ERIE AND THE ENFORCEABILITY OF FORUM SELECTION CLAUSES

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Whether and to what extent state law governs the contractual validity of forum selection clauses in federal court remains highly contested. This Article argues for a two-part answer.

State law should govern whenever a party seeks a § 1404(a) transfer of venue within the federal judicial system. The Court has insisted that the choice-of-law rules of the state to which the suit is transferred govern when transfer is required by a contractually valid clause. That insistence accords with the Erie *policy of vertical uniformity between state and federal courts only if the law of the state in which the transferring federal district court sits governs contractual validity. And the* Erie *policy properly applies whenever the forum selection clause is found in a contract governed by state or foreign contract law. The federal interest in controlling where in the federal judicial system a suit is heard does not change the analysis. That is because a federal district court may order a transfer even in the absence of a contractually valid clause.*

By contrast, federal common law properly governs contractual validity when a party seeks a forum non conveniens *dismissal on the ground that the federal judicial system as a whole is an inappropriate forum. A dismissal on that ground cannot plausibly depend on the law of the state in which the federal court sits. Reliance on that state's law would be incompatible with the need for a uniform answer across the federal judicial system. Federal common law, however, may borrow state or foreign law when doing so would not interfere with the federal interest in ensuring a federal forum when appropriate.*

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INTRODUCTION

Forum selection clauses are common.[1] And whether a court enforces or refuses to enforce a forum selection clause can mean the difference between winning and losing a case.[2] Yet, despite the obvious outcome-determinative potential of the law governing the enforceability of forum selection clauses, the U.S. Supreme Court still has not fully spelled out the role that state law should play in the enforcement of such clauses in federal court. In its most recent decision on forum selection clauses,[3] the Court held that when a party seeks a transfer of venue under 28 U.S.C. § 1404(a) or a dismissal on *forum non conveniens* grounds, a contractually valid forum selection clause must be enforced, aside from the exceptional case when "public-interest factors" require otherwise.[4] But the Court left unanswered a crucial question: what law determines the contractual validity of a forum selection clause?

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1. *See* John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1092 & nn.13–14 (2021) (noting the ubiquity of forum selection clauses and collecting statistics by type of contract); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973, 975 & n.4 (2008) (stating that "[t]he forum selection clause addresses a key aspect of litigation—the place of suit—and thus is among the most important and pervasive types of contract procedure" and explaining that "[o]ne measure of the ubiquity of forum selection clauses is the number of clause enforcement motions courts decide").

2. The forum in which the plaintiff files suit, for example, might apply rules of law that favor the plaintiff while the contractually selected forum would not. *See, e.g.*, Am. Online, Inc. v. Superior Ct., 90 Cal. App. 4th 1, 5 (Ct. App. 2001) (noting that the law of the chosen forum, Virginia, "does not allow consumer lawsuits to be brought as class actions and the available remedies are more limited than those afforded by California law," thus "substantially diminish[ing]" the rights of class members "if they are required to litigate their dispute in Virginia").

3. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49 (2013).

4. *Id.* at 63–64. In the absence of a contractually valid forum selection clause, § 1404(a) requires a court to weigh so-called private- and public-interest factors in deciding whether a transfer would be for "the convenience of parties and witnesses" and "in the interest of justice." *Id.* at 62–64, 62 n.6 (quoting 28 U.S.C. § 1404(a)); *see also* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3847 (4th ed. 2013) ("[M]ost courts divide the relevant factors into public and private categories, as is done under forum non conveniens.").

This Article contends that the Court's forum-selection clause jurisprudence—when read in the light of *Erie*[5]—requires a two-part answer. First, in a § 1404(a) analysis, the "whole law"[6] of the state in which the federal district court sits governs whether a forum selection clause is "contractually valid." And second, federal common law—which borrows state and foreign law in appropriate circumstances—governs the contractual validity of a forum selection clause in a *forum non conveniens* analysis.[7] "Contractual validity," for these purposes, refers to whether contract law—as opposed to the public- or private-interest factors of a § 1404(a) or *forum non conveniens* analysis—provides a basis for enforcing or refusing to enforce an otherwise applicable forum selection clause. Finally, although this Article focuses

5. "*Erie*," as used in this Article, is shorthand for *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and subsequent cases that analyze whether a federal court should apply state law when a state would be free to do so in its own courts. *Erie* requires federal courts to apply *state* law *unless* (1) a federal constitutional provision, valid federal statute, valid federal rule, or valid, self-executing treaty covers the point or (2) federal courts are authorized to decide the matter using federal common law. *See* Section I.C. The extent to which *Erie* is relevant to forum selection clauses will change if the United States ever ratifies the Hague Convention on Choice of Court Agreements. The United States has signed—but not ratified—the Convention. *See* Caroline Edsall, Comment, *Implementing the Hague Convention on Choice of Court Agreements: An Opportunity to Clarify Recognition and Enforcement Practice*, 120 YALE L.J. 397, 397 (2010) (noting that the United States signed the Hague Convention on Choice of Court Agreements on January 19, 2009). For a thorough discussion of the Convention, see Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on* Forum Non Conveniens, *Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT'L L. 1013 (2010).

6. The whole law of a state, by definition, includes the state's choice-of-law rules. *See* LEA BRILMAYER, JACK GOLDSMITH & ERIN O'HARA O'CONNOR, CONFLICT OF LAWS 121 (8th ed. 2020) ("Terminology: *whole law* = conflicts rules + internal law.").

7. This Article takes as a given that when the forum selection clause is in a contract governed by federal contract law—admiralty cases and cases involving federal contracts, for example—federal common law governs the contractual validity of the clause. *See, e.g.*, Great Lakes Ins. SE v. Raiders Retreat Realty Co., No. 22-500, slip op. at 12 (3d Cir. Feb. 21, 2024) (stating that the reference to public policy in *The Bremen* was "to the possibility of a conflict between federal maritime law and a foreign country's law—there, England's," and that "[s]tate law [is] not relevant" in an admiralty case); Smith v. Cent. Ariz. Water Conservation Dist., 418 F.3d 1028, 1034 (9th Cir. 2005) ("Federal law governs the interpretation of contracts entered into pursuant to federal law and to which the government is a party.").

on contractual validity, the argument is equally pertinent to the law governing the applicability of a forum selection clause.[8]

Circuit courts, even in diversity cases, have often looked to federal common law developed in a landmark admiralty case, *The Bremen v. Zapata Off-Shore Co.*[9] That case provides that a forum selection clause must be denied enforcement if the clause "[would be] invalid for such reasons as fraud or overreaching" or if "enforcement would be unreasonable and unjust."[10] Most circuit courts have also understood

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8. This Article addresses the "enforcement" of forum selection clauses, that is, cases in which a defending party seeks a remedy on the ground that the suit has not been brought in the forum identified in the forum selection clause. In addition to contractual validity, the enforcement of a forum selection clause also requires a determination that the clause is applicable—in other words, that the clause covers the case before the court. *Cf.* John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 129–31 (2022) (arguing that applicability is an element of contractual validity). Applicability includes matters of contract construction and the applicability of a forum selection clause to non-signatories. *Id.* at 131.

9. 407 U.S. 1 (1972); *see also infra* note 10 (collecting cases). Most of these circuit court cases involve *forum non conveniens* motions or motions to dismiss on other grounds. At least before *Atlantic Marine*, § 1404(a) was often understood to require a different analysis. *See, e.g.*, Tradecomet.com LLC v. Google, Inc., 647 F.3d 472, 478 (2d Cir. 2011) ("The better reading of *Stewart* . . . is that *Stewart* deals with motions to transfer pursuant to § 1404(a), while *Bremen* . . . address[es] the grant of dismissal or summary judgment based on a forum selection clause.").

10. *The Bremen*, 407 U.S. at 15. For circuit court cases looking to *The Bremen* for the applicable law, see, for example, *Starkey v. G. Adventures, Inc.*, 796 F.3d 193, 196 & n.1 (2d Cir. 2015), which holds that federal law governs whether a party has made "a sufficiently strong showing that enforcement [of the forum selection clause] would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching"; *Collins v. Mary Kay, Inc.*, 874 F.3d. 176, 181 (3d Cir. 2017) (quoting Foster v. Chesapeake Ins. Co., 933 F.2d 1207, 1219 (3d Cir. 1991)), which states that "[a] court examining the enforceability of a clause considers whether compelling compliance with the clause is '"unreasonable" under the circumstances,'" and explaining that "[a]pplying federal law to questions of enforceability of forum selection clauses comports with settled law in this Circuit"; *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995) (citation omitted) (quoting *The Bremen*, 407 U.S. at 12), which holds in a § 1404(a) case that "[w]here the forum selection clause is valid, which requires that there have been no 'fraud, . . . influence, or overweening bargaining power,' the plaintiffs bear the burden of demonstrating why they should not be bound by their contractual choice of forum"; *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 649–50 (4th Cir. 2010) (alteration in original) (quoting Bryant Elec. Co. v. Fredericksburg, 762 F.2d 1192, 1196 (4th Cir. 1985)), which cites *The Bremen* for the proposition that "when parties to a contract confer jurisdiction and venue on a particular court, as a general matter federal common law directs courts to favor enforcement of the agreement, so long as it is not unreasonable" and states that the

The Bremen's admonition that "a strong public policy"[11] may require the invalidation of a forum selection clause to incorporate consideration of *state* public policy as a matter of federal common law.[12]

But a few circuit courts—seeking to address nagging *Erie* concerns without overruling circuit precedent—have suggested that the law of the state in which the federal district court sits governs at least *some*

Fourth Circuit "has applied [*The Bremen*'s] reasoning in diversity cases not involving international contracts"; *Weber v. PACT XPP Techs., AG*, 811 F.3d 758, 773 (5th Cir. 2016), which reaffirms that federal law governs whether a forum selection clause is unreasonable; *Boling v. Prospect Funding Holdings, LLC*, 771 F. App'x 562, 568 (6th Cir. 2019) (quoting Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009)), which states that "[f]ederal law governs the enforceability of a forum-selection clause in a diversity suit," which the court defines as including "whether the clause was obtained by fraud, duress, or other unconscionable means," and "whether the designated forum would be so seriously inconvenient . . . that requiring the plaintiff to bring suit there would be unjust"; *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988), which states: "We conclude that . . . the federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases."; *Niemi v. Lasshofer*, 770 F.3d 1331, 1351–52 (10th Cir. 2014), which cites in a § 1404(a) case *The Bremen* for the proposition that the court "will enforce a mandatory forum selection clause unless the party challenging it 'clearly show[s] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching,'" and *Scherk v. Alberto–Culver Co.*, 417 U.S. 506, 519 n.14 (1974), for the proposition that fraud provides a basis for invalidating the clause only if the clause itself was included through fraud; *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009) (per curiam), which relies on *The Bremen* and other Supreme Court cases for the proposition that a forum-selection clause is invalid when "its formation was induced by fraud or overreaching," its enforcement would deprive the plaintiff of "its day in court," would lead to application of law that "would deprive the plaintiff of a remedy," or "would contravene public policy"; and *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874–75 (D.C. Cir. 2019), which quotes *The Bremen* to identify the law governing the validity and enforceability of forum selection clauses. The First and Eighth Circuits have not decided whether the criteria set forth in *The Bremen* govern outside the admiralty context. *See* Atlas Glass & Mirror, Inc. v. Tri-North Builders, Inc., 997 F.3d 367, 374 (1st Cir. 2021) (noting that the Supreme Court and the First Circuit have "reserved that question"); Smart Commc'ns Collier Inc. v. Pope Cnty. Sheriff's Off., 5 F.4th 895, 897 n.2 (8th Cir. 2021) (noting that the Eighth Circuit has "expressly declined to decide" the issue). The Seventh Circuit has answered the question in an idiosyncratic way. *Compare* Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 159 (7th Cir. 1993) (holding that "[t]he enforceability of forum selection clauses in international agreements is governed by the Supreme Court's decision in [*The Bremen*]" (citation omitted)), *with* Jackson v. Payday Fin., LLC, 764 F.3d 765, 775 (7th Cir. 2014) ("In contracts containing a choice of law clause . . . the law designated in the choice of law clause would be used to determine the validity of the forum selection clause.").

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

12. *See* Coyle, *supra* note 8, at 151–55 (discussing how federal courts assess state public policy under the *Bremen* standard).

issues of contractual validity. The Ninth Circuit, for example, recently held that whether a forum selection clause may be repudiated by one of the parties is governed by the law of the state in which the federal district court sits.[13] And two other circuits, the Fifth and the Eleventh, have suggested—without deciding—that some matters of contract formation may be governed by that state law.[14] These decisions, which refused to extend federal common law to matters not specifically addressed by *The Bremen*, are part of a broader movement toward the application of state law. That movement has found its widest success thus far in cases construing forum selection clauses,[15] but at least two

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13. *See* DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp., 28 F.4th 956, 964 (9th Cir. 2022) ("We hold that the state law applicable here, § 925(b), which grants employees the option to void a forum-selection clause under a limited set of circumstances, determines the threshold question of whether Waber's contract contains a valid forum-selection clause."). *DePuy* also found that the district court had not abused its discretion in finding the forum selection clause void on grounds of public policy. *Id.* at 966–67. A panel of the Ninth Circuit later misread *DePuy* as unambiguously standing for the proposition that "state law governs the validity of a forum-selection clause just like any other contract clause." Lee v. Fisher, 70 F.4th 1129, 1142 (9th Cir. 2023) (quoting *DePuy*, 28 F.4th at 963–64). *But cf. DePuy*, 28 F.4th at 964 n.6 ("We need not decide whether state law would govern validity of a forum-selection clause that had not been voided and is before the district court for consideration in the transfer analysis.").

14. *See, e.g.*, Wylie v. Kerzner Int'l Bah, Ltd., 706 F. App'x 577, 580 (11th Cir. 2017) (per curiam) ("It seems to us, then, that the analytical framework (and substantive law) governing the *forum non conveniens* inquiry in this diversity case depends on whether the *validity* of a forum-selection clause is distinct from, and antecedent to, its *enforceability*, or whether the validity of such a clause is just part of the federal law of enforceability, as developed in *Bremen* and expounded upon through *Atlantic Marine*."); Barnett v. DynCorp Int'l, LLC, 831 F.3d. 296, 301–03 (5th Cir. 2016) (considering the possibility that state law governed whether the forum selection clause was void). "Enforceability," as used in *Wylie* and *Barnett*, refers to *one* component of "contractual validity." *See infra* notes 97–101 and accompanying text.

15. *See, e.g.*, Martinez v. Bloomberg LP, 740 F.3d 211, 220 (2d Cir. 2014) ("To ensure that the meaning given to a forum selection clause corresponds with the parties' legitimate expectations, courts must apply the law contractually chosen by the parties to interpret the clause."); *Collins*, 874 F.3d. at 183 ("[W]e find no reason under . . . the *Erie* doctrine to apply federal common law to interpret the forum selection clauses in the Agreements here."); *Albemarle*, 628 F.3d at 649–50 (holding as a matter of federal common law that a court must apply the parties' choice of law in interpreting a forum clause); *Weber*, 811 F.3d at 770 (rejecting the use of "general common-law contract principles" to interpret forum selection clauses); Firexo, Inc. v. Firexo Grp. Ltd., 99 F.4th 304, 327 (6th Cir. 2024) ("Under the *Erie* approach to contract interpretation, a federal court sitting in diversity begins with a conflict-of-laws analysis using the law of the State in which it sits (here Ohio) to determine the governing law,

circuits have also rejected reliance on federal common law to determine the applicability of forum selection clauses to non-signatories.[16]

In an even more striking development, the Ninth Circuit has held that a federal district court was bound by an Idaho statute that invalidated on public policy grounds *all* forum selection clauses whose enforcement was sought in Idaho courts.[17] That decision displayed a remarkably weak attachment to the federal common law enunciated in *The Bremen*. The Court in *The Bremen* had specifically rejected the contention that forum selection clauses *as a category* may be deemed invalid contractual obligations on public policy grounds.[18] But relying instead on language in *The Bremen* that was shorn of context,[19] the Ninth Circuit held that federal courts were required to enforce an

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and then interprets the contract provision under that law."); Abbott Lab'ys v. Takeda Pharm. Co., 476 F.3d 421, 423 (7th Cir. 2007) (stating that "[s]implicity argues for determining the validity and meaning of a forum selection clause, in a case in which interests other than those of the parties will not be significantly affected by the choice of which law is to control, by reference to the law of the jurisdiction whose law governs the rest of the contract in which the clause appears"); Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006) ("We see no particular reason, at least in the international context, why a forum-selection clause, among the multitude of provisions in a contract, should be singled out as a provision not to be interpreted in accordance with the law chosen by the contracting parties."); *cf. Manetti-Farrow*, 858 F.2d at 513 ("[B]ecause enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum selection clauses.").

16. *Firexo*, 99 F.4th at 311–21, 326–27 (6th Cir. 2024) (discussing the "closely related" doctrine applied by some federal courts to bind non-signatories to a forum selection clause before rejecting the doctrine as an illegitimate form of federal common law); *In re* McGraw-Hill Glob. Educ. Holdings LLC., 909 F.3d 48, 58 (3d Cir. 2018) ("State law . . . typically governs whether . . . the clause applies to a non-signatory as an intended beneficiary or closely related party."); *see also Wylie*, 706 F. App'x at 578–80 (raising the possibility that state law might govern whether the plaintiff could be bound by the forum selection clause in an agreement only her husband had signed).

17. Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 912 (9th Cir. 2019).

18. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9–10 (1972) (noting that "[m]any courts, federal and state, have declined to enforce such clauses on the ground that they were 'contrary to public policy,' or that their effect was to 'oust the jurisdiction' of the court," but declaring that the Court "believe[d]" instead "that such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances").

19. *Id.* at 15 (stating that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision").

Idaho statute that categorically invalidated forum selection clauses.[20] In so ruling, the Ninth Circuit functionally held that state public policy—unmediated by the important qualification implicit in *The Bremen*—governs the validity of forum selection clauses.

The renewed attention to *Erie* considerations in these and other cases deserves applause. But ultimately, *Erie* provides no sound rationale for applying federal common law rules to determine some matters of contractual validity and the whole law of the state in which the federal district court sits to others. Thus, these cases are less a model of sound reasoning than a signal that the time is ripe for a wholesale reexamination of the role state law should play in determining the contractual validity of forum selection clauses. This Article conducts that reexamination.

The view that federal common law governs some or all issues of contractual validity in a § 1404(a) analysis simply misreads the Court's forum-selection-clause cases and misconceives the demands of *Erie*. Indeed, *Atlantic Marine Construction Co. v. United States District Court*[21]—when read in the light of *Erie*—compels the conclusion that the whole law of the state in which a federal district court sits governs the contractual validity of a forum selection clause in a § 1404(a) analysis. This is because the Court in *Atlantic Marine* insisted that the choice-of-law rules of the state to which the suit is transferred govern whenever the transfer is required by a contractually valid forum selection clause.[22] And that conclusion is consistent with the *Erie* policy[23] of vertical uniformity between state and federal courts *only if* the whole law of the state in which the transferring federal district court sits governs contractual validity. Nor is this concern limited to diversity cases. The *Erie* policy is relevant in this context to all cases except those in admiralty or in which federal contract law otherwise governs the underlying contract.[24]

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20. *Gemini Techs.*, 931 F.3d at 916.

21. 571 U.S. 49 (2013).

22. *Id.* at 64–65.

23. The "*Erie* policy" refers specifically to the policy which had its origin in *Erie*'s discussion of the social and political defects of the pre-*Erie* regime. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 73–77 (1938). As the Court explained in *York*: "The nub of the [*Erie*] policy . . . is that for the same transaction the accident of a suit . . . in a federal court instead of in a State court a block away should not lead to a substantially different result." Guaranty Tr. Co. v. York, 326 U.S. 99, 109 (1945).

24. *See infra* Section I.C.2.

Thus, in the absence of a federal interest or policy that outweighs the *Erie* policy, *Erie* requires that the whole law of the state in which the federal district court sits govern the contractual validity of a forum selection clause when a transfer of venue is sought under § 1404(a). It is sometimes argued that the federal interest in controlling the venue in which a suit is heard requires that federal law govern the validity of a forum selection clause. But the Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*,[25] properly understood, held that even a forum selection clause *invalid under state law* may, in appropriate circumstances, provide *evidence* with respect to the parties' convenience in a full-blown § 1404(a) analysis.[26] And even when a forum selection clause is entitled to no weight at all, transfer within the federal judicial system is still available under § 1404(a). Because a federal district court may transfer even when a forum selection clause is contractually invalid, there are no procedural policies or interests weighty enough to justify disregarding the *Erie* policy in determining whether a forum selection clause is contractually valid. The policy of enforcing contractually valid forum selection clauses protects the legitimate contractual expectations of the parties, not the federal interest in forum allocation.

By contrast, federal common law properly governs the contractual validity of a forum selection clause when a *forum non conveniens* analysis weighs whether the *federal judicial system* is the appropriate forum for a suit. The answer to that specific question cannot plausibly depend on the law of the state in which a federal district happens to sit. That is not to say that uniform federal common law rules must govern all questions of contractual validity. But the need for a uniform answer across the federal judicial system remains undiminished even when uniform federal common law rules are not being applied. Thus, when the use of state or foreign law would protect the legitimate expectations of the parties without interfering with federal policies regulating forum selection clauses, federal courts should *borrow* state or foreign law through a federal common law choice-of-law rule that points *all* federal courts—wherever they sit—to the same law. Specifically, when a matter is not governed by *The Bremen* and its progeny, federal courts should apply the chosen law, or in the absence of a choice that validates the forum selection clause at the time of contracting, the whole law of the chosen forum. Looking instead to the choice-of-law rules of the state

25. 487 U.S. 22 (1988).
26. *See infra* Section I.A.1.

in which the federal district court sits would give insufficient weight to the importance of a uniform resolution across the federal judicial system.

The argument is in two parts. Part I addresses the enforcement of forum selection clauses through § 1404(a) motions to transfer venue. Part II then considers the enforcement of such clauses through motions to dismiss on grounds of *forum non conveniens*.

I. GIVING EFFECT TO FORUM SELECTION CLAUSES THROUGH § 1404(A) MOTIONS

The Court's precedents have identified two separate ways in which a forum selection clause may be given effect in federal court: (1) through a full-blown § 1404(a) analysis in which even a forum selection clause invalid under state law may be treated as evidence with respect to the parties' convenience (*Stewart*); and (2) through a streamlined § 1404(a) or federal *forum non conveniens* analysis in which a "contractually valid" forum selection clause is controlling in all but exceptional cases (*Atlantic Marine*).

This Part focuses on § 1404(a) motions to enforce forum selection clauses.[27] Section I.A explores the alternative paths authorized by *Stewart* and *Atlantic Marine* for giving effect to forum selection clauses. The Section explains why *Stewart* is best read as requiring consideration of a forum selection clause as *evidence* in a full-blown § 1404(a) analysis and recognizes that *Atlantic Marine* separately treats a contractually valid forum selection clause as a waiver of "private"—as opposed to "public"—bases for resisting transfer under § 1404(a). Section I.B then explores and rejects the argument that some or all of the grounds set forth in *The Bremen* for refusing to enforce a forum selection should not be deemed contractual for purposes of determining whether a forum selection clause is "contractually valid" within the meaning of

27. The analysis set forth in this Part rests on the assumption that venue is properly laid in the federal district court in which suit is brought *and* that the federal district court has personal jurisdiction over the defendant. *See* 15 WRIGHT ET AL., *supra* note 4, § 3842 (recognizing that while § 1406(a) governs when venue is lacking, courts disagree about which transfer statute—§ 1404(a), § 1406(a), or § 1631—applies when venue is properly laid but the court lacks personal jurisdiction over the defendant). If venue is improperly laid, the court lacks personal jurisdiction over the defendant, or both, the district court (if it does not dismiss) will transfer, not to enforce the forum selection clause, but to cure the defect or defects that would otherwise have required dismissal. In such a case, it is irrelevant whether the forum selection clause is contractually valid under the law of the state in which the federal district court sits.

Atlantic Marine. Finally, Section I.C makes the case that to the extent that state and federal law governing contractual validity differ, *Erie* and *Atlantic Marine* require that the contractual validity of a forum selection clause in a § 1404(a) analysis be determined by the whole law of the state in which the federal district court sits.[28]

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28. Neither *Stewart* nor *Atlantic Marine* addresses a separate requirement of § 1404(a)—that transfer of a suit be to a district "where it might have been brought *or* . . . to which all parties have consented." 28 U.S.C. § 1404(a) (emphasis added).

If "consent" can be established by demonstrating that the forum selection clause is contractually valid under the law of the state in which suit is brought, this separate requirement will pose no additional obstacle to the enforcement of a forum selection clause in a case involving only parties bound by the forum selection clause.

It will be a different story, however, if to establish "consent" a forum selection clause must be contractually valid under the law of the state to which the suit would be transferred. In most—but not all—such cases, establishing "consent" would be no different than showing that suit "might have been brought" in the district to which transfer is sought.

The "might have been brought" language of § 1404(a) requires a transferor court to "assess" whether "personal jurisdiction and venue" would have existed "in the *transferee* court as of the time the suit was brought." 15 WRIGHT ET AL., *supra* note 4, § 3845 (emphasis added). The transferor court is the federal district court in which the suit is filed or to which it is removed, and the transferee court is the federal district court to which the suit is transferred.

Erie suggests that the law of the state in which the transferee federal district court sits should govern whether the transferee court has personal jurisdiction. *See* Patrick Woolley, *Rediscovering the Limited Role of the Federal Rules in Regulating Personal Jurisdiction*, 56 HOUS. L. REV. 565, 607–24, 626–27 (2019) (arguing that *Erie* generally requires that state law govern amenability to jurisdiction in the absence of congressional legislation to the contrary and that Rule 4(k)(1)(A) reaches the same result). For discussion of state jurisdictional law in this context, see John F. Coyle & Katherine Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 56 Ariz. St. L.J. 65, 84–94 (2021). A forum selection clause that is contractually valid under the law of the transferee state provides consent to jurisdiction before suit is brought. *Id.* at 76–77 ("If a defendant contractually agrees to submit to jurisdiction in a court before a lawsuit is filed, then that defendant is said to have *consented* to personal jurisdiction in the chosen court.").

Venue—unlike personal jurisdiction—is always governed by federal law. But if the forum selection clause is contractually valid under the law of state in which the transferee court sits, that should be enough to establish consent to venue in advance of the suit.

For all of these reasons, if a forum selection clause must be contractually valid under the law of the transferee state to establish consent, establishing consent will usually be indistinguishable from showing that the transferee district is a district where suit might have been brought. The separate consent alternative of § 1404(a) would have independent significance only if the law of the state in which the transferee federal district court sits would *not* treat consent obtained through a contractually valid

A. Stewart *and* Atlantic Marine *Provide Alternative Methods for Giving Effect to Forum Selection Clauses*

1. Stewart

Stewart Organization v. Ricoh was the first case in which the Court addressed the use of § 1404(a) to give effect to a forum selection clause.[29] The now oft-ignored majority opinion came sixteen years after the Court's seminal decision in *The Bremen*, an admiralty case that insisted that forum selection clauses should no longer be disfavored.[30]

The defendant in *The Bremen* sought to give effect to the forum selection clause through a motion to dismiss on *forum non conveniens* grounds.[31] But as other scholars have perceptively noted, *The Bremen* Court essentially used the *forum non conveniens* motion as a vehicle to enforce the forum selection clause as a *contract*.[32] Specifically, *The*

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forum selection clause as a *sufficient* basis for the exercise of personal jurisdiction. *See id.* at 87–92 (noting that some states impose additional requirements for jurisdiction).

29. 487 U.S. at 28.

30. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972).

31. *Id.* at 4. The clause required that suit be brought in the London Court of Justice. *Id.*

32. David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMPLE L. REV. 785, 787 (1993) ("The . . . approach . . . articulated in *The Bremen* and refined in *Shute*, views the question of enforcement primarily as a question of contract formation."); Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 152 (1982) ("*Bremen* recognizes the contractual *right* of the defendant to have the forum clause specifically enforced by the excluded forum; only in exceptional cases may a court refuse to enforce the agreement."). It has been argued that the evolution from a *forum non conveniens* analysis to a contractual analysis began later than *The Bremen*. *See* Marcus, *supra* note 1, at 991, 1019, 1027 (noting that "[a]ccording to one standard interpretation, *The Bremen* provides a contractual approach to clause enforcement" but arguing that the case "makes more sense as an affirmation of the forum non conveniens approach" and that it was *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991), that "entrenched [a] freedom of contract ideology"); *cf.* Maggie Gardner, *Admiralty's Influence*, 91 GEO. WASH. L. REV. 1585, 1603–08 (2023) (agreeing with Marcus that the process was more gradual than is sometimes recognized, but also noting that *The Bremen* began "a significant shift in the justification for, and the strength of, the federal policy of enforcing forum selection clauses when it invoked the 'ancient concepts of freedom of contract' to support its holding," thus helping to "reorient the frame for forum selection clause enforceability from an all-things-considered evaluation of reasonableness to a stricter adherence to contractual language" (quoting *The Bremen*, 407 U.S. at 11)). The precise timing of the shift is less important for purposes of this Article than the fact that when *Stewart* was decided *The Bremen* was widely understood as setting forth a contractual approach to the enforcement of forum selection clauses.

Bremen held that a forum selection clause, while *prima facie* valid, should not be enforced when doing so "would be unreasonable and unjust," or "the clause [would be] invalid for such reasons as fraud or overreaching," or "public policy."[33] In so holding, the Court began to develop a *federal* standard for determining the contractual validity of forum selection clauses in admiralty cases, a context in which federal law indisputably governs.

The defendant in *Stewart*, by contrast, sought a transfer of venue from the Northern District of Alabama to the Southern District of New York on the ground the forum selection clause required that suit be brought "in a court located in Manhattan."[34] The district court denied the motion because Alabama law deemed forum selection clauses invalid as a matter of public policy.[35] The Eleventh Circuit, purporting to apply "the standards articulated in . . . [*The Bremen*],"[36] reversed, holding that "the choice of forum clause in this contract was in all respects enforceable generally as a matter of federal law."[37]

The Supreme Court disagreed with the Eleventh Circuit's "articulation of the relevant inquiry as 'whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*.'"[38] But the Court also insisted that § 1404(a)—not Alabama law—governed whether the forum selection clause should be given effect: "The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a)."[39] As the Court explained:

Marcus, *supra* note 1, at 1021 ("If anything, [*Stewart*] should have slowed or reversed the trend by which courts derived a contractual approach to [forum selection] clause enforcement from *The Bremen*.").

33. 407 U.S. at 15 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.").

34. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 24 (1988).

35. *Id.* at 24, 30.

36. *Id.* at 25.

37. *Id.* (quoting Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1071 (11th Cir. 1987) (per curiam)).

38. *Id.* at 29 (quoting *Stewart*, 810 F.2d at 1069).

39. *Id.* at 31. The Court noted that "Congress has directed that multiple considerations govern transfer within the federal court system, and a state policy

> A motion to transfer under § 1404(a) . . . calls on the district court to weigh in the balance a number of case-specific factors. The presence of a forum-selection clause such as the parties entered into in this case will be a significant factor that figures centrally in the district court's calculus. In its resolution of the § 1404(a) motion in this case, for example, the District Court will be called on to address such issues as the convenience of a Manhattan forum given the parties' expressed preference for that venue, and the fairness of transfer in light of the forum-selection clause and the parties' relative bargaining power. The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties' private expression of their venue preferences.[40]

The Court's conclusion that a federal court faced with a forum selection clause must consider the convenience of the selected forum "given the parties' expressed preference for that venue and the fairness of the transfer in light of the parties' relative bargaining power,"[41] strongly suggests an evidentiary lens—not a contractual one—for assessing a forum selection clause.[42] *Stewart*, in other words, suggests that a forum selection clause may be a relevant factor in a full-blown § 1404(a) analysis because the clause may provide *evidence* about whether a transfer would promote "the convenience of parties and witnesses" and be "in the interest of justice."[43] Such evidence may be

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focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat that command." *Id.*

40. *Id.* at 29–30.

41. *Id.* at 29.

42. *Cf.* Kermit Roosevelt III & Bethan R. Jones, *Adrift on* Erie*: Characterizing Forum-Selection Clauses*, 52 AKRON L. REV. 297, 316 (2018) ("[T]here is a difference between . . . whether a forum selection clause is valid and . . . what effect the clause should have in federal litigation. . . . [A]n invalid clause might, in some circumstances, carry some weight."); Stephen E. Sachs, *Five Questions after* Atlantic Marine, 66 HASTINGS L.J. 761, 769 (2015) [hereinafter Sachs, *Five Questions*] (noting that under *Stewart* "[a] clause can justify transfer even if it's wholly unenforceable under the relevant law"); Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB. POL. 1, 5 (2014) [hereinafter Sachs, *Forum Selection*] (noting that "not all agreements have their legal effect determined exclusively by contract law").

43. 487 U.S. at 29 (quoting 28 U.S.C. § 1404(a)). As Caelan Mitchell–Bennett noted in providing comments on an earlier draft, a forum selection clause does not constitute definitive proof that the selected forum is convenient for both parties, or even one of them. But if the forum selection clause is freely entered into by parties with substantial bargaining power, that evidentiary fact suggests, at a minimum, that the allocation of convenience between the parties was not so out of whack that they were unable to reach agreement. It thus makes sense to give *some* evidentiary weight to

crucial to the "individualized, case-by-case consideration of convenience and fairness" that § 1404(a) ordinarily demands.[44]

In concluding that the forum selection clause should be deemed a factor in a full-blown § 1404(a) analysis, the Court harked back to a pre-*Bremen* understanding of how forum selection clauses may be given effect.[45] *The Bremen* held—or at least was understood to hold—that forum selection clauses would be enforced as contracts when federal law governs the validity of a forum selection clause.[46] But some courts before *The Bremen* had treated a forum selection clause as simply a relevant factor in a full-blown *forum non conveniens* analysis.[47] And to the extent the forum selection clause in *Stewart* was contractually invalid—as the federal district court had held—the pre-*Bremen* approach provided a sound basis for giving the clause effect, if appropriate, even if a contractual approach would not.

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the forum selection clause in considering the convenience of the parties. *See supra* notes 40–44 and accompanying text.

44. *Stewart*, 487 U.S. at 29 (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)). *Ferens v. John Deere Co.*, 494 U.S. 516 (1990), does not require a different understanding of *Stewart*. Describing the Court's earlier decision in *Stewart*, *Ferens* stated:

> We have held, in an isolated circumstance, that § 1404(a) may pre-empt state law. See *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (holding that federal law determines the validity of a forum selection clause). In general, however, we have seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case under *Erie*.

Ferens, 494 U.S. at 526. This description of *Stewart*—while ambiguous—is consistent with the understanding that a forum selection clause that state law would deem contractually invalid may be used as evidence of the parties' convenience in a § 1404(a) analysis. "Validity" is not a term confined to contract law. *See, e.g.*, Birchfield v. North Dakota, 579 U.S. 438, 455 (2016) (assessing validity in the context of search warrants). And *Stewart* does in fact hold that the validity of a forum selection clause is governed by federal law in the limited sense that federal law determines whether a forum selection clause may be considered in and ultimately be given effect in a § 1404(a) analysis. 478 U.S. at 28. *Ferens* should have avoided the ambiguity by eschewing any reference to "validity." But properly understood, *Ferens* simply points out that § 1404(a) sometimes displaces state law in federal court because a forum selection clause, in appropriate circumstances, may be given effect under § 1404(a) even if state law would refuse to give the clause effect.

45. *See* Taylor, *supra* note 32, at 822 (arguing that the *Stewart* approach "is the same as that applied by lower courts prior to *The Bremen* that utilized the forum non conveniens formulation of reasonableness").

46. *See supra* notes 10, 32 and accompanying text.

47. *See* Taylor, *supra* note 3232 at 799–806 (discussing some of the pre-*Bremen* circuit court authority); *see also* Marcus, *supra* note 1, at 993–1015 (discussing pre-*Bremen* case law in state and federal courts).

That is not to say that there is no overlap between the analysis *Stewart* requires and the federal law of contractual validity set forth in *The Bremen* and its progeny. There is, in fact, substantial overlap. But there are important differences as well. So, for example, although the Court in *Carnival Cruise Lines, Inc. v. Shute*[48] appeared to deem contractually valid a forum selection clause in an adhesion contract,[49] it is doubtful that an adhesion contract provides any evidence that the forum selected by the contract is in fact convenient for the weaker contracting party.[50] Conversely, a forum selection clause that is invalid on grounds of public policy—as apparently was the case in *Stewart*—may nonetheless provide evidence of the parties' expressed forum preferences and, therefore, evidence as to the convenience of the parties.

Justices Kennedy and O'Connor "concur[red] in full" with the majority opinion.[51] But Justice Kennedy—in an opinion joined by Justice O'Connor—further argued that "a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases."[52] That standard, the concurrence contended, would "spare litigants unnecessary costs" and "relieve courts of time-consuming pretrial motions."[53] The concurrence also endorsed "[t]he justifications [the Court had] noted in *The Bremen* to counter the historical disfavor forum-selection clauses had received in American courts" and stated that those justifications "should be understood to guide" analysis under § 1404(a).[54] But, as discussed below, those justifications do not require that the contractual validity of a forum selection clause be determined by federal law.[55] Nor do those justifications require that only contractually valid forum selection clauses be given effect. Indeed, because Justices Kennedy and O'Connor concurred *in full* in the majority opinion, the concurrence is best understood as presenting an alternative path *when* a defendant

48. 499 U.S. 585 (1991).

49. *See id.* at 593 (rejecting the view "that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining").

50. *Cf.* Taylor, *supra* note 32, at 832 (arguing that "[u]nder *Stewart* . . . a court may consider the relative bargaining power of the parties in regard to fairness").

51. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 33 (1988) (Kennedy, J., concurring).

52. *Id.*

53. *Id.*

54. *Id.*

55. *See infra* notes 169–82 and accompanying text.

seeks enforcement of a contractually valid forum selection clause through a § 1404(a) motion.

The lone dissenter, Justice Scalia, emphasized that § 1404(a) "looks to the present and the future"[56] and complained that the Court's approach "inevitably import[ed] . . . a new *retrospective* element into [a] court's deliberations, requiring examination of what the facts were concerning, among other things, the bargaining power of the parties and the presence or absence of overreaching at the time the contract was made."[57] But although the assessment of a forum selection clause is retrospective in the sense that Justice Scalia noted, a *freely negotiated clause*—at least in the absence of a significant change in circumstances—does provide evidence with respect to the convenience of the parties at the time suit is brought.

Justice Scalia also expressed concern that the Court was applying a federal common law of contracts in deciding that a forum selection clause invalid under state law is entitled to consideration in a § 1404(a) analysis.[58] He insisted that state law governs the contractual validity of a forum selection clause and that a contractually invalid clause is entitled to *no* weight in a § 1404(a) analysis.[59] But Justice Scalia misread *Stewart* as holding that federal law determines the contractual validity of a forum selection clause in a § 1404(a) analysis. The Court did not so hold or even suggest. The Court simply stated the proper question in the case was whether the district court should "give effect to the parties' forum-selection clause" after conducting a full-blown § 1404(a) analysis.[60] Justice Scalia's argument that the Court held that federal—rather than state—law governs the contractual validity of a forum selection clause appears to rest solely on the false assumption that a forum selection clause may be given effect *only if* the clause is

56. *Stewart*, 487 U.S. at 34 (Scalia, J., dissenting).
57. *Id.* at 34–35.
58. *Id.* at 38–39.
59. *Id.* at 36.
60. *Id.* at 32 (majority opinion).

contractually valid.[61] But as discussed above, contractual validity need not be a pre-requisite to giving a forum selection clause effect.[62]

2. Atlantic Marine

The Court next addressed whether a forum selection clause may be given effect through a § 1404(a) transfer in *Atlantic Marine Construction Co. v. United States District Court.* There, J-Crew Management, a subcontractor of Atlantic Marine Construction Co., sued Atlantic Marine when a dispute arose over payment under the subcontract.[63] J-Crew brought suit in the Western District of Texas despite a forum selection clause requiring "that all disputes between the parties '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.'"[64] Atlantic Marine sought enforcement of the forum selection clause through, among other things, a motion to transfer venue under § 1404(a).[65]

After deciding that the forum selection clause was a valid part of the parties' agreement,[66] the district court considered whether the clause should be enforced through a transfer of venue.[67] In so doing, the district court "'consider[ed] a nonexhaustive and nonexclusive list of

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61. For an argument that Justice Scalia was correct, see, for example, Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 337–38 (1988) (quoting *Stewart,* 487 U.S. at 35 (Scalia, J., dissenting)), which argues: "Justice Scalia . . . correctly identified the . . . problem that the Court's majority missed: . . . '[W]hat law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties.'"

62. *See supra* notes 41–47 and accompanying text.

63. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 53 (2013).

64. *Id.* (quoting *In re* Atl. Marine Constr. Co., 701 F.3d 736, 737–38 (5th Cir. 2012)).

65. *Id.*

66. *Id.* at 54–55. J-Crew, relying on the Texas Business and Commerce Code, had argued that the forum selection clause had been voided by its decision to file suit in Texas. United States *ex rel.* J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co., No. A-12-CV-228-LY, 2012 WL 8499879, at *2 (W.D. Tex. Aug. 6, 2012). The Code provides in relevant part that a forum selection clause in a contract principally for construction or repair of an improvement to real property in the state is voidable by the party obligated to perform the construction and repair. *Id.* at *8. The district court, however, rejected that argument, holding that the provision was inapplicable because the real property was not "in the state" but in Fort Hood, a federal enclave. *Id.* at *2. It does not appear that any other issue with respect to contractual validity was raised. *See id.* at *2–3 (discussing only this issue in the part of the opinion labeled validity and enforceability).

67. *Atl. Marine*, 571 U.S. at 53.

public and private interest factors,' of which the 'forum-selection clause [was] only one such factor.'"[68] The district court declined to transfer in part because compulsory process would not be available for the majority of J-Crew's witnesses and because significant expense would be incurred for witnesses willing to travel.[69] The Fifth Circuit denied a writ of mandamus on the ground that the district court "had not clearly abused its discretion in refusing to transfer the case after conducting the balance-of-interests analysis required by § 1404(a). That was so even though there was no dispute that the forum-selection clause was valid."[70]

The Supreme Court reversed. Specifically, the Court held that when parties agree to a *contractually valid* forum-selection clause,[71] "they *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. A court accordingly must deem the private-interest factors to weigh entirely in favor of the preselected forum."[72] The waiver of the private-interest factors leaves for consideration the "public-interest factors of systemic integrity and fairness" which fall under the heading of "the interest of justice."[73] And because the parties have waived consideration of the private-interest factors, the "interest of justice" by definition is "the overarching consideration" in a § 1404(a) analysis.[74] The public-interest factors—through which courts assess the "interest

68. *Id.* (second alteration in original) (quoting *Atl. Marine*, 2012 WL 8499879, at *5).

69. *Id.* at 53–54.

70. *Id.* at 54–55.

71. *Id.* at 62 n.5 (stating that its analysis "presupposes a contractually valid forum-selection clause").

72. *Id.* at 64.

73. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988) ("The district court also must weigh in the balance the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'").

74. *Atl. Marine*, 571 U.S. at 63. Robin Effron has criticized the Court's conclusion that the "interest of justice" is "the overarching consideration" in a § 1404(a) analysis. *See* Robin Effron, Atlantic Marine *and the Future of Forum Non Conveniens*, 66 HASTINGS L.J. 693, 713–14 (2015) (quoting *Atl. Marine*, 571 U.S. at 63) (noting that Justice Alito "provided no further insight as to why such a parsing of the language is the best or even a plausible reading of § 1404(a)" given the full statutory language). But *Atlantic Marine* should be read as making the limited and correct point that a waiver of arguments based on private-interest factors leaves the "interest of justice" as the all-embracing or comprehensive—that is, the overarching—criterion in a § 1404(a) analysis.

of justice"—"will rarely defeat a transfer motion."[75] So, "the practical result is that forum-selection clauses should control except in unusual cases."[76]

Atlantic Marine did not opine on how a forum selection clause should figure into a § 1404(a) analysis when the clause is *not* contractually valid. But there is no reason to believe that the Court overruled *Stewart*'s holding that even a forum selection clause invalid under state law may be considered in a full-blown § 1404(a) analysis. Rather, *Atlantic Marine* endorsed an additional method for giving effect to forum selection clauses—the method Justices Kennedy's concurrence in *Stewart* had championed.[77] Justice Kennedy's separate opinion in that case—which "concur[red] in full" with the opinion of the Court—is consistent with the understanding that there are two ways in which a forum selection clause may be given effect under § 1404(a).[78] The Court in *Atlantic Marine* said nothing to suggest that it had a narrower understanding.

Nor does *Atlantic Marine* define the term "contractual validity," let alone opine on what law governs the contractual validity of a forum selection clause. The Court had no need to do so because, by the time the case reached the Court of Appeals, there was no dispute that the forum selection clause was contractually valid.[79] As discussed in Section I.C, *Atlantic Marine*—when read in the light of *Erie*—ordinarily requires that the whole law of the state in which the federal district court sits govern the contractual validity of a forum selection clause in a § 1404(a) analysis. But before turning to that issue, the Section that follows seeks to define "contractual validity" for purposes of a § 1404(a) or *forum non conveniens* analysis of a forum selection clause.

B. The Bremen *Identifies Matters Within the Scope of "Contractual Validity"*

The Bremen—which many states have chosen to incorporate into their law[80]—sets forth a basic, though incomplete, contract rule for forum selection clauses when federal law governs.[81] Such a clause, while "*prima facie* valid," should not be "specifically" enforced when doing so

75. *Atl. Marine*, 571 U.S. at 64.
76. *Id.*
77. *Id.*
78. *See supra* Section I.A.1.
79. *Atl. Marine*, 571 U.S. at 62 n.5.
80. *See infra* note 106 and accompanying text.
81. *See infra* notes 229–31 and accompanying text.

"would be unreasonable and unjust," or "the clause [would be] invalid for such reasons as fraud or overreaching" or "public policy."[82] But the fact that the defendant in *The Bremen* sought to enforce the forum selection clause through a motion to dismiss on grounds of *forum non conveniens*[83] has sometimes obscured the contractual basis of the decision.

There is in fact overlap between a contractual analysis and a full-blown *forum non conveniens* analysis of a forum selection clause. Whether a choice of forum would be "unreasonable or unjust," for example, is a consideration that fits comfortably into a full-blown *forum non conveniens* analysis. But whether a choice of forum would be unreasonable or unjust also fits into a contractual analysis. While contract law rarely requires a reasonableness analysis,[84] forum selection clauses are not the only kind of contractual provision subject to a reasonableness limit on enforcement.[85] Conversely, fraud and public policy are classic contract defenses,[86] although they can also fit into a full-blown *forum non conveniens* analysis. Public policy is a recognized basis for denying a motion to dismiss on grounds of *forum non conveniens*.[87] And to the extent a forum selection clause is procured through fraud, such a clause provides no reliable evidence with respect

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82. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 15 (1972) ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.").

83. *Id.* at 4.

84. *See* Marcus, *supra* note 1, at 1018 (noting in an analysis of *The Bremen* that "[t]he term *unreasonable* has uncertain status in contract").

85. Covenants not to compete are one example of a contractual provision that may be enforced only if reasonable. *See* Kenneth G. Dau-Schmidt, Xiaohan Sun & Phillip J. Jones, *The American Experience with Employee Non-Compete Clauses: Constraints on Employees Flourish and Do Real Damage in the Land of Economic Liberty*, 42 COMPAR. LAB. L. & POL'Y J. 585, 596 (2022) (stating that "[c]ovenants not to compete are enforced only if they are reasonable in their duration, proscribed activities, and geographic scope" and that "[t]he reasonableness of the covenant's constraints are judged in light of the employer's legitimate interest"); Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 727 (1985) ("The reasonableness approach to post-employment restraint agreements, which is contrary to the general rule that courts will not examine the substantive fairness of contract terms, has remained virtually unchanged since 1711 . . . .").

86. *See* David Adam Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 565 (2012) (public policy); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 361, 365 n.18 (1993) (fraud).

87. *See infra* note 96 and accompanying text.

to the convenience of the parties, a key criterion in a full-blown *forum non conveniens* analysis.

But despite the overlap between a contractual validity and full-blown *forum non conveniens* analysis, *The Bremen*'s analysis is noticeably less wide-ranging and less discretionary than a full-blown *forum non conveniens* analysis.[88] From that perspective, *The Bremen*—like *Atlantic Marine*—is a *forum non conveniens* case less because it faithfully applies *forum non conveniens* doctrine than because it uses *forum non conveniens* as a vehicle to enforce contractually valid forum selection clauses.[89]

Several Ninth Circuit decisions have nonetheless rejected the view that the grounds *The Bremen* identified for refusing to enforce a forum selection clause are part of a "contractual validity" analysis.[90] Those grounds, these decisions claim, go instead to whether a case includes an "exceptional factor[],"[91] within the meaning of *Atlantic Marine*, which warrants denying enforcement to a contractually valid forum selection clause.[92]

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88. *See* Gruson, *supra* note 32, at 152 (noting that "[o]ne could say that in" pre-*Bremen* *forum non conveniens* cases "the discretion of the court is the rule, while in *Bremen* it is an exception" (first citing Wm. H. Muller & Co. v. Swedish Am. Line Ltd., 224 F.2d 806 (2d Cir. 1955); and then citing Exp. Ins. Co. v. Mitsui S.S. Co., 274 N.Y.S.2d 977 (App. Div. 1966))); *see also* Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: The Role of Judicial Discretion*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 185, 193 (2004) (stating that *The Bremen* "introduced a form of convenience analysis different from that used in traditional *forum non conveniens*"); George Weisz, Nancy E. Schwarzkopf & Mimi Panitch, *Selected Issues in Sovereign Debt Litigation*, 12 U. PA. J. INT'L BUS. L. 1, 14 (1991) (noting that *The Bremen* defines the term "serious inconvenience"—one of the grounds for finding a forum selection clause unreasonable—to mean that "litigation in the contractual forum must be so gravely inconvenient to the resisting party that it will be essentially deprived of a meaningful day in court" and arguing that "[t]his is a much higher level of inconvenience than would be necessary to justify a transfer under the traditional *forum non conveniens* doctrine").

89. Buxbaum, *supra* note 88, at 193 ("In holding that forum selection clauses were presumptively enforceable, the Court in *Bremen* indicated that private choice would ordinarily displace consideration of at least the private-interest factors reflected in normal *forum non conveniens* analysis.").

90. *See* Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 915 (9th Cir. 2019) (expressly looking to *The Bremen* to determine whether an "'extraordinary circumstance[]' [existed] in which courts should not give controlling weight to a valid forum-selection clause" (quoting Sun v. Advanced China Healthcare, Inc., 901 F.3d 1081, 1088 (9th Cir. 2018))).

91. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 62 (2013).

92. *Sun*, 901 F.3d at 1087–88.

Atlantic Marine, however, expressly held that a contractually valid forum selection clause waives all but the public-interest factors.[93] Thus, it is only the public-interest factors—not the private-interest factors—that can create an exceptional case in which a contractually valid forum selection clause may be denied enforcement. As the Court explained, "[o]nly under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied."[94] And whether the forum selection clause is unreasonable or unjust—or as the Ninth Circuit decisions put it, whether "trial in the contractual forum will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be deprived of his day in court"[95]—would properly fall under the private- rather than public-interest factors in a full-blown *forum non conveniens* analysis. Similarly, whether a forum selection clause should be denied enforcement because of fraud or overreaching addresses a core contractual issue that has no connection to the public-interest factors. By contrast, there is no question that a legislative or judicial decision to treat a forum selection clause as contrary to public policy may reflect a "local interest in having localized controversies decided at home,"[96] a public-interest factor. But that merely indicates that there is overlap between the contractual public policy defense and the public-interest factors. It does not change the fact that public policy may provide a basis for concluding that a forum selection clause is not valid as a contractual matter. For all of these reasons, decisions that treat the bases identified in *The Bremen* as outside the scope of "contractual validity" for purposes of *Atlantic Marine* are simply wrong.

An even more problematic argument is that *Atlantic Marine* overruled *sub silentio The Bremen*'s public policy exception and presumably *The Bremen*'s reasonableness analysis as well.[97] That

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93. *See Atl. Marine*, 571 U.S. at 64.

94. *Id.* at 62.

95. *Sun*, 901 F.3d at 1088 (alteration in original) (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18 (1972)).

96. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947). And quite apart from the public-interest factors the Court has identified, federal statutes in some cases may provide a basis for concluding that public policy bars a *forum non conveniens* dismissal. *See* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 477–79 (7th ed. 2023) (noting that vindicating the public policy of the forum is a basis for refusing to grant a *forum non conveniens* motion).

97. *See, e.g.*, Gemini Techs., Inc. v. Smith & Wesson Corp., 931 F.3d 911, 914 (9th Cir. 2019) (discussing the district court's conclusion that *The Bremen*'s "public policy factor is no longer good law after *Atlantic Marine*").

argument draws on a distinction between validity and enforceability in contract law. Validity, thus understood, goes to whether a contract was properly formed or revoked, and enforceability addresses matters such as public policy and reasonableness.[98] By indicating that its analysis depended on a contractually valid forum selection clause, the argument goes, *Atlantic Marine* excised reasonableness and public policy as contractual bases for denying enforcement to a forum selection clause.[99] But as the Ninth Circuit has pointed out, there is no reason to believe that *Atlantic Marine* overruled *The Bremen*.[100]

A more plausible use of the validity/enforceability distinction in this context treats enforceability as one *element* of "contractual validity" more broadly understood. John Coyle, for example, defines contractual validity, as used in *Atlantic Marine*, to include whether the forum selection clause is valid in the contract formation sense *and* whether it is enforceable in the sense that the clause is reasonable and does not violate public policy.[101] This parsing of contractual validity provided a basis—even before *Atlantic Marine* was decided—for arguing that contractual validity (narrowly understood) is governed by state law and enforceability is governed by federal common law.[102] And this parsing continues to provide a basis for courts to so argue after *Atlantic Marine*. But while the distinction between contractual validity (narrowly understood) and enforceability may be useful for some

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98. *See, e.g.*, Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement after* Stewart *and* Carnival Cruise, 45 FLA. L. REV. 553, 575–76 (1993) (outlining the distinction).

99. *Cf.* Gemini Techs., Inc. v. Smith & Wesson, Corp., No. 1:18-cv-00035-CWD, 2018 WL 2248587, at *5 (D. Idaho May 16, 2018) (refusing to "abandon *Atlantic Marine* in favor of utilizing an analysis under [*The*] *Bremen*" and characterizing *The Bremen* as authorizing public policy and reasonableness exceptions to the enforcement of a forum selection clause).

100. *See Gemini Techs.*, 931 F.3d at 914 (stating that to the extent *Atlantic Marine* discussed *The Bremen*, "it reaffirmed *Bremen*'s core holding that 'a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases'" and concluding that it is therefore "[u]nsurprising[]" that "our sister circuits have consistently held that *Bremen*" remains good law (first alteration in original) (quoting *Atl. Marine*, 571 U.S. at 63)).

101. *See* Coyle, *supra* note 8, at 130–31 (defining "contractually valid," as used by *Atlantic Marine*, to require "three separate inquiries": (1) whether the forum selection clause is valid in a narrow sense, (2) whether it is applicable, and (3) whether it is enforceable in the sense that the clause is reasonable and does not violate public policy).

102. *See, e.g.*, Heiser, *supra* note 98, at 575–78 (arguing that issues of contract validity should be governed by state law and clause enforceability by federal law).

purposes, it should not affect whether state or federal law governs the validity and enforceability of a forum selection clause.[103]

Under *Erie*, determining whether state or federal law governs the validity and enforceability of a forum selection clause requires a *functional* analysis—one not rooted in "analytical or terminological niceties," but one developed with an "eye alert to essentials in avoiding disregard of State law."[104] For the reasons discussed in the next Section, such an analysis indicates that in a § 1404(a) analysis *all* aspects of contractual validity (in the broad sense) must be determined in accordance with the whole law of the state in which the federal district court sits. The same is true of related issues such as the construction of forum selection clauses and the circumstances in which non-signatories may be bound.

C. The Contractual Validity of Forum Selection Clauses is Governed by State Law

State and federal law have come into closer alignment since *The Bremen* and even *Stewart* were decided. At most, a handful of states—and perhaps only Idaho—continues to treat forum selection clauses as invalid *per se*.[105] And among states that have rejected the view that

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103. The sharp distinction some courts have drawn between contractual validity and enforceability to justify applying state law to matters of contractual validity (narrowly understood) also appears inconsistent with how *Atlantic Marine* used the term. As the Court explained, a contractually valid forum selection should be enforced in all but an exceptional case. *Atl. Marine*, 571 U.S. at 63. Thus, after *Atlantic Marine*, the overlap between contractual validity and enforceability is virtually complete provided the forum selection clause applies to the facts of the case. Only in an exceptional case—a case in which "public-interest" factors provide a non-contractual basis for denying enforcement of a forum selection clause—is there a meaningful distinction between the contractual validity of a forum selection clause and its enforceability. *Cf.* Matthew J. Sorenson, Note, *Enforcement of Forum-Selection Clauses After* Atlantic Marine, 82 FORDHAM L. REV. 2521, 2556 (2014) ("[I]f . . . the forum-selection clause is valid . . . [t]ransfer will only be denied in extraordinary circumstances where public-interest factors unrelated to the convenience of the parties weigh heavily against a transfer.").

104. Guaranty Tr. Co. v. York, 326 U.S. 99, 110 (1945).

105. Coyle & Richardson, *supra* note 1, at 1105, 1107 (stating that "state legislatures in Montana, Idaho, Louisiana, Oklahoma, South Carolina, and South Dakota have all enacted statutes that—at least on their face—prohibit their courts from enforcing outbound forum selection clauses," and that "North Carolina has enacted a statute that directs its courts to refuse to enforce such clauses whenever the contract containing the clause was 'made' in North Carolina" but explaining that "[t]he only two states where general statutory prohibitions are routinely enforced are Idaho and North Carolina").

forum selection clauses are invalid *per se*, most have adopted *The Bremen* as the basic framework for determining the contractual validity of forum selection clauses.[106] But even states that have adopted *The Bremen* may diverge from federal law in significant ways. Federal law, for example, invalidates forum selection clauses for fraud or coercion *only if* "the *inclusion of that clause in the contract* was the product of fraud or coercion."[107] By contrast, some states invalidate a forum selection clause found in a *contract* that was the product of fraud or coercion.[108] Conversely, even when federal courts consider state law in determining whether enforcement of a forum selection clause would be contrary to public policy, federal courts sometimes give less weight to state public policy under federal common law than would a state court under state law.[109] And federal courts have sometimes refused to give any effect to state laws authorizing a contracting party to repudiate a forum selection clause at its option.[110]

For these reasons, there is no question that the choice between state and federal law can have a meaningful impact on whether a forum

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106. *Id.* at 1098 ("[V]irtually every state ([except for the five states that enacted the Model Choice of Forum Act)] has adopted some version of the test laid down in *The Bremen* to determine when forum selection clauses were enforceable as a matter of state common law.").

107. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 n.14 (1974).

108. *See, e.g.*, Energy Claims Ltd. v. Catalyst Inv. Grp. Ltd., 325 P.3d 70, 83–85 (Utah 2014). Most states that have addressed the issue follow the approach adopted in *Scherk*. *See id.* at 83–84. For a discussion of the caselaw in the states, see *Karon v. Elliott Aviation*, 937 N.W.2d 334, 341–45 (Iowa 2020).

109. *See* Coyle, *supra* note 8, at 153–55 (noting that some federal courts treat state public policy as one factor in a balancing test); Cara Reichard, Note, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866, 898 (2020) ("The treatment of [state anti-choice of forum] statutes is somewhat uneven, with state courts more likely than federal courts to apply such statutes in order to invalidate a contractual choice-of-forum clause."); *id.* at 898–902 (discussing in detail how state and federal courts respond to such statutes).

110. *See* Ameri-Fab, LLC v. Vanguard Energy Partners, LLC, 646 F. Supp. 3d 795, 803, 803 n.4 (W.D. Tex. 2022) (holding that a party's decision to repudiate a forum selection clause as permitted by Texas law did not render the forum selection clause invalid and stating—while purporting to distinguish *DePuy*—that "courts in other circuits appear at most to consider the existence of a state statute purportedly rendering forum-selection clauses 'voidable' as only one of many available factors in the § 1404(a) analysis"). There is Texas appellate authority holding that a forum selection clause may waive the statutory provision at issue in *Ameri-Fab*. *See In re* MVP Terminalling, LLC, No. 14-21-00399-CV, 2022 WL 3592303, at *7 (Tex. App. Aug. 23, 2022) (finding the legislature's use of "voidable" instead of "against public policy" supported an intent to allow a waiver of the right to void). But *Ameri-Fab* did not hold that Texas state law governed the validity of the clause.

selection clause will be deemed contractually valid.[111] Thus, this Section turns to whether federal district courts should apply state or federal law to determine the contractual validity of a forum selection clause in a § 1404(a) analysis. As explained below, applying federal rules of contractual validity that are different from the whole law of the state in which a federal district court sits would violate the *Erie* policy of vertical uniformity between state and federal courts. And there is no other federal policy or interest that outweighs the force of the *Erie* policy in this context. A federal district court should therefore apply the whole law of the state in which it sits to determine the contractual validity of a forum selection clause when deciding a § 1404(a) motion to transfer. The same is true of related issues such as the construction of forum selection clauses and the circumstances in which non-signatories may be bound.[112]

1. Federal common law and the § 1404(a) analysis

Because forum selection clauses are designed to select the place in which a suit is heard,[113] the Constitution grants the United States full authority to determine whether a forum selection clause should be given effect in federal court.[114] This necessarily includes the power to determine whether a forum selection clause is contractually valid to

111. For an excellent discussion of differences between state and federal law in this area and of differences in enforcement rates with respect to forum selection clauses, see John F. Coyle & F. Andrew Hessick, Erie *and Forum Selection Clauses*, 2024 U. ILL. L. REV. 777, 795–809.

112. *Cf.* Coyle, *supra* note 8, at 127 (treating these matters as elements of "contractual validity," broadly understood).

113. *See, e.g.*, Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 665 (2015) (noting that forum selection clauses are "special contracts on *forum allocation*"); Sachs, *Forum Selection*, *supra* note 42, at 5 ("Because these agreements concern the parties' procedural rights, they necessarily involve issues of procedural law, not just contract.").

114. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988) ("As the Court made plain in *Hanna*, '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.'" (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965))). This standard was described pithily—if disapprovingly—by Justice Harlan as the "'arguably procedural, *ergo* constitutional' test." *Hanna*, 380 U.S. at 476 (Harlan, J., concurring).

the extent federal law chooses to make that criterion relevant.[115] The fact that the Constitution may require that state law govern the validity of *other* clauses in the contract makes no difference to the constitutional inquiry. What matters is that the Constitution grants the United States plenary authority to define the circumstances in which parties may validly agree that suit shall be brought in a specified federal district court.

The mere existence of regulatory authority in the United States, however, has never meant that state law will be displaced in federal court or preempted in state and federal court. Unless the Constitution itself displaces or preempts state law,[116] federal law does so only if a valid federal statute, valid federal rule, or valid self-executing treaty covers the point *or* if courts have authority to develop and apply federal common law rules to resolve the matter.

Courts may elaborate federal common law when doing so would be consistent with the Rules of Decision Act ("RDA"), which provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[117] The Constitution, federal statutes, and federal treaties implicitly "require"[118] the elaboration of federal common law within the meaning of the RDA only when those sources of federal law are construed as

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115. Adam Steinman, by contrast, argues that "Congress's power vis-à-vis the federal judiciary—standing alone—does not justify displacing substantive rights created by state law," an argument he concedes is "in some tension" with *Hanna*. Adam N. Steinman, Atlantic Marine *Through the Lens of* Erie, 66 HASTINGS L.J. 795, 815 (2015). In so arguing, Professor Steinman seems to echo Justice Harlan's concerns with the test adopted in *Hanna* and reaffirmed in *Stewart*. But even assuming for purposes of argument that *Hanna*'s statement of the procedural power is too broad, determining the contractual validity of a *forum selection* clause should fit comfortably within the procedural power.

116. No constitutional provision provides a hook for the argument that the Constitution of its own force displaces state law that would otherwise govern the contractual validity of forum selection clauses in federal court.

117. 28 U.S.C. § 1652. "Because the RDA simply makes explicit the basic structural principle that state law should apply in federal court in the absence of an appropriate justification for applying federal law, the Court properly has held that the RDA is 'merely declaratory of what would in any event have governed the federal courts.'" Woolley, *supra* note 28, at 617 (quoting Guaranty Tr. Co. v. York, 326 U.S. 99, 103–04 (1945)).

118. 28 U.S.C. § 1652.

implicitly delegating common-law making authority to courts[119] or when there is a conflict between state and federal law.[120]

There is no evidence that Congress intended § 1404(a) to permit federal courts to develop federal common law rules to determine the contractual validity of forum selection clauses.[121] But § 1404(a) implicitly delegates to courts common law authority to determine the circumstances in which a transfer "[f]or the convenience of parties and witnesses [and] in the interest of justice" would be appropriate.[122] The open-ended language of the statute could not otherwise be given effect. And by referencing the discretionary doctrine of *forum non*

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119. *See* Thomas W. Merrill, *The Judicial Prerogative*, 12 PACE L. REV. 327, 354 (1992) ("A more common form of implicit delegation is when Congress enacts a statute containing broad language that must be filled in by the courts through the process of case-by-case adjudication, the federal antitrust laws being a prime example."). Justice Scalia appears to have been resistant to implicit delegation as a basis for federal common law making. Indeed, his opinion for the Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), insisted that the Court had "refused to find federal pre-emption of state law in the absence of either a clear statutory prescription or a direct conflict between federal and state law." *Id.* at 504 (citations omitted). But as one set of commentators have noted, "common lawmaking often cannot be sharply distinguished from statutory . . . interpretation." RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 635 (7th ed. 2015). Not much appears to turn on whether what would be federal common law under an implicit delegation theory is deemed instead a matter of statutory construction.

120. As the Court explained the "conflict" basis for federal common law making in *Boyle*, "a few areas, involving 'uniquely federal interests,' are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called 'federal common law.'" *Boyle*, 487 U.S. at 504 (citation omitted); *see also id.* at 507 (stating that when a unique federal interest is at stake "[t]he conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption when Congress legislates 'in a field which the States have traditionally occupied'" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))). This approach arguably provides a basis for some federal common law rules of procedure. *See* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 835 (2008) ("[O]ne might draw a straightforward analogy to the substantive common lawmaking powers of the federal courts by arguing that procedure, like other areas of federal common law, is an enclave in which federal interests are so strong that common lawmaking is justified in the absence of congressional regulation.").

121. *See* Eric Fahlman, Note, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?—*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988).*, 64 WASH. L. REV. 439, 448 (1989) ("The legislative history of 28 U.S.C. § 1404(a) suggests that Congress did not intend the statute to govern the validity of forum-selection clauses.").

122. 28 U.S.C. § 1404(a).

conveniens, the sparse legislative history similarly confirms that courts have broad common-law authority to develop rules that sensibly implement the statutory standard.[123] Section 1404(a)'s grant of authority to the federal courts is broad enough to justify *Stewart*'s holding that a forum selection clause, may, in appropriate circumstances, be deemed evidence with respect to the parties' convenience in a full-blown § 1404(a) analysis.[124] The common-law authority granted by the statute similarly is broad enough to justify the conclusion that a *contractually valid* forum selection clause waives a party's right to argue that transfer would be inconvenient for the party or its witnesses.[125]

Stewart and *Atlantic Marine*, in other words, properly address *how* the federal standard set forth in § 1404(a) should be implemented, a question that must be resolved through federal law.[126] But whether

123. *See id.* reviser's note ("Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.").

124. Justice Scalia, of course, had a different view. Relying on his understanding of the statutory text, he argued in his dissent that "[a]s the specific reference to convenience of parties and witnesses suggests, [the statute] requires consideration of what is likely to be just in the future, when the case is tried, in light of things as they now stand." Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 34 (1988) (Scalia, J., dissenting). For criticism of Justice Scalia's conclusion, see *supra* notes 58–61 and accompanying text.

125. *Cf.* Oxford Glob. Res., LLC v. Hernandez, 106 N.E.3d 556, 568 (Mass. 2018) (recognizing that "by agreeing to a particular forum, the defendant waives any objection to the forum based on the inconvenience of the forum to him or her" but holding contrary to *Atlantic Marine* that such an agreement does not "waive[] an objection to the forum based on any other private factor, including the convenience of witnesses").

126. Although *Atlantic Marine* did not decide whether a forum selection clause may be enforced through a motion to dismiss for failure to state a claim, Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 61 (2013), the Court's conclusion that a party's right to rely on public-interest factors cannot be waived in advance by a forum selection clause suggests that § 1404(a) (and the federal common law of *forum non conveniens*) displace in federal court procedural devices for enforcement of such clauses that do not include consideration of these factors. For a different view, see Sachs, *Forum Selection*, *supra* note 42, at 26–31. *Cf.* Roosevelt & Jones, *supra* note 42, at 316–17 (agreeing with Sachs but noting that "[s]tate substantive law and federal procedural law can overlap, and federal procedural law might preempt contrary state law" even in the absence of a § 1404(a) or *forum non conveniens* motion). At least two circuit courts have decided since *Atlantic Marine* that it is within the discretion of a federal district court to grant a 12(b)(6) dismissal rather than a transfer under § 1404(a). *See* Podesta v. Hanzel, 684 F. App'x 213, 216 (3d Cir. 2017); Smith v. Aegon Cos. Pension Plan, 769 F.3d 922, 933–34 (6th Cir. 2014).

contractually valid forum selection clauses waive the private-interest factors under § 1404(a) is a distinct question from whether a particular clause should be deemed contractually valid. And federal common law rules governing the contractual validity of forum selection clauses—at least on the surface—are not strictly necessary to implement § 1404(a).

Justice Scalia argued that the silence of § 1404(a) on forum selection clauses meant that § 1404(a) did not provide a basis for applying federal common law rules of contractual validity: "[I]ssues of contract, including a contract's validity, are nearly always governed by state law. It is simply contrary to the practice of our system that such an issue should be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision."[127] That said, determining whether a forum selection clause is contractually valid is a necessary *step* in the § 1404(a) analysis that the Court endorsed in *Atlantic Marine*.[128] And because forum selection clauses are specifically drafted to address where litigation should take place and are conceptually separable from the substantive provisions of a contract,[129] the general rule on which Justice Scalia relied may be inapplicable. Thus, the argument that the contractual validity of a forum selection clause should be governed by federal common law rather than state law under the Rules of Decision Act deserves careful consideration.

Federal common law is authorized under the RDA only if the Constitution, a valid federal statute, or a valid, self-executing treaty expressly "provide[s]" for or implicitly "require[s]" federal common law.[130] Some have argued that "require[d]," in this context means strictly necessary.[131] But a more permissive definition of the term may be premised on the fact that one definition of "require" is "to call for

127. *Stewart*, 487 U.S. at 36.

128. 571 U.S. 49, 62, 62 n.5 (2019).

129. *Cf.* Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1134 (2018) (noting that under the separability doctrine "a party challenging the clause 'must demonstrate that the [clause itself] is invalid rather than merely claim the contract is invalid'").

130. 28 U.S.C. § 1652; *see also supra* notes 117–20 and accompanying text (outlining the circumstances in which federal courts may create federal common law).

131. *See, e.g.*, Merrill, *supra* note 119, at 330–31 ("I would permit federal courts to go beyond conventional interpretation and make law in the common law mode provided they can show either that Congress has enacted law delegating lawmaking powers to courts, or that it is necessary to replace state with federal law in order to preserve a provision of enacted law.").

as suitable or appropriate."[132] The Court has expressly endorsed this more permissive definition on one occasion.[133] And at least in the context of federal "procedural statutes"[134] such as § 1404(a), "require" should mean no more than "appropriate." The Court, after all, has emphasized that the federal court system—created by the Constitution and federal statute—is an "independent system for administering justice to litigants who properly invoke its jurisdiction."[135] And insisting on strict necessity before elaborating federal common law rules of procedure would too tightly yoke the federal courts to the procedural law of the states in which they sit.[136] Indeed, this very concern appears to have shaped the views of those who simultaneously argue that the RDA requires strict necessity for federal common-law making but simply does not apply when federal courts make procedural law.[137]

The appropriateness standard, however, does not leave the development or application of federal common law rules of procedure to the complete discretion of federal judges. It is fundamental that federal common law rules of procedure are appropriate *only if* the *Erie* policy of vertical uniformity between state and federal courts would not require application of state law,[138] or alternatively, *if* the *Erie* policy would be outweighed by some other federal policy or interest. Thus, the *Erie* policy—and any necessary balancing of that policy against

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132. *Require*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/require [https://perma.cc/8N6U-CRRW].

133. *See*, FALLON ET AL., *supra* note 119, at 649 (noting that the Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), read the RDA to "authorize[] application of state law only when federal law does not 'otherwise require or provide'" and concluded that there is "no barrier to formulation of a federal rule of decision when called for by 'the policies and requirements of the underlying cause of action'" (quoting *DelCostello*, 462 U.S. at 159 n.13)).

134. "Federal procedural statutes" as used here refer to federal statutes that displace state law in federal court without preempting state law in state court.

135. Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).

136. *Cf.* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954) ("The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.").

137. *See* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 727–28 (1995) ("Absent preemptive congressional legislation, it is not only appropriate but essential for federal courts, as a matter of common law development, to fashion procedural principles to govern their internal operation." (footnote omitted)); Merrill, *supra* note 119, at 354 ("[F]ederal courts should be regarded as having an inherent power, in the absence of congressional intervention, to formulate rules of procedure and evidence.").

138. Guaranty Tr. Co. v. York, 326 U.S. 99, 109 (1945).

other federal policies and interests—govern whether federal courts, using their common law procedural authority, may use federal common law rules to determine the contractual validity of a forum selection clause.[139]

2. The Erie *policy calls for the application of state law to determine the contractual validity of forum selection clauses*

It is easy to fall into the error of concluding that *Erie* applies only in diversity cases. A moment of reflection, however, should make clear that *Erie*'s sweep cannot be limited in that way. No one would seriously question, for example, that *Erie* determines the applicable substantive law when a federal district court exercises supplemental jurisdiction and the claim itself is not based on federal law. Indeed, the Court so stated in *United Mine Workers of America v. Gibbs*.[140]

Nor is *Erie* relevant only when a federal district court is faced with state-law claims for relief. It is true that uniform federal common law rules of procedure generally govern *how* federal claims are adjudicated when the Constitution, a valid federal statute, or a valid federal rule is not on point.[141] But that is not because *Erie* categorically has no application to federal claims. It is because federal courts have a special

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139. Justice Scalia agreed, albeit on different grounds, that the *Erie* policy applied in this case. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) (stating that "[t]he federal courts . . . have authority . . . to make procedural rules that govern the practice before them" and that the Court "[i]n deciding what is substantive and what is procedural for these purposes" has applied what this Article calls the *Erie* policy). Justice Scalia apparently was of the view that whether a common law rule was a "rule of decision" (within the meaning of the RDA) or a rule of procedure (outside the scope of the RDA) required an *Erie* analysis. Specifically, Justice Scalia would have looked to what he called the twin-aims test of *Hanna* to determine whether a federal common law rule is a rule of decision or a rule of procedure. *Id.* This is a common approach to the RDA but, for reasons discussed elsewhere, defining "rule of decision" in this way is both ahistorical and undesirable. *See* Woolley, *supra* note 28, at 614–16.

140. 383 U.S. 715, 726 (1966) (noting with respect to a non–federal claim in federal court on the basis of supplemental jurisdiction that a federal court in appropriate circumstances should decline to exercise its discretion to hear supplemental claims "even though bound to apply state law to them" (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938))).

141. *See* Alexander A. Reinert, Erie *Step Zero*, 85 FORDHAM L. REV. 2341, 2353–54 (2017) ("Many [federal] courts assert that . . . federal law governs adjudication of claims created by the federal sovereign."); Patrick Woolley, *The Sources of Federal Preclusion Law after* Semtek, 72 U. CIN. L. REV. 527, 557–58 (2003) ("[F]ederal courts have assumed that they are free to apply uniform federal common law rules of procedure to federal-question claims.").

role to play in the enforcement of federal substantive law and must thus be allowed to elaborate federal common-law rules of procedure specifically adapted to that purpose. Concluding in this context that the *Erie* policy governs the adjudication of federal claims would impermissibly interfere with the weightier obligation of federal courts to elaborate federal common-law rules of procedure best adapted to the effectuation of federal substantive law.[142]

But this analysis—which centers on whether a state or federal claim for relief is being asserted in federal court—does not extend to forum selection clauses. Rules governing the contractual validity of forum selection clauses in a § 1404(a) analysis do not address *how* a claim is adjudicated but only in *which* federal district court. There is no reason in these circumstances to treat state and federal claims any differently. As the Second Circuit explained in a different context, what matters is the "source of the right sued upon."[143] And except for the rare case in which the contract containing the forum selection clause is governed by federal contract law—admiralty cases and cases involving federal contracts, for example—state or foreign law is the source of the right granted by a forum selection clause. Thus, the question posed by *Erie* is whether the whole law of a state or federal common law should govern the contractual validity of a forum selection clause in a federal action when the underlying contract is not subject to federal contract law.

Answering that question requires applying the outcome determination test announced in *Guaranty Trust Co. v. York*[144] and modified in *Hanna v. Plumer*.[145] *Hanna* modified the outcome determination test by insisting that it be read in light of the twin aims

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142. *Cf.* Holmberg v. Armbrecht, 327 U.S. 392, 394 (1946) ("The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress."). One might argue that state courts should likewise be compelled to apply uniform federal common-law rules specially adapted to the enforcement of federal law, and to a limited and somewhat uncertain extent, the so-called Reverse-*Erie* doctrine does impose such an obligation. *See generally* FALLON ET AL., *supra* note 119, at 440–60 (discussing the doctrine). But the general rule has always been that when state courts enforce federal law, federal law takes state courts as they are. *See supra* note 136.

143. Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 540 n.1 (2d Cir. 1956) ("[I]t is the source of the right sued upon, and not the ground on which federal jurisdiction over the case is founded which determines the governing law.").

144. 326 U.S. 99 (1945).

145. 380 U.S. 460 (1965).

of *Erie*: "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[146] The *Erie* policy of vertical uniformity—which the outcome determination test implements—thus is implicated only if the choice between federal and state law is outcome determinative *and* would lead *either* to forum shopping at the outset of the litigation *or* to the inequitable administration of laws.[147] If applying a federal common law rule different from state law would violate the *Erie* policy, state law must govern *unless* the *Erie* policy is outweighed by an even stronger federal policy or interest.[148]

Hanna suggested that, in the absence of the narrowing construction it gave the outcome determination test, "*every* procedural variation is 'outcome-determinative.'"[149] That is an exaggeration. But the choice between state and federal law is so often "outcome-determinative" that the Court since *Hanna* typically has focused solely on the twin aims of *Erie*.[150] Indeed, the test is sometimes simply referred to as the "twin-

146. *Id.* at 468 ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."); *see also* Woolley, *supra* note 141, at 556–57 (explaining why the concern about forum shopping and inequitable administration of the laws is not limited to cases in which a federal district court would have diversity jurisdiction).

147. Stephen Sachs has argued that "*Hanna*'s language about the 'discouragement of forum-shopping' seems rather out of place when the whole issue is *about* selecting a forum." Sachs, *Forum Selection*, *supra* note 42, at 20 (footnote omitted) (quoting *Hanna*, 380 U.S. at 468). But that conflates the underlying policy *Hanna* invoked with the means it developed to determine whether that policy is truly implicated when a federal court would apply a different rule of law than would a state court. The *Erie* policy is about *vertical* uniformity. So, the reference to discouragement of forum shopping refers only to forum shopping between the federal judicial system and that of a state. Indeed, *Hanna*'s reference to forum shopping is best understood as intended to make the outcome determination test easier to administer than would a focus solely on "inequitable administration of the laws." *See* Richard W. Bourne, *Federal Common Law and the* Erie-Byrd *Rule*, 12 U. BALT. L. REV. 426, 473 (1983) ("There seems to be some agreement that since forum shopping is not itself a *per se* evil, the main reason for using it is that it provides a handier touchstone than 'unfair discrimination' for determining in which cases state laws should prevail.").

148. For discussion of cases stating that the *Erie* policy may be outweighed by other federal interests and policies, see Woolley, *supra* note 141, at 559–65, which discusses *Byrd*, *Gasperini v. Center for Humanities*, 518 U.S. 415 (1996), and *Semtek International., Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001).

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

150. *See, e.g.*, *Semtek*, 531 U.S. at 508–09; Walker v. Armco Steel Corp., 446 U.S. 740, 747 (1980).

aims" test rather than the modified outcome determination test.[151] But neglecting the first part of the modified outcome-determination test can lead to error because the *Erie* policy—properly understood—is about differences between state and federal rules of law that directly determine whether and to what extent a party is entitled to recover on a claim for relief.

As the Court explained in *York*, Congress—in granting federal courts diversity jurisdiction—"afforded out-of-State litigants another tribunal, not another body of law."[152] And although this passage was focused on the choice between state and federal tribunals within the same state, the broader point holds: *Erie* is not about *any* potentially relevant difference between tribunals in state and federal court, nor about the effect of litigating in an inconvenient forum, but about differences in rules of law that directly determine whether and to what extent a party is entitled to recover on a claim for relief. That is why the Court in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*,[153] for example, sensibly questioned whether a state rule that—contrary to federal practice—allocated decision-making authority to the judge rather than the jury was outcome-determinative.[154]

None of this is to suggest that the court in which a suit is adjudicated lacks importance. Indeed, as Justice Scalia noted in his *Stewart* dissent, the behavior of lawyers leaves no doubt that differences among tribunals matter, even when not rooted in differences of law that directly determine whether and to what extent a party is entitled to

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151. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) ("Under the twin-aims test, I believe state law controls the question of the validity of a forum-selection clause between the parties.").

152. Guaranty Tr. Co. v. York, 326 U.S. 99, 112 (1945); *see also id.* at 109 (explaining that *Erie*'s intent "was to insure that . . . 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 state court") (emphasis added).

153. 356 U.S. 525 (1958).

154. *See id.* at 539–40 (suggesting that the choice may not be outcome determinative because "there is not present here the certainty that a different result would follow or even the strong possibility that this would be the case" (first citing *York*, 326 U.S. 99 (1945); and then citing Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198 (1956)); *cf. Bernhardt*, 350 U.S. at 203 (finding the choice between the court system and an arbitrator outcome determinative, at least in part because of differences in the law that would control the resolution of a claim or affirmative defense).

recover on a claim for relief.[155] But the Congressional decision to provide a federal tribunal—and in the case of § 1404(a), a transfer of venue from one federal court to another—suggests that these are not the sort of differences that the outcome determination test is designed to address.[156]

So, if all that were at stake in determining the contractual validity of a forum selection clause was the federal district in which suit would be heard, the choice between state and federal law would not be outcome-determinative. But a contractually valid forum selection clause also determines which state's choice-of-law rules will govern after transfer.[157] As the Court explained in *Atlantic Marine*, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer . . . will not carry with it the original venue's choice-of-law rules."[158] So if a federal district court were not bound by state law in determining whether a forum selection clause is contractually valid, the transferee federal district court might well be required to apply a different choice of law in the litigation than would the courts of the state in which the transferor

155. *Stewart*, 487 U.S. at 39–40 (Scalia, J., dissenting); *see also* Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249, 253 (1991) (noting that "[t]he legal result in a case is influenced by many attributes of the forum in addition to the rules of law that it chooses to apply" including "the local predilections, vagaries, biases and informal understandings of the forum's juries and judges," such as "the local propensities of juries to act in given ways independent of the legal rules under which they are charged").

156. Many scholars have taken a different view. *See, e.g.*, Coyle & Hessick, *supra* note 111, at 810–12 (treating the effect of a forum selection clause on where a suit will be adjudicated as sufficient to create an *Erie* problem); Steinman, *supra* note 115, at 804–05 (stating that "[a]lthough geography alone might not implicate truly substantive rights," a rule that would make enforcement of a forum selection clause dependent on whether suit was in state or federal court "would seem to encourage precisely the sort of vertical forum shopping *Erie* is meant to discourage"); Richard D. Freer, Erie*'s Mid-life Crisis*, 63 TUL. L. REV. 1087, 1140 (1989) ("With justification, then, Justice Scalia reasoned in *Stewart* that federal court application of *B*[*remen*] violated the twin aims of *Erie* . . . .").

157. *See* Roosevelt & Jones, *supra* note 42, at 315 (stating that forum selection clauses are arguably "outcome-determinative: choice of forum can affect choice of law and hence alter the parties' substantive rights").

158. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 64 (2013). *Atlantic Marine* did not rely on the *Erie* policy for this rule even though the *Erie* policy supports this rule if the contractual validity of a forum selection clause is governed by the law of the state in which the transferor federal district court sits. *Id.*

federal district court sits.[159] And as the Court held in *Van Dusen v. Barrack*,[160] "the critical identity to be maintained" for choice-of-law purposes under *Erie* "is between the federal district court which decides the case and the courts of the State in which the action was filed."[161] Thus, there can be no question that a choice between state and federal law that is intertwined with the choice-of-law rules that will govern after transfer may lead to a difference in outcome.

Nor is the problem limited to diversity cases. Federal courts routinely apply state choice-of-law rules to state-law claims over which they have supplemental jurisdiction.[162] Federal courts also have occasion to apply state choice-of-law rules even when adjudicating claims over which a federal district court has federal question jurisdiction.[163] For these

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159. The transferor federal district court is the court in which the suit was filed or to which it was removed, and the transferee federal district court is the court to which the suit is transferred.

160. 376 U.S. 612 (1964).

161. *Id.* at 639. It might be argued that the critical identity to be maintained is between the state and federal courts of the forum selected by the choice-of-court clause. But whether the law of the forum state or the law of the selected forum governs the contractual validity of a forum selection clause is a choice-of-law matter that the forum state has the power to determine for its courts. And the *Erie* policy of vertical uniformity requires a federal district court to look to the choice-of-law rules of the state in which the federal suit was initiated. Thus, a federal court would have power to independently apply the law of the selected forum only if a federal interest in applying an independent federal common law choice-of-law rule to determine contractual validity outweighs the *Erie* policy. As discussed in the Section that follows, there is no federal policy or interest that outweighs the *Erie* policy in the context of a § 1404(a) analysis.

162. *See, e.g.*, Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1136 (3d Cir. 1977) ("Although *Klaxon* was a diversity jurisdiction case, the same principle holds true with respect to pendent jurisdiction claims."). *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), held that *Erie* requires a federal district court to apply the choice-of-law rules of the state in which it sits, *id.* at 496, a holding that was later refined in *Van Dusen*. *See Van Dusen*, 376 U.S. at 637–39 (explaining that after a § 1404(a) transfer the transferee court generally must apply the choice-of-law rules of the state in which the transferor court sits). For discussion of other exceptions to the *Klaxon* rule, see *infra* notes 244–47 and accompanying text.

163. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 142 S. Ct. 1502, 1507–09 (2022) (holding that the choice-of-law rules of the state in which the federal district court sits applies in suits brought under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11, a statute that confers federal question jurisdiction on federal district courts); *id.* at 1509 (emphasizing in dicta that federal courts should create independent federal choice-of-law rules only when necessary to serve a uniquely federal interest); A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d. 1454, 1463

reasons, whether a federal district court has jurisdiction over a case on the basis of diversity or on the basis of a federal question does not affect whether the choice between state and federal rules of contractual validity may lead to a difference in outcome.

The modified outcome determination test also requires a showing that permitting application of a federal rule that is different from state law would create a serious risk of forum shopping at the outset of the litigation or lead to the inequitable administration of the laws.[164] Permitting application of different choice-of-law rules in state and federal court would undoubtedly qualify under both prongs. Choice-of-law considerations regularly lead good lawyers to choose one forum over another. The importance of choice-of-law considerations similarly leaves no doubt that applying different choice-of-law rules in state and federal court would lead to the "inequitable administration of the laws" as *Hanna* used that term.[165] Thus, to the extent choice of law is tied—as *Atlantic Marine* insists—to the contractual validity of the forum selection clause, the *Erie* policy requires that the contractual validity of such clauses be governed by state law.

(D.C. Cir. 1995) (stating in a case in which the federal district court had federal question jurisdiction under the Edge Act, 12 U.S.C. §§ 611–31, that it saw "no reason" not to apply "the general rule" set forth in *Klaxon* "when it decides an issue not addressed by federal law"); Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 23 U. PA. J. CONST. L. 2127, 2147 (2021) (discussing cases decided before *Cassirer* in which federal courts sometimes relied on independent federal common law choice-of-law rules and arguing that "federal courts should apply *Klaxon* whenever state law applies in federal court—regardless of the basis of jurisdiction").

164. As explained in greater detail elsewhere, the principal focus of the modified outcome-determination test typically should be on whether a federal rule of law different from the state rule "could *potentially* lead a reasonable party to choose one forum over the other at the outset of the litigation." Woolley, *supra* note 141, at 549. Focus on potential forum shopping by a reasonable lawyer and her client is critical because "a good lawyer may have to consider a wide variety of issues in choosing a potential forum." *Id.* A lawyer, for example, "might be willing to accept a rule that will reduce the chances of recovery because of the greater likelihood that a different, unrelated rule would increase the chance of recovery." *Id.* But these sorts of "global considerations . . . have no place in the inquiry." *Id.* Properly understood, the modified outcome-determination test is not intended to evaluate whether a canny litigator considering all the rules that will be applied to the litigation as a whole would choose a state or federal court. Rather, the test is designed to assist federal courts in determining whether a particular issue should be governed by state or federal law. For a more detailed discussion, see *id.* at 543–49.

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

3. No federal policies or interests outweigh the Erie *policy in this context*

Concluding that the modified outcome determination test calls for the application of state law does not end the analysis. That is because the *Erie* policy may be outweighed in appropriate circumstances by *other* federal policies and interests.[166] To the extent federal courts determine whether the *federal judicial system* is an appropriate forum for a suit, for example, the need for a federal common law rule that can be applied across the federal judicial system outweighs the *Erie* policy.[167] As discussed in the next Part, whether the *federal judicial system* should hear a case cannot be left to the law of the state in which a particular federal district court happens to sit.

But the contractual validity of a forum selection clause in a § 1404(a) analysis involves different considerations. The contractual validity of such a clause affects the consensual allocation of cases *within* the federal judicial system. Thus, *some* federal district court will be required to adjudicate the case whether state or federal law governs the contractual validity of the clause. And to the extent trial in a particular federal district would be an unreasonable imposition on the district court, that can be determined and addressed under § 1404(a) without regard to the contractual validity of the clause.

It might alternatively be argued that applying federal law to determine the contractual validity of forum selection clauses is necessary to ensure that state law does not frustrate the federal policy permitting parties to waive in advance certain requirements that would otherwise apply. A state law that treats forum selection clauses as *per se* invalid, for example, essentially makes it impossible to waive the private-interest factors under § 1404(a) if that state law governs the contractual validity of a forum selection clause in federal court. But federal waiver policy in this context should be understood more narrowly as simply authorizing the use of contractual waivers *when* valid under the whole law of the state in which the federal district court sits.

That narrower understanding is appropriate for two reasons. First, a transfer of venue simply allocates cases *within* the federal judicial system rather than removing cases from the system altogether. And second, applying federal common law to the contractual validity of a forum selection clause is not necessary to protect the integrity of

166. *See supra* note 148 and accompanying text.
167. *See infra* Part II.

federal judicial processes.[168] In other contexts, federal waiver standards may be appropriate to prevent parties from sitting on their rights to the detriment of other parties and the federal court system. But application of state law to determine the contractual validity of forum selection clauses does not facilitate dilatory behavior or affect the ability of a federal court to enforce rules that govern the parties' conduct in the litigation.

Nor is the *Erie* policy outweighed by policies the Court has expressly articulated with respect to forum selection clauses in the context of § 1404(a). Those policies may be vindicated simply by enforcing clauses that are "contractually valid" under the law of the state in which the federal district court sits. Recall that the Court in *Atlantic Marine* relied on Justice Kennedy's concurrence in *Stewart* to hold that a contractually valid forum selection clause should be enforced in all but the most exceptional circumstances.[169] As is evident from that concurrence, *Atlantic Marine*'s holding is designed to protect the "legitimate expectations" of the parties and to avoid the cost of uncertainty inherent in a full-blown § 1404(a) analysis.[170] But neither goal requires using federal law to determine the contractual validity of forum selection clauses.

A key choice-of-law principle is that the justified expectations of the parties to a contract are entitled to respect. As the *Restatement (Second) of Conflict of Laws* explains, the parties to a contract have a "justified" expectation that "the provisions of the contract will be binding upon them."[171] But the law is equally clear that that expectation may be outweighed "by the interest of the state with the invalidating rule in having [its] rule applied."[172] Both state and federal law impose constraints on the enforceability of forum selection clauses that go beyond those typically imposed on other contracts. And nothing in Justice Kennedy's concurrence suggests that the justified expectations

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168. *Cf.* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 509 (2001) (explaining in dicta that "[i]f, 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" application of a federal rule different from state law).

169. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 63 (2013) (citing Stewart Org., Inc, v. Ricoh Corp., 487 U.S. 22, 31, 33 (1988) (Kennedy, J., concurring)).

170. *See id.* (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)) (explaining that a forum selection clause requires that courts adjust their § 1404(a) analysis).

171. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 cmt. b (AM. L. INST. 1971).

172. *Id.*

of the parties outweigh limits imposed by law on the contractual validity or enforceability of a forum selection clause. Indeed, he cites without criticism *The Bremen*, which expressly imposed limits on forum selection clauses governed by federal law.

Nor should Justice Kennedy's citation of *The Bremen* be read to suggest that federal law provides the only appropriate standard for determining the contractual validity of a forum selection clause in federal court. *Bremen* was an admiralty case in which federal courts were free to exercise their judgment in shaping federal common law rules governing the contractual validity of forum selection clauses. But when federal contract law does not govern the underlying contract, the extent to which the legitimate expectations of the parties should shape the contractual validity of a forum selection clause implicates the *Erie* policy. Given the strength of that policy, the whole law of the state in which a federal district court sits should determine the contractual validity of a forum selection clause.[173] Justice Kennedy does not argue otherwise.

He focuses instead on rejecting the view that a contractually valid forum selection clause is simply *evidence* of the parties' venue preferences to be considered as part of a full-blown § 1404(a) or *forum non conveniens* analysis.[174] This approach—which some federal courts later adopted in response to *Stewart*[175]—is undesirable, he argued, when compared to a streamlined § 1404(a) analysis that treats contractual validity as dispositive in all but exceptional cases.[176] That

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173. *See supra* Section I.C.2.

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

175. For an example in the § 1404(a) context, see *United States ex rel. J-Crew Mgmt., Inc. v. Atlantic Marine Construction Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at *2–3 (W.D. Tex. Aug. 6, 2012), which concluded that the forum selection clause was valid and enforceable before weighing the § 1404(a) factors. For examples in the *forum non conveniens* context, see *Wong v. PartyGaming Ltd.*, 589 F.3d 821 (6th Cir. 2009); and Buxbaum, *supra* note 88, at 198–99, 198 n.65, 199 n.66, which cites cases for the proposition that "[s]ome courts have held that a valid forum selection clause should be viewed simply as one factor in a full *forum non conveniens* analysis," meaning that "the court may consider even the convenience of the party resisting the clause as a basis for dismissal."

176. A number of courts followed this approach even before *Atlantic Marine*. For cases decided in the context of § 1404(a), see Ben Minegar, Note, *For the Convenience of Parties and Witnesses, in the Interest of Justice: Forum-Selection Provisions After* Atlantic Marine Construction, 76 U. PITT. L. REV. 277, 287 & n.52 (2014), which cites cases for the proposition that "some courts concluded that plaintiffs waived the right to contest the 'convenience' of venue in the agreed-upon court (i.e., private interest factors)

streamlined approach helps ensure correct results that "spare litigants unnecessary costs" and "relieve courts of time-consuming pretrial motions."[177]

Justice Kennedy undoubtedly was correct that the individualized balancing of numerous factors required by *Stewart* has serious costs for both parties and courts. As Justice Scalia analogously noted with respect to *forum non conveniens*, "[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application make uniformity and predictability of outcome almost impossible."[178] By contrast, determining whether a forum selection clause is contractually valid is likely to be far more predictable and less time consuming than a full-blown § 1404(a) or *forum non conveniens* analysis. Faced with a contractually valid clause, the parties and the court may train their attention on whether an *exceptional* circumstance would justify not enforcing the forum selection clause. They need not embark on the amorphous, "individualized, case-by-case consideration of convenience and fairness" that § 1404(a) would otherwise demand.[179] Justice Kennedy's concurrence, in other words, is about whether a contractually valid forum selection clause must be enforced. It is *not* about whether state or federal law governs the contractual validity of a forum selection clause in a § 1404(a) analysis.

There is one passage of Justice Kennedy's concurrence that is arguably susceptible to a different interpretation. Specifically, he writes: "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."[180] This passage has sometimes been read to

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upon the execution of a forum-selection agreement," and that "these courts gave near-dispositive weight to forum-selection agreements, in tacit recognition of contractual freedom." For cases in the context of *forum non conveniens* motions, see Carolyn Dubay, *From Forum Non Conveniens to Open Forum: Implementing the Hague Convention on Choice of Court Agreements in the United States*, 3 GEO. MASON J. INT'L COM. L. 1, 19 & n.85 (2011), which cites cases for the proposition that "federal courts applying the *Bremen* reasonableness standard to determine the validity of a choice of court agreement have rejected the continued use of *forum non conveniens*, finding that the reasonableness standard subsumes the *forum non conveniens* considerations."

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

178. Am. Dredging Co. v. Miller, 510 U.S. 443, 455 (1994) (citation omitted).

179. *Stewart*, 487 U.S. at 29 (quoting Van Dusen v. Barrack, 376 U.S. 612, 622 (1964)).

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

suggest that Justice Kennedy believed that federal law should govern the contractual validity of a forum selection clause.[181] But the passage is better read in context as indicating that federal—rather than state—law governs whether a contractually valid forum selection clause constitutes a waiver of the private-interest factors in a § 1404(a) or *forum non conveniens* analysis.

Justice Kennedy's concurrence thus provides no sound basis for concluding that the *Erie* policy is outweighed by a federal interest in applying federal—rather than state—law to determine the contractual validity of a forum selection clause. Indeed, Justice Scalia—who insisted in his *Stewart* dissent that state law governs contractual validity—expressed agreement "with Justice Kennedy's concurrence that under § 1404(a) such a valid forum-selection clause is to be 'given controlling weight in all but the most exceptional cases.'"[182] In short, the policy favoring the enforcement of contractually valid forum selection clauses articulated by Justice Kennedy's concurrence in *Stewart* and the majority opinion in *Atlantic Marine* is fully consistent with looking to state law under *Erie* to determine *whether* a forum selection clause is contractually valid.

This reading of Justice Kennedy's concurrence is also consistent with a proper understanding of the kind of policies and interests that may outweigh the *Erie* policy. The extent to which the legitimate expectations of the parties should shape whether a forum selection clause is contractually valid is a matter of contract law. And the whole point of *Erie* is to safeguard state substantive law—including state contract law—from federal courts that might otherwise prefer simply to apply what they perceive as the better law.[183] *Erie* can effectively serve

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181. *See, e.g.*, Rachel Kincaid, *Foreign Forum-Selection Frustrations: Determining Clause Validity in Federal Diversity Suits*, 4 STAN. J. COMPLEX LIT. 131, 138–39 (2016) ("Although Justice Kennedy's analysis is somewhat unclear, it is evident that at the very least he believes federal law should govern forum-selection clause validity in the § 1404(a) context, and there are strong federal interests relevant to any forum-selection clause.").

182. *Stewart*, 487 U.S. at 35 n.* (Scalia, J., dissenting) (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

183. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (quoting Justice Field's dissent in *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368 (1893), in partial justification of its holding that "[t]here is no federal general common law"); *Baugh*, 149 U.S. at 401 (Field, J., dissenting) ("I am aware that what has been termed the general law of the country—which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject—has been

this function only if the common-law policies and interests that may override the *Erie* policy are limited to those focused on the proper functioning of the federal court system. A desire to protect the legitimate expectations of the parties to a contract is not within the narrowly circumscribed set of policies and interests that fit that description. Thus, any conclusion that the legitimate expectations of the parties outweigh the *Erie* policy would be fundamentally inconsistent with *Erie*.[184]

Justice Kennedy's concurrence did identify one consideration—cost to the court system[185]—that might in some circumstances override the *Erie* policy. Although the Court has never identified the federal interest in the proper allocation of federal judicial resources as an interest that can outweigh the *Erie* policy, some commentators have so argued.[186] But there is no reason to believe that applying federal—rather than state—rules of contractual validity can be justified on that ground. That is because a contractually valid forum selection clause—under whatever law that determination is made—serves to *simplify* the analysis that would otherwise be required under *federal* law. Given that reality,

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often advanced in judicial opinions of this court to control a conflicting law of a State.").

184. This does not mean that the Court lacks power to protect the legitimate expectations of the parties when it acts within its authority to create federal common law. The Court, for example, acted within its authority when it exercised its power to craft federal common law rules to determine *how* the open-ended statutory standard of § 1404(a) should be implemented. *See supra* notes 123–26 and accompanying text. The rule it crafted went to the limits of its authority to protect the legitimate expectations of the parties: a contractually valid forum selection clause constitutes a waiver of the private-interest factors in a § 1404(a) analysis. *See supra* notes 172–73 and accompanying text.

185. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring) ("The federal judicial system has a strong interest in the correct resolution of these questions, not only to spare litigants unnecessary costs but also to relieve courts of time-consuming pretrial motions.").

186. *See* Woolley, *supra* note 141, at 568 (arguing that the federal interest in the proper allocation of federal judicial resources outweighs the *Erie* policy in appropriate circumstances because "the heavy demand for limited federal judicial resources," means "the federal government has a clear interest in the proper allocation of . . . resources" that "fundamentally implicate the ability of federal courts to effectively exercise the responsibilities confided to them by the Constitution and federal statutes"); Martin H. Redish & Carter G. Phillips, Erie *and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 HARV. L. REV. 356, 392 (1977) ("[T]here is only one federal concern that should ever be allowed to outbalance a truly significant competing state interest—that of avoiding the cost or inconvenience to the federal courts that would accompany the application of a state procedural rule.").

the use of state rules of contractual validity in a § 1404(a) analysis can hardly be attacked as leading to an improper allocation of federal judicial resources.

For all these reasons, state rather than federal law governs the contractual validity of forum selection clauses in a § 1404(a) analysis. The next Part explains why this conclusion does not extend to the contractual validity of forum selection clauses in a *forum non conveniens* analysis.

II. ENFORCING FORUM SELECTION CLAUSES THROUGH *FORUM NON CONVENIENS* MOTIONS

The forum selection clause in *Atlantic Marine* could be enforced by transferring the suit from a federal district court in one state to a federal district court in another. So, the facts of the case did not provide the Court with a basis for addressing the enforcement of forum selection clauses in cases in which a transfer of venue would be unavailable. The Court nonetheless stated in dicta that "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*."[187] The Court reasoned that this was so because "§ 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system."[188]

This Part analyzes the use of *forum non conveniens* motions to enforce forum selection clauses. Section II.A confirms that the Court was correct to conclude that the federal common law of *forum non conveniens* may be used to enforce forum selection clauses and argues that such motions are best conceptualized as dismissing on the ground that the *federal judicial system* is an inappropriate forum vis-à-vis the courts of a foreign country or U.S. state. And as explained, that conceptualization requires that federal common law govern the contractual validity of forum selection clauses and other related issues.

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187. Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 60 (2013). The Court has also held that a motion to dismiss on *forum non conveniens* grounds may be granted without first deciding whether the federal district court has personal jurisdiction over the defendant or whether venue is properly laid in the district. *See* Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 425 (3d Cir. 2007) ("[A] district court has discretion to respond at once to a defendant's *forum non conveniens* plea, and need not take up first any other threshold objection.").

188. *Atl. Marine*, 571 U.S. at 60. For criticism of this view, see Effron, *supra* note 74, at 703–07.

Section II.B turns to the content of that federal common law. It explains that the specific defenses to contractual validity set forth in *The Bremen* and its progeny provide a uniform federal common law basis for invalidating forum selection clauses.[189] But issues of contractual validity not addressed by *The Bremen* and its progeny should be governed by a federal common law choice-of-law rule that would promote application of the same law across the federal judicial system: apply the chosen law, or in the absence of a choice that validates the forum selection clause at the time of contracting, the law of the chosen forum.

A. Forum Non Conveniens *Dismissals May Properly Be Used to Enforce Forum Selection Clauses*

A *forum non conveniens* dismissal in federal court necessarily is based on one of two possible findings: (1) the state in which the federal district court sits is an inappropriate forum vis-à-vis the alternative forum, *or* (2) the federal judicial system as a whole is an inappropriate forum vis-à-vis the alternative forum. To illustrate, consider the decision of a federal district court in California to dismiss on the ground that the suit should be pursued in the United Kingdom instead. That *forum non conveniens* dismissal might be based on the finding that California is a seriously inappropriate forum vis-à-vis the United Kingdom. Alternatively, the dismissal might be based on a finding that the United States is a seriously inappropriate forum. Because a dismissal on that latter basis is not binding in state court,[190] it is in fact a finding that the *federal judicial system* is an inappropriate forum vis-à-vis the United Kingdom.[191]

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189. The public policy defense set forth in *The Bremen* also incorporates state public policy as appropriate. *See infra* note 229 and accompanying text.

190. The Court has never decided whether the federal common law of foreign relations should preempt state *forum non conveniens* law when the alternative forum is a foreign country. Given the increasing hostility the modern Court has shown toward the making of substantive federal common law generally and the federal common law of foreign relations specifically, it seems unlikely that the Court would rule that substantive federal common law preempts state *forum non conveniens* law in state court. For an excellent discussion of some of these issues, see Paul B. Stephan, *One Voice in Foreign Relations and Federal Common Law*, 60 VA. J. INT'L. L. 1 (2019).

191. For the same reason, a finding that the courts of the state are an inappropriate forum vis-à-vis an alternative forum is more precisely a finding about the federal district courts of a state, that is unless state law governs such a dismissal under the Rules of Decision Act.

The basis on which a federal district court grants a *forum non conveniens* motion to dismiss has important implications. A dismissal on the ground that the federal judicial system is an inappropriate forum must rest on the "inherent authority" of federal courts to dismiss on grounds of *forum non conveniens*, federal common law, or both.[192] Inherent authority refers to common law powers federal courts may exercise simply "because Article III denominates them 'courts' in possession of 'the judicial power.'"[193] As distinguished from inherent power, authority to develop federal common law rests on an explicit or implicit statutory delegation of common law making power to the judiciary or on a conflict between state and federal law.[194] By contrast, even if federal district courts lack inherent authority or a federal common-law basis to dismiss on the ground that the state in which they sit is an inappropriate forum, they may be able to invoke state *forum non conveniens* law under the Rules of Decision Act.[195]

The basis on which a federal district court acts may also affect the issue-preclusive effect of a *forum non conveniens* dismissal. A finding by a California federal district court that California is a seriously

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192. Barrett, *supra* note 120, at 885.

193. *Id.* at 842. A court's "inherent powers are those so closely intertwined with a court's identity and its business of deciding cases that [it] possesses them in its own right, even in the absence of enabling legislation." *Id.* A dismissal on grounds of *forum non conveniens* is often characterized as an exercise of inherent power. *See infra* notes 200–02 and accompanying text. Then-Professor Barrett, however, argued that the basis for *forum non conveniens* is better understood as a form of federal common law separate and apart from inherent authority because "inherent authority is local authority, permitting each federal court to regulate only its own proceedings." Barrett, *supra* note 120, at 882.

194. *See* 28 U.S.C. § 1652.

195. Critics sometimes assume that inherent power or federal common law is the only appropriate basis for federal courts to apply the *forum non conveniens* doctrine. That assumption rests on the conclusion that "[i]t is well established that the procedure observed by the federal courts is a matter that the Constitution commits exclusively to federal control." Barrett, *supra* note 120, at 838 (citing *Wayman v. Southard*, 23 U.S. 1 (1825), as the "first and most forceful statement of this principle"). But this understanding appears to be antiquated. *See* Woolley, *supra* note 28, at 621 n.220 (noting that "[t]he predominant view . . . that when *Erie* so requires, state law applies of its own force to federal practice" suggests otherwise); Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73, 82 (2014) (arguing that courts have "abandoned a theory of exclusive regulatory authority over [civil] procedure"). Thus, if federal courts lack inherent authority or federal common law authority to dismiss on grounds of *forum non conveniens*, the *forum non conveniens* law of the state in which they sit should govern unless the Constitution, federal statutes or federal treaties require otherwise.

inappropriate forum, for example, should not bar a plaintiff from refiling its suit in a federal district court outside of California. That is because the "same issue" would not be presented if a subsequent suit were brought in a federal district court in another state.[196] By contrast, a finding that the federal judicial system is a seriously inappropriate forum should bind federal district courts across the country.[197]

If federal courts have authority to dismiss on both bases, it generally makes sense—at least after the enactment of § 1404(a)—for federal courts to rely on the broader basis for dismissal.[198] But the Court has

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196. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (AM. L. INST. 1982) (noting that whether "the new evidence or argument involve[s] application of the same rule of law" is an important consideration in deciding whether the same issue was involved); *see also* Note, *Cross-Jurisdictional Forum Non Conveniens Preclusion*, 121 HARV. L. REV. 2178, 2193 (2008) ("The Supreme Court signaled in [*Chick Kam*] *Choo v. Exxon Corp.*, [486 U.S. 140 (1988),] that a difference in governing law [with respect to a *forum non conveniens* motion] will prevent preclusion if it is sufficiently substantial."); *id.* at 2190 ("*Pastewka* [*v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977),] and the cases that follow it make clear that cross-jurisdictional *forum non conveniens* preclusion does not apply when the plaintiff can show that the legal standards that govern the convenience issue—the 'objective criteria' to be applied to the facts—are different in the second forum.").

Semtek International Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), sometimes requires a court seeking to determine the preclusive effect of a prior federal judgment to borrow the preclusion law of the state in which the federal district court that rendered the judgment sits. *Id.* at 508. But *Semtek* should have no impact on the preclusive effect of a federal *forum non conveniens* dismissal that rests on state law. To begin with, there is no reason to believe that the law of any state would give broader preclusive effect to a dismissal on *forum non conveniens* grounds than *Chick Kam Choo* and *Pastewka* indicate is appropriate. *Cf.* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 964 (1998) (stating that the assumption that "there is little difference from one jurisdiction to another" with respect "to much of preclusion law" is "correct" and explaining that "[t]he essential elements of both claim preclusion and issue preclusion look similar across jurisdictions"). Moreover, even if state law were to seek to give broader preclusive effect to *forum non conveniens* dismissals than authorized by *Chick Kam Choo* and *Pastewka*, state preclusion law on this point would likely be incompatible with federal interests. *See Semtek*, 531 U.S. at 509 (stating that the "federal reference to state [preclusion] law will not obtain, of course, in situations in which the state law is incompatible with federal interests").

197. *See supra* note 196.

198. A motion to dismiss a given case on the ground that the federal judicial system is an inappropriate forum renders unnecessary a motion to dismiss on the ground that the state in which the federal district court sits is an inappropriate forum. If the federal judicial system is an inappropriate forum, asking whether the state is also an inappropriate forum would serve no purpose. If, on the other hand, the federal judicial system is an appropriate forum, the only remaining question is whether the

not expressly weighed in, and the lower federal courts disagree among themselves.[199]

1. Federal courts have common law authority to enforce forum selection clauses through forum non conveniens *dismissals*

The Court first recognized an "inherent power" to dismiss on grounds of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*.[200] As Maggie Gardner has convincingly shown, the precedent on which *Gilbert* relied did not rebut Justice Black's criticism that the power to decline jurisdiction reflected "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity."[201] And *Gilbert*'s conclusion has been subject to vigorous criticism by scholars on structural grounds.[202] But even if the inherent power of federal courts to dismiss in a case like *Gilbert* is taken as a given, that does not resolve whether federal courts have power to grant a *forum non conveniens* dismissal when the alternative fora are not federal courts in another state but the courts of a foreign country or U.S. state.

To the extent federal district courts have inherent authority to dismiss on *forum non conveniens* grounds, such dismissals must be consistent with federal statutes. As then-Professor Amy Coney Barrett

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federal district in which the court sits is an appropriate forum. That question is governed, not by the *forum non conveniens* doctrine, but by § 1404(a).

199. *Compare, e.g.*, Aldana v. Del Monte Fresh Produce N.A., Inc. 578 F.3d 1283, 1293 (11th Cir. 2009) ("[T]he relevant forum for purposes of the federal [*forum non conveniens*] analysis is the United States as a whole."), *with* Ayco Farms, Inc. v. Ochoa, 862 F.3d 945, 949 (9th Cir. 2017) (per curiam) ("[T]he district court did not err when it compared the burdens and benefits of litigation in Mexico and California and not the burdens and benefits of litigation in Mexico and the United States as a whole.").

200. Gulf Oil Co. v. Gilbert Storage & Transfer Co., 330 U.S. 501, 502 (1947); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (characterizing a federal courts power to dismiss on grounds of *forum non conveniens* as a "facet[] to a federal court's inherent power"); Carlisle v. United States, 517 U.S. 416, 438 n.1 (1996) (Stevens, J., dissenting) ("We have held that a district court 'has inherent power to dismiss a suit pursuant to the doctrine of *forum non conveniens*.'" (quoting *Gilbert*, 330 U.S. at 502)).

201. Maggie Gardner, *Admiralty's Influence*, 91 GEO. WASH. L. REV. 1585, 1599–1601 (2023) (critiquing *Gilbert*'s analysis).

202. *See* Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 855 (2001) (arguing that *forum non conveniens* conflicts with the Constitution, properly understood, because courts may not decline to exercise jurisdiction unless Congress authorizes them to do so); Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1921–22 (2023) (same); Elizabeth T. Lear, *Congress, the Federal Courts, and* Forum Non Conveniens*: Friction on the Frontier of the Inherent Power*, 91 IOWA L. REV. 1147, 1171–72 (2006) (same).

explained with respect to inherent powers, "there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it."[203] And there is no basis for concluding that dismissals on *forum non conveniens* grounds fall within the narrow range of matters exclusively within the inherent power of the federal courts.[204]

A *forum non conveniens* dismissal when the alternative forum is a federal district court in another state, implicates, among other things, whether federal courts may legitimately abstain from hearing a case when venue is properly laid in the district. *Gilbert*, for example, specifically considered whether the venue provision applicable to the case *required* a federal district court with venue to hear the case.[205] The Court held the provision should instead be construed to *permit* dismissal if some other federal district in which venue could properly be laid would be a clearly more appropriate forum.[206] In so holding, the Court expressly distinguished cases brought under the special venue provision of the Federal Employers Liability Act.[207]

As Justice Black noted in *Gilbert*, a federal district court that dismisses on grounds of *forum non conveniens* also abstains from exercising subject-matter jurisdiction.[208] The Court in other contexts has

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203. Barrett, *supra* note 120, at 842.

204. *See* Pushaw, *supra* note 202, at 741–43 (distinguishing between "(1) '*implied indispensable*' powers—those [powers] that traditionally have been viewed as absolutely essential to fulfill the Article III mandate to exercise 'judicial power' as independent 'courts'"—which Congress cannot impair and (2) beneficial inherent powers such as *forum non conveniens* which are "merely helpful, useful, or convenient for federal judges" in performing their Article III duties and subject at a minimum to "plenary legislative control"); Barrett, *supra* note 120, at 845 (stating that "there are some—albeit few—procedural matters that are entirely beyond congressional regulation" but not including *forum non conveniens* within that group).

205. *Gilbert*, 330 U.S. at 502, 504.

206. *Id.* Because the relevant state and federal *forum non conveniens* law purportedly was identical, the Court ultimately did not decide whether it should use federal or state *forum non conveniens* law. *See id.* at 509 (stating that because "[t]he law of New York as to the discretion of a court to apply the doctrine of *forum non conveniens*, and as to the standards that guide discretion is, so far as here involved, the same as the federal rule," there was no need to determine "the source from which our rule must flow").

207. *Id.* at 505 (stating that in cases brought under Federal Employers Liability Act, the Court has "held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*" given the special venue provision of the statute).

208. *Id.* at 513 (Black, J., dissenting). A court that dismisses on grounds of *forum non conveniens* also abstains from the exercise of personal jurisdiction. It has been argued that the authority of federal district courts to exercise personal jurisdiction generally

concluded that separation-of-powers concerns do not compel the exercise of subject-matter jurisdiction in all circumstances.[209] But, as the Court itself has noted, if jurisdiction exists, "a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'"[210] Nonetheless, a *forum non conveniens* dismissal premised on a federal district court in another state serving as the alternative forum arguably provides a sound basis for an exception to the general rule. That is because such a dismissal rests on the understanding that some *other*, more appropriate federal district court in another state may exercise federal subject-matter jurisdiction if suit is refiled there.

By contrast, a dismissal in favor of a foreign forum or in favor of the courts of a state raises far more difficult questions about whether abstention from subject matter jurisdiction is appropriate. This is because a dismissal on those grounds contemplates—even when it does not decide—that *no* other federal district court should exercise subject matter jurisdiction over the action.[211] And far too little attention has been paid to whether a *forum non conveniens* dismissal in favor of an alternative forum outside the federal court system should be an exception to the general rule that federal courts have "no more

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rests on state law under the RDA. *See* Woolley, *supra* note 28, at 617–24. Others have argued that the authority of the federal district courts in this regard rests on state law pursuant to the Federal Rules of Civil Procedure. *Id.* at 597–98. Neither source of authority provides a basis to restrict any inherent authority federal district courts may have to dismiss on *forum non conveniens* grounds. By contrast, the handful of federal statutes that authorize the exercise of personal jurisdiction may restrict the authority of federal district courts to dismiss on *forum non conveniens* grounds. These restrictions on inherent power are likely to mimic related restrictions imposed by venue and federal subject-matter jurisdiction statutes and need not be discussed further here.

209. For a brief overview of abstention doctrines, see 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 4241 (3d ed. 2007).

210. Sprint Commc'ns, Inc. v. Jacob, 571 U.S. 69, 77 (2013) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

211. To the extent the *forum non conveniens* doctrine is conceptualized in part as a basis for abstaining from the exercise of federal subject-matter jurisdiction, it may be appropriate in some cases to remand a case back to state court rather than dismiss altogether. *See* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3739 (rev. 4th ed. 2018) (recognizing that remand is appropriate when a federal district court properly abstains from exercising federal subject matter jurisdiction). It might make sense, for example, to allow either side to choose remand rather than dismissal if a federal district court declines to exercise subject matter jurisdiction under the *forum non conveniens* doctrine. But whether and in what circumstances remand should be available when a court abstains on grounds of *forum non conveniens* is beyond the scope of this Article.

right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[212]

There is therefore reason to question whether federal courts generally have such inherent power or federal common law authority outside the context of admiralty jurisdiction.[213] But even if federal

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212. *Sprint Commc'ns, Inc.*, 571 U.S. at 77 (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821)); *cf.* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 545 (1985) ("Suggestions of an overriding obligation, subject only and at most to a few narrowly drawn exceptions, are far too grudging in their recognition of judicial discretion in matters of jurisdiction.").

213. The *forum non conveniens* doctrine originated in admiralty cases. And as Maggie Gardner has noted, "admiralty is a uniquely transnational project in which judges of different nations work in tandem to sustain a functional system of international commerce." Maggie Gardner, The Shallow Roots of Forum Non Conveniens 13 (unpublished manuscript) (on file with author). By contrast, such a dismissal is arguably inconsistent with the Congressional grant of federal question and diversity jurisdiction. Congress granted federal courts federal question jurisdiction to ensure that cases within that grant of jurisdiction could be heard by the federal courts. To dismiss such cases on the ground that the courts of a foreign country would provide a more appropriate forum is at the very least in tension with the Congressional plan. Congress similarly granted diversity jurisdiction to ensure the availability of federal—rather than state courts—for cases within that grant of jurisdiction. The role of diversity jurisdiction after *Erie* suggests that the diversity jurisdiction statute at the very least permits a *forum non conveniens* dismissal when the courts of state in which a federal district court sits would close their doors to a suit. But in the absence of a finding that the courts of *no* state would hear the case, dismissal on the ground that the *federal judicial system* is an inappropriate forum for resolution of a diversity case is also arguably inconsistent with the Congressional plan.

That said, the Court itself has expressed no misgivings about the power of federal courts to dismiss on *forum non conveniens* grounds when the alternative forum is a foreign country or the judicial system of a U.S. state. *Sinochem International Co. v. Malaysia International Shipping Corp.*, 549 U.S. 422 (2007), for example, broadly stated that "[t]he common-law doctrine of *forum non conveniens* 'has continuing application [in federal courts] . . . in cases where the alternative forum is abroad' and perhaps in rare instances where a state or territorial court serves litigational convenience best." *Id.* at 430 (first alteration in original) (citation omitted) (quoting Am. Dredging Co. v. Miller, 510 U.S. 443, 449 n.2 (1994)). *Sinochem* was an admiralty case, however, and the decisions on which it relies do not foreclose the possibility that federal question and diversity jurisdiction statutes generally prohibit dismissal on the ground that the *federal judicial system* would be an inappropriate forum. The only Supreme Court authority on which *Sinochem* relies is *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), an admiralty case. *Miller* claimed that "the Court held in *Gilbert* that *forum non conveniens* applied to all federal diversity cases." *Id.* at 450 (citation omitted). But *Gilbert* may be limited to cases in which there is a federal district court in another state in which suit alternatively can be brought. *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706 (1996), for its part, stated that *forum non conveniens* applies whenever the

courts generally lack such power, the use of *forum non conveniens* dismissals to enforce forum selection clauses is distinguishable.[214] Quite apart from any inherent power the federal courts may otherwise enjoy, federal common law rules governing forum selection clauses are "require[d]" by federal subject-matter jurisdiction statutes.[215]

Federal subject-matter jurisdiction statutes rest on the fundamental background principle that parties to a suit need not avail themselves of federal jurisdiction. It is hornbook law, for example, that a plaintiff may forgo filing suit on its federal claims, thereby locking its suit into state court.[216] Moreover, with rare exceptions, state courts have concurrent jurisdiction over cases within the subject-matter jurisdiction of the federal courts.[217] Thus, even when a federal district court would have jurisdiction over the plaintiff's claims, those claims—if not within the exclusive jurisdiction of the federal courts—may be adjudicated in state court.

To the extent parties forgo resort to the federal courts by not filing in or removing to federal district court, federal judicial involvement is unnecessary. But if suit is filed in defiance of a purported agreement

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alternative forum is abroad. *Id.* at 772. But *Quackenbush* cited only two cases for that proposition, *American Dredging* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), a diversity jurisdiction case in which the Court expressly left open whether state or federal law governed the motion to dismiss. *Id.* at 248 n.13. *Piper* is consistent with the understanding that the appropriate question in a diversity case is whether courts in the relevant U.S. state are an inappropriate forum vis-à-vis the courts of another country. The law of the state in which a federal district court sits can only determine whether that *state* is an appropriate forum vis-à-vis an alternative forum (such as the United Kingdom in the *Piper* case).

214. For a different view, see, for example, David H. Taylor & Sarah M. Cliffe, *Civil Procedure by Contract: A Convoluted Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1096–99 (2002), which argues that enforcement of forum selection clauses by federal courts is inconsistent with the principle that federal courts "have no more right to decline to exercise jurisdiction which is given than to usurp that which is not given"; and Mullenix, *supra* note 61, at 331–32 (alteration in original) (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)), which argues that enforcement of forum selection clauses is inconsistent with the principle "that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them'".

215. 28 U.S.C. § 1652.

216. GEOFFREY C. HAZARD, JR., WILLIAM A. FLETCHER, STEPHEN MCG. BUNDY & ANDREW D. BRADT, PLEADING AND PROCEDURE 307 (12th ed. 2020) ("If a plaintiff is willing to forgo her federal-law cause of action, she may prevent removal from state to federal court by limiting her complaint to her state law cause of action.").

217. *Id.* at 236 ("State trial courts have concurrent jurisdiction with the federal courts over most cases involving federal law.").

to forgo the federal court system, a court must exercise its subject matter jurisdiction at least for the purpose of deciding whether it should enforce the alleged agreement by declining to further exercise its jurisdiction.

State law can have no role to play in deciding *whether* a federal court has power to enforce advance agreements to forgo federal jurisdiction. In the absence of clear guidance in the Constitution, federal statutes or treaties, that question must be resolved through federal common law. Indeed, a refusal to resolve that question using the only tool available—federal common law—is itself a decision that advance agreements to forgo resort to the federal courts are unenforceable *per se*.[218]

For all of these reasons, there should be no question that the federal common law of *forum non conveniens* may be used, when appropriate, to enforce contractually valid forum selection clauses.[219] The harder question is whether the whole law of the state in which the federal district court sits has any role to play in determining whether a particular forum selection clause is contractually valid. If that law governs, a dismissal on *forum non conveniens* grounds can determine only whether the federal district courts sitting in that state must enforce the forum selection clause. The dismissal can have no issue-preclusive effect on whether federal district courts in *other* states must enforce the forum selection clause unless the law of those other states is the same.[220] By contrast, a *forum non conveniens* dismissal based on the ground that the forum selection clause is contractually invalid as a

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218. A similar analysis applies at the very least to the general venue provision set forth in 28 U.S.C. § 1391(b). Section 1391(b) can and should be read as permitting federal district courts to determine whether a purported agreement to forgo the federal courts altogether should be enforced. That conclusion is further buttressed by the fact that it is well established that a party may waive its right to have suit filed in a proper venue. Some commentators have noted that forum selection clauses are distinct in important ways from waivers that occur when suit is filed or thereafter. *See, e.g.*, Taylor & Cliffe, *supra* note 214, at 1104–07 (discussing some differences). These differences may properly affect whether courts should enforce forum selection clauses, but they cannot relieve courts from the burden of making a decision.

219. This Article does not address whether an *invalid* forum selection clause should be given evidentiary weight in a *forum non conveniens* analysis as a matter of federal law. *Cf. supra* Section I.A.1 (arguing that such an approach is appropriate under § 1404(a)). The answer to that question depends on whether federal district courts generally have power to determine that the federal judicial system is a seriously inappropriate forum for adjudication of a suit, and if not, whether state or federal law governs whether a federal district court may dismiss on the ground that the state is a seriously inappropriate forum vis-à-vis the courts of another country.

220. *See supra* note 196 and accompanying text.

matter of federal common law should have preclusive effect in federal courts across the country. Thus, the law of *forum non conveniens*, properly understood, puts federal courts to a choice between ensuring vertical uniformity between the state and federal courts in a state and giving preclusive effect across the federal judicial system to a determination that that system is an inappropriate forum. The next Section—after exploring the *Erie* consequences of both kinds of dismissals—explains why federal courts should use a *forum non conveniens* dismissal with preclusive effect across the federal judicial system.

2. Forum non conveniens *dismissals to enforce forum selection clauses should be premised on a finding that the federal judicial system is an inappropriate forum for the litigation*

A dismissal on *forum non conveniens* grounds has at least as much potential to be outcome determinative as a transfer under § 1404(a).[221] For that reason, state law must govern the contractual validity of a forum selection clause in a *forum non conveniens* analysis unless the *Erie* policy would be outweighed by some other federal policy or interest.[222] Part I argued that no such interest exists with respect to a transfer of venue.[223] But whether there are federal interests or policies that outweigh the *Erie* policy in the *forum non conveniens* context depends on what *kind* of *forum non conveniens* dismissal a court enters.

No federal interests or policies outweigh the *Erie* policy if a dismissal would rest on a finding that the federal district courts in the state are an inappropriate forum for the suit. Because a dismissal on this limited ground would permit a plaintiff to refile in the federal courts of another state, such a dismissal is, for *Erie* purposes, functionally equivalent to a transfer of venue under § 1404(a).

By contrast, if federal district courts determine whether the federal judicial system is an inappropriate forum, the federal interest in a uniform answer to that question across the federal judicial system outweighs the *Erie* policy. That is because application of the law of the state in which the federal district court sits would be incompatible with a finding that the federal judicial system is an inappropriate forum for

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221. *Cf. supra* Section I.C.2.

222. *Cf. supra* notes 125–26 and accompanying text (explaining that whether private-interest factors may be waived by a contractually valid forum selection clause is a separate question from whether a forum selection clause is contractually valid and that the same law need not apply to both).

223. *See supra* Section I.C.3.

litigation. It simply makes no sense for the law of the state in which a federal district court happens to sit to determine whether the federal judicial system—as opposed to the federal district courts in a particular state—is an appropriate forum for a particular suit. The law of that state can do no more than determine whether courts in *that state* would be an inappropriate forum vis-à-vis the contractually-selected forum.

It could be argued that federal district courts should decide only whether the federal district courts of the state are an inappropriate forum vis-à-vis the chosen forum. That would allow vindication of the *Erie* policy, albeit at the cost of leaving open the possibility that a dismissal would not foreclose a subsequent suit in the federal courts of a different state less willing to enforce the forum selection clause.

Federal district courts in fact routinely enter dismissals in other contexts that do not purport to preclude further litigation in the state and federal courts of another state. A dismissal on statute of limitations grounds provides an excellent example. A limitations dismissal traditionally does not preclude a plaintiff from bringing suit in a state with a longer statute of limitations.[224] Such a dismissal essentially means no more than "courts in *this state* may not hear the action." The same is true of a dismissal for lack of personal jurisdiction when the dismissal is based on a lack of jurisdiction under state law or the lack of necessary contacts with the state under the Fourteenth Amendment Due Process Clause.[225]

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224. RESTATEMENT OF JUDGMENTS § 49 cmt. a (AM. L. INST. 1942) (noting that a plaintiff whose suit is dismissed on statute of limitations grounds in one state generally is not "precluded from maintaining an action to enforce the claim in another State if it is not barred by the Statute of Limitations in that State"); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 19 cmt. f (AM. L. INST. 1980) (noting that if an "action is barred by the statute of limitations of the first state" it will not necessarily bar suit in a second state with a different statute of limitations). Some jurisdictions have departed from the traditional approach and treat limitations dismissals as having claim-preclusive effect. *See* Danielle Calamari, Note, *Voluntary Dismissal of Time-Barred Claims*, 85 FORDHAM L. REV. 789, 805 (2016) (noting that in some states, "statute-of-limitations dismissals are claim preclusive," thus barring "the plaintiff from refiling the action anywhere").

225. RESTATEMENT OF JUDGMENTS § 49 cmt. a (AM. L. INST. 1942) (noting that when a defendant "obtains judgment in his favor on a ground not involving the substance of the plaintiff's cause of action," such as a "judgment . . . based on the lack of jurisdiction of the court over the defendant," the judgment has only issue-preclusive effect); RESTATEMENT (SECOND) OF JUDGMENTS § 20 (AM. L. INST. 1980) ("A personal judgment for the defendant, although valid and final, does not bar an action by the plaintiff on the same claim . . . [w]hen the judgment is one of dismissal for lack of jurisdiction . . . .").

But there is an important distinction between such dismissals and a *forum non conveniens* dismissal enforcing a forum selection clause. A traditional limitations dismissal does not suggest that courts in a state with a longer statute of limitations should refuse to hear the case. And a dismissal for lack of personal jurisdiction that depends on the law of a state or the lack of required contacts with a state similarly has no bearing on the jurisdiction of courts in another state. By contrast, a dismissal enforcing an advance agreement to bring suit in the courts of a foreign country or U.S. state necessarily rests on a determination that the suit should be heard outside of the federal judicial system. The scope of a *forum non conveniens* dismissal should reflect that reality unless the U.S. Constitution or a federal statute requires otherwise.

As discussed above, it is within the constitutional power of the federal government to determine the validity of a forum selection clause in federal court using federal law.[226] The fact that *other* contractual provisions must be governed by the whole law of the state in which a federal district court sits is irrelevant. Nor does any federal statute require federal courts to apply state law to determine the validity of forum selection clauses choosing the courts of a foreign country or U.S. state. Indeed, the lack of any such statutory obligation sharply distinguishes forum selection clauses from arbitration clauses.[227]

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226. *See supra* notes 113–15 and accompanying text.

227. Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16, "state law" governs arbitration clauses "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); *see also* Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–31 (2009) ("'[S]tate law' . . . is applicable to determine which contracts are binding under § 2 and enforceable under § 3 [of the FAA] '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'" (quoting *id.*)). In the words of the statute, specified agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. That statutory language has been construed to require that an arbitration agreement covered by the FAA be put on the "same footing" as contracts generally. *See* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 458 (2003) ("Congress sought simply to 'place such agreements upon the same footing as other contracts.'" (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468, 474 (1989)); *Volt*, 489 U.S. at 474 (noting that the Federal Arbitration Act "was designed 'to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate,' and place such agreements 'upon the same footing as other contracts'" (citation omitted)). And arbitration clauses would not be on the same footing as other contracts if federal common law governed the validity of arbitration

Thus, on a *forum non conveniens* motion, federal common law should govern the contractual validity of forum selection clauses and other related issues such as the construction of such clauses and their applicability to non-signatories. The Section that follows discusses the content of that federal common law.

B. Federal Common Law Should Borrow State or Foreign Law When Appropriate to Govern the Contractual Validity of Forum Selection Clauses

Both policy and precedent suggest that the federal common law rules set forth in *The Bremen* and its progeny should govern when applicable. Those cases have long been understood to set forth important federal common law rules on the contractual validity of forum selection clauses. Specifically, *The Bremen* and its progeny (cases such as *Carnival Cruise Lines* and *Scherk*) indicate that forum selection clauses should be treated as *prima facie* valid and identify key defenses to contractual validity.[228] These defenses—with the exception of the public policy defense—must be adjudicated using uniform federal common law rules.[229]

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clauses while the whole law of the state in which a federal district court sits governed contracts generally. *See* Note, *An Unnecessary Choice of Law:* Volt, Mastrobuono, *and the Federal Arbitration Act*, 115 HARV. L. REV. 2250, 2253 (2002) ("Because the federal interest begins, and ends, with ensuring that private agreements to arbitrate are enforced according to their terms, the federal government's very interest is in applying—and not displacing—traditional state contract law."); *id.* ("[A] special federal rule of contract construction would frustrate the explicit purpose of the Act, 'to make arbitration agreements as enforceable as other contracts, but not more so.'" (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967))); Traci L. Jones, Note, *State Law of Contract Formation in the Shadow of the Federal Arbitration Act*, 46 DUKE L.J. 651, 663 (1996) ("Evaluating arbitration agreements under federal law while evaluating all other contractual provisions under state law would place the arbitration provision on footing different from the rest of the contract; the arbitration provisions would receive preferential treatment."); *cf.* Tuo Huang, *The Two Voices of Federal Law on "Arbitrability": Substantive Common Law, Federalism, and Choice of Law for International Commercial Arbitration Agreements*, 40 J.L. & COM. 61, 114–17 (2021) (arguing that a federal district court need not apply the whole law of the state in which it sits when determining which state or foreign country's contract law governs an international arbitration agreement). Thus, stays of arbitration under the FAA—unlike dismissals under the federal common law of *forum non conveniens*—will often require application of the whole law of the state in which a federal district court sits.

228. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972).

229. Federal courts have sometimes considered state public policy in implementing the "public policy" defense set forth in *The Bremen*. *See supra* note 12 and accompanying text. This approach is correct because federal law is by its very nature interstitial. *See*

The *Bremen* line of cases, however, leaves unanswered questions about the law governing the contractual validity of forum selection clauses: Aside from the specific defects identified in *The Bremen*, what other defects in contract formation render a forum selection clause invalid? And on what grounds may one party revoke an otherwise valid forum selection clause?[230] Federal courts sometimes apply uniform federal common law rules—often drawn from general contract principles—to fill in gaps of this sort.[231] But they should instead fill such gaps by borrowing (as the federal-common-law rule) the chosen law.[232] And if the agreement includes no valid choice-of-law clause or the chosen law would have invalidated the forum selection clause at

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Hart, *supra* note 136, at 498 (noting that federal law is "interstitial" because "Congress rarely enacts a complete and self-sufficient body of federal law" and "legal problems" do not necessarily "come wrapped up in neat packages marked 'all-federal' or 'all-state'"). There is simply no reason to believe that the only appropriate domestic source for public policy defenses in federal court is federal law. On a *forum non conveniens* motion to enforce a forum selection clause, a federal district court should nonetheless avoid invoking a public policy exception simply because the law of the state in which it sits would do so. For the reasons discussed in Section II.A.2, the law governing contractual validity on a *forum non conveniens* motion should be the same with respect to a particular forum selection clause across the country. Thus, in deciding *which* state's public policy should be applied in federal court to determine the contractual validity of a forum selection clause, federal courts should apply a choice-of-law rule that will point to the same state law across the country. When, for example, the public policy of a state would invalidate the forum selection clause to protect a party to the forum selection clause domiciled in the state, there may be good grounds to apply that state's policy. Federal courts should also decline to apply state public policy that is inconsistent with *The Bremen*'s view that forum selection clauses—as a category—should not be deemed contrary to public policy. *Cf. supra* note 105 and accompanying text (identifying Idaho and, with respect to contracts made there, North Carolina, as states that categorically invalidate forum selection clauses).

230. For discussion of issues *The Bremen* and its progeny do not specifically address with respect to international forum selection clauses, see Jason Webb Yackee, *Choice of Law Considerations in the Validity and Enforceability of International Forum Selection Agreements: Whose Law Applies?* 9 UCLA J. INT'L L. & FOREIGN AFFS. 43, 50–62 (2004).

231. Courts sometimes make the mistake of assuming that the grounds for invalidating a forum selection clause set forth in *The Bremen* and its progeny are the *exclusive* grounds for invalidating a forum selection clause. This view is untenable. *See* BORN & RUTLEDGE, *supra* note 96, at 548 ("Although relatively few decisions have addressed this, a forum selection clause would be invalid if it did not satisfy general contract law principles for the formation and validity of any contract."). This Article argues that the chosen law or the law of the chosen forum rather than general contract principles should govern these matters.

232. *See* Yackee, *supra* note 230, at 84 ("[T]he wide acceptance of the more general principle of 'party autonomy' . . . suggests that courts should turn first and foremost to the law that the parties have explicitly selected to govern their relationship.").

the time of contracting,[233] federal courts should borrow the whole law of the *chosen forum*.[234] Federal courts should borrow the chosen law and, in the alternative, the whole law of the chosen forum because rules drawn from those sources are consistent with the legitimate expectations of the parties. Simply put, parties to a forum selection clause have a legitimate expectation that the chosen law or the whole law of the chosen forum will govern the validity and enforceability of their forum selection clause. The risk that one of the parties may unilaterally upend those expectations by filing suit outside of the selected forum does not render those expectations illegitimate.

The Court's forum selection clause jurisprudence has stressed the desirability of protecting the legitimate expectations of the parties to a forum selection clause.[235] *Erie* limits the ability of the federal courts to do so in the context of § 1404(a): federal courts may protect the legitimate expectations of the parties by requiring that contractually valid forum selection clauses be enforced, but state law governs whether a forum selection clause is contractually valid.[236] When federal

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233. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. e (AM. L. INST. 1971) (stating that "[i]f the parties have chosen a law that would invalidate the contract, it can be assumed that they did so by mistake" and that in such cases "the chosen law will not be applied by reason of the parties' choice"). The Second Circuit argued in *Martinez v. Bloomberg LP*, 740 F.3d 211 (2d Cir. 2014), that if the chosen law "govern[ed] the enforceability of a forum selection clause, . . . 'choice of law provisions selecting jurisdictions that disfavor forum clauses would put district courts to the awkward choice of either ignoring the parties' choice of law or invalidating their choice of forum.'" *Id.* at 219 (quoting Phillips v. Audio Active, 494 F.3d 378, 385 (2007)). But the Second Circuit's argument overlooked the basic principle set forth in comment e. Comment e has been applied not just to the invalidation of contracts as a whole, but also to the invalidation of provisions in a contract. *See, e.g.*, Kipin Indus., Inc. v. Van Deilan Int'l Inc., 182 F.3d 490, 495 (6th Cir. 1999) (applying comment e to find the lien-waiver provision of a contract valid although Michigan law, which the parties had selected to govern the contract, would have invalidated the provision). The argument for application of comment e is even stronger with respect to forum selection clauses because such clauses are separable from the underlying contract. *Cf.* Peter B. Rutledge, *Convergence and Divergence in International Dispute Resolution*, 2012 J. DISP. RES. 49, 59 ("As several scholars have noted, one consequence of the separability doctrine is that the parties can subject the arbitration clause to a separate law than that governing the parties' substantive contract.").

234. Yackee, *supra* note 230, at 90–91 ("The better solution, in the absence of explicit party choice and in the interest of promoting simplicity of application and predictability of result, is to turn to the parties' implicit choice of governing law—the law of the designated forum.").

235. *See supra* notes 169–77 and accompanying text.

236. *See supra* Section I.C.

courts have authority to determine the contractual validity of forum selection clauses through federal common law, however, they may shape that law to protect the legitimate expectations of the parties. And federal courts should do so when it would not interfere with the federal interest in refusing enforcement to clauses that would improperly deny access to a federal forum.[237]

Kevin Clermont has argued that the law of the forum should *always* govern the validity and enforceability of a forum selection clause.[238] As he explains, the forum "court's sovereign has the predominant interest in being the one to decide where to draw the line between sovereign interest and party autonomy."[239] But the specific contractual rules laid down by *The Bremen* and its progeny need not occupy the field to protect the federal interest in refusing enforcement of a forum selection clause that inappropriately denies a party a federal forum. The public-interest factors of the *forum non conveniens* analysis should be enough to address the exceptional case in which the contractual defenses identified in *Bremen* and its progeny would not adequately protect a federal interest in adjudicating a particular case. Thus, federal courts should borrow the chosen law or the whole law of the

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237. As for the converse problem, it is less clear that there is a legitimate federal interest in refusing to adjudicate a case when the selection of a foreign forum would be invalid. That depends on whether federal law gives courts authority to dismiss on *forum non conveniens* grounds for reasons other than enforcing the parties' bargain. *See supra* notes 209–12 and accompanying text. But to the extent such an interest exists, it can be vindicated through a full-blown *forum non conveniens* analysis that does not turn on the contractual validity of the forum selection clause.

238. Clermont, *supra* note 113, at 654–60. By contrast, he argues that "[t]he law of the chosen court should normally govern interpretation of the forum-selection clause" and that "in the absence of a choice of law clause," a forum selection clause should be deemed "an implicit choice-of-law clause for matters relating to [the interpretation of] the forum-selection clause itself." *Id.* at 661. For a critique of the argument that the chosen law should govern matters of interpretation, see Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325 (2019). Professor Monestier argues, among other things, that the parties to a forum selection clause "did not necessarily intend that a forum unilaterally selected by one party (ostensibly in contravention of an exclusive forum selection clause) would apply the chosen law." *Id.* at 351 (footnote omitted). But to refuse to apply the chosen law in these circumstances would upend the legitimate expectations of the parties with respect to the law that should govern the meaning of the forum selection clause. *See supra* notes 233–35 and accompanying text.

239. Clermont, *supra* note 113, at 658.

chosen forum to fill in gaps in the law of contractual validity left open by *The Bremen* and its progeny.[240]

A few circuit courts have held or suggested that uniform federal common law rules do not in fact govern *all* issues of contractual validity.[241] But with the exception of the Seventh Circuit, federal appellate courts thus far have not applied the chosen law or the whole law of the chosen forum to matters of contractual validity.[242] The

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240. For an influential decision taking a very different view, see the Second Circuit's decision in *Martinez v. Bloomberg LP,* 740 F.3d 211 (2d Cir. 2014), in which it claimed that "[i]f the enforceability of a forum selection clause were governed by the law specified in the choice-of-law clause, then contracting parties would have an absolute right to 'oust the jurisdiction' of the federal courts." *Id.* at 218. *Martinez* made three additional arguments for applying forum law to validity and enforceability. First, the court claimed that "[t]he presumptive enforceability of forum selection clauses reflects a strong federal public policy of its own, which would likewise be undermined if another body of law were allowed to govern the enforceability of a forum selection clause." *Id.* But the fact that a forum selection clause is presumptively enforceable does not mean that federal law must apply to *all* questions of contractual validity and enforceability. It simply means that a full-blown *forum non conveniens* analysis is inappropriate if the forum selection clause is contractually valid and that the party resisting enforcement has the burden of proving the clause should not be enforced. Second, the court argued that applying federal law to all questions of validity and enforceability "prevents courts from having to engage in a potentially complex and protracted inquiry into the enforceability of a forum selection clause under foreign law, which would defeat the purpose of the forum selection clause." *Id.* at 220. The potential difficulties of such an inquiry, however, should not defeat the legitimate expectations of the parties. Moreover, in at least some cases, a federal court will have to rule on the validity of the forum selection clause under the law of the chosen forum in any event to determine whether the chosen forum is an adequate, alternative forum. Such a forum is required before a federal district court may dismiss on *forum non conveniens* grounds. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) (stating that a federal district court must determine whether an adequate, alternate forum before dismissing on grounds of *forum non conveniens*). For discussion of the third argument *Martinez* makes, see *supra* note 233.

241. *See* DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp., 28 F.4th 956, 958 (9th Cir. 2022) (holding in a transfer of venue case that whether a forum selection clause is voidable by one of the parties is governed by state law); Wylie v. Kerzner Int'l Bah. Ltd., 706 F. App'x 577, 580 (11th Cir. 2017) (per curiam) (suggesting in a *forum non conveniens* case seeking a dismissal in favor of a foreign forum that state law may govern the validity as opposed to the enforceability of a forum selection clause in a diversity case); Barnett v. DynCorp Int'l LLC, 831 F.3d. 296, 302 (5th Cir. 2016) (same).

242. The Seventh Circuit comes closest to the approach this Article argues is appropriate. *See* Jackson v. Payday Fin., LLC, 764 F.3d 765, 775 (7th Cir. 2014) (stating in a case in which the chosen forum was in the United States that "[i]n contracts containing a choice of law clause . . . the law designated in the choice of law clause

chosen law has been applied by other circuits only to govern the interpretation of forum selection clauses.[243] And the circuits have been far from unanimous in doing so.[244]

Indeed, two circuits have held instead that federal district courts must apply the choice-of-law rules of the state in which they sit to determine what law governs matters of interpretation and the extent to which non-signatories may be bound by a forum selection clause.[245] These circuits, in other words, hold that the choice-of-law rule set forth in *Klaxon Co. v. Stentor Electric Manufacturing Co.*[246] controls. *Klaxon*, of

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would be used to determine the validity of the forum selection clause"); Bonny v. Soc'y of Lloyd's, 3 F.3d 156, 159 (7th Cir. 1993) (stating that "[t]he enforceability of forum selection clauses in international agreements is governed by the Supreme Court's decision in *Bremen*").

243. *See Martinez*, 740 F.3d at 220 ("To ensure that the meaning given to a forum selection clause corresponds with the parties' legitimate expectations, courts must apply the law contractually chosen by the parties to interpret the clause."); Albemarle Corp. v. AstraZeneca UK, Ltd. 628 F.3d 643, 649–50 (4th Cir. 2010) (holding as a matter of federal common law that a court must apply the parties' choice of law in interpreting a forum clause); Yavuz v. 61MM, Ltd., 465 F.3d 418, 430 (10th Cir. 2006) ("[W]e now hold that under federal law the courts should ordinarily honor an international commercial agreement's forum-selection provision *as construed under the law specified in the agreement's choice-of-law provision*.").

244. *See, e.g.*, Manetti-Farrow, Inc. v. Gucci Am., Inc. 858 F.2d 509, 513 (9th Cir. 1988) (applying federal common law both to construe the forum selection clause and to determine its applicability to non-signatories); *infra* note 245 (identifying cases applying the law of the state in which federal district court sits to these issues).

245. *See, e.g.*, Firexo, Inc. v. Firexo Grp., Ltd., 99 F.4th 304, 326 (6th Cir. 2024) (holding that the choice-of-law rules of the state in which a federal district court sits determine the law governing the construction of the forum selection and whether a non-signatory may be bound by a forum selection clause); Weber v. PACT XPP Techs., AG, 811 F.3d 758, 773 (5th Cir. 2016) (holding the same with respect to the interpretation of a forum selection clause); *id.* at 770–71 (noting that "several sister circuits . . . have applied foreign law to determine the meaning of [a forum selection clause]," but insisting that "the presence or absence of a specific choice-of-law clause does not alter the core obligation of a federal court, sitting in diversity, to ascertain which body of substantive law to apply by implementing the choice-of-law rules of its home jurisdiction"); *cf. Wylie*, 706 F. App'x at 579–80 (suggesting that state law may govern whether a forum selection clause selecting the courts of a foreign country may be enforced against a non-party without addressing how to determine which state's law); *Barnett*, 831 F.3d. at 308 (not deciding whether the law of the state in which the federal district court sat governed an issue of contractual validity because Texas choice-of-law rules would require application of the chosen law with respect to that issue).

246. 313 U.S. 487 (1941).

course, held that a federal district court must apply the choice-of-law rules of the state in which it sits.[247]

It is true that the Court has repeatedly emphasized that the rule set forth in *Klaxon* may not be disregarded lightly.[248] But the Court has never suggested that federal district courts are required to apply *Klaxon* when doing so would disserve federal interests.[249] And applying *Klaxon* in this context would disserve the federal interest in providing a uniform answer to whether the federal judicial system is an appropriate forum in a particular case. A federal district court looking to the choice-of-law rules of the state in which it sits can determine only whether that state would be an appropriate forum vis-à-vis the chosen forum,[250] not whether the federal judicial system is an appropriate forum. That is why state or foreign law should be borrowed through a federal common law choice-of-law rule that points all federal courts across the country to the same law.[251]

The precedent most closely on point is *Semtek International Inc. v. Lockheed Martin Corp.*[252] The Court in that case adopted a federal common-law choice-of-law rule that—unlike *Klaxon*—required application of the *same* state law in every state and federal court across the country.[253] Specifically, *Semtek* held that when a uniform federal common law rule of preclusion is not required, federal and state courts must apply the preclusion law of the state in which the federal district

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247. *Id.* at 496–97; *see also* Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (modifying *Klaxon* slightly in certain transfer cases because "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").

248. The Court did so most recently in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022), where the Court rejected a departure from *Klaxon* in a case under the Foreign Sovereign Immunities Act. *Id.* at 1509; *see also* Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam) ("A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.").

249. *Cassirer*, 142 S. Ct. at 1509 (suggesting that federal courts may create independent federal choice-of-law rules when necessary to serve a uniquely federal interest).

250. *See supra* note 196–97 and accompanying text.

251. *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1651 (2008) ("[I]f the state rule does *not* apply of its own force, then a court choosing to adopt a state rule of decision can, at least in principle, adopt *any* state's rule—not necessarily the rule [as required by *Klaxon*].").

252. 531 U.S. 497 (2001).

253. *Id.* at 508.

court that rendered the judgment sits.[254] By so holding, *Semtek* vindicated the federal interest in according a federal judgment the same force and effect across the country even when a uniform federal common law rule of preclusion is not required.[255] The need for a uniform determination of whether the federal judicial system is an inappropriate forum for a suit similarly requires a departure from *Klaxon*.

To summarize, a federal district court deciding a *forum non conveniens* motion that seeks enforcement of a forum selection clause should apply the federal common law set forth in *The Bremen* and its progeny. The defenses to contractual validity set forth in these cases must—with the exception of the public policy defense—be adjudicated using uniform federal common law rules. But courts should borrow the chosen law or the whole law of the chosen forum to address any additional arguments that the forum selection clause is invalid.

This framework provides a straightforward means of furthering the legitimate expectations of the parties while fully taking into account important federal interests. But whatever rules federal courts ultimately apply, they should eschew any reliance on *Klaxon* in determining whether to enforce a forum selection clause. By so doing, federal courts can ensure that they are deciding whether the *federal judicial system*—rather than the federal district courts of the state in which they sit—is an appropriate forum for the litigation.

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254. *Id.* (stating that "nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court" and "adopting" that rule "as the federally prescribed rule of decision").

255. As explained elsewhere:

> The federal common law of preclusion is a rare instance in which refusing to displace state law would disserve federal interests even when a uniform federal common law rule of preclusion is unnecessary. To the extent that state law applies of its own force, the courts of each state would have authority to determine the preclusive effect of a federal judgment in their state, and a federal district court applying *Klaxon* would be required to defer to the preclusion law of the state in which it sits. Thus, the preclusive effect of a federal judgment might vary depending on the state in which preclusive effect for the judgment is sought. That "would create a significant conflict with the federal interest in giving federal judgments predictable effect." By requiring state courts to borrow the preclusion law of the state in which the federal court which rendered the judgment sat, the Court displaced *Klaxon* with a special choice-of-law rule for the preclusive effect of federal judgments that safeguards the federal interest in giving federal judgments predictable effect.

Woolley, *supra* note 28, at 623 n.224 (quoting Woolley, *supra* note 141, at 539) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496–97 (1941)).

CONCLUSION

A thorough reexamination of the Supreme Court's forum selection clause cases—viewed through the lens of *Erie*—indicates that many federal courts have relied on an unsound framework for enforcing forum selection clauses. In deciding, for example, that federal law governs the contractual validity of forum selection clauses in a § 1404(a) analysis, courts have focused too intensely on the obvious federal interest in controlling where federal litigation is heard. But that federal interest can be fully vindicated through a § 1404(a) analysis even if contractual validity is determined by state law. The requirement that contractually valid forum selection clauses be enforced in all but exceptional cases is focused on something quite different: respecting the legitimate expectations of the parties while giving effect to the limits imposed by the applicable law on the contractual validity and enforceability of a forum selection clause.

In all but an exceptional case—in which the public-interest factors of a § 1404(a) analysis will override the enforcement of a contractually valid forum selection clause—those limits are imposed by *state* rather than federal law. Applying federal rules of contractual validity instead would destroy the vertical uniformity between state and federal courts that the *Erie* policy demands. Specifically, the choice-of-law rules that determine the substantive rights of the parties would vary depending on whether the contractual validity of the forum selection clause was determined in state or federal court. For that reason, the whole law of the state in which a federal district court sits must govern contractual validity when a party seeks to enforce a forum selection clause through a § 1404(a) motion. The only exceptions are cases in which the forum selection clause is part of a contract governed by federal contract law.

By contrast, *forum non conveniens* motions to enforce forum selection clauses should be governed by federal common law. Properly understood, such motions seek dismissal on the ground that the federal judicial system is an inappropriate forum. The law of the state in which a federal district court sits cannot plausibly answer that question for the federal judicial system. A few courts nonetheless have looked to the whole law of the state in which they sit to resolve issues such as the proper interpretation of a forum selection clause. But that approach overvalues the *Erie* policy at the expense of the principle that a uniform answer should be available in federal courts across the country to the question of whether the federal judicial system is an appropriate forum for a suit.

That does not mean that uniform federal common law rules must apply to *all* issues of contractual validity and to other related issues such as the construction of forum selection clauses and the extent to which non-signatories may be bound. Indeed, when *The Bremen* and its progeny do not specifically address a matter, courts should fill in the gaps by applying the law chosen by the parties in their contract or the whole law of the chosen forum. By so doing, courts can protect the legitimate expectations of the parties when that would not interfere with the federal interest in retaining litigation that belongs in the federal court system. The public-interest factors of the *forum non conveniens* analysis should be enough to address the exceptional case in which *The Bremen* and its progeny do not adequately protect the federal interest in adjudicating a case.

In short, the case law suggests that many federal courts to date have failed to properly synthesize the *Erie* policy, countervailing federal interests, and the parties' legitimate expectations. The Court's forum-selection clause cases—properly read in the light of *Erie*—do an excellent job of showing the way. The federal courts need only follow.