferee venue is a nonfederal forum.

A. *Stewart v. Ricoh Corp.: Federal Law Governs Validity of Forum-Selection Clauses in § 1404(a) Context*

In *Stewart v. Ricoh Corp.*, the Supreme Court held that although the text of § 1404(a) does not specifically address forum-selection clauses or their validity,¹⁶ it is nevertheless broad enough to encompass clause validity, thereby trumping state law on the subject when courts use § 1404(a) to transfer.¹⁷ Consequently, in *Stewart*, the Court held that the federal district court where the case was brought was wrong to apply Alabama’s (the state where the district court sat) law on the question of forum-selection clause validity.¹⁸ Instead, it should have applied federal law.¹⁹

14. *Atl. Marine*, 134 S. Ct. at 580.

15. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26, 32 (1988) (“Our cases indicate that when the federal law sought to be applied is a congressional statute, the first and chief question for the district court’s determination is whether the statute is sufficiently broad to control the issue before the Court. . . . Section 1404(a) is doubtless capable of classification as a procedural rule, and, indeed, we have so classified it in holding that a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law. It therefore falls comfortably within Congress’ powers under Article III as augmented by the Necessary and Proper Clause.” (quoting another source)); *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (“*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules.”). For additional discussion of *Erie*, see *infra* Part II.

16. 28 U.S.C. § 1404 (2012) (“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 or to any district or division to which all parties have consented.”); *Stewart Org.*, 487 U.S. at 37 (“Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.”)

17. *Stewart*, 487 U.S. at 32.

18. *Id.*

19. It is not clear that Alabama would have applied its law, which was hostile to

The majority's analysis in *Stewart* relied on the existence of a federal statute that the Court found governed the question.²⁰ And the Court outlined the appropriate balancing test to use to determine whether to enforce a forum-selection clause in this context. It said that a district court considering a motion to transfer under § 1404(a) because of a forum-selection clause should balance a number of factors—with the forum-selection clause itself as a major factor.²¹ Other relevant factors are “the convenience of [the designated] forum given the parties’ expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties’ relative bargaining power.”²² Although this analysis is of limited import to the question presented in this Article—because there is no federal rule or statute that governs transfer to foreign forums—some courts and scholars nevertheless cite it in various contexts in the foreign forum-selection clause setting.

Justice Scalia's dissent is more helpful. He said that the text of § 1404(a) is not broad enough to govern forum-selection clause validity.²³ He then considered whose law should govern in the absence of a federal rule or statute—the exact inquiry in this Article, except that the clause in *Stewart* designated a domestic forum rather than a foreign one. Without a federal rule or statute governing the question of forum-selection clause validity, Justice Scalia opined that federal courts could not, without violating the rule set out in *Erie*, “fashion a judge-made rule to govern” the validity of a forum-selection clause.²⁴

Justice Scalia elaborated that in a situation where no governing federal rule or statute exists, “substantial uniformity of predictable outcome between federal and state courts in adjudicating claims should be striven for.”²⁵ At least some state courts are hostile to forum-selection clauses, so this consideration weighs against the use of federal law to govern clause validity. Justice Scalia defended his position that § 1404(a) should not be read so broadly by noting that it “was enacted against the background that issues of contract, including a contract’s validity, are nearly always governed by state law.”²⁶ Justice Scalia's

enforcement of forum-selection clauses, if it had thought some other law applied to the contract overall. But everyone in the case seemed to believe that Alabama would apply its own law to the question, and that assumption was implicit in the majority, concurrence, and dissent.

20. *Stewart*, 487 U.S. at 32.

21. *Id.* at 29.

22. *Id.*

23. *Id.* at 33 (Scalia, J., dissenting).

24. *Id.* This statement about federal court power to make common law is not entirely correct, as will be discussed in Part IV, *infra*.

25. *Id.* at 37.

26. *Id.* at 36 (“It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision. It is particularly instructive in this regard to compare § 1404(a) with another provision, enacted by the same Congress a year earlier, that *did* pre-empt state

position would therefore likely have been against the application of federal law to the validity of a foreign forum-selection clause.

Justice Kennedy's *Stewart* concurrence is also informative, although his brevity is obfuscating. It is unclear whether his two-paragraph concurrence was meant to outline a separate approach from the majority's or simply to add his "observations" on the subject.²⁷ He did not mention *Erie*. Instead, he cited the Supreme Court's admiralty ruling in *The Bremen*²⁸ to support the use of federal law to decide the question.²⁹ The Court in *The Bremen* held that forum-selection clauses should be enforced unless the party opposing enforcement can "clearly show that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching."³⁰ This standard is even more hospitable to forum-selection clause enforcement than the factor-balancing approach of the *Stewart* majority. There is some argument, therefore, that Justice Kennedy would turn to *The Bremen* to decide the validity of a forum-selection clause that is not governed by § 1404(a), holding that *The Bremen* established substantive federal common law on the subject premitting any *Erie* analysis—even outside the admiralty setting.³¹

However, it is more likely that Justice Kennedy meant the language in his short, but opaque, concurrence as a brief addendum of observations supporting the majority's approach, and would, therefore, still apply *Erie*.³² After pointing out the benefits of the approach in *The Bremen*, Justice Kennedy reminded readers that "state policies should be weighed in the balance" even if he believes that federal interests, especially as authorized by Congress in § 1404, are overwhelming.³³ He said that the reasoning in *The Bremen* "applies with much force to federal courts sitting in diversity."³⁴ And he noted that "[t]he federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions."³⁵ This "interest" and "weighing"

contract law, and in precisely the same field of agreement regarding forum selection.").

27. *Id.* at 33 (Kennedy, J., concurring).

28. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972) (holding that, at least in the context of admiralty, forum-selection "clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances.").

29. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)

30. *The Bremen*, 407 U.S. at 15.

31. See Leandra Lederman, Note, *Viva Zapata!: Toward A Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 467 n.205 (1991). More on this line of reasoning can be found in Part IV.A, *infra*.

32. See *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring) ("I write separately only to observe that enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." (emphasis added)).

33. *Id.*

34. *Id.* (quoting another source).

35. *Id.*

language suggests that Justice Kennedy was thinking about *Erie* when he wrote his concurrence.³⁶ His reference to *The Bremen* might simply indicate that he believes that under *Erie*, federal interests trump any state's interests in applying their own law. Although Justice Kennedy's analysis is somewhat unclear, it is evident that at the very least he believes federal law should govern forum-selection clause validity in the § 1404(a) context, and there are strong federal interests relevant to any forum-selection clause. These federal interests are germane to this Article's analysis.

B. International Concerns and the Primacy of Federal Law

The additional consideration of the international discord that could result from a federal court's unwillingness to enforce *foreign* forum-selection clauses³⁷ would likely reinforce Justice Kennedy's inclination to use federal, rather than state, law to govern validity. The Supreme Court noted the importance of certainty in international contracts in *Scherk v. Alberto-Culver Co.*³⁸:

Since uncertainty will almost inevitably exist with respect to any contract . . . with substantial contacts in two or more countries . . . a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction.³⁹

That case involved an agreement to arbitrate governed by the Federal Arbitration Act (FAA).⁴⁰ The Supreme Court equated the parties' agreement, which designated a specialized tribunal, to a specialized forum-selection clause.⁴¹ And it quoted *The Bremen* for the notion that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."⁴² Because *Scherk* was governed by the FAA,⁴³ it is not binding precedent outside of the FAA context. But the policies that the Supreme Court articulated in favor of uniform federal control of international disputes are relevant to foreign forum-selection clause validity.

The notion that federal law governs foreign forum-selection clause validity is also supported by *The Bremen* itself. In that case, the Supreme Court

36. Interests and weighing are what the *Erie* choice between the application of federal and state law in diversity is all about. See *infra* Part III.A.

37. *The Bremen*, 407 U.S. at 13-14 ("The elimination of . . . uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.")

38. 417 U.S. 506, 506 (1990).

39. *Id.* at 506-07.

40. *Id.* at 511-12.

41. *Id.* at 519.

42. *Id.* (quoting *The Bremen*, 407 U.S. at 9).

43. *Id.* at 511-12.

declared “the correct doctrine to be followed by federal district courts sitting in admiralty.”⁴⁴ It emphasized the importance of a forum-selection clause in an “international agreement”⁴⁵ affecting “international trade.”⁴⁶ Indeed, the Court held that the disputed contract’s international nature mandated clause enforcement as “the elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”⁴⁷ Although *The Bremen* was an admiralty case, it spoke in broad terms about the concerns of international trade, which are arguably just as applicable in the context of a foreign forum-selection clause as they were in the admiralty context.

C. Foreign Forum-Selection Clause Validity Is Left Unanswered

The foregoing Supreme Court jurisprudence provides an indication of how different members of the Court respond to the question here, and outlines the federal concerns a foreign forum-selection clause implicates. But it does not dictate an outcome. That becomes even more apparent in Part II of this Article, which shows the absolute lack of clarity with which federal appellate courts have approached this question. Before examining these opinions, it is worth noting that *Stewart* has generated a fair amount of criticism in the academic literature.⁴⁸ Many believe, as Justice Scalia articulated in his dissent, that the text of § 1404(a) is simply too narrow to encompass forum-selection clause validity. However, given the Court’s attitude toward stare decisis, and that it has expressed no doubt in subsequent cases about *Stewart*’s holding, it seems likely that *Stewart* will remain good law. This Article, therefore, takes *Stewart* as a given.⁴⁹

44. *The Bremen*, 407 U.S. at 10.

45. *Id.* at 12.

46. *Id.* at 13-15.

47. 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3803.1 (4th ed. 2008) (quoting *The Bremen*, 407 U.S. at 10, 13, 15).

48. See, e.g., Kelly Amanda Blair, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 GA. L. REV. 799, 821-22 (2012); Richard D. Freer, *Erie’s Mid-Life Crisis*, 63 TUL. L. REV. 1087, 1117 (1989); Lederman, *supra* note 31, at 453 (“[T]he *Stewart* Court’s *Erie* analysis was fundamentally misguided.”); Steinman, *supra* note 7, at 811 (“There are several reasons to question the notion that § 1404(a) can trump state law with respect to the validity of forum-selection clauses.”).

49. The academic criticism of *Stewart* is nevertheless noteworthy. It indicates that academics and judges should be cautious about assuming that the reasoning in *Stewart* applies to cases outside of the § 1404(a) context, especially given that the Court was quite clear in *Stewart* that the presence of a governing federal statute was determinative. Unfortunately, not all the appellate courts have recognized this distinction.

II. FEDERAL APPELLATE GUIDANCE

Lower federal courts have been left to resolve the question presented in this Article, given the Supreme Court's silence since *Stewart*. Unfortunately, the appellate courts have been neither particularly consistent nor particularly well-reasoned in their foreign forum-selection clause diversity jurisdiction analysis. A flippant summation of the appellate opinions on this question could read "federal law governs the question, just because." Courts offer varying rationales for this conclusion, but none is based on a thorough analysis of either *Erie*, federal common law, or other conflict-of-laws principles.

All of the cases referenced below were decided before the Court made clear in *Atlantic Marine* that a valid forum-selection clause does not render an otherwise proper venue improper.⁵⁰ Some appellate courts seem to rely on the availability of a motion to dismiss for improper venue to enforce these clauses and use that mechanism's availability to justify treating this as a purely procedural question covered by a federal rule,⁵¹ but *Atlantic Marine* undermines that reasoning. Those circuits might be forced to revisit this position in the near future.

A. Federal Law as Controlling

The Second,⁵² Fifth,⁵³ Ninth,⁵⁴ and Eleventh⁵⁵ Circuits have all held, in a

50. See *Atl. Marine v. U.S. Dist. Court*, 134 S. Ct. 568, 578 (2013).

51. See, e.g., *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 973 (8th Cir. 2012); *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010).

52. *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014) (considering a foreign forum-selection clause); see also *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (explicitly rejecting Plaintiff Jones's argument that an *Erie* analysis should point the court to the application of state law on the subject because venue questions are "procedural.").

53. *Haynsworth v. The Corporation*, 121 F.3d 956, 962 (5th Cir. 1997) ("In *The Bremen*, the Court . . . held that federal courts presumptively must enforce forum selection clauses in international transactions. Since *The Bremen*, the Court has consistently followed this rule and, in fact, has enforced every forum-selection clause in an international contract that has come before it." (citation omitted)).

54. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) ("We conclude that the federal procedural issues raised by forum selection clauses significantly outweigh the state interests, and the federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases."). Oddly, in reaching this conclusion the Ninth Circuit relied on the (then-ruled-irrelevant) *Erie* analysis performed by the Eleventh Circuit in *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068-69 (11th Cir. 1987), *aff'd and remanded*, 487 U.S. 22 (1988), ignoring the fact that the reasoning it quoted from the Eleventh Circuit's holding in *Stewart* relied on the existence of a relevant federal statute. *Manetti-Farrow*, 858 F.2d at 513. The Ninth Circuit also referenced Justice Kennedy's concurrence in *Stewart* to support this holding. *Id.*

55. *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1292 (11th Cir. 1998) ("[P]recedent and policy considerations compel us to conclude that *Bremen's* [sic] framework for evaluating choice clauses in international agreements governs this case."). Interestingly, unlike the Second and Fifth Circuits that apply *The Bremen* in both the

rather straightforward manner and without any significant analysis (*Erie* or otherwise), that the question of validity of foreign forum-selection clauses should be decided based on federal law—essentially the rule announced in the admiralty case *The Bremen*.⁵⁶ They do not mention *Stewart*'s holding that the reasoning in *The Bremen* is not applicable in the very similar § 1404(a) setting, nor do they explain why *Stewart*'s reasoning does not make *The Bremen* inapplicable in the foreign forum-selection clause context.

Similarly, the Eighth Circuit seems to have indicated that *The Bremen* governs these clauses because their enforcement is “procedural.”⁵⁷ Although not directly considering the validity of a forum-selection clause, the Eighth Circuit stated that federal law applies to a choice-of-forum clause brought in federal court on diversity grounds.⁵⁸ It did not say what that federal law is.⁵⁹ The same court later declared that a district court sitting in diversity and applying federal law (taking the application of federal law as a given) should apply the standard articulated in *The Bremen* when deciding whether to dismiss a case to enforce a forum-selection clause (as opposed to enforcement via a transfer of venue motion under § 1404(a) as required under *Atlantic Marine*).⁶⁰ As a result, the Eighth Circuit would likely hold that *The Bremen* applies in a diversity case involving an international forum-selection clause.

The First Circuit has also held that federal law applies to this “procedural” question. Its opinions hold that *The Bremen* is relevant but not dispositive because the Supreme Court's holding in *Stewart* limits *The Bremen*'s application in this context.⁶¹ The Fourth and Sixth Circuits also say they apply federal law to forum-selection clause validity, but they do not clearly follow either *The Bremen* or *Stewart*.⁶² The Sixth Circuit, citing *Carnival Cruise*

international and domestic contexts, the Eleventh Circuit has said that in the domestic context it engages in an *Erie* analysis to determine whether to apply federal or state law to a forum-selection clause. See *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231, 1235 (11th Cir. 2011).

56. *The Bremen*, 407 U.S. at 10 (Forum-selection “clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”).

57. See, for example, *Fru-Con Construction Corporation v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009), which, although not directly considering the validity of a forum-selection clause, stated that federal law applies to a choice-of-forum clause brought in federal court on diversity grounds.

58. *Id.*

59. *Id.*

60. *Union Elec. Co.*, 689 F.3d at 973. It should be noted that this case assumed the application of federal law to the question of forum-selection clause validity without actually deciding that it applied.

61. *Royal Bed & Spring Co. v. Famossul Industria e Comercio de Moveis Limitada.*, 906 F.2d 45, 50-53 (1st Cir. 1990).

62. See *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010). Although the issue of the validity of an international forum-selection clause was conceded in that case, the court cited to cases that had applied *The Bremen* to the question and said federal law should be applied to determine validity. The court did not articulate what exactly

*Lines, Inc. v. Shute*⁶³—another admiralty case—for the basic guideline that “[a] forum selection clause should be upheld absent a strong showing that it should be set aside,” uses a three-factor test, which is not found in either *The Bremen* or *Stewart*, to enforce this standard.⁶⁴

All of these federal appellate courts generally agree on two things: (1) some federal law applies to foreign forum-selection clause validity in diversity cases, and (2) no real analysis is necessary to come to that conclusion.

B. Non-federal Law as Controlling

Unique among the circuits, the Seventh Circuit values judicial economy in this vertical choice-of-law question. It has held that in certain circumstances, efficiency might dictate applying the same law that governs the rest of the contract to a forum-selection clause.⁶⁵ That means, in these certain circumstances, the court will decide which substantive contract law it should apply to the contract as a whole and then simply apply that law to the forum-selection clause to determine its validity.⁶⁶ The Seventh Circuit has not considered this question in the context of a contract that did not include a choice-of-law clause (in addition to a choice-of-forum clause). But it seems likely that the Seventh Circuit would treat a contract without a choice-of-law clause similarly.⁶⁷

Erie, as confusing as it is, clearly dictates that a federal court sitting in diversity should apply the substantive contract law that the state where it sits would apply in any given case. (Depending on the forum state’s conflict-of-laws rules that could mean the forum state’s contract law, or some other state or locality’s contract law.) Therefore, if the Seventh Circuit holds that in a diversity suit the law that applies to the rest of the contract governs forum-

that federal law should be. *Id.*

63. 499 U.S. 585 (1991).

64. *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 828 (6th Cir. 2009) (“(1) whether the clause was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient such that requiring the plaintiff to bring suit there would be unjust.”). The court called foreign forum-selection clause validity in diversity cases an “*Erie* issue” but did not perform an *Erie* analysis before concluding that federal law should apply. *Id.* at 826-28.

65. See *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007).

66. See *id.* (announcing this rule in dicta in a case that included a choice-of-law clause: “Simplicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears, rather than making the court apply two different bodies of law in the same case” (internal citations omitted)); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774-75 (7th Cir. 2014) (applying this rule in a case that involved a choice-of-law clause).

67. See *Abbott Labs.*, 476 F.3d at 423; *Jackson*, 764 F.3d at 774-75.

selection clause validity, it is de facto saying that state law governs the question. The Seventh Circuit's analysis at least acknowledges that this question is not one with a clear and automatic answer—dedicating several paragraphs to its discussion in *Abbott Laboratories v. Takeda Pharmaceutical* and concluding that neither forum shopping risks nor federal interests were implicated in that case.⁶⁸ But this approach disregards Supreme Court precedent that says either *Erie* or federal common law must be used to decide the vertical choice-of-law clause validity question. Nevertheless, the Seventh Circuit has still missed the boat⁶⁹ by not performing an *Erie* analysis or by finding federal procedural or substantive common law on point.

C. Undecided Circuits

The Third and Tenth Circuits have yet to decide whose law should apply to determine foreign forum-selection clause validity in a diversity case. Some general statements made by the Tenth Circuit might indicate that, at least when a choice-of-law clause is also present, its courts would apply the chosen law to these forum-selection clauses to determine their validity, but the court has never directly considered the question.⁷⁰

The Third Circuit is even more unsettled. In a pre-*Stewart* decision they applied state law to a forum-selection clause designating a state court.⁷¹ In a later case, the Third Circuit stated in general terms that federal law governs these clauses in diversity cases.⁷² However, that later case involved a forum-selection clause that allowed transfer to another federal district under § 1404(a), not a *forum non conveniens* dismissal.⁷³ In yet another case, the Third Circuit considered a forum-selection clause designating a foreign forum, but declined to decide whose law to apply to validity because it concluded that the laws of the state where the court sat, federal law, and the relevant foreign law all

68. 476 F.3d at 423-24.

69. In spite of not falling into the trap of holding that *The Bremen* (an admiralty case) governs.

70. See, for example, *Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006), a case in federal court because of federal question jurisdiction (as opposed to diversity), holding that “under federal law the courts should ordinarily honor an international commercial agreement’s forum-selection provision as construed under the law specified in the agreement’s choice-of-law provision.”

71. *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 357 (3d Cir. 1986).

72. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995) (“In federal court, the effect to be given a contractual forum selection clause in diversity cases is determined by federal not state law. Because questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature, federal law applies in diversity cases irrespective of *Erie Railroad v. Tompkins*.” (citing *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (internal quotations omitted))).

73. *Id.* at 875.

supported finding the clause valid.⁷⁴

D. Appellate-Court Summary

The Seventh Circuit comes the closest to a genuine analysis on the question of the validity of a contractual forum-selection clause and they hold that courts should—at least in some circumstances—apply whatever law governs the rest of the contract. This analysis omits discussion of the fundamental question (and the topic of this Article): whether—in the end—it is appropriate to apply federal or state law to determine whether a forum-selection clause is valid. Not a single federal appellate court has addressed this question with a full-scale *Erie* analysis.

Outside of the Seventh Circuit, the courts seem bent on finding federal law applicable and rather unconcerned with justifying that conclusion in a clear way. A majority of circuits uses federal law to govern validity, but their analysis justifying the application of federal common law is insufficient. To the extent that the federal appellate courts purport to perform an *Erie* analysis, that analysis tends to begin and end at the question of whether forum-selection clause validity is a procedural or substantive question. (And some courts do not even make it that far, holding that the *Erie* question is preempted entirely because all relevant law is the same.) As Part III will next demonstrate, categorizing a question as procedural or substantive is by no means a full *Erie* analysis.⁷⁵

III. *ERIE* AND FORUM-SELECTION CLAUSE VALIDITY

In contrast to the federal courts, the academic consensus on foreign forum-selection clause validity essentially concludes that “state law governs because of *Erie*.”⁷⁶ Nevertheless, although some academics offer more thorough

74. *Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 7 (3d Cir. 1988).

75. Justice Scalia did not think that the procedural versus substantive question was relevant to *Erie* at all. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (“*Erie* involved the constitutional power of federal courts to supplant state law with judge-made rules. In that context, it made no difference whether the rule was technically one of substance or procedure; the touchstone was whether it ‘significantly affect[s] the result of a litigation.’” (quoting another source)). Other Supreme Court opinions support the value of the substance/procedure distinction, although they do not hold that a superficial determination of whether an issue is procedural without any analysis is sufficient to account for the concerns in *Erie*. See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 416 (1996) (stating that “Under the doctrine of *Erie R. Co. v. Tompkins*, federal courts sitting in diversity apply state substantive law and federal procedural law,” but then acknowledging that that is sometimes a difficult question to answer, which is informed by *Hanna* and *Guaranty Trust.*).

76. There is some academic literature that addresses this question from the perspective of federal common law, but it is by far the minority. I consider that literature in Part IV,

analysis than the courts, most still dispose of the question in a surprisingly summary fashion. Nevertheless, *Erie* is a good place to start. It is the default for vertical conflict-of-laws questions in diversity cases, and is only displaced if arguments in favor of a federal approach point in another direction (see Part IV).

A. *Erie Doctrine*

Beginning with *Erie*,⁷⁷ the Supreme Court has given lower federal courts some guidance on whose law they should apply to diversity cases. But *Erie* is difficult. The Supreme Court does not use its analysis often,⁷⁸ and when it does discuss *Erie* it shows no love for the case's analytical framework.⁷⁹ *Erie*'s opacity may be the best explanation for federal appellate courts' sloppy *Erie* analyses.⁸⁰

Erie essentially stands for the proposition that federal courts must apply state statutory and decisional law to state law questions.⁸¹ If a valid federal statute or a properly promulgated Federal Rule of Civil Procedure governs an issue then it is not a state law question.⁸² This is how the Court decided *Stewart*, where it, somewhat surprisingly, held that § 1404 governs the validity of a forum-selection clause designating a federal forum in a contract otherwise governed by state law. Cases are more difficult when there is no federal statute or rule that governs. This is the situation presented when courts consider the validity of foreign forum-selection clauses in diversity suits. The *forum non conveniens* practice that federal courts use to dismiss these cases is federal judge-made law.⁸³ It is not possible, therefore, to skip the *Erie* analysis like the

infra.

77. A decision based on an interpretation of the Rules Decision Act. 28 U.S.C.A. § 1652 (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”).

78. The Supreme Court has not cited to *Erie* since 2011. And none of its opinions since the late 1980s have actually performed a traditional *Erie* analysis.

79. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (referring to “*Erie*’s murky waters”); see also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 26 (1988) (referring to the “relatively unguided *Erie* choice” (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965))).

80. See *supra* Part II.

81. This characterization of *Erie* aligns well with the idea that it was a decision about federalism. See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 504 (2001) (referring to the “federalism principle of *Erie*”).

82. See *Hanna*, 380 U.S. at 472-73.

83. Though the Supreme Court has not weighed in on whether federal or state *forum non conveniens* practice should be used in diversity cases (and there is disagreement in the academic literature), “federal courts that have reached the question have almost universally concluded that federal *forum non conveniens* governs.” Brian J. Springer, Comment, *An Inconvenient Truth: How Forum Non Conveniens Doctrine Allows Defendants to Escape State Court Jurisdiction*, 163 U. PA. L. REV. 833, 840-42 (2015).

court did in *Stewart* unless federal common law governs on its own authority (see Part IV). We must therefore wade into the analysis outlined by *Erie* and its progeny.

After *Erie*, in *Guaranty Trust Co. v. York*, the Supreme Court directed federal courts to apply state law whenever failure to do so would substantially affect a case's outcome.⁸⁴ The Court further refined *Erie*'s framework in *Byrd v. Blue Ridge Rural Electric Cooperative*.⁸⁵ The *Byrd* Court outlined a balancing test, weighing federal interests in applying federal law against state interests in applying state law even if the difference between the state and federal approaches was outcome determinative.⁸⁶

Dicta in *Hanna v. Plumer* directed courts to bear in mind the "twin aims of *Erie*: discouragement of forum-shopping and avoidance of inequitable administration of the laws."⁸⁷ In light of these twin aims, the *York* outcome-determinative test is cast as whether the issue at hand is the kind of concern that would ordinarily cause plaintiffs to forum shop, causing inequitable administration of the law.⁸⁸ In *Hanna v. Plumer*, applying federal law was not outcome determinative because it "would be of scant, if any, relevance to the choice of a forum."⁸⁹ The plaintiff "was not presented with a situation where application of the state rule would wholly bar recovery; rather, adherence to the state rule would have resulted only in altering the way in which process was served."⁹⁰

So an *Erie* analysis proceeds as follows: When a conflict exists between state and federal practices on the relevant issue⁹¹ and there is no applicable federal positive law⁹² or federal rule,⁹³ courts first ask whether the issue in question is outcome determinative, as clarified by *Hanna*. If it is, some courts perform the *Byrd* balancing test to decide which law to apply.⁹⁴ None of the courts of appeals have performed this analysis in full to determine what law to apply to foreign forum-selection clause validity.⁹⁵

84. 326 U.S. 99, 109 (1945).

85. 356 U.S. 525 (1958).

86. *Id.* at 538-40. Some question the continued vitality of *Byrd* balancing, but it has not been overruled. See Springer, *supra* note 83, at 841-42 n.46.

87. *Hanna*, 380 U.S. at 468; see also Matthew W. Lampe, Note, *Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases?—A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp.*, 22 CORNELL INT'L L.J. 307, 316 (1989).

88. *Hanna*, 380 U.S. at 468-69.

89. *Id.* at 469.

90. *Id.* at 469 (footnotes omitted).

91. The threshold question under *Erie*.

92. Which automatically trumps state law under the Supremacy Clause.

93. Which trumps state law per *Hanna*.

94. Lampe, *supra* note 87, at 317-18.

95. See *supra* Part II.

B. *Erie's application to a hypothetical*⁹⁶

Erie is a fact-intensive inquiry that yields different results depending on the context. A hypothetical contract will help to clarify this *Erie* analysis. First, consider a forum-selection clause in *state* court in a state that is hostile to forum-selection clauses. Assume that the forum-selection clause was freely bargained for and represents the parties' wishes. The parties to the contract are two companies, one headquartered in Idaho, the other headquartered in the United Kingdom. They entered into the contract in Idaho for performance in Idaho. The contract designates courts in London as the only allowable forum for disputes under the contract.⁹⁷ The Idaho headquartered company is dissatisfied with the UK company's performance and brings suit in Idaho state court. Idaho (in reality, not just in this hypothetical) has a strong public policy against forum-selection clause enforcement.⁹⁸ It is unlikely, therefore, that an Idaho state court would enforce this contract's forum-selection clause. The court would refuse to dismiss the case in favor of refileing in the United Kingdom and would render a binding decision in Idaho.

Now imagine that this same case was brought in a district court in Idaho under diversity jurisdiction. The threshold *Erie* question is whether the outcome with respect to forum-selection clause validity would be different if federal law instead of state law were applied to the clause. Given the appellate courts' analysis on this question it is safe to assume that federal practice, whatever its exact source, is amenable to forum-selection clauses. Thus federal law directly conflicts with Idaho law. Since no federal rule or statute governs validity, the district court would wade into the realm of the "relatively unguided *Erie* Choice."⁹⁹

Assume that under Idaho law, the Idaho company would be able to recover, but under UK law they would not. At first glance it appears that the

96. This Subpart outlines a proper *Erie* analysis. Although it is common practice for a literature review to precede original analysis, because I do not think the literature on this question adequately addresses whose law should apply, I respond to the literature after my analysis.

97. Lay readers might think that this forum seems "unfair" for a contract that was agreed to and to be performed in Idaho. However, remember that the contract was freely bargained for. That means that the Idaho company will have taken into account any disadvantages from the London forum and negotiated for other benefits as a result of this concession in the forum-selection clause.

98. Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of Atlantic Marine*, CONSTRUCTION LAW, Summer 2013, at 27, 30. See Idaho Code Ann. § 29-110(1) (West 2016), which provides that "[e]very stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract in Idaho tribunals, or which limits the time within which he may thus enforce his rights, is void as it is against the public policy of Idaho." Idaho courts interpret this statute to indicate a strong Idaho public policy against the enforcement of forum-selection clauses, rendering them void in the eyes of Idaho courts. *Cerami-Kote, Inc. v. Energywave Corp.*, 773 P.2d 1143, 1146 (Idaho 1989).

99. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965).

enforcement of the forum-selection clause is absolutely outcome determinative per *York*. But the inquiry does not end there. American courts do not simply apply their own forum's substantive law to all cases brought before them. They have complicated conflict-of-laws rules that govern which law to apply. Idaho, like many other states, applies to contracts the substantive law of the place where the contract was made.¹⁰⁰ Assume that a British court would do so as well under its conflict-of-laws rules. If both forums would apply Idaho law, the forum-selection clause's enforcement only matters for the purposes of the litigation's location, not for its ultimate outcome.

1. *Hanna v. Plumer: Forum Shopping and Inequitable Administration of the Law*

Hanna v. Plumer asks whether this difference in location is outcome determinative in a way that would cause plaintiffs to forum shop and/or cause an inequitable administration of the law.¹⁰¹ The hypothetical falls somewhere between a case where "application of the state rule would wholly bar recovery" and the clearly-not-outcome-determinative situation in *Hanna*.¹⁰² The litigation's location is more significant than the way process is served (the issue in *Hanna*), but recovery would not be absolutely barred in either location.

There are several reasons that applying federal law favoring enforcement of the choice-of-forum clause in the hypothetical could cause forum shopping. During the *Stewart* oral argument one justice emphasized the forum shopping danger of using federal law in that case: "Makes a lot of difference. Do you think that wouldn't result in forum shopping to bring suit in the Alabama court if you know if you bring it there, you can stay there, whereas if you brought it in federal court, you couldn't stay there?"¹⁰³ That danger is magnified when the forum-selection clause designates a foreign forum. The added cost to the party that does not want to litigate in the designated foreign forum will be much greater if they have to litigate abroad if the clause is enforced rather than simply having to litigate in another U.S. jurisdiction. And most *forum non conveniens* dismissals do not in fact get refiled abroad.¹⁰⁴

Litigation in the United Kingdom would be vastly more convenient for the British company than for the Idaho company. If the Idaho company knew that a federal court would dismiss the case in favor of a UK forum, the Idaho

100. See Andrew S. Jorgensen, *Choice of Law in Idaho: A Survey and Critique of Idaho Cases*, 49 IDAHO L. REV. 547, 549, 558-59 (2013).

101. *Hanna*, 380 U.S. at 468.

102. See *id.* at 469.

103. Oral Argument at 44:07, *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (No. 86-1908), <https://www.oyez.org/cases/1987/86-1908>.

104. Rajeev Muttreja, Note, *How to Fix the Inconsistent Application of Forum Non Conveniens to Latin American Jurisdiction—And Why Consistency May Not Be Enough*, 83 N.Y.U. L. REV. 1607, 1621-23, nn.83-85 (2008).

company would be incentivized to negate the forum-selection clause by filing in Idaho state court and adding an in-state defendant to prevent removal to federal court.¹⁰⁵ The UK company might also settle much more readily if it had to litigate in Idaho rather than London, again incentivizing the Idaho company to file in Idaho state court. So it is a close call, but I think this issue is the kind of concern that could cause plaintiffs to forum shop—especially given that most *forum non conveniens* dismissals are not refiled¹⁰⁶—and is therefore outcome determinative per *Hanna*.¹⁰⁷ So we proceed to the *Byrd* balancing test.

2. *Byrd* Balancing

Sometimes *Byrd* balancing is easily resolved by considering whether the relevant question regulates in-court or out-of-court behavior.¹⁰⁸ In-court behavior refers to court procedures. Out-of-court behavior refers to substantive rights outside of the courthouse. Courts care about their own in-court procedures much more than they care about another court's in-court procedures. A forum court therefore has a strong interest in applying its own in-court rules. Other courts are unlikely to care what in-court rules another court is applying. Out-of-court rules, on the other hand, are much more important to the court located in the jurisdiction where the relevant behavior occurred. A rule that affects parties' rights and obligations beyond the courthouse doors is less important to a forum court outside the jurisdiction where that behavior occurred. Courts want their out-of-court rules to apply to behavior that occurs in their jurisdiction, regardless of where suit is filed.

Forum-selection clause enforcement regulates in-court behavior inasmuch as it is about whether a clause will be enforced and where the case will be heard. In my hypothetical, it also regulates the out-of-court behavior—although perhaps *not* the rights and obligations—of contracting parties. Contracting parties will not bargain for forum-selection clauses if they know those clauses will not be enforced. Contracting parties who think these clauses *might* not be enforced might nevertheless bargain for them, but put less weight on them than if they knew they would be enforced. However, in my hypothetical, where the applicable law will be unaffected, clause enforcement only affects the obligations of the parties by obliging them to litigate in a certain court. Clause enforcement has no effect on any other rights or obligations under the contract.

105. Of course, if federal substantive common law governs this question, as explored in Part IV, this would do the Idaho company no good because federal substantive common law applies in state and federal courts alike.

106. See Muttreja, *supra* note 104.

107. See *Hanna*, 380 U.S. at 468-69.

108. See *Byrd*, 356 U.S. at 537-38 (referring to *Erie*'s "policy of uniform enforcement of state-created rights and obligations" as opposed to uniform enforcement of all state rules). This general lens for *Byrd* balancing comes from Professor Michael Collins's civil procedure class at the University of Virginia School of Law in fall 2012.

This issue is a little bit out-of-court and a lot in-court, leaning in favor of application of federal law when the case is in federal court, but not to a significant enough degree to be decisive on the *Byrd* balancing question. This in-court versus out-of-court simplified inquiry does not resolve the *Byrd* question in this case.

We proceed, therefore, to the two forums' actual interests in having their law apply. This analysis involves identifying the two forums' interests in having their law apply and then determining whether those interests are implicated on the particular facts of this case. Idaho has a public policy interest against withdrawing jurisdiction from the Idaho courts to hear disputes that they could otherwise hear. This public policy might not be relevant to these facts. Remember, in my hypothetical, we are in federal court because of diversity jurisdiction. An Idaho state court will not hear this case no matter what.¹⁰⁹ So let's posit that Idaho wants to provide an in-state forum for in-state litigants and does not want to allow parties to remove that benefit of Idaho residency. This policy is relevant here. Additionally, because contract law is typically a creature of state law, applying Idaho law to this question would reinforce state law's traditional role in contract disputes and respect Idaho's federalism right to govern these disputes. This policy is likewise implicated on these facts because we assumed that Idaho law would otherwise govern the terms of this contract, whether it was litigated in an Idaho court or a British one.

There are relevant federal interests in applying federal law here as well. First, using federal law to decide forum-selection clause validity gives federal courts greater control over their own dockets (a kind of in-court regulatory concern). Moreover, there is arguably a federal interest in facilitating international business arrangements. Assuring companies that these clauses will ordinarily be enforced and that a uniform law will be applied to these clauses in federal courts promotes international commerce. This interest is implicated on these facts. International disputes have the potential to create problems for the United States in the international community. There is therefore a federal interest in having federal law govern a forum-selection clause in a contract that could lead to international disputes. This interest, however, is likely not implicated here. A one-off contract between two companies is unlikely to lead to an international dispute of such import as to require federal control. Of course, that could be said of many individual contracts, but in the aggregate these contracts could cause problems. Finally, the federal government—not

109. In fact, when this argument was made during the *Stewart* oral argument, Justice Stevens questioned why this public policy should matter in a diversity suit at all. See Oral Argument at 06:06, *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988) (No. 86-1908), http://www.oyez.org/cases/1980-1989/1987/1987_86_1908 ("I can understand if if [sic.] the case had been brought in a State court, they might want to say, our courts ought to go forward, but why does Alabama care whether Federal judges in New York or in Birmingham decide this case?").

states—is responsible for governing foreign relations. The Supreme Court manifested general federal concern for these issues in *The Bremen* when it decided that the federal policy, at least in admiralty cases, was one that would generally enforce forum-selection clauses in order to promote contracting parties' certainty.¹¹⁰ This interest is implicated on these facts.

So both Idaho and federal courts have an interest in having their law apply. Comparing the two sets of interests is like trying to compare apples and oranges. The interests do not weigh heavily in favor of one forum or another. They might weigh slightly in favor of a federal forum, but that determination is highly subjective based on the weight given to the individual interests at issue.

3. *Erie Outcome*

The enforceability of a forum-selection clause, especially in the international context, will almost certainly affect a plaintiff's choice of forum. So from a forum shopping perspective, the *Erie* analysis on these facts points toward the application of state law. It is not clear how much weight the modern Court would put on the interest balancing of *Byrd*, so the *Byrd* balancing would have to strongly indicate federal law to override this forum shopping concern.¹¹¹ Here, neither the in-court/out-of-court analysis nor the direct balancing of interests under *Byrd* points strongly enough toward the application of federal law to override the relevant forum shopping concerns. So in my hypothetical, the federal district court in Idaho should apply the law that Idaho would apply (which in this case would be Idaho law) to determine the validity of the forum-selection clause.¹¹² This would likely mean not enforcing the clause and rendering a binding decision in the district court in Idaho.

4. *A Modified Hypothetical*

Erie analysis is fact-intensive and dependent on the particular circumstances of each case. I posited a case that was deliberately as favorable as possible to the application of federal law to the question of clause validity. That will not always be the case. For example, if the British forum designated by the forum-selection clause would not apply the same law to the contract as the federal district court—especially if the law applied by the British forum

110. *The Bremen*, 407 U.S. at 17-18.

111. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980).

112. A note on what applying Idaho law will mean: When a federal court is directed to apply state law to a question in a diversity case, it applies that state's conflict-of-laws rules to determine what law to apply. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). So the federal district court would look to Idaho's conflict-of-laws rules and apply whatever law a state court in Idaho would have applied to the question of clause validity. In this case, Idaho state law would probably apply. See Jorgensen, *supra* note 100, and accompanying text.

would not allow recovery—then this case is easy. If the federal court enforces the clause and the case proceeds in Britain, the plaintiff will not recover. If the federal court does not enforce the clause (following Idaho law) the plaintiff might recover. The choice of whether to enforce the forum-selection clause under these circumstances will affect the parties' rights and obligations. It is outcome determinative in a way that encourages forum shopping. An *Erie* analysis of these facts points strongly toward applying state law to clause validity. Given that my original hypothetical, which was deliberately favorable to federal interests, nevertheless pointed toward the application of state law, any *Erie* analysis of a foreign forum-selection clause would likely dictate the use of state law to govern clause validity.

C. *The Academic Literature*

Most of the academic literature agrees that state law should govern foreign forum-selection clauses, although scholars' analyses are less than clear and not always thorough. The most thorough analyses are done in the context of arguing against the *Stewart* majority. And no author has focused his or her analysis on the validity of a *foreign* forum-selection clause—the context where federal interests are most clearly implicated.

Several pieces published since *Atlantic Marine* purport to resolve the question of whose law should apply to forum-selection clauses generally. Matthew Sorenson believes that *Atlantic Marine* provided guidance on whose law to apply.¹¹³ He also advocates for splitting the question into two: first answering the clause validity question, and only then moving on to enforceability.¹¹⁴ He believes that splitting the question into these two steps creates clarity in the issues and results in a determination that state law should determine clause validity and federal law should determine enforceability.¹¹⁵ He says that *Atlantic Marine* dictates both of these conclusions.¹¹⁶ The distinction Sorenson draws between validity and enforceability is logical. If by enforceability he means the mechanism used to enforce such a clause, not whether a clause is valid (and thus “enforceable”), then it is possible that the same law should not apply to both questions. That question is outside this Article's scope. *Atlantic Marine* made clear that *forum non conveniens* dismissal is the appropriate enforcement mechanism if a foreign forum-selection clause is valid,¹¹⁷ but did not clarify whether federal or state *forum non conveniens* doctrine governs.¹¹⁸

113. Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521, 2552 (2014).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013).

118. *See generally id.*; *see also* Springer, *supra* note 83, and accompanying text.

Sorenson's analysis is brief on the question of validity. He contends that courts that apply federal law to the question of validity have incorrectly—in light of *Atlantic Marine*—viewed it as a venue question.¹¹⁹ Because it is not a venue question, no federal law governs validity, which in turn requires an *Erie* analysis.¹²⁰ He acknowledges how difficult the *Erie* analysis is.¹²¹ But he does no *Erie* analysis himself.¹²² Instead he claims that “many” have held that state law applies under *Erie*.¹²³ This picture of the state of the law on the subject is incorrect¹²⁴ and it is no substitute for an *Erie* analysis.¹²⁵ The most compelling argument he gives for the application of state law to the validity question is that Justice Scalia's dissent in *Stewart* supports his conclusion.¹²⁶

Professor Kevin Clermont performed a similarly cursory analysis on this question, but came to the opposite conclusion.¹²⁷ At its core, his *Erie* analysis is essentially that the federal courts of appeals have decided that federal law applies, so federal law applies.¹²⁸ He contends that the forum has “strong interests in controlling its own jurisdiction, venue, and procedure through its conflicts and enforceability doctrines. . . . [But] the state's substantive interests for and against party autonomy will have some claim to applicability under *Erie*”¹²⁹ He claims that “the Supreme Court has indicated that the federal statutes on transfer of venue or the federal doctrine of *forum non conveniens* can override the forum-selection clause, even in a diversity case.”¹³⁰ But that does not relate to the choice of law that should govern forum-selection clause validity in the first instance in a diversity case. He concludes that “[a]lthough the federal forum has strong interests in controlling its own jurisdiction, venue, and procedure, specifically substantive state interests *can* occasionally be strong enough to . . . call for state law to apply under *Erie*.”¹³¹ But he does not elaborate on when this might be the case.

Clermont also contends that state law will govern when these cases are

119. Sorenson, *supra* note 113 at 2554.

120. *Id.* at 2555.

121. *Id.* (“Without a broad interpretation of federal venue laws, district courts must engage in a complicated *Erie* analysis. As many have noted, the application of federal law to the validity question creates a host of messy *Erie* concerns.”).

122. *Id.*

123. *Id.*

124. *See supra* Part II.

125. *See supra* Part II.A for an example of a proper *Erie* analysis.

126. Sorensen, *supra* note 113, at 2555.

127. Kevin R. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 665-66 (2014).

128. *Id.* (“The federal forum has strong interests in discretionarily controlling its own jurisdiction, venue, and procedure, which should prevail over comparable state interests on such matters.”).

129. *Id.* at 665.

130. *Id.* at 666 (internal footnotes omitted).

131. *Id.* at 666-67 (emphasis added).

brought in state court because of state courts' interest in applying their own procedural rules in their courts; he says that this consideration overrides "any interests in foreign relations, international commerce, or substantive law" that might point in the direction of applying federal law.¹³² I agree with his conclusion,¹³³ but think that the possibility that substantive common law governs this question deserves more thorough consideration.¹³⁴ Professor Clermont outlines all the possible resolutions to this question,¹³⁵ but he does not fully evaluate them.

Several scholars, both before and after *Atlantic Marine*, have argued that *Stewart* was wrongly decided when it concluded that state law hostile to forum-selection clauses could be ignored in transfer of venue analysis under Section 1404(a).¹³⁶ Some of these scholars do a more thorough *Erie* analysis, but these analyses are not directly relevant here because they consider forum-selection clauses designating other federal forums. That means they do not consider the federal interests inherent in an international contract dispute.¹³⁷ For example, Professor Adam N. Steinman argues that *Stewart* was wrongly decided, that the Supreme Court signaled this in *Atlantic Marine*, and that this conclusion is supported by developments in the *Erie* doctrine subsequent to *Stewart*.¹³⁸ He allows that there might be "particular situations" when federal law should trump state law on the question of clause validity, but does no further analysis.¹³⁹ And he understandably does not consider any of the federal concerns inherent in a foreign forum-selection clause outlined above in Part III.B.

Writing before *Atlantic Marine*, Professor Leandra Lederman approached the same question with brevity.¹⁴⁰ She said *Stewart* was wrongly decided and that state law should govern forum-selection clauses generally in diversity cases.¹⁴¹ Professor Lederman then performed a stripped-down *Erie* analysis. She said that if no Federal Rule of Civil Procedure conflicts with state policy on a question, then state policy applies to that question in federal diversity cases in order to avoid a difference in outcome from state courts.¹⁴² She said that no Federal Rule of Civil Procedure governs forum-selection clause validity. And she concluded that using federal law to govern forum-selection clause enforcement could cause a difference in outcome between federal and

132. *Id.* at 668.

133. *See infra* Part IV.

134. *See infra* Part IV.

135. Save perhaps the procedural common law option, explored below.

136. *See, e.g.,* Blair, *supra* note 48; Lederman, *supra* note 31; Steinman, *supra* note 7.

137. *See supra* Part III.

138. Steinman, *supra* note 7, at 811-16.

139. *Id.* at 810.

140. Lederman, *supra* note 31.

141. *Id.* at 447-48.

142. *Id.* at 459-60.

state courts. So, per *Erie*, state law should govern.¹⁴³ She did not specifically address foreign forum-selection clauses.

Overall, the academic literature on this question fails to fully address the *Erie* analysis question in a coherent and comprehensive way, opting instead for superficial analyses that are better than those of most appellate courts, but nevertheless insufficient.

D. *Benefits and Weaknesses of Using Erie to Determine Clause Validity*

The clearest benefit to using *Erie* to determine clause validity is that *Erie* is the default inquiry for vertical choice-of-law questions. Every new law student learns *Erie* and learns that it is the mechanism federal courts sitting in diversity use to decide whose law to apply when there is no applicable federal positive law. The alternative, federal common law, is—as the next Part will show—an amorphous doctrine that many (maybe most) lawyers do not understand. And federal common law is controversial because it involves judicial lawmaking, which implicates the separation of powers.

The clearest drawback to *Erie* is that although the doctrine is clearer than federal common law, it is still a muddy inquiry. And unlike federal common law, which is a binary question—either it exists on point or it does not—*Erie* requires a fact-intensive analysis every time. However, given that my hypothetical, which was deliberately favorable to federal interests, nevertheless pointed toward the application of state law, perhaps the Supreme Court could hold—after an *Erie* analysis in such a case—that foreign forum-selection clause validity is always governed by state law. This would eliminate the need for an *Erie* analysis every time a court confronted the validity of a clause. But it would also mean that the enforceability of foreign forum-selection clauses would depend on which state suit was brought in, creating uncertainty for contracting parties.

IV. THE *ERIE* ALTERNATIVE: FEDERAL JUDGE-MADE LAW

Erie is not the only doctrine that could be used to answer this question. This could be a question of such federal importance that it is governed by substantive federal common law that is binding under the Constitution's

143. This is, in fact, her *entire Erie* analysis:

A straightforward *Erie* analysis compels the conclusion that state law should apply to forum-selection clause motions. Where a state policy against forum-selection clauses is implicated on a motion to enforce such a clause under a Federal Rule of Civil Procedure, *Hanna v. Plumer* precludes application of the federal rule unless it squarely conflicts with the state policy. It is difficult indeed to argue that any of the Federal Rules of Civil Procedure, none of which refer to forum-selection clauses, squarely conflicts with a state policy against such clauses. Once it is determined that a federal rule is not squarely in conflict with the state policy, state law must apply to avoid the differences in outcome that *Erie* condemns.

Id. (footnotes omitted).

Supremacy Clause in all cases heard in all courts, including state courts.¹⁴⁴ Or clause validity could be governed by federal procedural common law as a part of federal courts' implicit constitutional power to create housekeeping mechanisms to facilitate their jurisdiction. This kind of federal common law would only bind federal courts, but would apply in all diversity cases. Either procedural or substantive federal common law on point could eliminate the need for *Erie*'s fact-intensive inquiry.¹⁴⁵

In his dissent in *Stewart*, Justice Scalia argued that the Supreme Court lacks the power to create judge-made common law to govern the validity of forum-selection clauses.¹⁴⁶ He recognized that the Supreme Court might hold some power to develop federal common law, but claimed that power could not be used to develop substantive law.¹⁴⁷ Instead, he said, the power stretches only to the development of "procedural rules that govern the practice before them."¹⁴⁸ According to Justice Scalia the Court has used the "twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws" to determine what is substantive and what is procedural.¹⁴⁹ In *Stewart*, he declared that the use of state law to determine forum-selection clause validity served these aims.¹⁵⁰ But in this dissent Justice Scalia overlooked several arguments in favor of the opposite conclusion.

Erie eliminated federal general common law, not federal common law altogether.¹⁵¹ As Judge Friendly observed in his famous article on *Erie* and federal common law, "[t]he clarion yet careful pronouncement of *Erie*, 'There is no federal general common law,' opened the way to what, for want of a better term, we may call specialized federal common law."¹⁵²

144. GEORGE A. BERMAN, TRANSNATIONAL LITIGATION IN A NUTSHELL 32 (2003).

145. There is no question that substantive federal common law governs in federal and state courts irrespective of *Erie*. It is debatable—and perhaps unlikely—that procedural federal common law can circumvent *Erie*. See Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on Erie and Gasperini*, 46 U. KAN. L. REV. 751, 754-55 (1998) ("*Erie* cases . . . involve federal common law that is . . . procedural in nature and which does not apply outside of the federal courts."). But at least some scholars believe that procedural common law can circumvent *Erie*. See, e.g., Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1558 (2011) ("[T]here are many areas of procedural common law that seemingly fall outside of *Erie*'s dictates."). Whether these scholars are correct is outside the scope of this Article but for the purposes of organization I assume that they are.

146. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38-39 (1988) (Scalia, J., dissenting).

147. *Id.*

148. *Id.* at 39.

149. *Id.*

150. *Id.*

151. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 820-21 (2008).

152. Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405 (1964) (quoting *Erie*, 304 U.S. at 78); see also *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 420-21 (2011) (quoting Friendly's article).

A. *Substantive Common Law*

Today, there are several federal common law doctrines that govern substantive issues.¹⁵³ In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the Supreme Court recognized that although there is no “federal general common law, federal courts may legitimately fashion federal judge-made law to govern certain *substantive* issues, and that, although the federal judge-made law must be based on some constitutional or statutory enactment, its scope is not limited to mere judicial interpretation of those governing federal enactments.”¹⁵⁴ In that case, the Court explicitly held that “whether the water of an interstate stream must be apportioned between two States is a question of federal common law.”¹⁵⁵ Subsequent cases continue to uphold the power to make federal common law in this context.¹⁵⁶

Supreme Court cases have developed several enclaves that authorize the Court to develop substantive common law.¹⁵⁷ These exceptions are narrow, however: “Normally, a federal court may fashion federal common-law rules only upon a specific showing that the use of state law will create a significant conflict with, or threat to, some federal policy or interest.”¹⁵⁸ In fact, without “some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”¹⁵⁹

The *Erie* arguments for federal control of this question bleed into the argument that this is an area in which the Supreme Court has authority to create federal common law. The statements favoring federal control of these issues in Justice Kennedy’s *Stewart* concurrence, the majority in *Scherk v. Alberto-*

153. See Barrett, *supra* note 151, at 814.

154. Lampe, *supra* note 87, at 312 (citing *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938)).

155. *Hinderlider*, 304 U.S. at 110.

156. See *Am. Elec. Power Co.*, 564 U.S. at 421-22 (After *Erie* held that “[t]here is no federal general common law,” a “new federal common law” emerged. This new federal common law “addresses subjects within [the] national legislative power where Congress has so directed or where the basic scheme of the Constitution so demands. . . . [A]ir and water in their ambient or interstate aspects” implicate this new federal common law. (internal quotations omitted)).

157. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“[P]ost-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”).

158. *Atherton v. FDIC*, 519 U.S. 213, 214 (1997) (citations omitted); see also Barrett, *supra* note 151, at 820 (“[C]ertain enclaves of federal interest are ‘so committed by the Constitution and laws of the United States to federal control that state law is *pre-empted* and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts.’”) (quoting *Boyle v. United Techs.*, 487 U.S. 500, 504 (1988)).

159. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).

Culver Co., and the majority in *The Bremen* also support this argument.¹⁶⁰

1. *The Foreign-Relations Enclave*

The only existing enclave in which this issue might fit is the international disputes enclave. This enclave was first recognized in *Banco Nacional de Cuba v. Sabbatino*,¹⁶¹ a case about an action by an instrumentality of the Cuban government, implicating the Act of State doctrine.¹⁶² The Court said “we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.”¹⁶³ The issues surrounding the Act of State doctrine are “intrinsicly federal.”¹⁶⁴

Four years later the Court relied on the foreign-relations enclave in *Zschernig v. Miller*.¹⁶⁵ The Court held that an Oregon statute that articulated the conditions under which a non-resident alien could inherit property in that state by means of succession or testamentary disposition was improper as an intrusion into the federal government’s control over foreign relations.¹⁶⁶ The Court said the Oregon statute’s real purpose was to regulate “foreign policy attitudes [and] the freezing or thawing of the ‘cold war.’”¹⁶⁷ It was significant to the Court that Oregon probate judges construed the statute to require them to “ascertain whether ‘rights’ protected by foreign law [were] the same ‘rights’ that citizens of Oregon enjoy[ed].”¹⁶⁸ And as a result, these judges were issuing opinions holding that Communist-controlled states did not accord their citizens equivalent rights.¹⁶⁹ Passing judgment on the rights accorded by foreign governments is undoubtedly best left to federal regulation.¹⁷⁰

The Court considered federal preemption of state laws through the foreign relations enclave more recently in *American Insurance Ass’n v. Garamendi*.¹⁷¹ Unlike the preceding two cases, which relied on a judicial declaration of federal policy, in that case the Court relied on the fact that the executive had spoken on the relevant question: resolution of “Holocaust-era insurance claims.”¹⁷² The

160. *See supra* notes 28-47.

161. 376 U.S. 398 (1964).

162. *Id.* at 425.

163. *Id.*

164. *Id.* at 427.

165. 389 U.S. 429 (1968).

166. *Id.* at 432.

167. *Id.* at 437.

168. *Id.* at 440.

169. *Id.*

170. *Id.* at 437.

171. 539 U.S. 396 (2003).

172. *Id.* at 420.

executive had entered into executive agreements with France, Austria, and Germany that were in direct conflict with state law.¹⁷³ The Court also noted that “[v]indicating victims injured by acts and omissions of enemy corporations in wartime is . . . within the traditional subject matter of foreign policy in which national, not state, interests are overriding.” The executive agreements and traditional foreign policy nature of the claims led the Court to conclude that contrary state law was preempted.¹⁷⁴

As these cases demonstrate, the existence of the foreign-relations enclave is well settled. However, its exact scope is less clear.¹⁷⁵ Some scholars view it narrowly.¹⁷⁶ Others view it more expansively. The indeterminacy of its scope is partly due to the infrequency with which it is invoked by the Supreme Court.¹⁷⁷

2. *Scholars arguing for the enclave’s applicability*

Foreign forum-selection clause validity could fit into the foreign-relations enclave because of the foreign relations and international commerce implications of not enforcing these clauses. Several scholars have made this argument. Professor Jack Goldsmith contends that some lower courts have ruled this way and that commentators agree with those courts.¹⁷⁸ However, Professor Goldsmith arguably overstates the evidence on this point.¹⁷⁹

The only federal appellate court case he cites for this proposition is *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*¹⁸⁰ Although this case does contain a broad statement about federal law governing forum-selection clauses—albeit without any qualifying language about diversity jurisdiction—it also contains no discussion of federal common law.¹⁸¹ And to support its broad conclusion that federal law *always* governs, the court cites to a *diversity* case that held that federal law governs such questions because they are venue questions, and Congress, by passing venue statutes, has clearly indicated that

173. *Id.*

174. *Id.* at 421.

175. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1632 (1997).

176. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 861 (1997) (“*Sabbatino*’s federal common law analysis was designed to shield courts from involvement in foreign affairs. It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field.”).

177. Goldsmith, *supra* note 175.

178. Goldsmith, *supra* note 175, at 1634-35.

179. And if these rationales were enough to hold that forum-selection clauses are governed by federal substantive common law, then so should state personal jurisdiction and damages laws be preempted by federal common law when they operate in the context of international agreements. This result seems unlikely.

180. 915 F.2d 1351, 1353 (9th Cir. 1990).

181. *Id.*

the federal interests in this context outweigh any state interests.¹⁸² This is likely a case of accidental judicial overstatement rather than a holding that federal common law governs the validity of *all* forum-selection clauses—whether in federal or state court. The only other case Goldsmith cites to support this proposition is a District of Nevada case from 1991.¹⁸³ This court likewise fails to discuss federal common law, relying instead on *TAAG* and the Ninth Circuit's holding in *Shute v. Carnival Cruise Lines*, an admiralty case¹⁸⁴ of questionable relevance to the general question of federal common law on this subject.

The academic literature that Professor Goldsmith cites for the proposition that substantive federal common law should govern a foreign forum-selection clause's validity does explicitly conclude that federal law should govern *all* foreign forum-selection clauses (whether in federal or in state court), unlike the court cases he cites. But the reasoning of these sources is unconvincing. For example, Professor Harold Maier argues that federal common law governs clause validity because he thinks it is clear that the Supreme Court's holding in *Zapata* is not confined to the realm of admiralty cases.¹⁸⁵ He contends that the Court's language displays no intention to limit its holding, and that the nature of international forum-selection clauses—and the national interests they implicate—indicates the wisdom in having them governed by a uniform federal standard.¹⁸⁶ But an admiralty case is not binding outside of admiralty.

Professor Linda Silberman also argues for a federal standard—either federal common law or a statutory standard—in order to create uniformity in transnational litigation and to avoid forum shopping across jurisdictions.¹⁸⁷ However, she does not address the issue in any more detail.¹⁸⁸ Relying on Justice Kennedy's concurrence in *Stewart*, Professor Andreas Lowenfeld likewise argues for a federal standard for enforcement of foreign forum-selection clauses: the same standard that governs § 1404 cases.¹⁸⁹ Like Professor Silberman, he provides little support for this proposition, although he does allude to the dangers of horizontal forum shopping between states and the

182. *Id.* (citing *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988)).

183. *Appell v. George Philip & Son, Ltd.*, 760 F. Supp. 167, 168 (D. Nev. 1991).

184. 897 F.2d 377, 380 (9th Cir. 1990), *rev'd sub nom.* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

185. Harold G. Maier, *The Three Faces of Zapata: Maritime Law, Federal Common Law, Federal Courts Law*, 6 VAND. J. TRANSNAT'L L. 387, 395-96 (1973).

186. *Id.* at 396.

187. Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 528-29 (1993).

188. *Id.*

189. Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT'L L. 121, 133-36 (1997).

benefit of assuring parties that courts will enforce these clauses.¹⁹⁰

3. *Analysis*

Unlike these academics, the Supreme Court has not interpreted the international disputes enclave of substantive federal common law in an expansive way. Holding that the enclave requires a uniform federal standard to govern in the absence of a foreign state's involvement,¹⁹¹ discrimination against or judgment of foreign governments,¹⁹² or direct executive contradiction in a field of traditional executive control¹⁹³ would greatly expand this enclave. Foreign forum-selection clause enforcement between private parties is not "intrinsically federal."¹⁹⁴ If anything it is intrinsically state-based because of private contract law's history of state control.

Expanding the foreign-relations enclave's coverage to include these cases would seriously undermine states' traditional control of contract disputes. Such an expansion would also raise separation of powers concerns. Congress is capable of creating a uniform standard to govern these cases as it did with § 1404. Some argue that the federal judiciary oversteps when it legislates where Congress has chosen not to.¹⁹⁵

Additionally, if the Supreme Court held that substantive federal common law governed foreign forum-selection clause validity, this federal common law would apply not only in federal courts, *but also in state courts* because of the Supremacy Clause.¹⁹⁶ This would create a dramatic effect. The impact of such a holding would be especially controversial given the tradition of state-law control of contract obligations, and it would likely result in an uproar from defenders of federalism. Because of these practical concerns and the foreign-relations enclave's doctrinal limitations, it seems unlikely that the Supreme Court would hold that substantive federal common law governs foreign forum-selection clause validity in diversity cases.

B. *Procedural common law*

Substantive federal common law is not the only avenue the Supreme Court could use to avoid an *Erie* analysis and hold that forum-selection clause validity is governed by federal law. The Court could hold that this is a procedural question governed by federal common law as a "housekeeping"

190. *Id.* at 135-36.

191. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964).

192. *See Zschernig v. Miller*, 389 U.S. 429 (1968).

193. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003).

194. *See Sabbatino*, 376 U.S. at 427.

195. *See Goldsmith*, *supra* note 175, at 1665 (arguing that "the need for such federal judicial lawmaking [in the foreign-relations realm generally] is greatly exaggerated").

196. Barrett, *supra* note 151, at 820.

mechanism.¹⁹⁷ Although not nearly as common a topic of discussion as substantive federal common law, and never listed as one of the “enclaves” of federal common law,¹⁹⁸ federal courts are thought to have a number of “implied powers that are inherent in the nature of their institution.”¹⁹⁹ The power to create this type of common law exists in the realm of procedural in-court conduct.²⁰⁰ No statute grants this power to the federal courts, and courts developing federal procedural common law typically do not address their authority to do so, but procedural federal common law undeniably exists.²⁰¹ This kind of federal common law is only binding in federal courts.²⁰² That means that if procedural federal common law governs clause validity in diversity suits, when a state court hears a case with a forum-selection clause, the state court may use state court practice to determine the clause’s validity.

Courts tend not to perform a rigorous analysis when they determine that federal procedural common law governs a question, so it is not clear how to determine whether it applies in yet-to-be-determined cases. That being said, there is a plausible argument that just as federal *forum non conveniens* doctrine exists absent any explicit Congressional statutory authorization,²⁰³ the Supreme Court could hold that federal courts may fashion their own standards for the enforcement—including validity—of foreign forum-selection clauses.

The in-court, out-of-court analysis in Part III lends credence to this argument. Although it did not point overwhelmingly in one direction, the scales were tipped slightly toward the determination that forum-selection clause validity is an in-court concern. It is difficult to make a convincing argument that forum-selection clause validity is purely procedural, but many circuits have said exactly that in their analyses of this question. The Supreme Court could

197. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 18 (1985). Professor Merrill says that if a federal common law doctrine does not involve the “substantive rights and remedies available to parties,” then there is no issue as to the legitimacy of the development and use of that doctrine in federal courts. *Id.* at 46-47.

198. Barrett, *supra* note 151, at 822.

199. Merrill, *supra* note 197, at 18 (quoting *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812)); *see also* Barrett, *supra* note 151, at 814-15 (describing procedural common law as “common law that is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations”).

200. *See* Barrett, *supra* note 151, at 824.

201. *See* Barrett, *supra* note 151, at 815. Professor Barrett describes five particular doctrines of procedural common law: “abstention, *forum non conveniens*, stare decisis, remittitur, and preclusion.” *Id.* She also explores the source of the power to make procedural federal common law and finds that it could be either the Inferior Tribunals Clause and the Sweeping Clause, in which case any judge-made law could be superseded by Congressional lawmaking, or Article III, meaning that there “is likely some small core of inherent procedural authority [in the courts] that Congress cannot reach.” *Id.* at 815-16. The exact justification for the power to make procedural federal common law is beyond the scope of this Article, but suffice it to say that it exists.

202. *See* Barrett, *supra* note 151, at 815.

203. *See* Barrett, *supra* note 151, at 826-27.

plausibly say the same thing. This holding might not require an *Erie* analysis.²⁰⁴

If the Supreme Court held that procedural common law governs clause validity, it would likely do so because a majority disagreed with Justice Scalia's assertion in his *Stewart* dissent. Justice Scalia said that to determine what questions procedural federal common law governs, courts must look to *Erie*'s twin aims²⁰⁵ (and *Erie* points toward state law in this context²⁰⁶). The Supreme Court could hold that just as § 1404 encompasses the validity of a forum-selection clause designating another federal forum, *forum non conveniens* governs foreign forum-selection clause validity. This is especially plausible given that the Supreme Court regards § 1404 as simply a codification of common law *forum non conveniens*.²⁰⁷ Or the Supreme Court could hold that forum-selection clause validity is encompassed in a federal court's general power to control venue decisions. But this holding seems less likely given that *Atlantic Marine* held that venue in violation of a valid forum-selection clause is not *bad venue* under federal law.²⁰⁸

The federal procedural common law route is much more plausible than the federal substantive common law one because it lacks the federalism implications that come with substantive federal common law. The procedural doctrine's muddiness makes it difficult to evaluate the plausibility of its application to validity of foreign forum-selection clauses. But it is certainly a possibility.

CONCLUSION

The outcome of a vertical choice-of-law analysis as to the validity of a foreign forum-selection clause is not clearly dictated by any cogent approach.

The clearest route for resolving this question—and the one the federal appellate courts should follow—is an *Erie* analysis, which likely will point them to the application of state law. Although the *Erie* analysis is a close call, the hypothetical I posited was designed specifically to implicate federal interests. However, it nevertheless indicates that state law should govern. My *Erie* analysis is necessarily based on a judgment about the weight of different factors, but I think under the majority of circumstances, any court that performs a rigorous *Erie* analysis on clause validity will find that state law should apply.

The Supreme Court is unlikely to decide that substantive federal common law governs this question. This holding would cut deeply into traditionally state-governed matters, and imply a vast expansion of federal common law's

204. See Childress, *supra* note 145.

205. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) (Scalia, J., dissenting).

206. See *supra* Part III.

207. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013).

208. See *id.* at 578.

foreign-relations enclave. Any substantive federal common law on point would bind both federal and state court cases under the Supremacy Clause. This would cause outrage from defenders of states' federalism rights, especially given state law's traditional role in governing contract disputes. The Supreme Court would almost certainly reverse an appellate court opinion holding that substantive federal common law governs foreign forum-selection clause validity.

But the argument that procedural federal common law governs this question could be convincing to the Court. Venue is generally considered a procedural question. Section 1404(a)—which governs venue and is therefore arguably procedural—governs forum-selection clause validity when a clause designates another federal forum. *Forum non conveniens* is § 1404's predecessor. It might be possible therefore to hold that *forum non conveniens* governs the procedural question of foreign forum-selection clause validity in a federal diversity suit.²⁰⁹ The Supreme Court could also hold that forum-selection clause validity is an inherently procedural question all on its own. The federal appellate courts have called this a procedural question, not a substantive one, and the Supreme Court has not corrected them. This is the best argument for federal control of the question. It would lend more certainty going forward than an *Erie* analysis because an *Erie* analysis could, in theory, change depending on a case's particular facts. A holding that federal procedural common law governs clause validity would be definitive and clear. And it could avoid wading into the uncertain realm of *Erie* by relying on the Supreme Court's power to create procedural common law.

Moreover, that the Supreme Court has not yet addressed this issue, although most of the circuits continue to use federal law to govern the question, might indicate a level of comfort with the status quo. This complacency supports the proposition that if they ever do consider this question, the Supreme Court will use federal law in some form to answer it.

Thus, although my *Erie* analysis points toward state law, the Supreme Court could nevertheless hold that federal law governs foreign forum-selection clause validity in two ways: The Court could wade into *Erie*'s murky waters and reach a different result—because even the Supreme Court has noted *Erie*'s indeterminacy—or it could call this a federal procedural common law question. Regardless, unlike the lower courts and the academic literature, irrespective of its outcome, the Court will choose one of these two avenues for addressing this question and perform an analysis based on this choice in order to reach its conclusion. Accordingly, this Article predicts the most likely avenue the Court will take and properly outlines the arguments that litigants should make to any

209. To the extent that this reasoning relies on classifying the validity of a forum-selection clause as a question of venue, any court using this reasoning would have to contend with the Supreme Court's holding that a forum-selection clause has no impact on whether a given venue is correct or proper under federal venue laws. *See id.*

court addressing this question in the future.