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## Atlantic Marine and Choice-of-Law Federalism

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# *Symposium: Forum Selection After Atlantic Marine*

## *Atlantic Marine and Choice-of-Law Federalism*

ANDREW D. BRADT\*

*The headline holding of the Supreme Court's opinion in Atlantic Marine is its conclusion that a forum-selection clause is usually enforceable under the federal transfer statute, 28 U.S.C. § 1404(a). Also lurking within the opinion, however, is a significant shift in the Court's approach to choice of law in federal courts. In Atlantic Marine, the Court held that after a transfer to enforce a forum-selection clause, the transferee district court must apply the choice-of-law rules of the state in which it sits. The Court's rationale is straightforward—the plaintiff should not be allowed to flout the forum-selection clause and obtain the benefits of more favorable choice-of-law rules of another state. But the Court's new rule is a departure from its prior treatment of choice of law in transfer cases, which provided that after a § 1404(a) transfer the transferee court must apply the choice-of-law rules of the transferor court, which, in diversity cases, means the choice-of-law rules of the state in which the transferor court sits. This rule was based on several longstanding principles of what I call choice-of-law federalism, which itself is premised on respect for the substantive policies underlying states' choice-of-law rules and the refusal to sanction different applicable law in federal and state courts within the same state—even in the face of evident interstate forum shopping by plaintiffs. This Article examines how the Court's abandonment of these principles creates numerous complications in its jurisprudence under the Erie doctrine and in choice of law.*

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## TABLE OF CONTENTS

INTRODUCTION.....	618
I. THE SUPREME COURT’S CHOICE-OF-LAW FEDERALISM	
JURISPRUDENCE.....	621
A. THE FULL FAITH AND CREDIT AND DUE PROCESS CASES .....	622
B. APPLYING <i>ERIE</i> TO CHOICE OF LAW: <i>KLAXON V. STENTOR</i> .....	624
C. CHOICE OF LAW AND TRANSFERS PURSUANT TO 28 U.S.C.	
§ 1404(a).....	626
II. <i>ATLANTIC MARINE</i> AND IMPLICATIONS FOR CHOICE OF LAW .....	631
A. WHAT <i>ATLANTIC MARINE</i> DID .....	632
B. OBSERVATIONS ABOUT THE COURT’S NEW CHOICE-OF-LAW	
RULE .....	633
1. <i>Intrastate Disuniformity</i> .....	634
2. <i>Policing Plaintiffs’ Choice-of-Law Gamesmanship</i> .....	639
CONCLUSION .....	641

## INTRODUCTION

Whatever one’s views on the outcome, one admirable thing about Justice Alito’s opinion for a unanimous Supreme Court in *Atlantic Marine Construction Co. v. U.S. District Court* is its clarity of purpose: the Court made plain that, except in “extraordinary circumstances,” the federal courts are to “hold[] parties to their bargain” by enforcing forum-selection clauses.<sup>1</sup> The ruling mandates that federal courts should almost always transfer or dismiss cases filed in a forum other than that denominated by a valid forum-selection clause in order to ensure that litigation proceeds in the previously agreed-upon forum. Enforcing the forum-selection clause, according to the Court, ensures that the parties’ expectations are fulfilled and “[i]n all but the most unusual cases” serves “the interest of justice.”<sup>2</sup> One could certainly argue with the Court’s conclusions, but, as they say in electoral politics, at least you know where it stands.

Given the Court’s aims, it is unsurprising that at the end of its short opinion and almost in passing, the Court also held that “when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a transfer of venue under 28 U.S.C. § 1404(a) will not carry with it the original venue’s choice-of-law rules.”<sup>3</sup> In so doing, the Court departed from the standard rule, announced in 1964’s *Van Dusen v. Barrack*, that when a case is transferred to another federal forum, the transferee court should apply the choice-of-law rules of the

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1. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

2. *Id.* at 583.

3. *Id.* at 582.

transferor court—that is, a transfer should not change the applicable law that would have applied had the case remained in the court where it was filed.<sup>4</sup> In *Atlantic Marine*, neither party explicitly argued for this departure from the *Van Dusen* rule in the briefs, nor was the change discussed in depth at oral argument.<sup>5</sup>

But the holding flows naturally from the Court’s intentions. If the Court was attempting to ensure that the litigation proceeds in the contractually chosen forum as though the case had never been filed elsewhere, then it would be odd for the transferee forum to apply another state’s choice-of-law rules, especially if those rules change the applicable law. If the *Van Dusen* rule were to apply in cases like *Atlantic Marine*, then the party seeking to enforce the forum-selection clause would get only half a loaf—the preferred forum, but with a different set of choice-of-law rules, and often different governing law as a result. *Atlantic Marine* therefore ensures that a contractual forum-selection clause is also a “choice-of-law rules selection” clause. That is, by choosing a forum in a contract, the parties also choose that forum’s choice-of-law rules, and therefore, often that forum’s law.

Despite the natural alignment of the Court’s choice-of-law holding with its stated intentions, its rather cursory statements on the matter are in tension with its earlier cases dealing with state choice-of-law rules in diversity cases. For instance, in its earlier opinions involving transfer, the Court emphasized the transfer statute’s purely “judicial housekeeping” function—as the Court stated in *Van Dusen*, a federal court transfer accomplishes only a “change of courtrooms,” *not* a change in law.<sup>6</sup> And, although the Court has long recognized the interstate forum-shopping possibilities created by *Van Dusen*, its predecessor *Klaxon v. Stentor*,<sup>7</sup> and its successor *Ferens v. John Deere Co.*,<sup>8</sup> the Court has typically subordinated those concerns to other priorities: namely, rejecting *intrastate* forum shopping in diversity cases and refusing to become enmeshed in judgments about arguable gamesmanship involved in the plaintiff’s choice of forum and its impact on choice-of-law rules.

The holdings in *Klaxon* and *Van Dusen* rested on an additional underpinning, which is also developed in the Court’s decisions reviewing states’ choices of law under the Due Process and Full Faith and Credit clauses: that a state’s choice-of-law rules in a case in which it has jurisdiction are a part of that state’s substantive law because they reflect the state’s

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4. 376 U.S. 612, 636–37 (1964).

5. See Transcript of Oral Argument at 25–26, 42–43, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929).

6. *Van Dusen*, 376 U.S. at 637.

7. 313 U.S. 487 (1941).

8. 494 U.S. 516 (1990).

policies regarding both the scope of its laws and interstate relations.<sup>9</sup> A majority of the Court reaffirmed this approach to the choice-of-law implications of the transfer statute in *Stewart Organization, Inc. v. Ricoh Corp.*<sup>10</sup> In *Stewart*, the majority, relying on *Van Dusen*, based its holding that the transfer statute was procedural for *Erie* purposes, in part, on the fact that a transfer would not change the choice-of-law rules applicable to a case.<sup>11</sup> Together, the cases demonstrate that the Court has steadfastly avoided (1) crafting federal choice-of-law rules for diversity cases, (2) second-guessing states' choice-of-law decisions, or (3) changing the state choice-of-law rules applicable to a case due to parties' attempts to forum shop.<sup>12</sup>

The Court's recent commitment to enforcing forum-selection clauses may require it to depart from these practices. By creating an exception to the *Van Dusen* rule and allowing the federal transfer statute to be a vehicle for changing the applicable law in *Atlantic Marine*, the Court has placed itself in the role of policing the choice-of-law impact of plaintiffs' forum shopping, even when they select a forum otherwise allowed by the venue statute and personal jurisdiction doctrine. The Court's new rule thus amplifies the status of the transfer statute beyond mere "housekeeping" and prioritizes the federal policies of enforcing forum-selection clauses and preventing inappropriate forum choices by plaintiffs over ensuring intrastate uniformity and leaving untouched states' choice-of-law rules in cases in which they have jurisdiction. This may be a reasonable rule in the context of enforcing forum-selection clauses, by virtue of which the Court contends that plaintiffs have waived their right to select an alternative forum.<sup>13</sup> But it does represent a shift in the Court's thinking about choice-of-law rules, and it may indicate that the Court will continue to craft exceptions to the *Van Dusen* rule when it thinks plaintiffs are engaging in inappropriate forum shopping.<sup>14</sup>

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9. See *Klaxon*, 313 U.S. at 496 ("[*Erie*] leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws."); see also Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 Nw. U. L. Rev. 1, 21 (2012); Russell J. Weintraub, *The Erie Doctrine and State Conflicts of Laws Rules*, 39 IND. L.J. 228, 242 (1963) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy.").

10. 487 U.S. 22 (1988).

11. *Id.* at 32 ("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." (citing *Van Dusen*, 376 U.S. at 636-37 (1964))).

12. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); see also, e.g., Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 444 (1982).

13. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013).

14. See Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988) (noting that *Atlantic Marine* is the next step in the "quiet revolution" of contractual procedure and jurisdiction).

Moreover, the Court's new rule creates a vehicle that allows courts to police plaintiffs' strategic choice-of-law behavior without having to review the *content* of state courts' choice-of-law rules. Indeed, aside from matters of federalism, there are strong prudential reasons for the Court to avoid passing judgment on states' choice-of-law rules—among them, not wanting to take on the tasks of crafting federal choice-of-law rules or policing state choices of law,<sup>15</sup> except in extreme cases.<sup>16</sup> The “choice of choice-of-law rules” rule the Court promulgated in *Atlantic Marine*, alongside the Court's recent restrictive personal jurisdiction decisions,<sup>17</sup> allows it to restrict forum and choice-of-law shopping by plaintiffs without having to strike down a state's plaintiff-friendly choice-of-law rule for violating the Due Process or Full Faith and Credit Clauses. In other words, by restricting the plaintiff's ability to take advantage of states' friendly choice-of-law rules, the Court minimizes the need to actually review the content of those rules. The choice-of-law rule in *Atlantic Marine*, then, provides an opportunity for the Court to frustrate plaintiffs' manipulation of the opportunities presented by the diversity of states' choice-of-law rules without having to address the constitutionality of those rules.

Part I of this Article lays out the doctrinal backdrop of choice-of-law federalism against which *Atlantic Marine* was decided. Part II discusses how the *Atlantic Marine* decision backs away from the thinking that has emerged from the Supreme Court's prior cases. In particular, I note how the new rule in *Atlantic Marine* deprioritizes intrastate uniformity. Part II also discusses how the Court's focus on the inappropriateness of the plaintiff's forum shopping is a departure in this area and, along with the Court's recent personal jurisdiction cases, how it provides an avenue to restrict plaintiffs' ability to take advantage of the diversity of choice-of-law rules without passing judgment on the constitutionality of those rules or their application.

## I. THE SUPREME COURT'S CHOICE-OF-LAW FEDERALISM JURISPRUDENCE

In a series of cases dealing with choice of law since the 1930s, the Court has developed a doctrinal framework that takes a decidedly hands-off approach to horizontal choice-of-law issues. This approach has emerged

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15. See Gene R. Shreve, *Choice of Law and the Forgiving Constitution*, 71 IND. L.J. 271, 295 (1996) (arguing that that the Supreme Court should avoid choice-of-law matters due to “the capacity of the Supreme Court to oversee enforcement of constitutional reforms”).

16. See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

17. See, e.g., *Daimler Chrysler AG v. Bauman*, 134 S. Ct. 746 (2014) (finding no general jurisdiction in California over German automaker despite significant sales in California); *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (finding no specific jurisdiction in plaintiff's home state of Nevada when defendant committed allegedly tortious acts in Georgia); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011) (finding no general jurisdiction over foreign subsidiaries in North Carolina in case involving bus crash in France); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011) (finding no specific jurisdiction over British manufacturer in New Jersey despite the fact that its product caused injury there).

out of three lines of cases: the cases which provide for minimal scrutiny of states' choice-of-law decisions under the Due Process and Full Faith and Credit Clauses, the *Erie*-progeny cases requiring federal courts sitting in diversity to apply the choice-of-law rules of the states in which they sit, and the cases applying the *Erie* rule in the context of transfers under § 1404(a). Taken together, these cases established three principles of what I refer to as "choice-of-law federalism": (1) a willingness to accept some degree of forum shopping by plaintiffs that takes advantage of a diversity of state choice-of-law rules in order to avoid disuniformity between federal and state courts sitting in the same state; (2) a prudential refusal to police such gamesmanship on the part of plaintiffs; and (3) a recognition that a state's choice-of-law rules are a part of that state's substantive law, rarely to be disturbed or departed from in diversity cases, as a matter of constitutional law. The Court's new rule in *Atlantic Marine* marks a subtle, but real, step away from all three of these principles in favor of the policy of enforcing forum-selection clauses.

#### A. THE FULL FAITH AND CREDIT AND DUE PROCESS CASES

Before the mid-1930s, the Supreme Court heard a significant number of choice-of-law cases. There were two reasons for this: First, to a much greater degree, the Supreme Court policed states' choice-of-law decisions under the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause.<sup>18</sup> During this time, the Supreme Court seemed to have considered the territorial rules eventually embodied by the Restatement (First) of Conflict of Laws to have a constitutional dimension, and, as a result, the Court regularly reviewed and invalidated state choices of law.<sup>19</sup> Second, in diversity cases, choice of law was considered a matter of general law, and federal courts were not required to follow the choice-of-law decisions of the states in which they sat.<sup>20</sup> Neither of these reasons was still applicable by the end of 1941.

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18. See, e.g., *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930); *N.Y. Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918).

19. See, e.g., Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1634-36 (2005); see also PETER HAY ET AL., CONFLICT OF LAWS §§ 3.21-3.24 (5th ed. 2010) (describing the evolution of the Court's conflicts jurisprudence).

20. See, e.g., *Sampson v. Channell*, 110 F.2d 754, 761 (1st Cir. 1940) ("Under *Swift v. Tyson*, . . . the federal courts were free to disregard state court decisions on matters of 'general law', and this included state court decisions on the common law relating to conflict of laws."); see also William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 31 (1963) ("It is clear, then, that from the founding of the federal government through [*Erie*,] the federal courts exercised independent judgment on choice [of law] rules."); Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1212 (1946) (describing that "spacious era before the *Erie* case, when federal judges in diversity were more than echoes of half-heard whispers of the state tribunals").

In the 1930s,<sup>21</sup> coming on the heels of rampant academic criticism of the territorial rules of the First Restatement,<sup>22</sup> the Supreme Court explicitly recognized, as Paul Freund described, “there are at least two possibly applicable rules or systems of law in a multistate problem.”<sup>23</sup> Rather than requiring that one state’s law govern in a multistate case, in two important decisions authored by Justice Stone, the Court came to the view that in most cases, the Constitution “does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events.”<sup>24</sup> As a result, in Professor Freund’s words, these decisions established that “within limits, there is room for assertiveness as well as reticence in our family of states.”<sup>25</sup>

The Court has maintained this lenient approach to constitutional supervision of states’ choice-of-law rules ever since. The current controlling case in the area remains 1981’s *Allstate Insurance Co. v. Hague*, which allows a state to apply the law of the forum so long as it has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>26</sup> Although *Hague* is unpopular among conflicts scholars,<sup>27</sup> one thing about it is clear: the extremely loose standards promulgated in *Allstate* took the Supreme Court out of the business of rigorously policing states’ choice-of-law rules.<sup>28</sup> The Court seemed to take a step in

21. *Alaska Packers Ass’n v. Indus. Acc. Comm’n*, 294 U.S. 532 (1935) (holding that different states may constitutionally apply their own law to the same set of facts); *Pac. Emp’rs Ins. Co. v. Indus. Acc. Comm’n*, 306 U.S. 493 (1939) (holding that a state may constitutionally apply its own law even though a different state with jurisdiction would apply that state’s own law).

22. See, e.g., WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* (1942); see also Arthur Taylor von Mehren, *Recent Trends in Choice of Law Methodology*, 60 CORNELL L. REV. 927, 929–30 (1975) (describing critiques of the First Restatement).

23. Freund, *supra* note 20, at 1210.

24. *Pac. Emp’rs*, 306 U.S. at 502; see also Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 209.

25. Freund, *supra* note 20, at 1222; see also Weinberg *supra*, note 19, at 1637 (noting the “liberating insight” of the “innovative Supreme Court cases of the 1930s” that “in a two-state case in tort, the law chosen did not *have* to be the law of the place of the injury . . . nor, indeed, of any other *single* place”).

26. 449 U.S. 302, 312 (1981).

27. See HAY ET AL., *supra* note 19, at 182 (“In sum, the plurality opinion in *Hague* does not present an analytical framework.”); Herma Hill Kay, *A Defense of Currie’s Governmental Interest Analysis*, 215 RECUEIL DE COURS 145 (1989) (arguing that “the *Hague* standard . . . is insufficiently sensitive to the connection between the state’s factual contacts with the case and its governmental policies”); Linda Silberman, *Can The State of Minnesota Bind the Nation?: Federal Choice-of-Law Constraints After Allstate Insurance Co. v. Hague*, 10 HOFSTRA L. REV. 103, 129 (1981).

28. See Weinberg, *supra* note 12, at 440; Shreve, *supra* note 15, at 271 (noting “the Supreme Court rarely intervenes” in conflicts); see also Russell J. Weintraub, *Who’s Afraid of Constitutional Limitations on Choice of Law?* 10 HOFSTRA L. REV. 17, 34 (1981) (noting that post-*Hague*, “[i]f a choice of law does not outrageously surprise one of the parties, it will rarely be held unconstitutional”).

a more proactive direction in 1985's *Phillips Petroleum Co. v. Shutts*,<sup>29</sup> but then quickly backed away again in 1988's *Sun Oil Co. v. Wortman*.<sup>30</sup> Overall, since the mid-1930s, the Court has been reluctant to intervene in rejecting states' choice-of-law decisions on the merits.

B. APPLYING *ERIE* TO CHOICE OF LAW: *KLAXON V. STENTOR*

Shortly after the Court reformulated its perspective on choice of law, it had to deal with the choice-of-law implications of its decision in *Erie Railroad Co. v. Tompkins* and answer the question: would a federal court sitting in diversity have to follow the choice-of-law rules of the state in which it sits?<sup>31</sup> The circuits split, and in 1941, the Court unanimously answered "yes" in *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>32</sup> Although Justice Reed's short opinion for a unanimous Court is not especially detailed in its reasoning, the Court at least handed down a clear rule: a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits.<sup>33</sup> Of its rule, the Court said:

Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.<sup>34</sup>

The Court also affirmed the consistency of its new rule with the *Pacific Employers Insurance Co. v. Industrial Accident Com.* decision regarding the Constitutional limits on state choice-of-law rules in upholding the lower court's right to apply forum law in the case. The Court stated, "[n]othing in the Constitution ensures unlimited extraterritorial

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29. 472 U.S. 797 (1985) (holding that Kansas could not constitutionally apply its law to all claims in a nationwide class action when most of those claims had no factual connection to Kansas).

30. 486 U.S. 717 (1988) (holding that a state may apply its own statute of limitations to all claims in a nationwide class action, even to those claims with no factual connection to the forum state); see also *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003) (stating that "[w]ithout a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause"); Arthur R. Miller, *Reliving and Reflecting on Shutts*, 74 UMKC L. REV. 505, 509 (2006) (noting that, after *Shutts*, "[n]ot surprisingly, the Court has not encouraged other choice-of-law challenges").

31. Indeed, the Court could have taken this question up on the same day the *Erie* opinion came down, but it reserved decision on the question in *Ruhlin v. N.Y. Life Ins. Co.* See 304 U.S. 202, 208 n.2 (1938).

32. 313 U.S. 487 (1941).

33. *Id.* at 496 ("We are of opinion that the prohibition declared in [*Erie*] against such independent determinations by the federal courts extends to the field of conflict of laws.").

34. *Id.* at 496-97.

recognition of all statutes or of any statute under all circumstances.”<sup>35</sup> The *Klaxon* opinion, despite its brevity, demonstrates that the Court is willing to tolerate some interstate forum shopping to preserve the principle of intrastate uniformity, even if this creates strategic options for plaintiffs, *and* that states’ choice-of-law rules are a matter of substantive law expressing local policy regarding its treatment of its own law in relation to that of other states.<sup>36</sup>

As has been well documented, *Klaxon* has never been universally beloved and has been criticized by numerous reasonably prominent commentators.<sup>37</sup> Among the early critics, Henry Hart was the most vociferous.<sup>38</sup> Hart’s view was that the Supreme Court had it backwards—that the evils of interstate forum shopping were far worse than the evils of disuniformity within a state, and that the federal courts should be in the business of independently developing choice-of-law rules that would eventually become uniform among the federal courts and be copied by the states.<sup>39</sup> David Cavers emerged as *Klaxon*’s chief defender, arguing that there was little reason to believe that the federal courts would converge on uniform choice-of-law rules, and if they did, they would opt for the “lowest common denominator” territorial rules that had been such a failure in the first place.<sup>40</sup> Cavers also firmly believed that a state’s conflicts rules “identify state policies and determine the significance of

35. *Id.* at 498 (citing *Pac. Emp’rs Ins. Co. v. Indus. Accident Comm.*, 306 U.S. 493 (1939)) (upholding Delaware’s right to apply forum law as opposed to New York law if “such application would interfere with its local policy”).

36. See *Sampson v. Channell*, 110 F.2d 754, 759–62 (1st. Cir. 1940), cited with approval in *Klaxon*, 313 U.S. at 496 n.2; Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 572–73 (1996) (arguing that choice-of-law rules are a matter of substantive law); Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1647 (1992) (“Federalized choice of law reduces incentives for horizontal forum shopping across states, but perhaps increases incentives for vertical forum shopping from state to federal court. If this is true then the proposed federalized choice-of-law schemes violate *Erie* in diversity cases.”).

37. See, e.g., Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 402 (1964) (“[T]he constitutional basis of *Erie* does not apply to choice of law issues even when diversity is the sole basis of federal jurisdiction and *a fortiori* when it is not.”); Charles E. Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 285–87 (1946); COOK, *supra* note 22, at 136. See generally Linda J. Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLIAMS U. L. REV. 54, 66 (2009) (noting that “[a]mong conflict of laws cognoscenti, there has always been some general anti-*Klaxon* sentiment”).

38. David F. Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 LAW & CONTEMP. PROBS. 732, 735 (1963) (referring to Hart as an “unrelenting critic”).

39. Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 514–15 (1954) (arguing that the federal courts “are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply”); see also EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* 251 (2000) (noting that Hart “despised *Klaxon*”).

40. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 220–22 (1965) (“What the new freedom of the federal courts would bring would not be a new set of normative principles or a discriminating effort to narrow the issues in choice-of-law cases but a nostalgic search for a doctrinal lowest common denominator.”).

those policies in their application or non-application in interstate situations,” and that federal courts in diversity cases should not overrule those rules.<sup>41</sup> In any event, despite all of the persistent criticism, the Supreme Court has never backed away from the *Klaxon* doctrine.<sup>42</sup> Nor has Congress expressed much interest in overruling it.<sup>43</sup>

Taken together, the *Allstate* and *Klaxon* doctrines establish a hands-off approach to state choice-of-law rules. Both decisions recognize the substantive nature of states’ choice-of-law decisions and refuse to sanction federal intervention.

### C. CHOICE OF LAW AND TRANSFERS PURSUANT TO 28 U.S.C. § 1404(a)

*Klaxon* came down prior to the 1948 passage of the federal transfer statute, 28 U.S.C. § 1404(a). The statute created the expedient of transfer to a more appropriate federal district “[f]or the convenience of parties and witnesses, in the interest of justice.”<sup>44</sup> The transfer process was much more streamlined than a dismissal for forum non conveniens followed by a refile in a new district court as would have been required before the enactment of § 1404(a).<sup>45</sup> The statute created a new dilemma, though. Prior to its passage, when a diversity case was dismissed and refiled in a new federal district, the new district court, following *Klaxon*, applied the choice-of-law rules of the state in which it sat. After the enactment of § 1404(a), a court receiving a transferred case faced the question of whether to apply the choice-of-law rules of the state in which the transferor court was located or those of its own state.<sup>46</sup>

The Court resolved the problem in 1964’s *Van Dusen v. Barrack*.<sup>47</sup> *Van Dusen* involved the crash of an airplane that had taken off from Boston and was bound for Philadelphia.<sup>48</sup> The plane crashed into the Boston Harbor shortly after takeoff. Some 150 plaintiffs filed actions for

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41. David F. Cavers, *Change in Choice-of-Law Thinking and its Bearing on the Klaxon Problem*, in AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 165–66 (Tentative Draft No. 1, 1963); see Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1940 (2006) (describing the disagreement between Hart and *Klaxon*’s defenders).

42. *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (reaffirming *Klaxon*); Gene R. Shreve, *Conflicts Law—State or Federal?*, 68 IND. L.J. 907, 910 n.20 (1993) (noting that the Court has “not wavered” on *Klaxon*).

43. Edward H. Cooper, *Aggregation and Choice of Law*, 14 ROGER WILLIAMS U. L. REV. 12, 22 (2009).

44. 28 U.S.C. § 1404(a) (2012).

45. See generally 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3841 (4th ed. 2013).

46. See Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 682 (1984) (“Almost from the beginning, section 1404(a) created a new species of choice-of-law problem in diversity cases.”); Arthur T. von Mehren & Donald T. Trautman, THE LAW OF MULTISTATE PROBLEMS 1383–84 (1965) (noting the dilemmas created by the transfer statute).

47. 376 U.S. 612 (1964).

48. *Id.* at 613.

personal injury or wrongful death, some in the District of Massachusetts, and others in the Eastern District of Pennsylvania.<sup>49</sup> Jurisdiction and venue were proper in both districts, but the defendant airlines sought to transfer the cases filed in Philadelphia to the federal court in Boston.<sup>50</sup> In short, the problem for the Philadelphia wrongful death plaintiffs was that if a transfer resulted in the application of Massachusetts rather than Pennsylvania law, the cases would either be dismissed or their damages would be capped much more stringently.<sup>51</sup> Stating, “[T]he potential prejudice to the plaintiffs is so substantial as to require review of the assumption that a change of state law would be a permissible result of transfer,”<sup>52</sup> the *Van Dusen* Court held that the transfer statute was a mere “housekeeping measure.”<sup>53</sup> Thus, the Court held, “in cases such as the present, where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.”<sup>54</sup>

In so holding, the *Van Dusen* Court held firm to the “fundamental *Erie* doctrine” principles underlying the *Klaxon* decision.<sup>55</sup> First, the Court was willing to accept some degree of interstate disuniformity to preserve the principle of intrastate federal uniformity. Stating that “the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed”<sup>56</sup> the Court stressed that courts

should ensure that the “accident” of federal diversity jurisdiction does not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed. This purpose would be defeated in cases such as the present if nonresident defendants, properly subjected to suit in the transferor state (Pennsylvania) could invoke § 1404(a) to gain the benefits of the laws of another jurisdiction (Massachusetts).<sup>57</sup>

Second, almost apologetically, the Court expressed its willingness to tolerate gamesmanship on the part of the plaintiff to achieve the choice-of-law benefits of her chosen forum:

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49. *Id.* at 613–14.

50. *Id.* at 614.

51. *Id.* at 627–28.

52. *Id.* at 630.

53. *Id.* at 636–37.

54. *Id.* at 639.

55. *Id.* at 638.

56. *Id.* at 639.

57. *Id.* at 638.

Of course [the rule] allow[s] plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue.<sup>58</sup>

Third, the Court rejected calls from critics who posited that in transfer cases, the federal courts should follow the choice-of-law rules of transferee courts, and critics of *Klaxon* who believed the federal courts should develop their own choice-of-law common law in transfer cases.<sup>59</sup> Indeed, the Court based its opinion, in part, on the fact that the legislative history of § 1404(a) “indicate[d] that it should be regarded as a judicial housekeeping measure” because Congress had said nothing about a change of venue effecting a change in law.<sup>60</sup>

*Van Dusen* explicitly left two questions unanswered. The Court stated, “[w]e do not attempt to determine whether, for example, the same considerations would govern if a plaintiff sought transfer under § 1404(a) or if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*.”<sup>61</sup> The *Van Dusen* holding was, therefore, expressly limited to cases in which a federal court transferred a case pursuant to the standards of § 1404(a) at a defendant’s request, but which would not be dismissed on *forum non conveniens* grounds by a state court of the transferor state.

The Court has not addressed the second of these open questions. Under such circumstances, at least post-*Atlantic Marine*, one could

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58. *Id.* at 633–34.

59. *See id.* at 639 n.39 (citing Irving R. Kaufman, *Observations on Transfers Under § 1404(a) of the New Judicial Code*, 10 F.R.D. 595, 601 (1951)). The Court also recognized Professor Brainerd Currie’s change of heart on this issue in this footnote. Currie originally believed that the federal courts should abandon *Klaxon* and develop their own choice-of-law rules in transfer cases to decide whether to apply the law of the transferor or transferee state. *See* Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 497 (1955). But Currie later came to the view that his original position was “hopelessly wrong” on the grounds that this would “produce a difference of result in state and federal courts that will be difficult to reconcile with the *Erie* doctrine” and that “a federal court should be bound as firmly to apply the state court’s construction of the law in its application to cases having foreign aspects as it is bound to apply the state court’s construction of the law in its application to marginal domestic situations and preexisting conditions.” *See* Brainerd Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 344, 347, 349 (1960). Currie began his second article by stating, “The [previous] article was not without merit . . . . Indeed, there is only one reason for regretting the article or offering apologies for it: The conclusion reached was wrong—not just plain wrong, but fundamentally and impossibly wrong.” *Id.* at 341. Currie came to ultimately agree with the *Van Dusen* rule, absent Congressional legislation to the contrary, unless the plaintiff’s original choice-of-forum would result in application of an unconstitutional choice of law. *Id.* There are strong reasons to decouple the plaintiff’s choice of venue from choice-of-law considerations, but because there are no federal choice-of-law rules to handle such questions, as Professor Marcus has argued, the venue privilege prevails by default. Marcus, *supra* note 46, at 701.

60. *Van Dusen*, 376 U.S. at 636. The Court did not reference such legislative history in its *Atlantic Marine* opinion.

61. *Id.* at 640 (emphasis added).

imagine the Court deciding that the choice-of-law rules of the transferee court should apply, because to do otherwise would create an anomalous result: a case that would be dismissed by a state court persisting in the transferee federal court under the choice-of-law rules of that state. But the Court has yet to answer this question, perhaps understandably, since doing so would require the Court to decide whether state or federal law of forum non conveniens should apply in diversity cases, a question it famously dodged in *Piper Aircraft v. Reyno*.<sup>62</sup>

However, the Court did answer the first of *Van Dusen's* open questions in *Ferens v. John Deere*, in which it held that a transferee forum must “apply the law of the transferor court, regardless of who initiates the transfer.”<sup>63</sup> The Court, according to Justice Kennedy writing for a 5-4 majority, was again willing to accept the plaintiff’s interstate forum shopping in order to preserve the principle that the federal transfer statute should not result in a change of applicable law. And, in *Ferens*, the forum shopping was blatant: the plaintiff was a Pennsylvanian injured by the defendant’s harvester in Pennsylvania. He did not manage to file a tort action in Pennsylvania before that state’s two-year statute of limitations had run. Instead, the plaintiff filed in Mississippi federal court in an attempt to take advantage of that state’s longer statute of limitations and *then* sought to transfer the case to Pennsylvania, where he could take advantage of both the convenience of his home forum and the benefits of Mississippi law.<sup>64</sup>

Over a vigorous dissent by Justice Scalia, the Court accepted the plaintiff’s maneuvering on the grounds that

[a]pplying the transferee law . . . would undermine the *Erie* rule in a serious way. It would mean that initiating a transfer under § 1404(a) changes the state law applicable to a diversity case. . . . § 1404(a) [is] a housekeeping measure that should not alter the state law governing a case under *Erie*.

Additionally, the Court held, “[d]iversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie*, the federal courts had to replicate them.”<sup>65</sup> The Court made clear that transfers under § 1404(a) were to be decided purely on the basis of convenience,

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62. 454 U.S. 235, 249 n.13 (1981); see also HAY ET AL., *supra* note 19, at 225 n.6; GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 453 (5th ed. 2011) (noting that the Court did not resolve the question in *Piper*, but suggesting that the Court tipped its hand in favor of federal law governing in *American Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994)); Kevin M. Clermont, *The Story of Piper: Forum Matters*, in *CIVIL PROCEDURE STORIES* 199, 221 (Kevin M. Clermont ed., 2d ed. 2008) (noting that “although the lower federal courts still respectfully say that this *Erie* question is not completely settled, the strong trend in these courts favors federal doctrine as the governing law on forum non conveniens in the federal court”).

63. 494 U.S. 516, 523 (1990).

64. *Id.* at 519–21.

65. *Id.* at 526–27.

without assessment of the prejudice created by a change in the applicable law or a normative assessment of the litigation conduct of the party seeking the transfer. The Court worried that such considerations would demand “extensive judicial time and resources.”<sup>66</sup> The Court added, “[f]oresight and judicial economy now seem to favor the simple rule that the law does not change following a transfer of venue under § 1404(a).”<sup>67</sup> And the Court again affirmed that it was uninterested in either interfering with state choice-of-law rules or developing such rules as a matter of federal common law.<sup>68</sup> *Ferens* is far more vulnerable to criticism than *Van Dusen*, and that criticism has been well stated.<sup>69</sup> For the purposes of this Article, however, it is important to see that the Court in *Ferens* was, again, willing to tolerate even blatant interstate forum shopping and refused to engage in analysis of the parties’ litigation conduct as a basis for altering the applicable choice of law.<sup>70</sup>

The notion that a § 1404(a) transfer would not result in a change of the applicable law was also at the heart of the Court’s decision in *Stewart Organization, Inc. v. Ricoh Corp.*, in which the Court held that the federal transfer statute, and not state law, provides the standard for a motion to change venue in federal court.<sup>71</sup> *Stewart* was a diversity case heard in federal court in Alabama.<sup>72</sup> The defendant sought a transfer to a Manhattan court, as mandated by the forum-selection clause in the parties’ contract.<sup>73</sup> The plaintiff contended that the clause was unenforceable under Alabama law, but a majority of the Court held that Alabama law was preempted by the federal transfer statute, which demanded “balanc[ing] a number of case-specific factors.”<sup>74</sup> The clash between the federal transfer statute and Alabama state law thus set up the *Erie* question. In the majority opinion, applying the test from *Hanna v. Plumer*, Justice Marshall stated, “Section 1404(a) is doubtless[ly] capable of classification as a procedural rule, and indeed, we have so classified it in holding that a transfer pursuant

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66. *Id.* at 529.

67. *Id.* at 530.

68. *Id.* at 532 (citing ROBERT LEFLAR, AMERICAN CONFLICTS LAW § 293 (3d ed. 1977) (arguing against a federal common law of conflicts)).

69. See, e.g., Allan R. Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527, 540 (2012) (referring to *Ferens* as an “unmitigated train wreck”); Kimberly Jade Norwood, *Double Forum Shopping and the Extension of Ferens to Federal Claims that Borrow State Limitations Periods*, 44 EMORY L.J. 501, 543–48 (1995); Linda S. Mullenix, *Badly Fractured Decisions Muddy Cases on Venue*, NAT’L L.J. Aug. 13 1990, at 4–5.

70. As Professor Mullenix’s contribution to this Symposium demonstrates, however, the Court’s tolerance of plaintiffs’ forum shopping has not extended into many other areas. See generally Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015).

71. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

72. *Id.* at 24.

73. *Id.*

74. *Id.* at 29.

to § 1404(a) does not carry with it a change in the applicable law.”<sup>75</sup> As a result, § 1404(a) would apply in federal diversity cases, despite Alabama’s clashing state law.

Justice Marshall’s conclusion in this respect reflected that of the victorious respondent, Ricoh, which argued in its brief that because

a transfer of venue pursuant to a choice-of-venue agreement in no way affects the underlying body of federal or state law that will be applicable to the dispute between the parties, it follows that the designation of venue within the federal court system is merely a procedural concern affecting the administration of the federal court system.<sup>76</sup>

The reasoning in *Stewart*, therefore, seems to demand that the defendant be able to achieve a geographical transfer but not a change in choice-of-law rules. And, again, in holding that *Stewart* did not overrule *Van Dusen* in the forum-selection context, the Court indicated its willingness to abide the choice-of-law impact of plaintiff’s interstate forum shopping.<sup>77</sup>

## II. ATLANTIC MARINE AND IMPLICATIONS FOR CHOICE OF LAW

In *Atlantic Marine*, the Court backed away from the three strands of thinking that emerged from the choice-of-law cases described above: (1) preference for intrastate uniformity over interstate uniformity; (2) tolerance of plaintiffs’ gamesmanship in forum shopping; and (3) recognition of states’ choice-of-law practices as substantive law unaffected by change of federal venue. In sum, these cases had led the Court to conclude repeatedly that a transfer of a diversity case under § 1404(a) did not result in a change of the law applicable to a plaintiff’s case, even if that conclusion vindicated forum shopping. In *Atlantic Marine*, for the first time, the Court held the opposite: a transfer under § 1404(a) *does* result in a change of the applicable choice-of-law rules in diversity cases.<sup>78</sup> The Court’s explicit reasoning for doing so was to prevent plaintiffs from reaping the choice-of-law benefits of interstate forum shopping.<sup>79</sup> In creating the new rule, the Court had nothing to say about the principle of intrastate uniformity or the status of choice-of-law rules as substantive law, which should not be altered due to the accident of diversity. Moreover, the Court created an exceptionally difficult future

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75. *Id.* at 32.

76. Brief for Respondent at 11, *Stewart*, 487 U.S. 22 (No. 86-1908).

77. See Julia L. Erickson, *Comment: Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization Inc. v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1115 (1988) (explaining that “some forum shopping is possible regardless of whether state or federal law is applied in diversity”).

78. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582–83 (2013).

79. *Id.*

question: what should a court do in a diversity case when the forum state's law would refuse to enforce the forum-selection clause, but the transfer statute would? Because *Atlantic Marine* went beyond *Stewart* by mandating a change in the applicable choice-of-law rules, that question has become far more difficult.

#### A. WHAT *ATLANTIC MARINE* DID

In *Atlantic Marine*, for the first time, the Court created an exception to the *Van Dusen/Ferens* rule by holding, “when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules.”<sup>80</sup> The Court did not hold that the *Atlantic Marine* plaintiff, J-Crew Management, Inc., filed its suit in a forum rendered “wrong” or “improper” by the rules of venue and personal jurisdiction.<sup>81</sup> Instead, the Court held that the forum-selection clause should be enforced through application of the transfer statute “in the interest of justice,” and the case should almost certainly be transferred to the Eastern District of Virginia, one of the courts chosen in the parties’ contract.<sup>82</sup> The Court implicitly acknowledged that under normal circumstances, because this was a transferred diversity case, the Virginia district court would be required to apply the choice-of-law rules of the state of Texas, the state of the transferor court. But the Court made clear: “[W]e will not apply the *Van Dusen* rule when a transfer stems from enforcement of a valid forum-selection clause: The court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right.”<sup>83</sup>

In so holding, the Court described the policy underlying *Van Dusen* as to “prevent ‘defendants, properly subjected to suit in the transferor State,’ from ‘invok[ing] § 1404(a) to gain the benefits of the laws of another jurisdiction.’”<sup>84</sup> The limited discussion of choice of law in the oral

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80. *Id.* at 582.

81. *Id.* at 579.

82. *Id.* at 584. The Court did not affect the transfer, but remanded the case to determine whether public interest factors supported a denial of the transfer motion. But the Court provided guidance when it noted that no such factors were “apparent on the record before [it].”

83. *Id.* at 583.

84. *Id.* at 582 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 638 (1964)). It is interesting to note that the Court also classified *Van Dusen* as an “exception” to the *Klaxon* “principle” that a federal court sitting in diversity must apply the choice-of-law rules of the state in which it sits. This is sleight of hand. It is true, as I have written, that *Van Dusen* is an “exception from the letter of the *Klaxon* rule” because it does mean that the transferee court applies a different state’s choice-of-law rules. Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 779 (2012). But it is not right to imply, as the Supreme Court did, that *Van Dusen* “identified an exception to [the *Klaxon*] principle,” as though the Court has regularly done such a thing. *Atl. Marine*, 134 S. Ct. at 582. *Van Dusen* did not disregard the *Klaxon* principle in the slightest. To the contrary, as I have noted above, it was an application of all of the policies underlying the *Klaxon* rule.

argument emphasized the same grounds.<sup>85</sup> This is, however, a rather thin reading of *Van Dusen*, and, for better or worse, it entirely ignores the reasoning of *Ferens*. The holding in *Van Dusen* was not *only* to preserve a plaintiff's venue privilege, although it did emphasize that effect of the rule it created. The *Van Dusen* Court was also attuned to the problems of *intrastate* disuniformity created by the transfer statute and was willing to accept, almost apologetically, the "gamesmanship" that the *Atlantic Marine* Court sought to prevent.<sup>86</sup> The *Van Dusen* Court also rejected the notion that the transferee court should apply a different set of choice-of-law rules when the plaintiff selected a forum in which venue was proper and there was personal jurisdiction over the defendant. In so holding, the Court explicitly stated that it did not want to engage in federal common law making in the area of choice-of-law or displace the choice-of-law rules of a state with jurisdiction over the case. Moreover, the *Ferens* court was unwilling to deprive the plaintiff of the choice-of-law benefits of obvious gamesmanship on the ground that doing so would permit disuniformity in the federal courts.<sup>87</sup> The *Ferens* majority explicitly wanted no part in creating exceptions to *Van Dusen* based on a judgment about plaintiff's forum shopping for fear of becoming enmeshed in addressing the problem in similar cases.<sup>88</sup> But the *Atlantic Marine* Court was far more willing to cast aspersions on the plaintiff's actions and to deprive it of the choice-of-law benefits of those actions.

#### B. OBSERVATIONS ABOUT THE COURT'S NEW CHOICE-OF-LAW RULE

What is interesting about the Court's *Atlantic Marine* rule? For one thing, the Court's new rule signals a willingness to depart from the cornerstone principles that had animated its prior choice-of-law cases. This has interesting implications for the future of the Court's *Erie* and

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Nor did the *Van Dusen* Court think it was creating an "exception" to the *Klaxon* "principle." It referred to the argument that *Klaxon* required the transferee court to apply its home state's choice-of-law rules as a "superficial reading" that "directly contradicts the fundamental *Erie* doctrine which the quoted formulations were designed to express." *Van Dusen*, 376 U.S. at 637–38. The notion that *Atlantic Marine* was a straightforward application of *Klaxon*, while *Van Dusen* was an "exception," is difficult to swallow.

85. Transcript of Oral Argument, *supra* note 5, at 26, 42. As Justice Ginsburg stated: "Van Dusen against Barrack was intended to give the plaintiff plaintiff's choice of initial forum. If plaintiff chooses a forum in violation of the contract, there's no reason why *Van Dusen* should apply." *Id.* at 26. She later added that "if the Plaintiff chooses a forum in violation of the contract, the whole rationale of [*Van Dusen*] falls." *Id.* at 41.

86. See *Van Dusen*, 376 U.S. at 633–34 ("Of course [the rule] allow[s] plaintiffs to retain whatever advantages may flow from the state laws of the forum they have initially selected. There is nothing, however, in the language or policy of § 1404(a) to justify its use by defendants to defeat the advantages accruing to plaintiffs who have chosen a forum which, although it was inconvenient, was a proper venue."); see also Marcus, *supra* note 46, at 686.

87. *Ferens v. John Deere Co.*, 494 U.S. 516, 529 (1990).

88. *Id.* at 530.

choice-of-law jurisprudence. But the Court's willingness to depart from *Van Dusen* in *Atlantic Marine* may also be thought of as part of a larger trend of restricting plaintiffs' forum choices and the associated choice-of-law effects. While the Court was willing to live with such conduct in *Klaxon* and its progeny, the *Atlantic Marine* rule suggests a much more searching eye. In a sense, the Court's refusal to allow plaintiffs to evade forum-selection clauses seems to outweigh the desire to avoid intrastate disuniformity and leave states' choice-of-law decisions alone.

### I. *Intrastate Disuniformity*

One hallmark of the Court's prior opinions in this area was a willingness to accept some degree of interstate disuniformity in exchange for intrastate uniformity. That is, the Court tolerated different state choice-of-law rules, and therefore different outcomes, in order to preserve the uniformity of results in state and federal courts within the same state. In the transfer area, the Court was careful to ensure that the opportunity to change venue to a district in a different state, which was not available in the state courts, would not affect the choice-of-law rules that applied.

The lower federal courts, however, have never applied this rule to *every* transfer within the federal system. To begin with, courts have reached consensus that the *Van Dusen* rule does not apply to transfers from an *improper* venue under 28 U.S.C. § 1406(a).<sup>89</sup> This rule makes the most sense in cases in which the plaintiff has filed in a federal district court in a state in which he could not have filed the same case in that state's courts. Under those circumstances, allowing the plaintiff to achieve a choice-of-law benefit in federal court that could not have been obtained in state court would violate the mandate of intrastate uniformity in *Klaxon*.<sup>90</sup> The refusal to extend the *Van Dusen* rule to transfers under

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89. 15 WRIGHT ET AL., *supra* note 45, § 3846 ("Clearly, the holding in *Van Dusen*—that the transferee in a diversity of citizenship case applies the choice-of-law rules that the transferor court would have applied—should not apply in Section 1406(a) transfers or when the transferor court lacked personal jurisdiction. To apply *Van Dusen* in such cases would permit the plaintiff to file suit in an improper forum and 'capture' presumably favorable choice-of-law rules. Thus, courts agree that *Van Dusen* does not apply if the transferor court was an improper venue or lacked personal jurisdiction. In such cases, the transferee court applies the choice-of-law rules it would have applied had the action been filed there originally.").

90. *See, e.g., Gerena v. Korb*, 617 F.3d 197, 204 (2d Cir. 2010) ("If a district court receives a case pursuant to a transfer under 28 U.S.C. § 1406(a), for improper venue, or 28 U.S.C. § 1631, for want of jurisdiction, it logically applies the law of the state in which it sits, since the original venue, with its governing laws, was never a proper option."); *Lafferty v. St. Riel*, 495 F.3d 72, 77 (3d Cir. 2007) ("When cases have been transferred for improper venue, transferee courts generally apply the substantive law they would have applied had the action been brought there initially."); *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1110 (5th Cir. 1981) ("[F]ollowing a section 1406(a) transfer, regardless of which party requested the transfer or the purpose behind the transfer, the transferee court must apply the choice of law rules of the state in which it sits.").

§ 1406(a) is also rather uncontroversial in light of the *Van Dusen* Court's statement that it left open the question of the application of its rule to a case that would be dismissed in a state court on forum non conveniens grounds. It stands to reason that if a case could not be maintained in a state court—and therefore could not be decided under that state's choice-of-law rules—the choice-of-law rules should not follow the case after a transfer that could not be achieved between state courts.<sup>91</sup>

In *Atlantic Marine*, however, the Supreme Court held that to enforce a forum-selection clause, the proper vehicle to transfer was § 1404(a), not § 1406(a).<sup>92</sup> In the Court's view, this was because the original venue the plaintiff chose was not “improper” under the venue statute or personal jurisdiction problem. Instead, the Court held that such a transfer was, in the words of § 1404(a), for “the convenience of parties and witnesses” and “in the interest of justice.” As a result, *Atlantic Marine* presents the possibility of a much harder case.

The harder case is that of a plaintiff who, flouting the forum-selection clause, files a case in a state hostile to enforcing forum-selection clauses.<sup>93</sup> If the defendant is unable to remove the case to federal court, then the plaintiff's chosen state court would refuse, presumably applying its law, to grant the defendant's motion to dismiss the case on forum non conveniens grounds and proceed to decide it pursuant to its own choice-of-law rules.<sup>94</sup> If there *is* diversity of citizenship, and the defendant is not a citizen of the state in which the plaintiff filed the suit, the defendant may remove the case to federal court and achieve a transfer to the forum chosen in the contract, as mandated by *Stewart* and now *Atlantic Marine*.<sup>95</sup> That transfer would have been impossible had the defendant

91. See *Roofing & Sheet Metal Servs, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 992 (11th Cir. 1982) (refusing to apply *Van Dusen* rule when cases are transferred under § 1404(a) for lack of personal jurisdiction in the filing state). According to the Eleventh Circuit,

[s]uch abuses by plaintiffs would be precisely the type that *Van Dusen* sought to prevent on the part of defendants. A rule allowing them would defeat the goal of uniformity articulated in *Erie* and elaborated in *Van Dusen*, by producing different outcomes, depending on whether the action is initially brought in state or federal court.

*Id.*

92. *Atl. Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 579–80 (2013).

93. See BORN & RUTLEDGE, *supra* note 62, at 469 (noting that the standards for enforcement of a choice-of-forum clause in the United States continue to vary significantly in different jurisdictions); HAY ET AL., *supra* note 19, at 545 (noting efforts by states to protect consumers and that “while federal doctrine has been enormously persuasive to states, important distinctions between state and federal court practice are likely to continue and state innovations may well produce improvements to the law in this area”).

94. See BORN & RUTLEDGE, *supra* note 62, at 469–70 (describing the unresolved state of the law in many states regarding the enforceability of forum-selection clauses); Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 429 n.41 (1991).

95. See 28 U.S.C. § 1441(a) (2012) (allowing removal of cases over which federal courts would have original jurisdiction); *id.* § 1441(b)(2) (providing that removal is not available to a defendant who

been a citizen of the same state as the plaintiff, or if the defendant was a citizen of the state in which the plaintiff originally sued.

Prior to *Atlantic Marine*, *Stewart* seemed to indicate that the transfer would not carry with it a change in applicable choice-of-law rules. Post-*Atlantic Marine*, however, it appears clear that the transferee forum *will* apply its choice-of-law rules after the transfer. The defendant is therefore able to achieve *both* a different forum and choice of law based on the “accident of diversity of citizenship.”<sup>96</sup> *Atlantic Marine*, therefore, may allow exactly the sort of intrastate disuniformity that *Klaxon*, *Van Dusen*, and *Ferens* forswore.<sup>97</sup>

In *Atlantic Marine*, the Court simply assumed that the forum-selection clause at issue was “valid,” and therefore did not address the implications of the harder question that remains. Interestingly, however, even prior to *Atlantic Marine*, some federal courts already applied the choice-of-law rules of the transferee court when a case was transferred pursuant to a forum-selection clause, even if that transfer was effectuated under § 1404(a) and the plaintiff’s chosen forum was otherwise proper.<sup>98</sup> And, as the contribution to this Symposium by Professor Clermont amply demonstrates, most federal courts currently follow federal law with respect to the enforceability of a forum-selection clause,<sup>99</sup> though the question remains open in the Supreme Court.<sup>100</sup> These lower courts’ subsequent conclusion that the transferee courts’ choice-of-law rules should apply is not terribly surprising for the same reason the Court’s choice-of-law rule in *Atlantic Marine* was not surprising—it would seem

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is a citizen of the state in which he was sued if federal subject matter jurisdiction is based on diversity of citizenship).

96. *Klaxon v. Stentor*, 313 U.S. 487, 496 (1941).

97. HAY ET AL., *supra* note 19, at 543–44 (“Application of federal law has, of course, the advantage of reducing the incentive for interstate forum shopping, although application of state law preserves uniformity of outcome as between a federal court and its home state’s courts.”).

98. *See, e.g.*, *Artistic Stone Crafters, Inc. v. Safeco Ins. Co. of Am.*, 726 F. Supp. 2d 595, 600 (E.D. Va. 2010) (holding that “an exception to the *Van Dusen* rule applies when a Section 1404(a) transfer is made pursuant to a forum selection clause, and in such cases the law of the state of the transferee court is to be applied”); *Omnicare, Inc. v. UnitedHealth Grp.*, 594 F. Supp. 2d 945, 976 (N.D. Ill. 2009) (refusing to apply the *Van Dusen* rule when enforcing a forum-selection clause on the ground that it would “allow the plaintiff to manipulate the choice-of-law-rules to be applied”); *Freedman v. Am. Online, Inc.*, 325 F. Supp. 2d 638, 652 (E.D. Va. 2004) (holding that “to apply the laws of the transferor state in such circumstances, would allow a plaintiff to file a claim in a court without proper venue to avoid the effect of a contractual forum selection clause and the unfavorable choice-of-law that would otherwise have resulted”).

99. *See generally* Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015).

100. *See generally* Mullenix, *supra* note 70; *see also* BORN & RUTLEDGE, *supra* note 62, at 531 (noting that the Supreme Court has not directly addressed the question whether federal or state law applies to the enforceability of forum clauses in diversity cases); Jason Webb Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. INT’L L. & FOREIGN AFF. 43, 64–67 (2004).

insufficient to give the defendant the benefit of the location of the forum-selection clause but not that forum's choice-of-law rules. The result, though, is that even in cases in which the state in which the federal court sits would not enforce the forum-selection clause, the federal court will both effect a geographic transfer of the case *and* require application of the transferee state's choice-of-law rules. In such cases, then, not only does diversity jurisdiction potentially lead to a different applicable law in federal versus state court, but the courts reach this conclusion based on a determination of unacceptable manipulation by the plaintiff.

This practice, now mandated by the Court, adds significant bite to the Court's holding in *Stewart*, where Justice Marshall, for the majority, cited the *Van Dusen* language about § 1404(a) being only a housekeeping measure. The Supreme Court reaffirmed this conclusion in *Ferens*,<sup>101</sup> when Justice Kennedy, writing for the majority, cited *Stewart* for the proposition that “§ 1404(a) may pre-empt state law. In general, however, we have seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case under *Erie*.”<sup>102</sup>

Under *Atlantic Marine*, diversity jurisdiction now may not only result in a transfer that would not otherwise be available in state court, but also a change in applicable choice-of-law rules, making it tougher to contend that the statute is procedural for *Erie* purposes. This is so particularly in light of the Court's holding in *Klaxon* that choice-of-law rules are substantive law for *Erie* purposes. This observation does not necessarily mean that if the Court were to hold that such a change in choice of law were part and parcel of the transfer statute, the transfer statute would now run afoul of the lenient test for congressional statutes adopted in *Hanna*, but it does make it a closer call. And, even though the statute may not fail the *Hanna* test, it does create new tension with *Klaxon*, which rested on the ground that a state's choice-of-law rules are substantive law that should not change in federal court due to the accident of diversity.

The Court might, however, have charted a different course—and perhaps it still might should the “harder case” arise. Having decided that the appropriate mechanism to transfer was § 1404(a) and not § 1406, the Court should consider fashioning a rule more sensitive to the concerns underlying *Klaxon* and *Van Dusen* and those Justice Marshall expressed in *Stewart*. Such a rule ought to distinguish between states that would dismiss the plaintiff's action on forum non conveniens grounds and those that would not. If the state in which the plaintiff files would dismiss the

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101. *Ferens v. John Deere Co.*, 494 U.S. 516, 526 (1990).

102. *Id.* at 526; *see also id.* at 528 (“*Van Dusen* also made clear that the decision to transfer venue under § 1404(a) should turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law.”).

plaintiff's action for forum non conveniens, then the choice-of-law rule stated in *Atlantic Marine* should apply. But if the state in which the plaintiff files would *not* dismiss the case, then the court should transfer the case, but the transferee court should apply the choice-of-law rules of the state in which the transferor court sits. Judge Leisure of the Southern District of New York followed this approach in a thorough opinion issued shortly after *Stewart*, in *Caribbean Wholesale Services Corp. v. USJVC Corp.*<sup>103</sup> In his opinion, Judge Leisure noted:

Foremost among the virtues of this solution is its fidelity to the principles of *Erie*. The same substantive law will apply whether a party commences suit in federal or state court. The opportunities for forum shopping between state and federal court will thereby be eliminated. In addition, this solution is consistent with the concerns of *Ferens* and *Stewart* that a transfer pursuant to § 1404(a) should remain a "housekeeping measure" rather than a determination of substantive law; the applicable law will depend not on whether the case is transferred but on whether the state courts of the transferor state would have dismissed the case for *forum non conveniens*.<sup>104</sup>

The Supreme Court, of course, did not consider such an alternative in *Atlantic Marine*, as there was almost no argument about choice of law at all. One wonders, however, whether any such argument would have made a difference. Adoption of an approach like Judge Leisure's was unlikely for several reasons, the most important being that it would cut against the Court's complete embrace of forum-selection clauses.<sup>105</sup> Indeed, the lower courts have already by and large adopted the *Atlantic Marine* approach. But this approach would have preserved the underlying principles of *Klaxon* and *Van Dusen* while achieving some of the benefits of enforcing the forum-selection clause. Instead, the Court went whole-hog in favor of forum-selection clauses, letting the choice-of-law chips fall where they may.

One possibility is that the Court will someday view a forum-selection clause that would not be enforced by a state court as "invalid" in a federal court sitting in that state out of respect for state law. Under such circumstances, the Court could consider ordering the geographical transfer but not the change in applicable choice-of-law rules. But given the Court's enthusiasm for enforcing forum-selection clauses, and its complete disregard for the problem in *Atlantic Marine*, chances for a more fine-tuned rule seem slim.

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103. 855 F. Supp. 627 (S.D.N.Y. 1994).

104. *Id.* at 632. No other federal courts appear to have followed this approach.

105. This approach would also be marginally more complicated to apply, though not especially so.

## 2. Policing Plaintiffs' Choice-of-Law Gamesmanship

In *Klaxon*, *Van Dusen*, and *Ferens*, the Court was aware of the potential for interstate forum shopping its opinions wrought. In all three cases, especially *Ferens*, the Court was willing to accept plaintiffs' ability to choose among proper forums based on their different choice-of-law rules. In large part, this was accepted as part of the plaintiff's venue privilege, but it was also in the service of *Erie* principles generally and a desire to avoid case-by-case judgments about plaintiffs' conduct. *Atlantic Marine* took the opposite view. It considered a plaintiff's filing in a forum other than the one selected by the forum-selection clause as "inappropriately fil[ing] suit," "flout[ing]" the contract, and unworthy of the benefits of the *Van Dusen* rule.<sup>106</sup> That is a reasonable conclusion, but it is a step in the direction of greater willingness on the Court's part to police plaintiffs' strategic behavior in the future.

For starters, one could certainly imagine the Court revisiting *Ferens*. Aside from Justice Kennedy, who wrote the majority opinion for a 5-4 Court, and Justice Scalia, who dissented, the membership of the Court has changed entirely since the Court decided *Ferens* in 1990. Indeed, although the Court cited *Ferens* in *Atlantic Marine* and could distinguish *Ferens* on the ground that the plaintiffs in that case did not "waive" their venue privilege as the *Atlantic Marine* plaintiff did by virtue of a forum-selection clause,<sup>107</sup> it is difficult to imagine this Court deciding *Ferens* in the same way today. The Court's tone overall suggests that a plaintiff's filing suit in an inconvenient forum while also seeking the choice-of-law benefits of that forum would be equally "inappropriate."<sup>108</sup>

If this is correct, and the Court's *Atlantic Marine* rule represents a shift toward a normative assessment of plaintiff forum shopping, it might also portend depriving plaintiffs of the choice-of-law benefits of forum selection in other kinds of cases where such behavior could be detected. One example might be in multidistrict litigation ("MDL"), in which plaintiffs often have several choices of initial filing forum, which they might choose with little drawback given that filing will be followed almost immediately by a transfer to the MDL court. In such cases, plaintiffs are able to take advantage of forum shopping to obtain better law with little impact if the chosen forum is inconvenient. In the spirit of *Atlantic Marine*, MDL courts might decide that in such cases, the plaintiff's forum shopping is inappropriate and warrants a departure from the *Van Dusen* rule, especially if the case is filed after the MDL has been established and the court has sanctioned direct filing into the MDL. Such a move would be a significant departure from the dogma that an MDL transfer is only

106. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582–83 (2013).

107. *Id.* at 583.

108. This, of course, would require the Court actually taking an interest in the *Ferens* problem.

for “pretrial proceedings,” but one could imagine a lower court charting such a course in an effort to simplify its choice-of-law task.<sup>109</sup>

In any event, the “choice of choice-of-law rules rule” that the Court created in *Atlantic Marine* may also provide a way to police plaintiffs’ and states’ choice-of-law decisions *without* the Court’s needing to substantively review states’ choice-of-law decisions under the Due Process or Full Faith and Credit Clauses. As noted above, the Court has been loath to substantively review states’ choice-of-law rules since the 1930s. This is in part due to the Court’s inability to develop workable principles for making such decisions, but is also likely due to pragmatic considerations counseling against the Court having to take on such a potentially onerous task. One way to accomplish the goal of policing states’ choice-of-law decisions without inquiring into the content of states’ choice-of-law rules is to limit plaintiffs’ choice of forum. By preventing a plaintiff from invoking a state’s choice-of-law rules, the Court could avoid having to deal with them at all. *Atlantic Marine* might be seen as employing this strategy. By creating a rule that provides that a forum-selection clause also chooses choice-of-law rules, the Court has effectively prevented the plaintiff from choosing a different forum whose choice-of-law rules might defeat the forum-selection clause. As a result, the Court can prevent application of those choice-of-law rules without having to reject their substance as unconstitutional.

In this way, the *Atlantic Marine* rule is consistent with the Court’s recent forays into personal jurisdiction. In the quartet of cases the Court has heard since 2010, it has rejected jurisdiction in all of them, taking what could be considered a more restrictive view of both general and specific jurisdiction.<sup>110</sup> *Atlantic Marine* falls in the same category of forum-restrictive rules, limiting the plaintiff’s ability to shop for preferable choice-of-law rules, and preventing the Court from having to pass judgment on those rules. The personal jurisdiction cases accomplish this goal by ensuring that a plaintiff’s contacts with a state are especially strong, meaning a state’s choice to apply forum law is unlikely to run afoul of constitutional restrictions.<sup>111</sup> The *Atlantic Marine* rule

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109. See, e.g., Kramer, *supra* note 36, at 573 (noting judges’ tendency to “[distort] and misus[e] choice of law to produce some pseudo-federal law or federal law equivalent” in complex cases).

110. See *supra* note 17 and accompanying text.

111. Professors von Mehren and Trautman noted this very possibility in their classic article on personal jurisdiction. See Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1132–33 (1966) (“The Court might well find itself under increasing pressure to refine and strengthen the constitutional controls on choice of law suggested by *Home Ins. Co. v. Dick*. The Court could also move in the direction of holding unconstitutional those exercises of jurisdiction that are not clearly justified by the relation of the parties litigant to the forum or by other litigational and enforcement considerations, unless the community asserting jurisdiction had a significant substantive-law concern that the choice-of-law rules of another forum could not accommodate. More generally, the Supreme Court might well tighten standards and be less permissive

accomplishes this goal by formally eliminating any notion of unfair surprise associated with a state's application of forum law. Together, the cases take pressure off the Court potentially having to review state's choices of law or develop federal choice-of-law principles in diversity cases.<sup>112</sup> As a result, despite the Court's relatively restrictive posture toward plaintiffs and its attention to the purported evils of forum shopping in recent procedure cases,<sup>113</sup> and its possible turn back toward territorial thinking in personal jurisdiction,<sup>114</sup> one can expect that the relatively lax *Allstate* standard will remain unchanged.

### CONCLUSION

The Court's choice-of-law holding in *Atlantic Marine* is, in one sense, unsurprising. The Court's enthusiasm for forum-selection clauses almost requires this result. Indeed, it is difficult to imagine that this Court would decide that the transfer statute demands enforcement of almost all forum-selection agreements but allow plaintiffs to achieve application of different law by filing first in a different forum. But the Court's new rule does mark a step in a different direction from its earlier choice-of-law holdings in *Klaxon*, *Van Dusen*, and *Ferens*, by explicitly sanctioning intrastate disuniformity and punishing plaintiffs for interstate forum shopping. The Court's restriction on plaintiffs' ability to shop for plaintiff-friendly choice-of-law rules reduces potential pressure on the Court to ever have to engage in constitutional review of the substance of those rules themselves. Whether the Court's choice-of-law approach in *Atlantic Marine* signals a new trend remains to be seen, but it does represent a different orientation to state choice-of-law rules in federal courts.

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with respect to state assertions of jurisdiction than has yet been the case.”); *see also* Stewart E. Sterk, *Personal Jurisdiction and Choice of Law*, 98 IOWA L. REV. 1163, 1166–67 (2013) (discussing the ability of limitations of personal jurisdiction to limit choice of law).

<sup>112</sup> For instance, the Court's recent general jurisdiction cases may solve the *Ferens* problem for it. John Deere was not incorporated in Mississippi, and Mississippi was not its principal place of business. As a result, post-*Goodyear* and *Daimler*, it is possible that there would be no personal jurisdiction over *Ferens*' case in Mississippi, meaning that personal jurisdiction limitations might prevent the application of Mississippi's then-outré choice-of-law rule. Professor Stein suggests this might be the case. *See* Stein, *supra* note 69, at 547–48.

<sup>113</sup> *See generally* Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 656–59 (2013); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 352 (2013) (expressing concern that *McIntyre* will allow the “personal jurisdiction defense [to] become yet another procedural stop sign, one posted at the very genesis of the case”).

<sup>114</sup> *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2789–90 (2011).

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