

4-2015

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Recommended Citation

Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795 (2015).

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Atlantic Marine Through the Lens of *Erie*

ADAM N. STEINMAN*

The Supreme Court's unanimous decision in Atlantic Marine clarified several things about the enforcement of forum-selection clauses in federal court. But something important was missing from Justice Alito's opinion—the Erie doctrine. Erie, of course, helps to determine the applicability of state law in federal court, and state law potentially has a lot to say about contractual forum-selection clauses. Indeed, Erie was front and center the last time the Court confronted the enforcement of forum-selection clauses in federal court, when it decided Stewart Organization v. Ricoh a quarter century ago.

This article examines the Atlantic Marine decision through the lens of Erie, and explores the role that Erie and state law should play in the Atlantic Marine framework. Atlantic Marine may appear at first glance to mandate virtually unflinching enforcement of forum-selection clauses. But Justice Alito's approach in Atlantic Marine applies only when the forum-selection clause is "contractually valid." Properly understood, Erie requires federal courts to look to state law to decide this question—at least in diversity cases. To allow federal courts to disregard state law in applying Atlantic Marine would raise several troubling Erie concerns: geographic relocation contrary to what would occur in state court; changing the substantive law that would govern the ultimate merits of the litigation in state court; and overriding state contract law and contractual remedies via the sort of federal common law that Erie forbids.

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INTRODUCTION

In his opinion for the Court in *Atlantic Marine Construction Co. v. U.S. District Court*,¹ Justice Alito neither cited nor discussed *Erie Railroad Co. v. Tompkins*.² Yet forum-selection clauses implicate precisely the sort of vertical choice-of-law issues that are at the heart of the *Erie* doctrine. Indeed, the choice between state law and federal law was front-and-center the last time the Supreme Court addressed the relationship between forum-selection clauses and the federal venue-transfer statutes. In its 1988 decision in *Stewart Organization, Inc. v. Ricoh Corp.*,³ the Court seemed to declare that state law regarding such clauses plays no role in deciding whether a transfer of venue is justified under 28 U.S.C. § 1404(a).⁴

Given *Atlantic Marine*'s silence on the potential role of state law with respect to forum-selection clauses, it is worth examining that decision's framework through the lens of *Erie*. Properly understood, *Atlantic Marine* opens the door for state law to play a more significant role than many anticipated in the wake of *Stewart*. Most significantly, Justice Alito recognized that the enforcement of a forum-selection clause via a § 1404(a) venue-transfer motion (or a forum non conveniens motion, for that matter) hinges on a determination that the forum-selection clause is "contractually valid."⁵

There are strong arguments that state law should govern the question of whether a forum-selection clause is contractually valid, and that a federal court should not have freestanding authority to displace state law on contractual validity with its own preferred approach. This

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

2. 304 U.S. 64 (1938).

3. 487 U.S. 22 (1988).

4. *See id.* at 27, 30 n.9 ("[A] district court sitting in diversity must apply a federal statute that controls the issue before the court and that represents a valid exercise of Congress' constitutional powers. . . . Our determination that § 1404(a) governs the parties' dispute notwithstanding any contrary Alabama policy makes it unnecessary to address the contours of state law.").

5. *Atl. Marine*, 134 S. Ct. at 581 n.5.

would be in some tension with *Stewart*, admittedly. But intervening developments in the Supreme Court's approach to the *Erie* doctrine—in addition to lines of argument that the *Stewart* majority did not address—bolster the case that state law, not federal law, should govern whether a forum-selection clause is contractually valid. Accordingly, *Atlantic Marine* does not mandate unflinching enforcement of forum-selection clauses without any mechanism for parties to raise legitimate concerns about the use and operation of such clauses in certain contexts. Rather, *Atlantic Marine* should be read to defer to state law on such matters.

This Article proceeds as follows: Part I summarizes the *Atlantic Marine* decision. Part II briefly describes *Erie* and the vertical choice-of-law frameworks that have sprung up around that venerable, perhaps mythical,⁶ decision. Part III assesses whether *Erie* demands the application of state contract law in determining the contractual validity of a forum-selection clause, while Part IV addresses whether the general authority to transfer venue provided by § 1404(a) justifies federalizing the issue of contract validity. Part V considers Justice Alito's recognition that "extraordinary circumstances unrelated to the convenience of the parties"⁷ may permit a federal court to deny a § 1404(a) motion despite a contractually valid forum-selection clause, and explores how such an inquiry would fit within the *Erie* framework. Part VI concludes by synthesizing these arguments to explain how federal courts should approach forum-selection clauses in light of *Erie* and *Atlantic Marine*.

I. THE *ATLANTIC MARINE* DECISION

The Supreme Court's opinion in *Atlantic Marine*, written by Justice Alito for a unanimous Court, addressed a number of issues relating to the enforcement of forum-selection clauses. The case began in a Texas federal district court, where J-Crew Management, Inc. (a Texas corporation) sued Atlantic Marine Construction Co. (a Virginia corporation).⁸ Federal jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332(a).⁹ Atlantic Marine had contracted with the U.S. Army Corps of Engineers to build a child development center at Fort Hood in Texas, and Atlantic Marine had entered into a subcontract with J-Crew.¹⁰ J-Crew's lawsuit sought nearly \$160,000 for Atlantic Marine's

6. See generally John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) (arguing against the "myth" that *Erie* "carried some special constitutional magic").

7. *Atl. Marine*, 134 S. Ct. at 575, 581.

8. *Id.* at 575.

9. *Id.* at 576.

10. *Id.* at 575.

failure to pay under the subcontract.¹¹ That subcontract contained the following forum-selection clause:

[J-Crew] agrees that all . . . disputes . . . shall be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. The Parties hereto expressly consent to the jurisdiction and venue of said courts.¹²

Atlantic Marine sought to enforce the forum-selection clause via a number of alternative means. First, it asked that the case be dismissed under Federal Rule of Civil Procedure 12(b)(3),¹³ which authorizes dismissal for “improper venue.”¹⁴ Second, Atlantic Marine sought transfer to the Eastern District of Virginia under 28 U.S.C. § 1406,¹⁵ which authorizes transfer from a venue that is “wrong” to a venue where the case “could have been brought.”¹⁶ Third, Atlantic Marine sought transfer to the Eastern District of Virginia under 28 U.S.C. § 1404(a),¹⁷ which provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.”¹⁸

The federal district court in Texas denied all these requests, and Atlantic Marine petitioned the U.S. Court of Appeals for the Fifth Circuit for a writ of mandamus directing the district court to dismiss or transfer the case. The Fifth Circuit denied the petition, noting that Atlantic Marine was required to show a “clear and indisputable” right to the issuance of the writ.¹⁹ According to the Fifth Circuit, Atlantic Marine failed to satisfy this standard because the district court “did not clearly abuse its discretion” either in considering the forum-selection clause

11. Joint Appendix at 9, *Atl. Marine*, 134 S. Ct. 568 (No. 12-929) (alleging an unpaid balance of \$159,675.87).

12. United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co., 2012 WL 8499879, at *1 (W.D. Tex. Aug. 6, 2012).

13. *Atl. Marine*, 134 S. Ct. at 576.

14. FED. R. CIV. P. 12(b)(3) (authorizing a motion to dismiss for “improper venue”).

15. *Atl. Marine*, 134 S. Ct. at 576.

16. 28 U.S.C. § 1406(a) (2012) (“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.”).

17. *Atl. Marine*, 134 S. Ct. at 576.

18. 28 U.S.C. § 1404(a).

19. *In re* Atl. Marine Constr. Co., 701 F.3d 736, 738 (5th Cir. 2012) (“With respect to the second requirement—that the petitioner’s right to issuance of the writ must be ‘clear and indisputable’—this Court has made clear that ‘we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal.’ Instead, we will only grant mandamus relief when errors ‘produce a patently erroneous result’ and ‘clearly exceed[] the bounds of judicial discretion.’” (quoting *In re* Volkswagen of Am., Inc., 545 F.3d 304, 310 (5th Cir. 2008) (en banc)).

under § 1404(a) or in conducting its § 1404(a) analysis.²⁰ Atlantic Marine then petitioned the Supreme Court for a writ of certiorari, which the Court granted.²¹

The Supreme Court first addressed the proper procedural vehicles for enforcing a forum-selection clause. Justice Alito's opinion held that such a clause cannot be enforced by either a Rule 12(b)(3) motion to dismiss or a 28 U.S.C. § 1406(a) motion to transfer. He explained: "Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is 'wrong' or 'improper.' Whether venue is 'wrong' or 'improper' depends exclusively on whether the court in which the case was brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause."²² In *Atlantic Marine*, of course, the Western District of Texas was a proper venue under 28 U.S.C. § 1391(b)(2) because the parties entered into the contract in that district and it was to be performed there (where Fort Hood was located).²³

So what motion should a party seeking to enforce a forum-selection clause file? If the forum-selection clause points to another federal district, a party may file a motion to transfer under 28 U.S.C. § 1404(a).²⁴ Section 1404(a), Justice Alito explained, "permits transfer to any district where venue is also proper (*i.e.*, 'where [the case] might have been brought') or to any other district to which the parties have agreed by contract or stipulation."²⁵ If the forum-selection clause points to a state court or a foreign forum, a party may file a motion to dismiss for forum non conveniens.²⁶ Prompted by an amicus brief filed by fellow symposium contributor Stephen Sachs, the Court also acknowledged the view that a party may enforce a forum-selection clause by filing a motion to dismiss under Rule 12(b)(6); but the Court declined to resolve this question

20. *Id.* ("Atlantic urges that the district court clearly abused its discretion (1) by considering enforcement of the forum-selection clause under § 1404(a), instead of under Rule 12(b)(3) and § 1406, and (2) by committing errors when conducting its analysis under § 1404(a). Because we find the district court did not clearly abuse its discretion in either respect, we deny Atlantic's petition."). Interestingly, the Supreme Court's analysis in *Atlantic Marine* did not address whether the prerequisites for the "extraordinary" writ of mandamus were present. *Cf. Cheney v. United States District Court*, 542 U.S. 367, 380 (2004) ("This is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes.'" (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947))).

21. *Atl. Marine*, 134 S. Ct. at 576; *see also Atl. Marine*, 133 S. Ct. 1748, 1748 (2013) (granting writ of certiorari).

22. *Atl. Marine*, 134 S. Ct. at 577.

23. *Id.* at 576 n.1.

24. *Id.* at 579 ("Section 1404(a) . . . provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district.").

25. *Id.*

26. *Id.* at 580 ("[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*"); *see also id.* at 583 n.8 (noting that the approach to § 1404(a) forum-selection-clause transfers should also "apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums").

because Atlantic Marine had never filed such a motion and neither party addressed in their briefing whether a Rule 12(b)(6) motion would have been proper.²⁷

Justice Alito's opinion then turned to how a court should evaluate a § 1404(a) motion that is "premised on a forum-selection clause."²⁸ The answer is that, "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."²⁹ I have placed emphasis on the word "valid" in the first sentence of this quotation, because Justice Alito emphasized it as well—not with italics but rather with footnote 5 of the opinion, which appears at the end of that sentence. Footnote 5 states: "Our analysis presupposes a contractually valid forum-selection clause."³⁰

The opinion does not address how a court should decide whether a forum-selection clause is valid. I hope to provide some preliminary thoughts on that question in this Article. It is clear, however, that the *Atlantic Marine* opinion itself places no restrictions on a court's assessment of contractual validity in the first instance.

Assuming a contractually valid forum-selection clause exists, how should a federal court analyze a § 1404(a) motion or a forum non conveniens motion seeking to enforce that clause? Justice Alito began by acknowledging the factors that govern such motions as a general matter. One set of factors involve "the parties' private interests," which include:

[R]elative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.³¹

A court should also consider "[p]ublic-interest factors," which include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law."³² In addition, a court must "give some weight to the plaintiffs' choice of forum."³³

When such a motion is based on a valid forum-selection clause, however, a court must approach the motion differently. First, as Justice

27. *Id.* at 580 ("Petitioner, however, did not file a motion under Rule 12(b)(6), and the parties did not brief the Rule's application to this case at any stage of this litigation. We therefore will not consider it.")

28. *Id.* at 581.

29. *Id.* (emphasis added) (citation omitted).

30. *Id.* at 581 n.5.

31. *Id.* at 581 n.6 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)).

32. *Id.* (quoting *Piper*, 454 U.S. at 241 n.6).

33. *Id.* (quoting *Piper*, 454 U.S. at 241 n.6).

Alito explained, “the plaintiff’s choice of forum merits no weight.”³⁴ Because the plaintiff is “the party defying the forum-selection clause,” the plaintiff is the one that “bears the burden of establishing that transfer to the forum for which the parties bargained is unwarranted.”³⁵

Second, the court must not refuse to enforce a valid forum-selection clause based on “arguments about the parties’ private interests.”³⁶ Parties to such a clause “waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation.”³⁷ With such private interest factors off the table, “a district court may consider arguments about public-interest factors only.”³⁸ This leaves any party resisting a valid forum-selection clause with a daunting challenge. Justice Alito wrote that public interest factors alone “will rarely defeat a transfer motion.”³⁹ Accordingly, “forum-selection clauses should control except in unusual cases. Although it is conceivable in a particular case that the district court would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, such cases will not be common.”⁴⁰ Later in the opinion, Justice Alito summed it up this way: “As the party acting in violation of the forum-selection clause, J-Crew must bear the burden of showing that public-interest factors overwhelmingly disfavor a transfer.”⁴¹

There is one final way that a § 1404(a) motion based on a forum-selection clause differs from other § 1404(a) motions. When a § 1404(a) motion is granted based on a valid forum-selection clause, the “transfer of venue will not carry with it the original venue’s choice-of-law rules.”⁴² Rather, the transferee court (the one designated in the forum-selection clause) will apply its own choice-of-law rules. Because of *Klaxon Co. v. Stentor Manufacturing Co.*,⁴³ this means the transferee court will follow the choice-of-law rules of the state in which it is located.⁴⁴ This deviates from the rule that has generally governed § 1404(a) motions for the last half-century. In *Van Dusen v. Barrack*,⁴⁵ the Court held that when a case

34. *Id.* at 581.

35. *Id.*

36. *Id.* at 582.

37. *Id.*; see also *id.* at 584 (“[J-Crew] promised to resolve its disputes in Virginia, and the District Court should not have given any weight to J-Crew’s current claims of inconvenience.”).

38. *Id.* at 582.

39. *Id.*

40. *Id.* (internal citations and quotation marks omitted).

41. *Id.* at 583.

42. *Id.* at 582.

43. 313 U.S. 487 (1941).

44. *Id.* at 496 (“The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.” (citation omitted)).

45. 376 U.S. 612 (1964).

is transferred under § 1404(a), “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.”⁴⁶ Justice Alito made clear in *Atlantic Marine* that the *Van Dusen* rule does not apply “to cases where a defendant’s motion is premised on enforcement of a valid forum-selection clause.”⁴⁷

With this summary of the *Atlantic Marine* decision in mind, let us turn to *Erie*.

II. FEDERAL COURTS, STATE LAW: *ERIE* AND ITS CHOICES

Few Supreme Court decisions are as iconic as *Erie Railroad Co. v. Tompkins*.⁴⁸ The overarching question of whether a federal court is bound to follow state law, however, implicates a variety of distinct doctrines whose relationship to *Erie*—and to each other—is far from clear.⁴⁹ The *Erie* decision itself purported to be based on a constitutional constraint on the power of the federal judiciary.⁵⁰ Although Justice Brandeis’s opinion was opaque about the content and scope of this limitation, one way to understand *Erie*’s constitutional core is this: If the sole basis for federal judicial lawmaking is that federal courts may adjudicate a particular dispute, such lawmaking cannot dictate the substantive rights that are the basis for the adjudication.⁵¹ This explains the basic conclusion in *Erie* that the mere existence of diversity jurisdiction did not authorize a federal court to displace the duty of care imposed by state tort law.⁵² The same principle applies with respect to

46. *Id.* at 639; see also *Atl. Marine*, 134 S. Ct. at 582 (citing *Van Dusen* as “requiring that the state law applicable in the original court also apply in the transferee court”).

47. *Atl. Marine*, 134 S. Ct. at 583. There was no need for Justice Alito to create a special exception from *Van Dusen* in cases where a forum-selection clause is enforced via a forum non conveniens motion, see *supra* note 26 and accompanying text, because *Van Dusen* does not apply in the context of forum non conveniens. See *Piper v. Reyno*, 454 U.S. 235, 253 (1981) (“The reasoning employed in *Van Dusen v. Barrack* is simply inapplicable to dismissals on grounds of forum non conveniens.”).

48. 304 U.S. 64 (1938).

49. See Adam N. Steinman, *What Is the Erie Doctrine? (And What Does it Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 306 (2008) (“[P]rofound uncertainties still exist about *Erie*’s source, its scope, and its relationship to other important issues relating to federalism and judicial power.”); *id.* at 306–16 (describing “*Erie*’s problems”).

50. *Erie*, 304 U.S. at 78 (“Congress has no power to declare substantive rules of common law applicable in a state And no clause in the Constitution purports to confer such a power upon the federal courts.”). For arguments that *Erie* should be understood as resting on statutory rather than constitutional grounds, see Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What’s Wrong with the Recent Erie Decisions*, 92 VA. L. REV. 707, 713 (2006); Ely, *supra* note 6, at 718; Craig Green, *Repressing Erie’s Myth*, 96 CALIF. L. REV. 595, 596 (2008); Martin H. Redish & Carter G. Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 357–60 (1977); Allan D. Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 254 (1963).

51. Steinman, *supra* note 49, at 316.

52. *Id.*

federal procedural lawmaking: the mere authority to develop procedures for adjudicating disputes is not a sufficient basis for the federal judiciary to impose federal substantive law.⁵³

Operating in tandem with this constitutional core are two other frameworks for choosing between state and federal law. Even if federal judicial lawmaking would *not* displace truly substantive state law rights, a federal court might still be obligated to follow state law. This is reflected in the principle that federal courts should follow state law in order to vindicate *Erie's* “twin aims” of discouraging forum shopping and inequitable administration of laws.⁵⁴ This inquiry might be called a “sub-*Erie*” choice, because (1) it is not constitutionally mandated (unlike *Erie's* core principle), and (2) opting for a federal rule would not displace state *substantive* law.⁵⁵

There is also a choice-of-law framework that operates in cases where there *is* a sufficient federal interest to justify federal judicial lawmaking that displaces substantive state law. As the Supreme Court’s “classic” federal common law cases recognize, substantive judicial lawmaking by federal courts is not improper per se; it merely requires the presence of a “uniquely federal interest.”⁵⁶ But the presence of such a federal interest alone does not eliminate the role of state law. The federal court would need to inquire whether state law should be incorporated into federal common law. On a number of occasions, the Supreme Court has concluded that, although federal common law governs a particular issue, state law would provide the “federally prescribed rule of decision.”⁵⁷ Incorporation of state law into federal common law is appropriate unless a “significant conflict exists between

53. *Id.* at 316–17.

54. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

55. *See* Steinman, *supra* note 49, at 323–24. That *Erie's* twin aims are not constitutionally mandated is confirmed by the fact that the existence of a governing Federal Rule of Civil Procedure or federal statute can permit a federal court to disregard state law *regardless* of the potential impact on forum shopping or the inequitable administration of laws. *See, e.g.,* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 415–16 (2010) (noting that applying a federal rule that induces forum shopping “is unacceptable when it comes as the consequence of *judge-made rules* created to fill supposed ‘gaps’ in positive federal law” but that “a *Federal Rule* governing procedure [adopted pursuant to the Rules Enabling Act] is valid whether or not it alters the outcome of the case in a way that induces forum shopping” (emphasis added)).

56. *See* Steinman, *supra* note 49, at 306–08, 317–19 (discussing, *e.g.,* *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943)).

57. *See* *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (holding that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity” but “adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits”); *see also* *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) (holding that “federal courts should incorporate *state* law into federal common law” to fill “a gap in the federal securities laws”).

an identifiable federal policy or interest and the [operation] of state law,”⁵⁸ or there is a “need for a nationally uniform body of law.”⁵⁹

III. *ERIE* AND FORUM-SELECTION CLAUSES

In analyzing the relationship between *Erie* and forum-selection clauses, the crucial question is whether a federal court should be permitted to reach a different conclusion about the enforcement of a forum-selection clause than a state court would. To allow such a disparity between federal and state courts would raise three distinct but partially overlapping concerns under *Erie*. The first is a *relocation* concern: if a state court decides the forum-selection clause issue, the case will be adjudicated in State A; but if a federal court decides the forum-selection clause issue, the case will be adjudicated in State B. The second is a *horizontal choice-of-law* concern: if a state court decides the forum-selection clause issue, the case will be adjudicated according to the substantive law that would apply in State A (using State A’s choice-of-law rules); but if a federal court decides the forum-selection clause issue, the case will be adjudicated according to the substantive law that would apply in State B (using State B’s choice-of-law rules). The third is a *vertical substantive law* concern: the validity of a forum-selection clause and the appropriate remedies for its enforcement are fundamentally questions of substantive contract law, for which state law must be followed just like other private law issues traditionally governed by state law (such as the defendant’s duty of care in a tort case like *Erie* itself). This Part examines these potential *Erie* problems in more detail.

Let us first address the relocation concern. Imagine that a plaintiff wishes to sue in State A, but the forum-selection clause requires disputes to proceed in State B. If a State A state court and a State A federal court take opposite views of a contractual forum-selection clause, then the choice between state and federal court means the difference between having the case adjudicated in State A or in State B. Although geography alone might not implicate truly substantive rights, it may contravene the “twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”⁶⁰ To have a federal rule that allows plaintiffs to evade forum-selection clauses that would be binding in state court—or to allow defendants to compel the enforcement of forum-selection clauses that would be invalid in state court—would

58. *Boyle*, 487 U.S. at 507 (1988) (alteration in original) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)) (internal quotation marks omitted); see also *Semtek*, 531 U.S. at 509 (examining whether a particular state law “is incompatible with federal interests”).

59. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); see also *Semtek*, 531 U.S. at 508 (noting that there was “no need for a uniform federal rule”).

60. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

seem to encourage precisely the sort of vertical forum shopping *Erie* is meant to discourage.

According to Justice Scalia, in fact, it is “inevitabl[e]” that such differences would provide a “significant encouragement to forum shopping.”⁶¹ As Justice Scalia explained in his *Stewart* dissent, “[v]enue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue. Suit might well not be pursued, or might not be as successful, in a significantly less convenient forum.”⁶²

Justice Scalia found that a different federal approach to forum-selection clauses “fails the second part of the twin-aims test as well, producing inequitable administration of the laws.”⁶³ He wrote in *Stewart*:

The decision of an important legal issue should not turn on the accident of diversity of citizenship, or the presence of a federal question unrelated to that issue. It is difficult to imagine an issue of more importance, other than one that goes to the very merits of the lawsuit, than the validity of a contractual forum-selection provision.⁶⁴

He then observed: “Certainly, the *Erie* doctrine has previously been held to require the application of state law on subjects of similar or obviously lesser importance,”⁶⁵ giving as examples “whether filing of complaint or service tolls statute of limitations,”⁶⁶ “arbitrability,”⁶⁷ and “indemnity bond[s] for litigation expenses.”⁶⁸

Although Justice Scalia was the lone dissenter in *Stewart*, the majority did not disagree with him on these points. Rather, Justice Marshall’s majority opinion in *Stewart* concluded that encouraging forum shopping was irrelevant because § 1404(a) “control[led] the issue.”⁶⁹ As explained below, however, the *Stewart* majority’s attitude toward the preemptive scope of § 1404(a) is hard to square with more

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

62. *Id.* at 39–40. Elaborating on the sort of forum shopping that was likely to occur in connection with forum-selection clauses, Justice Scalia wrote:

[I]n a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and nonresident defendants will be encouraged to shop for more favorable law by removing to federal court. In the reverse situation—where a State has law favorable to enforcing such clauses—plaintiffs will be encouraged to sue in federal court.

Id. at 40.

63. *Id.*

64. *Id.* (internal citation omitted).

65. *Id.*

66. *Id.* (citing *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980)).

67. *Id.* at 41 (citing *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202–04 (1956)).

68. *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 555–56 (1949)).

69. *Id.* at 31 (majority opinion); see also *id.* at 32 n.11 (“Because a validly enacted Act of Congress controls the issue in dispute, we have no occasion to evaluate the impact of application of federal judge-made law on the ‘twin aims’ that animate the *Erie* doctrine.”).

recent Supreme Court opinions on the *Erie* doctrine. If, instead, § 1404(a) must be interpreted to accommodate state law regarding forum-selection clauses, Justice Scalia's concerns about the effect of relocation on *Erie*'s twin aims become dispositive.

Indeed, this tension with *Erie*'s twin aims existed even though, according to the *Stewart* majority, the basic *Van Dusen* rule would apply in the forum-selection clause situation: a § 1404(a) transfer to the court designated in the forum-selection clause would not have made any change in the substantive law that would govern the dispute.⁷⁰ That is—as Justice Scalia argued in his *Stewart* dissent—the relocation *alone* would offend *Erie*'s twin aims. *Atlantic Marine* compounds the potential *Erie* problem by declaring, for the first time, that *Van Dusen* does not apply when a § 1404(a) transfer is based on 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.”⁷¹

Atlantic Marine, therefore, creates a second *Erie* concern—a horizontal choice-of-law concern. Not only will different approaches to forum-selection clauses mean that a case will proceed in a different geographic location depending on whether it is filed in state court or federal court, but those different approaches can also lead to a disparity in the substantive law that will ultimately govern the dispute between the parties. Such a disparity flies in the face of the *Erie*-driven choice-of-law framework reflected in *Klaxon*, *Van Dusen*, and other Supreme Court cases.

The basic rule under *Klaxon* is that a federal court applies the choice-of-law rules of the state in which it is located.⁷² *Erie* required that approach, the *Klaxon* Court explained, because “[a]ny other ruling would do violence to the principle of uniformity within a state upon which [*Erie*] is based”; “the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”⁷³

Van Dusen's approach to choice of law in the § 1404(a) context is similarly motivated by the *Erie*-inspired need to “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.”⁷⁴

70. *Id.* at 32 (emphasizing that “a transfer pursuant to § 1404(a) does not carry with it a change in the applicable law” (citing *Van Dusen v. Barrack*, 376 U.S. 612, 636–37 (1964))).

71. *Atl. Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 583 (2013).

72. *Klaxon Co. v. Stentor Mfg. Co.*, 313 U.S. 487, 496 (1941) (“[T]he prohibition declared in *Erie R. Co. v. Tompkins* extends . . . to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.” (citation omitted)).

73. *Id.* at 496–97 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938)).

74. *Van Dusen*, 376 U.S. at 638.

Imagine a case that is filed in State A *federal* court and then transferred to State B federal court under § 1404(a). If that case had instead been filed in State A *state* court—where § 1404(a) does not permit a transfer to a court in another state—the State A court would use its own choice-of-law rules to determine the substantive law that would ultimately apply to the dispute. *Van Dusen* makes sure that the same law would apply in federal court, by requiring the State B federal court—which is hearing the case solely because of a § 1404(a) transfer—to apply the substantive law that would apply in State A. As *Van Dusen* explained, “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.*”⁷⁵

More recently, in *Ferens v. John Deere Co.*,⁷⁶ the Supreme Court clarified that the *Van Dusen* rule applies even if the plaintiff requests the § 1404(a) transfer. As Justice Kennedy explained in *Ferens*, “§ 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction.”⁷⁷ This policy “has its real foundation in *Erie Railroad Co. v. Tompkins.*”⁷⁸ He continued:

The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States “In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”⁷⁹

To adopt a choice-of-law approach where a § 1404(a) transfer leads to the application of different substantive 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.”⁸⁰

To allow different treatment of forum-selection clauses in state court and federal court would produce precisely this problematic result; it would “deprive parties of state-law advantages that exist absent diversity jurisdiction”⁸¹ and destroy the “critical identity . . . between the

75. *Id.* at 639 (emphasis added).

76. 494 U.S. 516 (1990).

77. *Id.* at 523.

78. *Id.* at 524 (internal citation omitted).

79. *Id.* (alteration in original) (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)).

80. *Id.* at 526.

81. *Id.* at 523. Justice Kennedy’s majority opinion in *Ferens* did make the following observation: “We have held, in an isolated circumstance, that § 1404(a) may pre-empt state law.” *Id.* at 526 (citing *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (holding that federal law determines the validity of a forum-selection clause). But he recognized in the very next sentence—relying explicitly on Justice Scalia’s *Stewart* dissent—that, “[i]n general . . . we have seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case under *Erie.*” *Id.* (citing *Van Dusen v.*

federal district court which decides the case and the courts of the State in which the action was filed.”⁸² First, consider the situation where a state court would dismiss a case pursuant to a forum-selection clause but a federal court would not. A plaintiff sues in State A, but the forum-selection clause requires disputes to proceed in State B. In State A state court, which would enforce the forum-selection clause, the case would be dismissed for refiling in State B, where the case will be governed by the substantive law that would govern in State B. In federal court, however, the case would remain in the State A federal court and—under *Klaxon*—would be governed by the substantive law that would govern in State A. We would have exactly the same disparity that *Van Dusen* and *Ferens* refused to tolerate.

An identical problem would arise if the federal court would enforce the forum-selection clause but the state court would not. If filed in State A state court, the case would remain there and would be governed by the substantive law that would apply in State A. If filed in State A federal court, however, the court would transfer the case to State B federal court; under *Atlantic Marine*, the State B federal court would apply the substantive law that would apply in State B.⁸³

The third and final *Erie* concern is independent of the substantive law that will ultimately govern the parties’ dispute. This concern, rather, is the substantive law by which the effect of the forum-selection clause itself is determined. The effect of a forum-selection clause raises issues of contract law that are quintessentially the realm of state law. For a federal court to displace state contract law is arguably a classic interference with state law substantive rights in violation of *Erie*. Just as a federal court could not disregard state tort law and declare its own standard of care for the duty owed by the Erie Railroad Co. toward Mr. Tompkins,⁸⁴ a federal court may not disregard state contract law and declare its own standard of contract validity for forum-selection clauses.⁸⁵ To have a

Barrack, 376 U.S. 612, 636–37 (1964); *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting) (finding the language of § 1404(a) “plainly insufficient” to work a change in the applicable state law through pre-emption)).

Indeed, as explained below, giving § 1404(a) the sort of preemptive scope suggested by *Stewart* is inconsistent with more recent *Erie* doctrine decisions. See *infra* notes 102–114 and accompanying text. Moreover, the § 1404(a) transfer envisioned in *Stewart* would not have resulted in a change to the substantive law. See *supra* note 70 and accompanying text. Under *Atlantic Marine*, the substantive law would change. See *Atl. Marine Constr. Co. v. U.S. District Court*, 134 S. Ct. 568, 583 (2013).

82. *Van Dusen*, 376 U.S. at 639.

83. See *supra* notes 42–47 and accompanying text.

84. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 81–82 (1938) (Butler, J., concurring) (describing how the lower court in *Erie* disregarded decisions by the Pennsylvania Supreme Court regarding the duty owed to the plaintiff).

85. It is an open question, of course, as to what qualifies as truly substantive rights for this purpose. This issue has evaded doctrinal clarity in the analogous context of when a Federal Rule of Civil Procedure impermissibly abridges, enlarges, or modifies substantive rights. See 28 U.S.C. § 2072(b) (2012). Compare *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393,

federal approach to such contract questions trump the state law approach not only invites forum shopping and inequitable administration of laws (for all the reasons discussed above), it may also implicate *Erie*'s constitutional core.⁸⁶

Admittedly, displacement of state law might be permissible if it is justified by a uniquely federal interest.⁸⁷ But that interest must be more than merely the fact that federal courts have jurisdiction to hear the case in which the forum-selection clause is invoked.⁸⁸ That interest must be more than merely the fact that federal courts have authority to develop procedures for adjudicating a case,⁸⁹ including procedures for resolving whether a forum-selection clause mandates a particular course of action. That interest must be more than merely the federal court's view that a different standard for contract validity would be more desirable.⁹⁰

For some kinds of cases, a sufficient federal interest may well exist. Where a forum-selection clause impacts federal law claims, a federal interest may justify deviating from state law with respect to the

406–15 (2010) (Scalia, J.), with *id.* at 417–28 (Stevens, J., concurring) (each offering different interpretations of the Rules Enabling Act's substantive rights provisions). Arguably, the Rules Enabling Act's substantive rights provision and the constitutional core of *Erie* are one and the same. See Steinman, *supra* note 49, at 324 (“If [a] Federal Rule does not override substantive rights, then it passes muster under both the Rules Enabling Act and *Erie*'s constitutional core.”). But *cf. id.* at 324–25 n.427 (recognizing that there may be a mismatch in federal question cases between federal common law authority and rulemaking authority under the Rules Enabling Act). And state law itself may play a role in determining whether a particular aspect of state law is, or is not, substantive. See, e.g., Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 11–14 (2012). Even if one concludes that the contractual validity of a forum-selection clause does *not* override state law substantive rights with respect to the forum-selection clause itself, the practical consequences of giving different effect to such clauses in state and federal court—in terms of relocation and a change in the substantive law that will govern the dispute—raise significant *Erie* concerns on their own. See *supra* pp. 806–08.

86. Justice Scalia's *Stewart* dissent alluded to this point as well when he wrote, at the end of his paragraph discussing the potential for inequitable administration of laws, “[n]or can or should courts ignore that issues of contract validity are traditionally matters governed by state law.” *Stewart*, 487 U.S. at 41 (Scalia, J., dissenting).

87. See *supra* note 56 and accompanying text.

88. See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law”); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580, 591 (1973) (“This principle [that a jurisdictional grant alone does justify federal common law] follows from *Erie* itself, where, although the federal courts had jurisdiction over diversity cases, we held that the federal courts did not possess the power to develop a concomitant body of general federal law.”); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 922–23 (1986) (arguing that *Erie* “clearly rejects the proposition that a court can make federal common law simply because it has jurisdiction”).

89. See Steinman, *supra* note 49, at 317 (“[T]he mere authority to develop *procedures* for adjudicating disputes is not a sufficient basis for the federal judiciary to impose federal substantive law.”); see also *id.* at 288–93, 290 n.256 (explaining how a different federal approach to summary judgment could interfere with state substantive law).

90. See *id.* at 327–28, 328 n.439.

contractual validity of that clause.⁹¹ This may explain, for example, why the Supreme Court has declared—in cases like *The Bremen v. Zapata Off-Shore Co.*⁹² and *Carnival Cruise Lines, Inc. v. Shute*⁹³—that federal law governs forum-selection clauses in admiralty cases.⁹⁴ It is also possible that particular situations presented by particular cases (the “extraordinary circumstances” Justice Alito alluded to in *Atlantic Marine*) might justify federal displacement of state contract law.⁹⁵ But it is hard to see why, as a general matter, there is a uniquely federal interest that allows federal courts to disregard state law on the contractual validity of forum-selection clauses.

Moreover, even if federal common law *does* govern the contractual validity of a forum-selection clause, courts must consider whether federal common law should incorporate state law. As discussed above, incorporation of state law is appropriate unless a *significant* conflict exists between an *identifiable* federal policy or interest and the operation of state law, or there is a need for a nationally uniform body of law.⁹⁶ The Supreme Court has taken this requirement seriously. For example, even though it concluded that “federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity,” the Court held that such federal common law should “adopt[], as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits.”⁹⁷

IV. *ERIE* AND 28 U.S.C. § 1404

One possible retort to the argument that state law governs the contractual validity of forum-selection clauses is that 28 U.S.C. § 1404(a)

91. *See id.* at 318 (arguing that “[i]n general, Congress’ choice to enact substantive legislation in a particular area creates a federal interest that is more than merely adjudicative and that, therefore, justifies federal lawmaking on related issues left unanswered by the relevant statute” and that this explains “why the *Erie* doctrine is largely absent from federal question cases”).

92. 407 U.S. 1 (1972).

93. 499 U.S. 585 (1991).

94. *See id.* at 590 (“[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize.”); *Bremen*, 407 U.S. at 10 (“We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.”); *see also* Steinman, *supra* note 49, at 319 n.411 (arguing that federal common law in admiralty cases “is grounded in precisely the kind of uniquely federal interest that justifies substantive federal common law in other areas” (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205, 216 (1917) (describing the need to prevent state law from “interfer[ing] with the proper harmony and uniformity of [general maritime law] in its international and interstate relations”)). Although the prevailing view is that federal judicial lawmaking is justified in maritime cases, that view has not been immune from scholarly critique. *See, e.g.*, Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274 (1999) (noting that “admiralty is often assumed to be the paradigm case of truly *legitimate* federal common law” but arguing that maritime cases should not be exempt from *Erie*).

95. *See infra* Part V.

96. *See supra* notes 57–59 and accompanying text.

97. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

federalizes the issue. In *Stewart*, after all, the majority held that “federal law, specifically 28 U.S.C. § 1404(a), governs the District Court’s decision whether to give effect to the parties’ forum-selection clause and transfer this case”⁹⁸

Through the lens of *Erie*, the presence of a federal statute is significant whether we view forum-selection clauses as implicating *Erie*’s constitutional core (protecting state law substantive rights) or the sub-*Erie* inquiry into forum shopping and inequitable administration of laws. A federal statute can eliminate the potential constitutional problem because the Supremacy Clause itself allows a federal statute to trump state law.⁹⁹ For the same reason, a federal statute can eliminate the need to engage *Erie*’s twin aims. Indeed, the same decision that first articulated the twin aims test—*Hanna v. Plumer*—also explained how federal positive law changes the *Erie* inquiry. While the twin aims are dispositive for a “relatively unguided *Erie* choice,”¹⁰⁰ a federal statute “must be applied if it represents a valid exercise of Congress’ authority under the Constitution.”¹⁰¹

There are several reasons to question the notion that § 1404(a) can trump state law with respect to the validity of forum-selection clauses. First, that view ignores aspects of the *Erie* doctrine that have been brought into sharper focus in the quarter century since *Stewart* was decided. Second, it is undermined—at least implicitly—by the *Atlantic Marine* decision itself. And third, it overlooks potential constitutional concerns.

When a party invokes federal positive law—whether a federal statute or a Federal Rule of Civil Procedure—to preempt the standard *Erie* analysis, there is a crucial threshold question: does that federal positive law actually “control” the particular issue for which the other party is invoking state law? The Supreme Court has framed this inquiry in a number of ways: whether the issue is “covered by” the statute or

98. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988); see also *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877–78 (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.”).

99. Even if § 1404(a) eliminates the constitutional problem, one could still argue that it should be read to incorporate state law with respect to contract validity. See, e.g., *United States v. Mitchell*, 403 U.S. 190, 197 (1971) (“In the determination of ownership [for purposes of federal income tax liability], state law controls.”); see also *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (“Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area, as is true in this instance, it must be remembered that ‘Congress acts . . . against the background of the total *corpus juris* of the states’” (quoting HENRY M. HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 435 (1953))). The inquiry into whether state law should be employed when applying a federal statute is analogous to the question of whether state law should be incorporated into federal common law. See *Wallis*, 384 U.S. at 68–69.

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

101. *Stewart*, 487 U.S. at 31–32.

rule; whether the statute or rule “answers the question in dispute”; whether the scope of the statute or rule “is sufficiently broad to control the issue before the Court”; whether the “clash” between state law and the federal statute or rule is “unavoidable”; whether the federal statute or rule “leav[es] no room for the operation of state law”; and whether the federal statute or rule and state law “can exist side by side, each controlling its own intended sphere of coverage without conflict.”¹⁰² Or as Justice Ginsburg put it recently: “Is this conflict really necessary?”¹⁰³

In the quarter century since *Stewart*, the Court has emphasized that—when undertaking this inquiry—federal courts must interpret positive federal law (whether a federal statute or a Federal Rule of Civil Procedure) to accommodate state law, provided the statute or rule is flexible or ambiguous enough to do so.¹⁰⁴ If the text of the federal statute or rule does not itself dictate a result that is contrary to state law, the choice should be treated as a “relatively unguided *Erie* choice;”¹⁰⁵ that is, the federal statute or rule must be applied in a way that is consistent with state law if doing otherwise would offend the “twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”¹⁰⁶

A good example of this was the 1996 decision in *Gasperini v. Center for Humanities, Inc.*¹⁰⁷ There, the Court recognized that Federal Rule 59 governed a defendant’s post-trial motion challenging a jury’s damage award as excessive. Because of *Erie*, however, federal courts were required to use the state law standard for evaluating such damage awards (in that case, New York’s “deviates materially” standard)—rather than the traditional federal approach that allowed a new trial only when the award was so excessive as to “shock the conscience.”¹⁰⁸ *Gasperini* reasoned that Rule 59 itself did not impose the shock-the-conscience standard that had long applied in federal court: “Whether damages are excessive for the claim-in-suit must be governed by *some law*. And there is no candidate for that governance other than the law that gives rise to the claim for relief—here, the law of New York.”¹⁰⁹ Accordingly, *Gasperini* rejected the idea that Rule 59 created “a ‘federal standard’ for new trial motions in ‘direct collision’ with, and ‘leaving no room for the operation

102. Adam N. Steinman, *Our Class Action Federalism: Erie and the Rules Enabling Act After Shady Grove*, 86 NOTRE DAME L. REV. 1131, 1135–36 (2011) (citations and internal quotation marks omitted).

103. *Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (Ginsburg, J., dissenting) (citing Roger J. Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657 (1959)).

104. See Steinman, *supra* note 102, at 1144–53.

105. *Hanna*, 380 U.S. at 471.

106. *Id.* at 468.

107. 518 U.S. 415 (1996).

108. See *id.* at 437 n.22; see also Steinman, *supra* note 49, at 283–84.

109. *Gasperini*, 518 U.S. at 437 n.22.

of,’ a state law like [New York’s].”¹¹⁰ More recently, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*,¹¹¹ all nine Justices endorsed the view that, for *Erie* purposes, Federal Rules should be construed—if possible—to avoid substantial variations in outcomes between state and federal cases.¹¹²

Section 1404(a)’s standard for transferring venue—“[f]or the convenience of parties and witnesses, in the interest of justice”¹¹³—is flexible enough to allow a federal court to give force to a forum-selection clause that would be binding as a matter of state law. As *Atlantic Marine* itself recognized, “[i]n all but the most unusual cases, . . . ‘the interest of justice’ is served by holding parties to their bargain.”¹¹⁴ This insight also applies in cases where state law would deem a forum-selection clause to be contractually invalid. Even if one accepts that the selection of a forum by the parties will satisfy § 1404(a)’s requirements for a transfer to that forum, the statute is open ended enough to accommodate state law regarding whether the parties have truly *selected* that forum as a matter of contract law. Either way, the key inquiry would become whether allowing a federal court to reach a different conclusion than the state court about the contractual validity of a forum-selection clause is likely to encourage forum shopping or lead to inequitable administration of the laws.

To view § 1404(a) as federalizing contractual validity is also in tension with some of the reasoning in *Atlantic Marine*—in particular, the Court’s view that its approach applies with equal force when a forum-selection clause “call[s] for a nonfederal forum.”¹¹⁵ As Justice Alito recognized, “§ 1404(a) ha[d] no application” in this context, because that provision authorizes a transfer only to another federal district or division. Instead, forum-selection clauses that specify a state or foreign court may be enforced using “the residual doctrine of forum non conveniens.”¹¹⁶

110. *Id.* (quoting *id.* at 468 (Scalia, J., dissenting)). Thus, *Gasperini* squarely refutes a key premise of *Stewart*: that accommodating state law is problematic because “it makes the applicability of a federal statute depend on the content of state law.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 n.10 (1988). After *Gasperini*, it is clear that a federal rule or statute *can* be applied differently depending on the content of state law.

111. 559 U.S. 393 (2010).

112. *See, e.g., id.* at 405 n.7. The *Shady Grove* majority ultimately concluded that Rule 23 was not susceptible to a reading that could accommodate state law. *Id.* (“[T]here is only one reasonable reading of Rule 23.”). Four Justices, in dissent, found that Rule 23 could be read to avoid a conflict with state law. *See id.* at 437 (Ginsburg, J., dissenting). But it was neither argued nor considered, in *Shady Grove*, whether state law might play a role in the application of Rule 23’s requirements. *See Steinman, supra* note 102, at 1144.

113. 28 U.S.C. § 1404(a) (2012).

114. *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court*, 134 S. Ct. 568, 583 (2013).

115. *Id.* at 576.

116. *Id.* at 581.

Nonetheless, *Atlantic Marine* explained 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 way* that they evaluate a forum-selection clause pointing to a federal forum.”¹¹⁷ However, there is no Act of Congress that federalizes the forum non conveniens doctrine. That *Atlantic Marine* treated § 1404(a) and forum non conveniens as identical vehicles for enforcing a forum-selection clause indicates that the presence of a federal statute *itself* cannot be what resolves whether state or federal law governs the contractual validity of a forum-selection clause.

Here is one final observation on whether § 1404(a) authorizes federal courts to displace state contract law. Although Acts of Congress are often viewed as a federalizing, anti-*Erie* trump card, it is worth considering whether *Erie* places limits on congressional authority as well.¹¹⁸ Justice Brandeis’ reasoning in *Erie*, after all, contemplated a constitutional principle that constrained both Congress and the federal courts: “*Congress* has no power to declare substantive rules of common law applicable in a State And no clause in the Constitution purports to confer such a power upon the federal courts.”¹¹⁹

What constitutional limit on congressional authority did Justice Brandeis have in mind? This has long been a mystery—and it has earned *Erie* considerable criticism.¹²⁰ There is, however, a plausible legislative counterpart to *Erie*: Just as federal courts may not displace substantive state law simply because they have jurisdiction to adjudicate a particular case,¹²¹ Congress may not pass a law that displaces substantive state law solely on the basis that federal courts might have jurisdiction over cases concerning those substantive areas of law.¹²² And just as federal courts may not override substantive state law under the guise of developing procedural rules,¹²³ Congress may not pass a law that overrides state substantive law solely because it wants to establish procedures for federal courts.¹²⁴ The parallel between these judicial and legislative constraints fits with Justice Brandeis’ logic in *Erie*, yet it would not upset

117. *Id.* at 580 (emphasis added).

118. See Steinman, *supra* note 49, at 317 n.399, 322 n.420.

119. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added).

120. See, e.g., Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie As the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 143 (2011) (“It is doubtful that *Erie*’s federalism limitation on congressional power was correct when it was decided, and doctrinal developments have made it even less valid.”).

121. See Steinman, *supra* note 49, at 316.

122. See *id.* at 317 n.399, 322 n.420 (questioning whether Congress can enact substantive law solely because of its “power to regulate the business of the federal courts” or “on the basis that federal courts might adjudicate claims concerning those substantive areas of law”).

123. See *id.* at 316–17.

124. See *id.* at 317 n.399, 322 n.420.

contemporary views of congressional power. Congress would retain authority to make substantive law pursuant to other enumerated powers (for example, the Commerce Clause).¹²⁵ The legislative counterpart to *Erie* that I suggest here is simply that Congress's power vis-à-vis the federal judiciary—standing alone—does not justify displacing substantive rights created by state law.

This view would be in some tension with the dicta in *Hanna* that the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.¹²⁶

It would certainly conflict with more aggressive readings of congressional authority in this regard, such as John Hart Ely's famous example that Congress could impose a substantive "no-fault system" for all diversity-jurisdiction accident cases on the "procedural" theory that "keeping accident cases out of federal courts will clear their dockets so that they can do juster justice in other cases."¹²⁷

But the Supreme Court has yet to approve anything along the lines of Ely's hypothetical. Indeed, just a few years before *Hanna*'s dicta on this issue, the Court spoke in much more skeptical terms. The Court noted in *Bernhardt v. Polygraphic Co. of America*¹²⁸ that the defendant's proposed interpretation of the Federal Arbitration Act—which would have compelled a different result in federal court than state court as to the enforceability of an arbitration agreement—raised constitutional concerns because "*Erie R. Co. v. Tompkins* indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."¹²⁹ More recently, the Supreme Court has suggested that federalism concerns may demand a narrower view of Congress' authority under the Necessary and Proper

125. *See id.* at 322 n.420.

126. *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965).

127. Ely, *supra* note 6, at 706 n.77.

128. 350 U.S. 198 (1956).

129. *Id.* at 201–02. In the decades since *Bernhardt*, the Supreme Court has clarified that the constitutional authority for the Federal Arbitration Act ("FAA") is the Commerce Clause, not Congress's power over the federal judiciary. *See Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984) ("The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause."). That has seemingly eliminated the potential *Erie* problem with the FAA, and has given the FAA an even more sweeping scope insofar as it now binds state courts as well as federal courts. *See id.* at 16 (holding that the FAA "creat[ed] a substantive rule applicable in state as well as federal courts"). The *Erie* concern remains, however, for § 1404(a)—which is not based on Congress's power under the Commerce Clause. *See Stewart*, 487 U.S. at 32 (noting that § 1404(a)'s constitutional basis is "Congress's powers under Article III as augmented by the Necessary and Proper Clause").

Clause.¹³⁰ All of this suggests that § 1404(a)—an unquestionably procedural statute based solely on Congress’s authority vis-à-vis the federal courts—should not be a basis for overriding substantive state law.

V. EXTRAORDINARY CIRCUMSTANCES: WHEN MIGHT A FEDERAL COURT REFUSE TO ENFORCE A VALID FORUM-SELECTION CLAUSE?

Justice Alito recognized that there may be some “extraordinary circumstances unrelated to the convenience of the parties” that would permit a federal court to deny a § 1404(a) motion despite a contractually valid forum-selection clause.¹³¹ A decision to disregard a valid forum-selection clause, however, must be justified by “public-interest factors only”¹³²—factors that may include “the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law.”¹³³

Justice Alito provided no concrete examples of when the public interest factors might warrant a refusal to enforce a contractually valid forum-selection clause, except to say that they would be “exceptional,”¹³⁴ “extraordinary,”¹³⁵ “rare[]”¹³⁶ and “unusual.”¹³⁷ It should be kept in mind, however, that a party contesting a forum-selection clause need only establish the presence of such “extraordinary circumstances” if the clause is *valid* under state law. Many potential objections to a forum-selection clause might be vindicated by the state law inquiry into contractual validity.

Assuming that the forum-selection clause *is* contractually valid under state law, the question, as viewed through the lens of *Erie*, should be framed as follows: When can a federal court legitimately displace substantive rights created by state contract law? One answer is that a uniquely federal interest can justify a federal judicial override of state substantive law. This notion is reflected in the “classic” federal common

130. See *Printz v. United States*, 521 U.S. 898, 918–22 (1997); *New York v. United States*, 505 U.S. 144, 156–57 (1992); see also *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2585–93 (2012) (Roberts, C.J.); *id.* at 2646–50 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

131. *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court*, 134 S. Ct. 568, 575 (2013).

132. *Id.* at 582.

133. *Id.* at 581 n.6 (alteration in original) (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 241 n.6 (1981)); see *supra* notes 31–41 and accompanying text.

134. *Id.* at 581 (“[N]o such exceptional factors appear to be present in this case.”).

135. *Id.* (“Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied.”).

136. *Id.* at 582 (“[T]hose factors will rarely defeat a transfer motion . . .”).

137. *Id.* (“[T]he practical result is that forum-selection clauses should control except in unusual cases.”).

law cases,¹³⁸ as well as the Supreme Court's pre-*Hanna* decision in *Byrd v. Blue Ridge Rural Electric Cooperative*.¹³⁹

One could certainly articulate a relationship between some of the public interest factors identified in *Atlantic Marine* and the sort of federal interests that might justify an override of state substantive law in the context of a forum-selection clause.¹⁴⁰ If, for example, especially severe "court congestion"¹⁴¹ was present in the selected federal district, there might be a unique federal interest in avoiding further burdens on that district. Relatedly, severe congestion or some other emergency could deprive the contractually chosen district of the practical ability to adjudicate the case, which could undermine the integrity of the federal judicial process.¹⁴² It might be a more difficult argument that there is a uniquely *federal* interest in "having localized controversies decided at home" or "having the trial of a diversity case in a forum that is at home with the law."¹⁴³ These interests would seem to be just as strong—if not stronger—with respect to a *state* court that is asked to dismiss a case away based on a forum-selection clause. But just to be clear: if the state court would vindicate these interests by refusing to enforce the forum-selection clause, *Erie* should require the federal court to do the same (for all the reasons described earlier).¹⁴⁴

138. See *supra* note 56 and accompanying text.

139. 356 U.S. 525, 537–39 (1958) (stating that "countervailing" interests such as "the essential character or function of a federal court" might justify a federal rule notwithstanding an effect on the outcome that would otherwise be unacceptable under *Erie*).

140. It should be remembered, of course, that *Piper's* list of public interest factors (and private interest factors, for that matter) was never meant to be exhaustive. See, e.g., *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1381–82 (11th Cir. 2009) ("These factors are not exhaustive or dispositive, and courts are free to be flexible in responding to cases as they are presented.").

141. *Atl. Marine*, 134 S. Ct. at 581 n.6 (recognizing "administrative difficulties flowing from court congestion" as a public interest factor).

142. The idea that the integrity of the federal judicial process might be a federal interest that justifies departing from state law finds support in *Semtek Int'l, Inc. v. Lockheed Martin Corp.* See 531 U.S. 497, 509 (2001). Relying on *Erie*, *Semtek* recognized that decisions by federal courts sitting in diversity should ordinarily have the same preclusive effect as decisions of the state courts where the federal court is located. *Id.* at 508–09. It recognized, however, that:

[S]tate law will not obtain, of course, in situations in which the state law is incompatible with federal interests. If, for example, state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts' interest in the integrity of their own processes might justify a contrary federal rule.

Id. at 509.

143. *Atl. Marine*, 134 S. Ct. at 581 n.6.

144. If the state court would enforce the forum-selection clause—and the federal court therefore transfers the case under § 1404(a)—it is also conceivable that the contractually designated federal district might then transfer the case under § 1404(a) to a district that is more "at home" with the dispute and the law that would govern it. This would hold the parties to their enforceable bargain that the case be filed in the selected district, but would still allow the federal judiciary to manage where—within the federal judicial system as a whole—is the most suitable venue to ultimately adjudicate the case. That second transfer would not be compelled as a matter of contract law, so it would not

CONCLUSION: *ATLANTIC MARINE* AND STATE LAW

Where does this leave us? *Erie* is a notoriously complex and unpredictable area of law. It is clear, however, that the potential *Erie* concerns described above would disappear with one simple clarification of the *Atlantic Marine* framework: For purposes of *Atlantic Marine*'s footnote 5—at least for diversity cases—a forum-selection clause is contractually valid if and only if it would be deemed valid and enforceable by the state court where the federal district court is located.

This refinement solves the *Erie* relocation problem, because the federal court will transfer the case under *Atlantic Marine* only when a state court would provide a similar remedy. And it solves the *Erie* horizontal choice-of-law problem because the law-changing *Atlantic Marine* transfer will only occur if the state court would, pursuant to the forum-selection clause, dismiss the case for refile in the contractually designated forum.¹⁴⁵ And it solves the *Erie* vertical substantive law

implicate the vertical substantive law concern described above. *See supra* notes 84–86 and accompanying text. And that second transfer would not entail any change to the substantive law, because it would be subject to the usual *Van Dusen* rule for § 1404(a) transfers. Thus, it would not implicate the horizontal choice-of-law concern described above. *See supra* notes 71–83 and accompanying text.

145. This understanding may also pave the way toward a more coherent general theory of how federal courts should handle choice-of-law questions when a case moves from one federal district to another. Prior to *Atlantic Marine*, the prevailing view was that for a § 1404(a) transfer, the transferee court must use the law that would apply in the state where the case was originally filed; but for a § 1406(a) transfer, the transferee court must use the law that would apply in its own state. *See, e.g., Martin v. Stokes*, 623 F.2d 469, 473 (6th Cir. 1980) (“If an action is transferred under § 1404(a), the state law of the transferor court should be applied. In contrast, if an action is transferred under § 1406(a), the state law of the transferee district court should be applied.”). At first blush, *Atlantic Marine* seems to create an inelegant exception to this rule by declaring that a venue-transfer motion based on a forum-selection clause is governed by § 1404(a) but must be treated like a § 1406 motion for purposes of choice of law. *See supra* notes 42–47 and accompanying text.

Under an *Erie*-driven approach, however, there is no need for either an arbitrary line between § 1404(a) and § 1406(a) transfers or an arbitrary exception to that line for forum-selection clauses. Rather, the key question is: what law would ultimately have governed the case without the “accident” of diversity jurisdiction? *See supra* notes 73–74 and accompanying text. In other words, if the case had been filed in a state court in the state where the transferor court was located, what would have happened? *See Van Dusen*, 376 U.S. at 639 (noting that, under *Erie*, “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*” (emphasis added)). Understood this way, *Atlantic Marine*'s choice-of-law rule for transfers based on a forum-selection clause presumes that a state court would dismiss the case pursuant to the forum-selection clause, after which the case would be refiled in the contractually selected state and be subject to that state's choice-of-law rules. *Van Dusen*'s choice-of-law rule presumes that a state court (in which § 1404(a) does not apply) would keep the case and therefore would have applied its own choice-of-law rules. *See supra* notes 74–75 and accompanying text. Indeed, *Van Dusen* explicitly left open the possibility that a different approach to choice of law following a § 1404(a) transfer might be needed if it could be shown that the state court would have dismissed the case on *forum non conveniens* grounds. *See Van Dusen*, 376 U.S. at 640 (“We do not attempt to determine whether . . . the same considerations would govern . . . if it was contended that the transferor State would simply have dismissed the action on the ground of *forum non conveniens*.”). While it is beyond the scope of this article to explore this theory further, it provides a potentially fruitful alternative to one focused solely on which venue transfer statute—§ 1404(a) or § 1406(a)—applies.

concern because the federal court would not displace state contract law with its own approach.

Accordingly, *Atlantic Marine* should not be read to impose a rigid, pro-enforcement rule for forum-selection clauses. It should not be read to disregard legitimate concerns about whether parties have meaningfully consented to such clauses in particular cases, or about the use of such clauses to constrain consumers or other parties with minimal bargaining power and no practical means to negotiate with the more powerful party. Rather, courts applying *Atlantic Marine* should look to state law to address these issues—as *Erie* requires.

This understanding places Justice Alito’s narrow view of the “extraordinary circumstances” that justify disregarding a contractually valid forum-selection clause into proper perspective. If the forum-selection clause would not be enforced in state court, then *Atlantic Marine* does not compel its enforcement in federal court. The extraordinary circumstances Justice Alito described allow a federal court to refuse enforcement of a forum-selection clause even where a state court *would* find the clause valid and enforceable. And as described above, those extraordinary circumstances might themselves be justified in terms of the unique federal interests that can allow federal courts to displace state law.¹⁴⁶

There is nothing in the *Atlantic Marine* opinion that forecloses this approach. Again, footnote 5 explicitly reserves the question of contract validity. It does not prejudge the role that state law might play in that regard, and there are strong arguments—as summarized above—that *Erie* requires federal courts to follow state law. It is worth addressing, however, some snippets of the *Atlantic Marine* opinion that might be misconstrued to require a distinct, federal approach to questions of contractual validity.

At one point in the opinion, Justice Alito stated that “when a plaintiff agrees by contract to bring suit only in a specified forum—*presumably in exchange for other binding promises by the defendant*—the plaintiff has effectively exercised its ‘venue privilege’ before a dispute arises.”¹⁴⁷ One might argue that this language reflects a rule that federal courts *should* “presum[e]” that forum-selection clauses are, in fact, agreed to “in exchange for other binding promises,” and that federal courts should therefore discount concerns that are legitimately addressed by substantive contract law—consent, bargaining power, and the like. That view, however, takes this sentence out of context. Again, the Court’s entire analysis “presuppose[d] a contractually valid forum-selection

146. *See supra* Part V.

147. *Atl. Marine*, 134 S. Ct. at 582 (emphasis added).

clause.”¹⁴⁸ If the forum-selection clause *is* contractually valid—an inquiry that is properly governed by state law—then this sentence from the opinion simply recognizes such a contractually valid clause can restrict the plaintiff’s “venue privilege.” It does not dictate a particular approach to determining contractual validity in the first instance.

Later in the opinion, Justice Alito cited Justice Kennedy’s concurring opinion in *Stewart* for the proposition that *Bremen*’s “reasoning applies with much force to federal courts sitting in diversity.”¹⁴⁹ *Bremen*, of course, was a 1972 admiralty case where the Supreme Court adopted an approach to forum-selection clauses that was more inclined toward enforcement than “the traditional view of many American courts”—which had often refused to enforce such clauses on the ground that they improperly “oust the jurisdiction of the courts.”¹⁵⁰ But Justice Kennedy’s view in *Stewart* was this: “Though state policies should be weighed in the balance, the authority and prerogative of the federal courts to determine the issue, as Congress has directed by § 1404(a), should be exercised so that a *valid* forum-selection clause is given controlling weight in all but the most exceptional cases.”¹⁵¹ So Justice Kennedy’s view, as well, was premised on the existence of a *valid* forum-selection clause. Moreover, Justice Kennedy made this point in the context of *Stewart*’s understanding that the substantive law would not change when a forum-selection clause is enforced via § 1404(a).¹⁵² Under *Atlantic Marine*, a transfer based on a forum-selection clause would change the substantive law that would otherwise apply.¹⁵³

Indeed, Justice Kennedy has been an interesting figure in *Erie*’s evolution during the last quarter century. Not long after *Stewart*, Justice Kennedy authored the majority opinion in *Ferens*, in which he emphasized that “§ 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction”¹⁵⁴ and explained that this policy “has its real foundation in *Erie Railroad Co. v. Tompkins*.”¹⁵⁵ Indeed, his *Ferens* opinion explicitly embraced Justice Scalia’s *Stewart* dissent, citing his view that “the language of § 1404(a) was ‘plainly insufficient’ to work a change in the applicable state law through pre-emption.”¹⁵⁶ Justice Kennedy also joined Justice Ginsburg’s majority opinion in *Gasperini* and her dissent in *Shady Grove*, both of which

148. *Id.* at 581 n.5.

149. *Id.* at 582 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)).

150. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 6 (1972).

151. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring) (emphasis added).

152. See *supra* note 70 and accompanying text.

153. See *supra* notes 42–47, 71 and accompanying text.

154. *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990).

155. *Id.* at 524.

156. *Id.* at 526 (citing *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting)); see *supra* note 81.

concluded that state law should prevail in federal court notwithstanding the presence of federal positive law. As much as any Justice, Kennedy has been receptive to applying the *Erie* doctrine in a way that accommodates state law.

* * *

It is impossible to appreciate the full impact of *Atlantic Marine* without taking *Erie* into account. As described above, the *Atlantic Marine* decision leaves room for state law to play a significant role in determining the ultimate effect of a forum-selection clause in federal court. And forum-selection clauses raise several concerns that, under a proper understanding of *Erie*, should require federal courts to follow state law regarding whether such clauses must be enforced in particular cases.
