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Enforcement of Forum-Selection Clauses in Federal Court After *Atlantic Marine*

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**ENFORCEMENT OF FORUM-SELECTION
CLAUSES IN FEDERAL COURT
AFTER ATLANTIC MARINE**

*Matthew J. Sorensen**

Forum-selection clauses are important agreements that limit exposure to risk of litigation in an undesired locale. The enforcement of forum-selection clauses in the U.S. federal court system was not always certain, but today, such agreements are broadly considered enforceable. Courts, however, are split as to whether such clauses are governed by state or federal law and as to the proper procedural mechanism for enforcement. Recently, in Atlantic Marine Construction Co. v. U.S. District Court, the U.S. Supreme Court made strides toward resolving these disagreements among lower courts.

This Note explores the history of enforcement of forum-selection clauses in federal court and articulates the legal complexities that remain in the wake of Atlantic Marine. It argues that Atlantic Marine implicitly resolved the choice-of-law split in favor of applying state substantive law to determine a forum clause's validity and federal procedural law to determine its enforceability. To effectuate this implicit resolution, this Note proposes that courts engage in a two-step analysis in evaluating motions to enforce forum-selection clauses and that litigants bring such motions under Federal Rules of Civil Procedure 12(b)(6), 12(c), or 56.

TABLE OF CONTENTS

INTRODUCTION.....	2523
I. THE HISTORY OF FORUM-SELECTION CLAUSES AND THE SUPREME COURT'S FORUM-SELECTION CLAUSE JURISPRUDENCE.....	2527
A. <i>The Importance of Forum-Selection Clauses to Contracting Parties</i>	2527
B. <i>The Supreme Court's Forum-Selection Clause Jurisprudence</i>	2529
1. <i>The Bremen v. Zapata Off-Shore Co.</i>	2530
2. <i>Stewart Organization, Inc. v. Ricoh Corp.</i>	2532

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a. <i>The Majority Opinion</i>	2532
b. <i>Justice Scalia's Dissent</i>	2534
3. <i>Carnival Cruise Lines, Inc. v. Shute</i>	2536
4. <i>Atlantic Marine Construction Co. v. U.S. District Court</i>	2538
a. <i>The Venue Split: The Discretionary Venue Transfer Approach Versus the Improper Venue Approach</i>	2539
b. <i>The Supreme Court Settles the Venue Split</i>	2540
II. CHOICE OF LAW AND PROCEDURAL MECHANISMS FOR ENFORCEMENT OF FORUM-SELECTION CLAUSES	2545
A. <i>The Choice of Law Split: Does Federal or State Law Govern the Validity of Forum-Selection Clauses?</i>	2546
B. <i>The Procedural Split</i>	2549
1. <i>The Affirmative Defense Approach</i>	2550
2. <i>Implications of the Atlantic Marine and Affirmative Defense Approaches</i>	2551
III. ANALYZING ATLANTIC MARINE: RESOLVING THE CHOICE OF LAW SPLIT, THE TROUBLE WITH FORUM NON CONVENIENS, AND WHY COURTS SHOULD ADOPT THE AFFIRMATIVE DEFENSE APPROACH TO ENFORCE FORUM-SELECTION CLAUSES	2552
A. <i>Choice of Law and the Validity-Enforcement Two-Step</i>	2552
1. <i>Step One: Validity</i>	2553
2. <i>Step Two: Enforceability</i>	2555
3. <i>The Validity-Enforceability Two-Step Applied</i>	2556
B. <i>Applying Federal Common Law Forum Non Conveniens Standards to Forum-Selection Clauses May Raise Concerns Under the Erie Doctrine</i>	2558
C. <i>Raising the Forum-Selection Clause As an Affirmative Defense Is a Superior Procedural Mechanism for Enforcement</i>	2560
CONCLUSION	2562

INTRODUCTION

A large internet service provider makes the search records of more than 650,000 customers available for public download.¹ These records are subsequently distributed widely throughout the internet.² They reveal highly sensitive personal information, including the customers' struggles with sexuality, alcohol addiction, mental illness, physical abuse, domestic violence, incest, adultery, and rape.³ The records also "contain[] addresses, phone numbers, credit card numbers, social security numbers, passwords and other personal information."⁴ In response to this information breach, two customers, suing as "Doe" plaintiffs to protect their anonymity, bring a class action against the internet service provider in California federal court seeking relief for all customers under a federal privacy statute and various California consumer protection laws.⁵ The defendant, seeking to enforce a forum-selection clause found in its standard customer agreement, brings a motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3).⁶ If the motion is successful, the plaintiffs will be compelled to bring their lawsuit in Virginia state court "where a class action remedy would be unavailable to them"⁷ and could be forced to bring their claims pursuant to Virginia law, which "provides significantly less consumer protection to its citizens than California law."⁸

This Note assesses the substantive law governing the validity and enforceability of forum-selection clauses⁹ and procedural mechanisms for enforcing such clauses in federal court. The U.S. Supreme Court, in *Atlantic Marine Construction Co. v. U.S. District Court*,¹⁰ recently resolved a circuit split on the use of 28 U.S.C. §§ 1404 and 1406, relating to "Change of Venue" and "Cure or waiver of defects" in venue, respectively, and Rule 12(b)(3), relating to the enforcement of forum-selection clauses.

1. *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1078 (9th Cir. 2009).

2. *Id.* at 1079.

3. *Id.*

4. *Id.*

5. *Id.* at 1079–80.

6. *Id.* at 1080 (noting that the defendant "moved to dismiss the action for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3)" on the basis of the parties' forum selection clause).

7. *Id.* at 1079; *see also id.* at 1081–82 ("[T]he forum selection clause at issue here—designating the courts of Virginia—means the state courts of Virginia only . . .").

8. *Id.* at 1084 n.13; *see also id.* at 1083 n.12 ("California courts have 'extolled' 'the right to seek class action relief in consumer cases.' In Virginia state court, in contrast, class action relief for consumer claims is unavailable." (quoting *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 712 (Ct. App. 2001))).

9. A forum-selection clause is a "contractual provision in which the parties [to the contract] establish the place . . . for specified litigation between them." BLACK'S LAW DICTIONARY 726 (9th ed. 2009). The case law and academic literature use a number of different terms to describe the same basic contractual provisions, and this Note uses these terms interchangeably. *See* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 56 n.1 (1992) (referring to "'forum selection clause' or 'forum clause' and 'forum selection agreement' or 'forum agreement' interchangeably").

10. No. 12-929, slip op. at 1 (U.S. Dec. 3, 2013).

Missing from the narrow debate before the Court in *Atlantic Marine*, however, was discussion of a broader circuit split concerning the validity and enforcement of forum-selection clauses.¹¹

Prior to *Atlantic Marine*, there was no meaningful consensus among the circuits concerning the standard for determining the validity and enforceability of forum-selection clauses or the proper procedural mechanisms for enforcement.¹² While *Atlantic Marine* has provided some clarification, the remaining multifaceted circuit splits implicate longstanding federalism concerns,¹³ threaten to confuse litigators and courts, and jeopardize parties' substantial litigation and contractual rights in federal court.¹⁴

Part I of this Note begins with an overview of the importance of forum-selection clauses to contracting parties. These provisions assist parties in allocating the risk of litigating in a given jurisdiction before contractual disputes arise and thus increase predictability and efficient resolution of such disputes.¹⁵ The overview also explores the difference between so-called "mandatory" and "permissive" forum-selection clauses,¹⁶ how they interact with choice-of-law agreements, and how federal courts interpret the scope and meaning of such provisions.¹⁷ Part I includes a discussion of the Supreme Court's forum-selection clause jurisprudence. This discussion begins with the Court's historic refusal to give effect to forum-selection clauses, traces how that refusal was grounded in the "ouster doctrine,"¹⁸ and examines its subsequent abandonment by the Supreme Court in *The Bremen v. Zapata Off-Shore Co.*¹⁹ Part I.B discusses the Court's holdings in *The Bremen*, *Stewart Organization, Inc. v. Ricoh Corp.*,²⁰ and *Carnival Cruise Lines, Inc. v. Shute*,²¹ which led to widespread disagreements among lower

11. See *infra* Part II.A.

12. See *infra* Part I.B.4.a.

13. See generally Borchers, *supra* note 9 (discussing federal versus state choice of law issues, federal subject matter jurisdiction, and transfer issues); Kelly Amanda Blair, Note, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving Erie a Second Chance*, 46 GA. L. REV. 799 (2012) (discussing *Erie* issues raised by forum-selection clauses); Robert A. de By, Note, *Forum Selection Clauses: Substantive or Procedural for Erie Purposes*, 89 COLUM. L. REV. 1068 (1989) (same); Ryan T. Holt, Note, *A Uniform System for the Enforcement of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913 (2009) (discussing choice-of-law barriers and procedural barriers to enforcement of forum-selection clauses); Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT'L L. 663 (1997) (same).

14. See Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 296 (1988).

15. Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 700-01 (1992).

16. See *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383, 386-87 (2d Cir. 2007).

17. See *infra* Part I.A.

18. Borchers, *supra* note 9, at 60.

19. 407 U.S. 1 (1972).

20. 487 U.S. 22 (1988).

21. 499 U.S. 585 (1991).

federal courts concerning the enforcement of forum-selection clauses.²² It concludes with a discussion of *Atlantic Marine*,²³ which resolved some—but far from all—of these disagreements and altered the standard of enforcement of forum clauses through the federal common law²⁴ doctrine of forum non conveniens and § 1404(a).²⁵

Part II explains the disagreements that remain among lower courts concerning the enforcement of forum-selection clauses. First, it discusses the split among federal courts concerning the application of federal or state law to determine the validity and enforceability of forum-selection clauses.²⁶ Part II concludes by discussing the viability of enforcing forum-selection clauses via Federal Rules of Civil Procedure 12(b)(6), 12(c), and 56²⁷ and explores the implications of this approach alongside *Atlantic Marine*'s newly articulated § 1404(a) and forum non conveniens standard.²⁸

Part III argues that *Atlantic Marine* breathed new life into arguments that the *validity* of forum-selection clauses should be determined according to state law, even if *enforceability* is a question of federal law. It proposes that courts and litigants adopt a two-step method in assessing whether a given forum-selection clause should be enforced.²⁹

This argument is grounded in the *Stewart* Court's interpretation of the venue transfer statute, § 1404(a), as implicating only the enforceability of forum-selection clauses and not their validity.³⁰ Part III then argues that the Supreme Court implicitly adopted this interpretation in *Atlantic Marine* when it held that “venue in all civil actions” is determined exclusively by statute and that § 1406(a) and Rule 12(b)(3) are applicable only when venue is statutorily infirm.³¹

22. See Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 LOY. L.A. L. REV. 1625, 1636–43 (2011).

23. No. 12-929 (U.S. Dec. 3, 2013).

24. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253–54 (1981) (discussing the federal “common-law doctrine” of forum non conveniens).

25. See *infra* Part I.B.4.b.

26. See *infra* Part II.A.

27. See *infra* Part II.B.1.

28. See *infra* Part II.B.2.

29. See *infra* Part III.A.

30. See *infra* Part III.A.1. As Justice Antonin Scalia observed in his *Stewart* dissent: “Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (1988) (Scalia, J., dissenting).

31. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 4–8 (U.S. Dec. 3, 2013). Proper venue is established according to the dictates of 28 U.S.C. § 1391(b) and an agreement of the parties cannot fairly be characterized as rendering statutory venue “improper.” See *Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 404–05 (S.D.N.Y. 2000) (“‘Venue,’ in turn, is defined by statute at 28 U.S.C. § 1391, which sets forth where venue may properly be laid. The determination of the appropriate venue under Section 1391 revolves around [various factors listed in that statute, which do not include forum-selection clauses.] . . . The fact that the parties contractually agreed to litigate disputes in another forum is not a

Next, Part III argues that enforcing forum-selection clauses through the doctrine of forum non conveniens could raise concerns grounded in the *Erie Railroad Co. v. Tompkins*³² doctrine. This is because the forum non conveniens inquiry under federal law allows for a balancing of various interests in making the enforcement-dismissal determination,³³ while state law may presume validity and enforceability of forum clauses absent a showing of extraordinary circumstances such as fraud, adhesion, or violation of public policy.³⁴ Thus, the application of forum non conveniens doctrine could violate the twin aims of *Erie* by encouraging forum shopping and leading to possible inequitable administration of state contract law.³⁵

Part III concludes by arguing that the Supreme Court gave too little consideration in *Atlantic Marine* to the method of raising a forum-selection clause as an affirmative defense and enforcing it by moving either to dismiss for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), for judgment on the pleadings pursuant to Rule 12(c), or for summary judgment pursuant to Rule 56.³⁶ In evaluating a hypothetical defendant's forum-clause affirmative defense, a federal court sitting in diversity would look to the substantive state law governing contract disputes, including the state law that governs the validity of forum-selection clauses, and enforce the clause via dismissal provided that a defendant has met its procedural burden under the applicable rule of civil procedure.³⁷ For example, where a plaintiff has filed a lawsuit in violation of a forum-selection clause, the defendant files a motion for summary judgment, and the plaintiff can "raise no genuine

question of venue, but one of contract." (quoting *Nat'l Micrographics Sys., Inc. v. Canon U.S.A., Inc.*, 825 F. Supp. 671, 678–79 (D.N.J. 1993))).

32. 304 U.S. 64 (1938).

33. *See* *MBI Grp., Inc. v. Credit Foncier Du Cameroun*, 616 F.3d 568, 571 (D.C. Cir. 2010) ("A court *may* . . . dismiss a suit for forum non conveniens if the defendant shows there is an alternative forum that is both available and adequate and, *upon a weighing of public and private interests*, the strongly preferred location for the litigation." (emphasis added)). The Court has modified this standard when the movant is seeking to enforce a valid forum-selection clause, but some concerns remain. *See infra* Part III.B.

34. *See* *Doe I v. AOL LLC*, 552 F.3d 1077, 1084 (9th Cir. 2009) (recognizing California's refusal to enforce forum-selection clauses that limit a resident's ability to pursue state-law consumer protection claims); *Polzin v. Appleway Equip. Leasing, Inc.*, 191 P.3d 476, 481 (Mont. 2008) ("[F]orum selection clauses are 'prima facia [sic] valid' and will be enforced unless the resisting party can show that the clause is unreasonable under the circumstances." (quoting *Milanovich v. Schnibben*, 160 P.3d 562, 564 (Mont. 2007))).

35. *See* *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (noting the importance of "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws").

36. *See, e.g.*, *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009); Brief of Professor Stephen E. Sachs As Amicus Curiae in Support of Neither Party at 12–15, *Atl. Marine Constr. Co. v. U.S. Dist. Court* (U.S. Dec. 3, 2013) (No. 12-929) [hereinafter Brief of Sachs].

37. *See, e.g.*, *Westerberg v. Home Depot USA, Inc.*, No. 94-16630, 1996 WL 43512, at *1 (9th Cir. Feb. 1, 1996) (applying substantive state contract law in affirming a Rule 12(b)(6) dismissal); *Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 610 F.2d 371 (5th Cir. 1980) (applying substantive state contract law and reversing a Rule 12(b)(6) dismissal).

dispute as to any material fact” that the forum-selection clause is valid and should be enforced, then the defendant would be entitled to summary judgment.³⁸ This approach is superior for four reasons. First, it circumvents the complicated statutory interpretation issues raised by the venue transfer approach. Second, it avoids the potential *Erie* problems of the forum non conveniens approach.³⁹ Third, it throws into sharp relief the important distinction between the validity and the enforceability of forum-selection clauses. Finally, it is superior to those solutions that propose statutory reform or the promulgation of a new Federal Rule of Civil Procedure,⁴⁰ because it does not depend on legislative action.

I. THE HISTORY OF FORUM-SELECTION CLAUSES AND THE SUPREME COURT’S FORUM-SELECTION CLAUSE JURISPRUDENCE

This Part begins with a discussion of the importance of forum-selection clauses to contracting parties including their economic and contractual significance: forum clauses are either part of the parties’ bargained-for exchange (in the case of sophisticated parties) or they more generally reduce transaction costs and produce savings that are then passed on to consumers (in the case of form contracts with little or no bargaining). Part I.B.1, Part I.B.2, and Part I.B.3 give a detailed account of three Supreme Court cases, *The Bremen*, *Stewart*, and *Carnival Cruise*, whose subsequent interpretation by lower federal courts led to disarray in forum-selection clause enforcement. This disarray includes numerous circuit splits.⁴¹ Part I.B.4 concludes with an examination of the Supreme Court’s recent holding in *Atlantic Marine*, where the Court resolved some, but not all, of the disagreements concerning the enforcement of forum-selection clauses.

A. *The Importance of Forum-Selection Clauses to Contracting Parties*

Forum-selection clauses have numerous benefits in complex national or transnational transactions. Such transactions are by their very nature “fraught with legal risks,” including the “unwelcome possibility of litigation in a foreign court applying unfamiliar rules.”⁴² The economic disruptions caused by having to litigate in an unfamiliar court system can be substantial—they include: significant travel expenses, communication and language barriers, and lack of familiarity with laws governing the jurisdiction.⁴³ Forum-selection clauses can diminish the costs of these risks, and the resultant savings are presumably passed on to the contracting

38. FED. R. CIV. P. 56(a); *see also* cases cited *supra* note 37 (applying Rule 12(b)(6)).

39. *See infra* Part III.C.

40. *See, e.g.*, Borchers, *supra* note 9, at 93–111 (proposing a federal statute); Lee, *supra* note 13, 690–95 (same); Wright, *supra* note 22, at 1651–54 (advocating promulgation of a new Federal Rule of Civil Procedure).

41. *See* Wright, *supra* note 22, at 1635–42.

42. Friedrich K. Juenger, *Supreme Court Validation of Forum-Selection Clauses*, 19 WAYNE L. REV. 49, 50 (1972).

43. *Id.*

parties.⁴⁴ Courts and commentators have noted, “The right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy,”⁴⁵ and it is arguably superior for the parties to allocate the costs associated with that right via contract.⁴⁶ As a result, forum-selection clauses can be an important part of the contracting parties’ bargaining process.⁴⁷ Beyond the context of international business, the savings gained from forum-selection clauses is recognized by those engaged in all types of business.⁴⁸ Forum-selection clauses have permeated American commercial activity to such an extent that even many of today’s form contracts designate the appropriate forum to litigate disputes.⁴⁹

The scope of a forum-selection clause, is, in a sense, constrained only by the imagination of the drafter.⁵⁰ But, broadly classified, a forum-selection clause can be one of two types.⁵¹ Either it is merely “an agreement to litigate in the agreed forum or fora,” or it is “an agreement to litigate *only* in a forum or fora.”⁵² The former is called a “permissive” or “nonexclusive” forum clause, while the latter is called a “mandatory” or “exclusive” forum clause.⁵³ In determining whether a forum clause is mandatory or permissive, the “inquiry is one of . . . interpretation” according to basic principles of contract law.⁵⁴

44. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (“[I]t stands to reason that [consumers entering into contracts] containing a forum clause . . . benefit in the form of reduced [prices] reflecting the savings that [a merchant] enjoys by limiting the fora in which it may be sued.”).

45. Borchers, *supra* note 9, at 57 (citing *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 378 (7th Cir. 1990) (Posner, J.)).

46. *Carnival Cruise*, 499 U.S. at 594. *But see* Goldman, *supra* note 15, at 701 (noting that the Supreme Court “implicitly, if not explicitly, based its decision [in *Carnival Cruise*] on principles of economic efficiency,” but arguing that economic analysis cannot support its result or reasoning).

47. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 14 (1972) (noting, in the context of an admiralty towing agreement, that “it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations”).

48. See, e.g., *Carnival Cruise*, 499 U.S. at 587–88 (examining a forum-selection clause on a boat cruise ticket); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1078 (9th Cir. 2009) (interpreting a forum-selection clause in an internet service provider customer agreement); Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court’s Pending Review of Atlantic Marine*, CONSTRUCTION LAW., Fall 2002, at 27, 27 (“Most standard construction contract forms require that any disputes be venued where the project is located.”).

49. See sources cited *supra* note 48.

50. See Borchers, *supra* note 9, at 56–57; *cf.* *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964) (“[P]arties to a contract may agree in advance to submit to the jurisdiction of [any] given court.”).

51. Borchers, *supra* note 9, at 56–57.

52. *Id.* at 56 n.1.

53. *Id.*; see also *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 383 (2d Cir. 2007).

54. *Phillips*, 494 F.3d at 386. It should be noted that whether a forum clause should be interpreted according to federal or state law is an open question. See *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.) (“[I]t can be argued that as the rest of the contract in which a forum selection clause is found will be interpreted under the principles of interpretation followed by the state whose law governs the contract, so should

While not always the case, presently at the state level, forum-selection clauses are broadly enforced.⁵⁵ As to the procedural mechanism for enforcement, the most popular appears to be dismissal,⁵⁶ although other methods are used as well.⁵⁷ There is overlap between the standards employed for determining the validity and the enforceability of forum clauses in state and federal court.⁵⁸ This overlap is largely due to state court adoption of the U.S. Supreme Court's forum-selection clause jurisprudence since the early 1970s.⁵⁹ Still, the standards are far from entirely coextensive.⁶⁰

B. *The Supreme Court's Forum-Selection Clause Jurisprudence*

Historically, American courts, both state and federal, were nearly unanimous in their refusal to enforce forum-selection clauses.⁶¹ The primary support for this categorical refusal was found in the (now rejected) "ouster doctrine."⁶² Put simply, in the era of the ouster doctrine, courts refused to enforce forum-selection clauses because they were "'contrary to public policy,' or . . . their effect was to [impermissibly] 'oust the jurisdiction' of the court."⁶³ In other words, a court properly vested with jurisdiction could not be ousted by the acts of a private party.⁶⁴ The ouster doctrine began to fall into disfavor in the mid-twentieth century and was finally explicitly rejected by the Supreme Court in 1972 in *The Bremen v.*

that clause be."); *cf.* Volkswagenwerk, A. G. v. Klippan, GmbH, 611 P.2d 498, 503–04 (Alaska 1980) (interpreting a forum clause according to both state and federal law).

55. See generally Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404 (1984) (collecting cases from every state where forum-selection clauses were enforced). But in limited circumstances enforcement of forum-selection clauses is deemed contrary to public policy. See *id.* § 3; see also *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083–84 (9th Cir. 2009); *Morris v. Towers Fin. Corp.*, 916 P.2d 678, 679 (Colo. App. 1996).

56. See, e.g., *Vessels Oil & Gas Co. v. Coastal Refin. & Mktg., Inc.*, 764 P.2d 391, 392 (Colo. 1988); *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 215 (Del. Super. Ct. 1978); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 424–25 (Fla. Dist. Ct. App. 2001); *Digital Enters., Inc. v. Arch Telecom, Inc.*, 658 So. 2d 20, 20–21 (La. Ct. App. 1995); *Koob v. IDS Fin. Servs., Inc.*, 629 N.Y.S.2d 426, 434 (App. Div. 1995); *Barnett v. Network Solutions, Inc.*, 38 S.W.3d 200, 204–05 (Tex. App. 2001).

57. *Smith, Valentino & Smith, Inc. v. Superior Court*, 551 P.2d 1206, 1209–10 (Cal. 1976) (affirming a stay of action pending resolution of case in jurisdiction designated by forum clause).

58. See generally Dougherty, *supra* note 55, § 4.

59. See generally *id.* § 4[a] ("[C]ourts in [nearly all states] have adopted the view that contractual provisions limiting the place or court in which a future action may be brought are not invalid per se, and that such provisions may be enforceable if, upon consideration of the facts of each case, they are ascertained to be reasonable.").

60. See *id.*

61. Borchers, *supra* note 9, at 56–57; Mullenix, *supra* note 14, at 307–10; see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) ("Forum-selection clauses have historically not been favored by American courts.").

62. Borchers, *supra* note 9, at 60.

63. *The Bremen*, 407 U.S. at 9. See Juenger, *supra* note 42, at 51–54, for a discussion of the ouster doctrine.

64. See Juenger, *supra* note 42, at 51.

Zapata Off-Shore Co.,⁶⁵ which forms the foundation of the federal courts' understanding of forum-selection clauses.

1. *The Bremen v. Zapata Off-Shore Co.*

The Bremen was an admiralty case.⁶⁶ In that case, plaintiff Zapata, a corporation based in Houston, Texas, contracted with defendant Unterweser, a German corporation and owner of the tug boat "Bremen," to tow Zapata's oil rig from Louisiana to Ravenna, Italy, where Zapata planned to drill wells.⁶⁷ The contract contained the following forum-selection clause: "Any dispute arising must be treated before the London Court of Justice."⁶⁸ The oil rig's journey from Louisiana to Italy was cut short when severe weather conditions in the Gulf of Mexico caused substantial damage to the rig and Zapata instructed the Bremen to tow the damaged rig to Tampa, Florida.⁶⁹ Zapata brought suit in the Middle District of Florida against Unterweser in personam and the Bremen in rem seeking \$3.5 million in damages.⁷⁰ Unterweser invoked the contract's forum-selection clause and moved to dismiss for lack of jurisdiction, in apparent reliance on a theory of ouster, "or on *forum non conveniens* grounds."⁷¹

The district court refused to enforce the forum-selection clause and the then Fifth Circuit Court of Appeals, sitting en banc, affirmed.⁷² It found that the forum-selection clause was contrary to public policy⁷³ and that "even if it took the view that choice-of-forum clauses were enforceable unless 'unreasonable' it was 'doubtful' that enforcement would be proper . . . because England was 'seriously inconvenient' for trial of the action."⁷⁴ This holding directly contradicted the intent of the parties in entering into the forum-selection clause in the first place: England was chosen by the parties because it was a neutral forum with significant admiralty expertise.⁷⁵

The Supreme Court reversed, finding that the court of appeals had given "far too little weight and effect . . . to the forum clause."⁷⁶ In light of the policy pressures exerted by modern commercial realities and international trade,⁷⁷ the Supreme Court held that forum-selection clauses are "prima

65. 407 U.S. 1.

66. *Id.* at 2.

67. *Id.*

68. *Id.*

69. *Id.* at 3.

70. *Id.* at 3-4.

71. *Id.* at 4.

72. *Id.* at 4-8.

73. *Id.* at 8.

74. *Id.* at 8 n.9.

75. *See id.* at 12 ("Plainly, the courts of England meet the standards of neutrality and long experience in admiralty litigation.").

76. *Id.* at 8.

77. *See id.* at 9 ("The expansion of American business and industry will hardly be encouraged if . . . we insist . . . that all disputes must be resolved under our laws and in our courts."); *see also id.* ("[I]n an era of expanding world trade and commerce, the absolute

facie valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.”⁷⁸ Under this standard, a forum-selection clause must be enforced unless the resisting party can make a strong showing that enforcement would be unreasonable and unjust, or “that the clause [itself is] invalid” due to fraud.⁷⁹ Likewise, a forum-selection clause will not be enforced if enforcement would be contrary to public policy, “whether declared by statute or *by judicial decision*.”⁸⁰

Basic contract law principles were at the foundation of the Court’s reasoning when it articulated this standard.⁸¹ The Court recognized that forum-selection clauses are frequently freely negotiated and bargained-for elements of the parties’ exchange⁸² and thus, like other contractual rights, should be enforced in all but the most exceptional circumstances.⁸³ One such circumstance is when the substantive law of the jurisdiction where suit is brought forbids enforcement.⁸⁴

Yet, while the Court articulated a standard for determining whether or not a forum-selection clause is enforceable, it left open the question of what procedural mechanism should be employed to effectuate such enforcement.⁸⁵ Furthermore, in the wake of *The Bremen*, it was unclear if the standard articulated by the Supreme Court was applicable only to “federal district courts sitting in admiralty,”⁸⁶ or to all cases over which the federal courts had jurisdiction, including diversity actions.⁸⁷ Nevertheless, for some time it was “rare that a federal court even question *The Bremen*’s applicability to domestic cases based in federal question or diversity

aspects of the [ouster] doctrine . . . would be a heavy hand indeed on the future development of international commercial dealings by Americans.”).

78. *Id.* at 10.

79. *Id.* at 15.

80. *Id.* at 15 (emphasis added).

81. Indeed, *The Bremen* is replete with language deferential to private contracts and with the language of substantive contract law itself. *See, e.g., id.* at 11 (noting that enforcement of forum-selection clauses “accords with ancient concepts of freedom of contract”); *id.* at 12–13 (“There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect.”); *id.* at 9 (“[E]xpansion of American business and industry will hardly be encouraged if, notwithstanding *solemn contracts*, we insist . . . that all disputes must be resolved under our laws and in our courts.” (emphasis added)).

82. *Id.* at 16; *see* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 2 (6th ed. 2009) (“[T]he economic core of [a] contract is an exchange between at least two parties . . .”).

83. *The Bremen*, 407 U.S. at 16–17.

84. *Id.* 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.”).

85. *See* Borchers, *supra* note 9, at 68–69.

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

87. *See* Mullenix, *supra* note 14, at 313 (“[A]s a case based in admiralty jurisdiction, the Court could fashion a federal common law rule [But w]hether the Supreme Court could speak more broadly to domestic federal cases is troublesome . . .”).

jurisdiction,”⁸⁸ at least until the next time the Supreme Court encountered forum clauses directly.

2. *Stewart Organization, Inc. v. Ricoh Corp.*

The Court revisited forum-selection clauses over a decade later in *Stewart Organization, Inc. v. Ricoh Corp.*,⁸⁹ a nearly unanimous, if flawed, decision.⁹⁰ In *Stewart*, the Court confronted a straightforward forum-selection dispute.⁹¹ There, petitioner Stewart, an Alabama corporation, entered into a distributorship contract with respondent Ricoh, a manufacturer of copier products.⁹² The contract contained a mandatory forum-selection clause which provided that “any appropriate state or federal district court located in . . . New York City . . . shall have exclusive jurisdiction” over any dispute arising under the contract.⁹³ When relations between the parties went sour, Stewart filed an action, in contravention to the forum-selection clause, in the Northern District of Alabama.⁹⁴ Relying on the forum clause, Ricoh moved to transfer or dismiss the case to the Southern District of New York pursuant to 28 U.S.C. §§ 1404(a) and 1406.⁹⁵

The district court refused to enforce the forum-selection clause, reasoning “that the transfer motion was controlled by Alabama law and that Alabama looks unfavorably upon contractual forum-selection clauses.”⁹⁶ The district court, however, certified its ruling for interlocutory appeal, and the Eleventh Circuit Court of Appeals reversed, holding that “venue in a diversity case is manifestly within the province of federal law”⁹⁷ and that the standards articulated in *The Bremen* mandated enforcement.⁹⁸

a. *The Majority Opinion*

The Supreme Court essentially followed the lead of the Eleventh Circuit⁹⁹ and addressed the enforcement of a forum-selection clause through a motion to transfer pursuant to 28 U.S.C. § 1404(a) as a matter of

88. *Id.*

89. 487 U.S. 22 (1988).

90. *See* Borchers, *supra* note 9, at 67 (“[T]he Court has been more forthcoming with questions than answers.”); Lee, *supra* note 13 at 671–73.

91. *Stewart*, 487 U.S. at 24.

92. *Id.*

93. *Id.* at 24 n.1.

94. *Id.* at 24.

95. *Id.*

96. *Id.*

97. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068 (11th Cir. 1987) (en banc), *aff’d*, 487 U.S. 22. The Eleventh Circuit reheard the case en banc and essentially adopted the reasoning of the original panel. *See id.* (“As the panel stated[,] . . . ‘If venue were to be governed by the law of the state in which the forum court sat, the federal venue statute would be nugatory.’” (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 649 (11th Cir. 1986))).

98. *Stewart*, 487 U.S. at 25.

99. *See id.* (“We now affirm under somewhat different reasoning.”).

statutory transfer-of-venue law.¹⁰⁰ It framed the question as “whether to apply a federal statute such as [28 U.S.C. § 1404(a)] in a diversity action.”¹⁰¹ Rather than applying the *Bremen* standard to determine if the forum-selection clause was enforceable, the Court drew on its Rules Enabling Act jurisprudence, including *Hanna v. Plumer*¹⁰² and its progeny, and interpreted § 1404(a) to resolve the dispute between the parties.¹⁰³ This allowed the Court to sidestep any possible *Erie* question because “when the federal law sought to be applied is a congressional statute, the first and chief question . . . is whether the statute is ‘sufficiently broad to control the issue before the Court.’”¹⁰⁴

Setting aside the holding in *The Bremen* that forum clauses are prima facie valid and should be enforced absent extraordinary circumstances, but not explicitly overruling it, the Court concluded that § 1404(a) controlled the respondent’s request to transfer venue pursuant to the forum-selection clause and that the clause was merely a factor to be considered in deciding whether or not to transfer.¹⁰⁵ Importantly, the Court recognized in footnote

100. *See generally id.* at 24–25.

101. *Id.* at 26.

102. 380 U.S. 460 (1965).

103. *Stewart*, 487 U.S. at 26 (citing *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 4–5 (1987); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 759 (1980)).

104. *Id.* (quoting *Walker*, 446 U.S. at 749–50).

105. *Id.* at 32 (“We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court’s decision whether to give effect to the parties’ forum-selection clause and transfer this case.”); *see also id.* at 29–30 (“The flexible and individualized analysis Congress prescribed in § 1404(a) thus encompasses consideration of the parties’ private expression of their venue preferences.”). As currently worded, the “Change of venue” statute, 28 U.S.C. § 1404(a), provides, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or . . . to which all parties have consented.” 28 U.S.C. § 1404(a) (2006). It applies when plaintiff has sued in a proper venue, but where “in the interest of justice,” 28 U.S.C. § 1404(a), the case should have been tried in a different district or division. *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). Section 1404(a) was passed into law as part of the Judicial Code of 1948. *See* 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3841 (4th ed. 2013). The overall purpose of § 1404(a) “is to prevent the waste ‘of time, energy, and money’ and ‘to protect litigants, witnesses, and the public against unnecessary inconvenience and expense.’” *Van Dusen*, 376 U.S. at 616 (citing *Cont’l Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26, 27 (1960)). While the judicial standard used to determine whether to grant a motion to transfer brought pursuant to § 1404(a) is similar to that used in evaluating a motion to dismiss based on the doctrine of *forum non conveniens*, and though “the statute was drafted in accordance with the doctrine of *forum non conveniens*, . . . [§ 1404(a)] was intended to be a revision rather than a codification of the common law.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981). *Compare Piper Aircraft Co.*, 454 U.S. at 255–61 (indicating that courts should balance the plaintiff’s choice of forum, adequacy of an alternative forum, private interest factors, and public interest factors in deciding to grant *forum non conveniens* dismissal), *with Van Dusen*, 376 U.S. at 616 (holding that a district court may grant a motion pursuant to § 1404 “if the transfer is warranted by the convenience of parties and witnesses and promotes the interests of justice”). The inquiry under § 1404(a) is essentially a balancing test of public and private interest factors. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879 (3d Cir. 1995). These interest factors include, but are not limited to: the plaintiff’s choice of forum, the defendant’s preferred forum, the relative physical and financial conditions of the parties as it relates to their ability to litigate in given fora, the availability of witnesses to appear at trial in given fora, where the claim arose, the location of physical evidence relevant

eight that “the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406 because [Ricoh] apparently does business in the Northern District of Alabama,” making the district a proper venue as per § 1391(c).¹⁰⁶ Arguably, the implication of this footnote is that the forum-selection clause at issue did not render venue improper in all but the designated forum, even though the clause, by its terms, was clearly exclusive.¹⁰⁷

b. Justice Scalia’s Dissent

Justice Antonin Scalia was alone in dissent.¹⁰⁸ The gravamen of his objection was that the Court had answered the wrong question, or at the very least had answered the pertinent questions in the incorrect order.¹⁰⁹ He framed the question before the Court differently: “[T]he initial question before us is whether the *validity* between the parties of a contractual forum-selection clause falls within the scope of 28 U.S.C. § 1404(a).”¹¹⁰ He then objected to the court’s interpretation of § 1404(a) as “sufficiently broad to cause a direct collision with state law” and as determinate of the “validity between the parties of the forum-selection clause.”¹¹¹ As a dissenter had noted in the Eleventh Circuit below, “The enforceability of contract provisions is typically an issue of substance which a federal court sitting in its diversity jurisdiction must decide according to state law.”¹¹² Similarly, Justice Scalia pointed out that Congress enacted § 1404(a) “against the background that issues of contract, including a contract’s validity, are nearly always governed by state law.”¹¹³ He observed that when Congress

to the claim (such as construction sites), court docket congestion (to insure speedy resolution of the action), public policies of the fora, and “familiarity of the trial judge with the applicable state law.” *Jumara*, 55 F.3d at 879–80. The key difference between the § 1404(a) transfer and forum non conveniens analyses is one of degree: a district is permitted to grant a transfer motion pursuant to § 1404(a) “upon a lesser showing of inconvenience” than that required to grant a forum non conveniens dismissal. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). A district court’s discretion is thus broader in evaluating a § 1404(a) transfer motion than it is when evaluating a forum non conveniens motion. *Norwood*, 349 U.S. at 32.

106. *Stewart*, 487 U.S. at 29 n.8 (“[V]enue [is] proper in [a] judicial district in which [a defendant] corporation is doing business.”). Venue is defined by 28 U.S.C. § 1391. “Except as otherwise provided by law,” § 1391 governs “the venue of all civil actions brought in the district courts of the United States.” 28 U.S.C. § 1391(a). As per § 1391, venue is properly laid in: (1) any judicial district in which any defendant resides, provided that all defendants reside in the same state; (2) a judicial district where a “substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action” is located; or (3) if no judicial district satisfies (1) or (2), in any judicial district in which any defendant is subject to personal jurisdiction with respect to the instant action. 28 U.S.C. § 1391.

107. *See* *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 8 (U.S. Dec. 3, 2013) (adopting this dictum).

108. *Stewart*, 487 U.S. at 33 (Scalia, J., dissenting).

109. *Id.*

110. *Id.* (emphasis added).

111. *Id.* at 34.

112. *Stewart Org., Inc. v. Ricoh Corp.*, 779 F.2d 643, 651 (11th Cir.) (Godbold, C.J., dissenting), *aff’d en banc*, 810 F.2d 1066 (11th Cir. 1987), *aff’d*, 487 U.S. 22.

113. *Stewart*, 487 U.S. at 36 (Scalia, J., dissenting).

intended to preempt state contract law, it did so explicitly, as it had with the Federal Arbitration Act, which was passed just a year before the venue statute that included § 1404(a).¹¹⁴ Thus, application of a venue transfer statute to a question of contract validity was inapposite.¹¹⁵

Furthermore, § 1404(a) did not speak to the enforceability issue, especially because the plain language of § 1404(a)¹¹⁶ looks to the present and the future, namely “what is likely to be just in the future, when the case is tried, in light of things as they now stand.”¹¹⁷ By requiring that lower courts now consider the parties’ stated forum preference in making the transfer determination, Scalia argued that the Court had introduced “a new *retrospective* element” of examining the relative position of the parties at the time they contracted.¹¹⁸ In light of the types of factors that courts typically analyze in making the discretionary venue-transfer decisions permitted by § 1404(a), consideration of a retrospective element is improper.¹¹⁹ Congress clearly did not contemplate § 1404(a) being used to determine contract validity when it passed the venue statute.¹²⁰

Finally, Justice Scalia noted that the framework established by the majority, whereby the forum clause is to be weighed against other factors in the transfer determination, further implicates the validity issue and raises an important question: “what law governs whether the forum-selection clause is a *valid* or *invalid* allocation of any inconvenience between the parties?”¹²¹ This is because if the forum clause is invalid it should not be entitled any weight at all in the § 1404(a) transfer determination.¹²² Having interpreted § 1404(a) as “simply a venue provision that nowhere mentions contracts or agreements, much less the validity of certain contracts or agreements,” Justice Scalia concluded that there was no federal statute or rule of procedure that governed the validity of forum-selection clauses.¹²³

114. *Id.* at 36. He further noted that “[i]t is difficult to believe that state contract law was meant to be pre-empted by [§ 1404, which this Court has] said ‘should be regarded as a federal judicial housekeeping measure.’” *Id.* at 37 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 636–37 (1964)).

115. *See id.* (“Section 1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.”).

116. *Id.* at 34 (noting that § 1404(a) “vests the district courts with authority to transfer a civil action to another district ‘[f]or the convenience of the parties and witnesses, in the interest of justice,’” and such “language looks to the present and the future,” but not the past (quoting 28 U.S.C. § 1404(a) (1982)) (alteration in original)).

117. *Id.*

118. *Id.* at 34–35.

119. *See id.* at 34 (noting that courts consider “the forum actually chosen by the plaintiff, the current convenience of the parties and witnesses, the current location of pertinent books and records, similar litigation pending elsewhere, current docket conditions, and familiarity of the potential courts with governing state law”).

120. *See id.*

121. *Id.*

122. *Id.*

123. *Id.* at 37. In addition, Justice Scalia argued that it was a fair to assume that “Congress is just as concerned as [the Supreme Court] ha[s] been to avoid significant differences between state and federal courts in adjudicating claims” because such an assumption comports with the “congressional plan underlying the creation of diversity . . .

Thus, the Court was faced with an *Erie*¹²⁴ issue governed by the Rules of Decision Act rather than a question of the constitutional limits on Congress's power to legislate in a given area.¹²⁵ Justice Scalia argued that resolution of this issue demanded application of *Hanna v. Plumer*'s "relatively unguided *Erie* choice."¹²⁶ He reasoned that application of a federal judge-made rule for determining validity of a forum-selection clause (i.e., the *Bremen* standard) would violate the twin aims of *Erie* because it would encourage forum shopping between state and federal courts and lead to inequitable administration of state-created contract law.¹²⁷

3. *Carnival Cruise Lines, Inc. v. Shute*

The Court's next forum-selection clause case was *Carnival Cruise Lines, Inc. v. Shute*.¹²⁸ *Carnival Cruise*, like *The Bremen*, was an admiralty case.¹²⁹ Unlike that earlier case, the parties in *Carnival Cruise* were not both commercial entities, but two ordinary consumers, the Shutes, and a large cruise ship operator, Carnival.¹³⁰ The Shutes purchased a seven-day cruise aboard one of Carnival's cruise ships, and while on board the vessel in international waters off the coast of Mexico, Eulalia Shute slipped on the deck and was injured.¹³¹ When the Shutes, residents of Washington State, brought suit against Carnival in the Western District of Washington, Carnival moved for summary judgment, arguing that the forum-selection

jurisdiction" and therefore § 1404(a) should be construed to "avoid the significant . . . forum shopping that will inevitably" be encouraged by the majority's interpretation. *Id.* at 37–38.

124. 304 U.S. 64 (1938).

125. *Stewart*, 487 U.S. at 38 (Scalia, J., dissenting) ("Since no federal statute or Rule of Procedure governs the validity of a forum-selection clause, the remaining issue is whether federal courts may fashion a judge-made rule to govern the question.")

126. *Id.* at 26 (majority opinion) (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)).

127. *Id.* at 38–41 (Scalia, J., dissenting) ("With respect to forum-selection clauses, in a State with law unfavorable to validity, plaintiffs who seek to avoid the effect of a clause will be encouraged to sue in state court, and non-resident defendants will be encouraged to shop for more favorable law by removing to federal court [to get the benefit of the *Bremen* standard of enforceability.]"). It should be noted that although he was resoundingly outvoted on the Supreme Court, some lower federal courts view Justice Scalia's dissent favorably. *See Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 396 (S.D.N.Y. 2000) (Lynch, J.) (expressing "lingering doubt" that Second Circuit precedent following the majority in *Stewart* would prevail if it came before the Supreme Court, and noting that it "is strongly arguable that in a diversity case, the validity of [forum] clauses should be determined by state law, which generally governs substantive questions involving the making and enforcement of contracts"); *see also* *Nw. Nat'l Ins. Co. v. Donovan*, 916 F.2d 372, 374 (7th Cir. 1990) (Posner, J.) (noting a "strong dissent by Justice Scalia . . . particularly [the argument regarding] the spur to forum shopping that is created when the choice of a federal court over a state court determines the validity of a forum selection clause"). The academic response to *Stewart* has likewise been critical. *See* Mullenix, *supra* note 14, at 321, 334 ("The Court sheepishly evaded the [forum-selection clause] issues" and instead "elected to frame and answer a subtly altered issue of its own choosing"); Blair, *supra* note 13, at 810–12; Lee, *supra* note 13, at 671–73; Wright, *supra* note 22, at 1636–39.

128. 499 U.S. 585 (1991).

129. *Id.* at 587.

130. *Id.*

131. *Id.* at 588.

clause in the Shutes' tickets required they bring their lawsuit in a court in Florida and that Carnival's contacts with Washington were insufficient to subject it to personal jurisdiction there.¹³² The district court granted the summary judgment motion on personal jurisdiction grounds.¹³³

The Ninth Circuit reversed, finding that Carnival's contacts with Washington were sufficient to sustain the exercise of personal jurisdiction by the district court, and to conclude that under the *Bremen* standard "the forum clause should not be enforced."¹³⁴ Key to the Ninth Circuit's reasoning was evidence "suggest[ing] the sort of disparity in bargaining power that justifies setting aside the forum selection provision," in contrast to the "complex commercial contract between two sophisticated parties" in *The Bremen*.¹³⁵ Here, the contract was "presented to the purchaser on a take-it-or-leave-it basis."¹³⁶ Even if the Shutes had notice of the forum-selection clause, which was doubtful, the Ninth Circuit noted that there was "nothing in the record to suggest that the Shutes could have bargained over this language," another important factor distinguishing *The Bremen*.¹³⁷ Finally, independent from the Shute's lack of bargaining power, the court of appeals held that the clause was unenforceable on grounds that "enforcement . . . would operate to deprive [the Shutes] of their day in court" because they were incapable of litigating the dispute in Florida.¹³⁸

The Supreme Court reversed the Ninth Circuit on the forum clause issue.¹³⁹ Finding that the Shutes had "essentially . . . conceded that they had notice of the forum-selection provision," the Court held that the Ninth Circuit has "distorted somewhat" the holding in *The Bremen* "by ignoring the crucial business contexts in which the respective contracts were executed."¹⁴⁰ The majority noted that the fact that the forum provision was not bargained for was inapposite, because "[c]ommon sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line."¹⁴¹ The majority reasoned that Carnival had a compelling economic interest in limiting the fora in which it could be sued and that the savings from the forum clause would, in part, be passed on to consumers like the Shutes.¹⁴²

132. *Id.*

133. *Id.*

134. *Id.* at 589.

135. *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 388 (9th Cir. 1988), *rev'd*, 499 U.S. 585.

136. *Id.*

137. *Id.* at 389.

138. *Carnival Cruise*, 499 U.S. at 589.

139. *Id.* at 590. The Court found the forum-selection clause issue dispositive and did not address the parties' personal jurisdiction arguments. *See id.* at 589 ("Because we find the forum-selection clause to be dispositive . . . we need not consider petitioner's constitutional argument as to personal jurisdiction.").

140. *Id.* at 593.

141. *Id.*

142. *Id.* at 593–94.

The Court also rejected the Ninth Circuit's analysis of the "serious inconvenience of the contractual forum" factor of the *Bremen* enforceability standard.¹⁴³ According to the majority, that factor was articulated in the context of a hypothetical situation where two American parties designate a "remote alien forum" for resolution of a local dispute.¹⁴⁴ The forum designated by the ticket here, Florida, was neither remote (Carnival was headquartered there) nor alien.¹⁴⁵ While forum-selection agreements found in form contracts must withstand judicial scrutiny for "fundamental fairness," the Court seemed to limit its review to rooting out "bad-faith" motives such as using a forum clause "as a means of discouraging cruise passengers from pursuing legitimate claims."¹⁴⁶

At least one commentator has questioned "whether anything remains of the reasonableness rule announced in *Bremen*," because "[t]he principles in *Carnival Cruise* . . . seem to validate [nearly] every agreement" in light of the fact that every large corporation risks being sued in multiple fora and that litigation cost savings resulting from forum clauses can always, in theory, be passed on to consumers in the form of lower prices.¹⁴⁷ Moreover, *Carnival Cruise* did not answer the central question of which law applies to determine the validity and enforceability of forum selection agreements in diversity cases.¹⁴⁸ Instead, lower courts were forced to develop their own patchwork of enforceability standards and mechanisms, creating a complex and multifaceted circuit split.¹⁴⁹

4. *Atlantic Marine Construction Co. v. U.S. District Court*

The Bremen, *Stewart*, and *Carnival Cruise* created massive disarray among lower courts regarding the enforcement of forum selection clauses.¹⁵⁰ First, courts disagreed as to whether to apply state or federal law in determining the validity and enforceability of forum clauses.¹⁵¹ Moreover, even under federal law, uncertainty ran rampant because courts employed a litany of procedural mechanics to enforce forum clauses, including § 1404(a), § 1406(a), Rule 12(b)(3), Rule 12(b)(6), Rule 12(c), Rule 56, and the federal common law doctrine of forum non conveniens.¹⁵² The split between courts that used § 1404(a) as opposed to § 1406(a) and Federal Rule of Civil Procedure 12(b)(3) to enforce forum-selection clauses

143. *Id.* at 594 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)).

144. *Id.*

145. *Id.*

146. *Id.* at 595.

147. Borchers, *supra* note 9, at 74; see Goldman, *supra* note 15, at 701.

148. See Borchers, *supra* note 9, at 80–81.

149. See Holt, *supra* note 13, at 1918–28.

150. See generally Wright, *supra* note 22.

151. See Blair, *supra* note 13, at 810–12.

152. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) (enforcing a forum-selection clause via summary judgment); *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970–74 (8th Cir. 2012) (examining Rule 12(b)(3) and § 1406(a) as procedural devices to give effect to forum clauses); Wright, *supra* note 22, at 1639–42 (collecting cases).

became perhaps the most prominent (the Venue Split).¹⁵³ This was because enforcement of a forum-selection clause under § 1404(a), as provided for in *Stewart*, is discretionary and requires that judges weigh a number of factors, some of which may prove more compelling than the parties' agreed upon forum, in determining whether or not to enforce the clause and transfer the action.¹⁵⁴ This stood in contrast to the judicial inquiry mandated by the application of § 1406(a), which allows for no judicial discretion at all: if the forum clause renders venue "improper" in the district court where the action was filed, the case *must* be transferred or dismissed.¹⁵⁵ This difference was not merely technical; it had real consequences for contracting parties, third-party litigants, attorneys, and the judiciary.¹⁵⁶

Recently, the Supreme Court squarely addressed the § 1404(a) versus § 1406(a) and Rule 12(b)(3) split in *Atlantic Marine Construction Co. v. U.S. District Court*.¹⁵⁷ This subsection first explores the underlying logic for each side of the Venue Split and then uses the history of the *Atlantic Marine* litigation to articulate what was at stake and why litigants would argue for the application of § 1404(a) versus § 1406(a) and Rule 12(b)(3). Finally, the section concludes by explaining the Supreme Court's unanimous rejection of the § 1406(a) and Rule 12(b)(3) approaches in *Atlantic Marine*, and its clarification of the appropriate inquiry under § 1404 when enforcing a forum-selection clause.

*a. The Venue Split: The Discretionary Venue Transfer Approach
Versus the Improper Venue Approach*

Prior to the Supreme Court's recent decision in *Atlantic Marine*, courts that enforced forum-selection clauses through venue transfer motions pursuant to § 1404(a) followed *Stewart* to the letter (the Discretionary Venue Transfer Approach).¹⁵⁸ Key to their understanding was footnote eight of the majority opinion in *Stewart*: "The parties do not dispute that the District Court properly denied the motion to dismiss the case for improper venue under 28 U.S.C. § 1406(a) because respondent apparently does business in the [forum]."¹⁵⁹ Courts that adopted the Discretionary Venue Transfer Approach held that § 1404(a) governs only in the instance where venue is otherwise proper and recognized that "*Stewart* did not hold that § 1404 is *always* the proper approach when the parties have entered into a contractual forum-selection clause."¹⁶⁰ These courts observed that

153. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 4 (U.S. Dec. 3, 2013).

154. See *infra* Part I.B.4.a.

155. See *infra* Part I.B.4.a.

156. See *infra* Part I.B.4.a.

157. No. 12-929, slip op. at 4.

158. See, e.g., *In re Atl. Marine Constr. Co.*, 701 F.3d 736, 739–40 (5th Cir. 2012), *rev'd sub nom. Atl. Marine*, No. 12-929; *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 538–39 (6th Cir. 2002); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 879–83 (3d Cir. 1995).

159. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 n.8 (1988).

160. *In re Atl. Marine Constr. Co.*, 701 F.3d at 741.

“[a] forum-selection clause is properly enforced via § 1404(a) as long as venue is statutorily proper in the district where suit was originally filed *and* as long as the forum-selection clause elects an alternative federal forum.”¹⁶¹ Thus, for courts following the Discretionary Venue Transfer Approach, whether venue was properly laid, as defined by statute, in the forum where plaintiff brought the action was a question precedent to choosing the proper procedural mechanism for the enforcement of the forum-selection clause.¹⁶² Just because the forum-selection clause provided for venue in another federal district court did not guarantee that the clause would be enforced when applying § 1404(a).¹⁶³

Courts that enforced forum-selection clauses through § 1406(a) and Rule 12(b)(3), however, held that an exclusive forum-selection clause rendered venue “wrong” or “improper” in any court other than that declared by the agreement (the Improper Venue Approach).¹⁶⁴ Courts employing the Improper Venue Approach cited the general definition of venue as the “place of litigation” as grounds for their interpretation.¹⁶⁵ The courts held that since parties to a contract that contains a forum clause have set the place of litigation by their contract, venue was rendered “wrong” or “improper” in any court other than that set by the terms of the forum clause.¹⁶⁶ Under these circumstances, the judicial inquiry for forum clause enforceability was then exceedingly simple: read the contract and dismiss or transfer if venue was “improper” or “wrong” according to the forum-selection clause.¹⁶⁷

b. The Supreme Court Settles the Venue Split

The clash between the § 1404(a) approach on the one hand, and the § 1406(a) and Rule 12(b)(3) approach on the other, was sharply illustrated by the litigation positions of the parties in the *Atlantic Marine* case.¹⁶⁸

161. *Id.* (emphasis added).

162. *See id.* (“The choice between § 1404 and § 1406 depends on whether venue was statutorily proper under § 1391 in the forum where the action was initially filed.”); *Id.* at 748 n.4 (Haynes, J., concurring) (arguing that the Venue Clarification Act of 2011 “demonstrates that Congress recognizes that forum-selection clauses may be enforced even where the chosen venue is not that chosen by federal venue statutes”); *Jumara*, 55 F.3d at 878.

163. *See* *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 970–74 (8th Cir. 2012).

164. *See id.* Section 1406(a) mandates dismissal or transfer of a “case laying venue in the wrong division or district.” 28 U.S.C. § 1406(a) (2006). The district court has discretion to choose between transfer and dismissal, in evaluating motions pursuant to § 1406(a). *Id.* Likewise, Federal Rule of Civil Procedure 12(b)(3) permits a defendant to bring a preanswer motion to dismiss for “improper venue.” FED. R. CIV. P. 12(b)(3). Neither the federal venue statute, nor the Federal Rules of Civil Procedure define “wrong” or “improper” venue. *See generally* 28 U.S.C. §§ 1391–1413; FED. R. CIV. P. 12.

165. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 5–6 (U.S. Dec. 3, 2013).

166. *Id.*

167. *Union Elec. Co.*, 689 F.3d at 970–74. Indeed, the § 1406(a) and Rule 12(b)(3) inquiries are arguably made even more mechanistic in light of what little remains of the *Bremen* standard after *Carnival Cruise*. *See supra* note 147 and accompanying text.

168. *See generally In re Atl. Marine Constr. Co.*, 701 F.3d 736 (5th Cir. 2012) *rev’d sub nom. Atl. Marine*, No. 12-929.

There, Atlantic Marine and J-Crew Management, Inc. contracted for the performance of certain subcontractor duties at a large construction site in Texas.¹⁶⁹ Their contractual agreement contained an exclusive forum-selection clause providing that “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.’”¹⁷⁰ The contract did not contain a choice-of-law provision.¹⁷¹

Atlantic Marine failed to make required payments under the contract and J-Crew filed suit in the Austin Division of the Western District of Texas in violation of the forum clause.¹⁷² Seeking to enforce the forum clause, Atlantic Marine filed a motion to dismiss pursuant to § 1406(a) and Rule 12(b)(3), arguing that the agreement rendered venue wrong and improper in the Western District of Texas.¹⁷³ In the alternative, Atlantic Marine also moved pursuant to § 1404(a) to transfer to the Eastern District of Virginia.¹⁷⁴

Following *Stewart*, the District Court held that § 1404(a) was the proper procedural mechanism to enforce the forum clause.¹⁷⁵ It rejected Atlantic Marine’s argument that the contract rendered venue “wrong” or “improper” in the Western District of Texas and refused to dismiss or transfer on those grounds.¹⁷⁶ Instead, the district court balanced a number of factors in its § 1404(a) analysis and found that, notwithstanding the forum clause, the location of the construction site in Texas and the location of third-party witnesses who would be unavailable for trial testimony in Virginia mandated denial of Atlantic Marine’s transfer request.¹⁷⁷ The Fifth Circuit affirmed: it also followed *Stewart* and adopted the Discretionary Venue Transfer Approach followed by a minority of circuit courts.¹⁷⁸ It rejected Atlantic Marine’s § 1406(a) argument that the contract had rendered venue improper in Texas¹⁷⁹ and noted in dictum that Rule 12(b)(3) governed when the “forum-selection clause designates an arbitral, foreign, or state court

169. *In re Atl. Marine Constr. Co.*, 701 F.3d at 737.

170. *Id.* at 737–38.

171. *Id.* at 738.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.* Notably, the district court also rejected J-Crew’s argument that it had “exercised its statutory right under [Texas law] to void the forum-selection clause when it filed [its] complaint in Texas federal court.” *United States ex rel. J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at *2–3 (W.D. Tex. Aug. 6, 2012), *mandamus denied sub nom. In re Atl. Marine Constr. Co.*, 701 F.3d 736, *rev’d sub nom. Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929 (U.S. Dec. 3, 2013). It found that the Texas statute did “not apply to the subcontract agreement between J-Crew and Atlantic” because the construction project was “contained entirely within the federal enclave” of Fort Hood. *Id.* The significance of this choice-of-law argument is discussed below. *See infra* Parts II.A, III.A.1.

178. *See In re Atl. Marine Constr. Co.*, 701 F.3d at 738–39.

179. *Id.*

forum . . . because dismissal is the only available option for the district court in those cases.”¹⁸⁰

The Fifth Circuit then affirmed the district court’s decision not to transfer and its § 1404(a) analysis in three steps.¹⁸¹ First, it found that the district court did not err in holding that the movant has the burden to prove transfer would be for the convenience of the parties and witnesses and in the interests of justice, even when the parties have entered into a forum-selection agreement.¹⁸² Second, it found no error when the district court considered “the foreseeable inconvenience J-Crew would face if the case were transferred.”¹⁸³ The Fifth Circuit held that “*Stewart* teaches that Congress has by § 1404(a) removed the lateral transfer of cases among federal courts from the control of private contracts.”¹⁸⁴ Third, it was permissible for the district court to consider the “difficulties J-Crew would face in obtaining depositions from non-party witnesses” if the case were transferred.¹⁸⁵

The Supreme Court granted Atlantic Marine’s subsequent petition for writ of certiorari.¹⁸⁶ J-Crew and Atlantic Marine argued substantially the same points before the Supreme Court as they had before the Fifth Circuit.¹⁸⁷ An amicus, Professor Stephen E. Sachs, argued that the forum-selection clause should be raised in a Rule 8 responsive pleading or under Rule 12(b)(6), Rule 12(c), or Rule 56 as an affirmative defense to suit—similar to other contract defenses such as waiver, accord and satisfaction, estoppel, and the like.¹⁸⁸

The Supreme Court, in a unanimous opinion written by Justice Samuel Alito, reversed.¹⁸⁹ First, it sided with the minority of circuit courts of appeals in holding that a party may not enforce a forum-selection agreement under § 1406(a) or Rule 12(b)(3).¹⁹⁰ The Supreme Court held that a statutorily proper venue cannot be rendered improper by the parties’ contractual agreement.¹⁹¹ It reached this interpretation of the venue statutes by relying on their plain language,¹⁹² their structure,¹⁹³ and Supreme Court jurisprudence construing the same.¹⁹⁴

180. *Id.* at 740 (dictum).

181. *See id.* at 741–43.

182. *See id.* at 741–42.

183. *Id.* at 742.

184. *Id.*

185. *Id.* at 743.

186. *See Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 1 (U.S. Dec. 3, 2013).

187. *See generally id.*

188. *See generally* Brief of Sachs, *supra* note 36 (making this argument).

189. *Atl. Marine*, No. 12-929, slip op. at 2.

190. *Id.* at 1–2.

191. *Id.* at 4 (“Section 1406(a) and Rule 12(b)(3) allow dismissal only when venue is ‘wrong’ or ‘improper.’ Whether venue is ‘wrong’ or ‘improper’ depends *exclusively* on whether the court in which the case is brought satisfies the requirements of federal venue laws, and those provisions say nothing about a forum-selection clause.” (emphasis added)).

192. *See id.* at 4–6.

193. *See id.* at 6 (“The structure of the federal venue provisions confirms that *they alone* define whether venue exists in a given forum. . . . [P]etitioner’s approach would mean that

Notably, the Court pointed to footnote eight of *Stewart* to support its interpretation of the venue statute and observed that “[a] contrary view would all but drain *Stewart* of any significance” because under such a view *Stewart*’s “holding would be limited to the presumably rare case in which the defendant inexplicably fails to file a motion under § 1406(a) or Rule 12(b)(3).”¹⁹⁵ Instead, as the Fifth Circuit had ruled below, the Court held that the parties’ forum-selection agreement *could* be enforced via a motion to transfer pursuant to § 1404(a), at least where the agreement designated a federal court as an available forum.¹⁹⁶ It reasoned that § 1404(a) is an appropriate mechanism for enforcement because, in contrast to § 1406(a) or Rule 12(b)(3), discretionary transfer does not depend on the initial forum being “wrong” or “improper.”¹⁹⁷ In further support of its holding, the Court noted that § 1404(a) “permits transfer to any district where venue is also proper . . . or to any other district to which the parties have *agreed* by contract or stipulation.”¹⁹⁸

The Court’s agreement with the Fifth Circuit ended there.¹⁹⁹ First, contrary to the Fifth Circuit’s Rule 12(b)(3) approach, the Supreme Court held 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*.”²⁰⁰ This is because *forum non conveniens* was codified in § 1404(a), where Congress provided for transfer as an alternative to dismissal.²⁰¹ Using *forum non conveniens* also creates a more uniform standard for enforcement than the Fifth Circuit’s Rule 12(b)(3) approach, “because both § 1404(a) and the *forum non conveniens* doctrine . . . entail the same balancing-of-interests standard.”²⁰² The Court explicitly left open

in some number of cases . . . venue would not lie in any federal district. That would not comport with the statute’s design, which contemplates that venue will always exist in some federal court.” (emphasis added).

194. *Id.* at 6–8; *see also id.* at 7 (“Under the construction of the venue laws we adopted in *Van Dusen*, a ‘wrong’ district is . . . a district other than ‘those districts in which Congress has provided by its venue statutes that the action ‘may be brought.’ [Since] the federal venue statutes establish that suit may be brought in a particular district, a contractual bar cannot render venue in that district ‘wrong.’” (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 618 (1964))).

195. *Id.* at 8.

196. *Id.* at 8–9.

197. *Id.* at 9.

198. *Id.* (emphasis added).

199. *See generally id.* at 9–14.

200. *Id.* at 9–10.

201. *See id.* at 10 (“For the remaining set of cases calling for a nonfederal forum, § 1404(a) has no application, but the residual doctrine of *forum non conveniens* ‘has continuing application in federal courts.’” (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007))).

202. *Id.* at 10 (“[C]ourts should evaluate a forum-selection clause pointing to a nonfederal forum in the same way that they evaluate a forum-selection clause pointing to a federal forum.”). As an aside, this directive seems to implicitly contradict how the Court previously characterized the *forum non conveniens* doctrine in *Piper Aircraft* where it noted that, “District courts [are] given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.” *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).

the prospect of using a Rule 12(b)(6) motion to enforce a forum clause, whereby a defendant would assert the forum clause as an affirmative defense to suit in any fora other than that designated by the parties' agreement.²⁰³

Second, the Fifth Circuit erred "in failing to make the adjustments required in a § 1404(a) analysis when the transfer motion is premised on a forum-selection clause."²⁰⁴ With the caveat that its "analysis presuppose[d] a contractually valid forum-selection clause,"²⁰⁵ the Supreme Court clarified that, under a properly adjusted § 1404(a) analysis, a case should be transferred to the forum specified in the forum clause except "under extraordinary circumstances unrelated to the convenience of the parties."²⁰⁶ This stood in contrast to "the typical case" where the trial court balances the convenience of the parties and public interests, but gives some deference to the plaintiff's choice of forum.²⁰⁷ Instead, "when a plaintiff agrees by contract to bring suit only in a specified forum," his "choice of forum merits no weight"²⁰⁸ and he bears the burden of establishing that transfer to the agreed upon forum is unwarranted.²⁰⁹ Furthermore, the Court clarified that since the parties have already allocated inconveniences privately via their forum agreement, "the private-interest factors . . . weigh entirely in favor of the preselected forum."²¹⁰ Thus, a district court may only consider arguments about public interests,²¹¹ and the plaintiff must show that public interest factors "overwhelmingly disfavor a transfer."²¹² In so limiting the § 1404(a) and forum non conveniens inquiries, the Court brought greater uniformity to the enforceability standards under those approaches and the *Bremen* standard²¹³ used in admiralty cases and adopted by many states.²¹⁴

Finally, the Court limited *Van Dusen v. Barrack*.²¹⁵ Underscoring the federal source of the enforcement determination under § 1404(a), it held that when a plaintiff files suit in violation of a valid forum-selection clause, "a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules" as it usually would.²¹⁶ In short, the Court declared that the "policies motivating [*Van Dusen's*] exception to the *Klaxon* rule for

203. *See Atl. Marine*, No. 12-929, slip op. at 11.

204. *Id.*

205. *Id.* at 11 n.5.

206. *Id.*

207. *Id.* at 12; *see also id.* at 12 n.6 ("The Court must also give some weight to the plaintiffs' choice of forum." (citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1995))).

208. *Atl. Marine*, No. 12-929, slip op. at 13.

209. *Id.*

210. *Id.*

211. *Id.* at 14.

212. *Id.* at 16.

213. *See supra* Part I.B.1.

214. *See supra* notes 58–59 and accompanying text.

215. 376 U.S. 612 (1964).

216. *Atl. Marine*, No. 12-929, slip op. at 14.

§ 1404(a) . . . do not support an extension to cases where a defendant's motion is premised on enforcement of a valid forum-selection clause."²¹⁷

II. CHOICE OF LAW AND PROCEDURAL MECHANISMS FOR ENFORCEMENT OF FORUM-SELECTION CLAUSES

While *Atlantic Marine* resolved some of the circuit splits relating to enforcement of forum-selection clauses, at least two remain: (1) the split between courts that apply state versus federal law to determine the validity of forum-selection clauses (the Choice of Law Split); and (2) the split between those circuits that employ § 1404(a) to enforce forum clauses and those that use Rule 12(b)(6) (the Procedure Split). Part II.A looks at the Choice of Law Split. The primary axis of dispute between circuits on either side of this split is that articulated by Justice Scalia's dissent in *Stewart*: does federal law or state law govern the question of validity of forum-selection clauses?²¹⁸

Part II.B examines the remaining split among federal courts as to the proper procedural mechanism for enforcement of forum clauses. This split was somewhat simplified by the resolution of *Atlantic Marine*. Those courts that followed *Stewart* literally and adopted § 1404(a) as a proper mechanism for enforcing forum-selection clauses have been vindicated, in part, by the holding in *Atlantic Marine*.²¹⁹ These courts, however, will have to develop new decisional law implementing the new modified § 1404(a) and forum non conveniens inquiries.²²⁰ This section also examines courts that treat a forum clause as an affirmative defense to suit and enforce the clause through Rules 12(b)(6), 12(c), and 56 (the Affirmative Defense Approach). These courts opt to sidestep the venue transfer analysis, and their choice of procedural mechanism appears to be animated by the choice-of-law concerns Justice Scalia articulated in his *Stewart* dissent.²²¹ This

217. *Id.* at 14–15. The *Klaxon* rule holds that a federal court sitting in diversity is compelled by the *Erie* doctrine to apply the choice of law rules of the state in which it sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). *Van Dusen* provided an exception to this rule, namely, that “where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue.” *Van Dusen*, 376 U.S. at 639.

218. A second axis arises when the contract containing the forum-selection clause also includes a choice of law clause. Should a federal court sitting in diversity apply the law indicated in the contract, the law dictated by choice-of-law rules of the state in which it sits as per *Klaxon*, or the federal standard articulated in *The Bremen*? See Mullenix, *supra* note 14, at 348–49.

219. See, e.g., *Kerobo v. Sw. Clean Fuels, Corp.*, 285 F.3d 531, 538–39 (6th Cir. 2002) (following *Stewart* and applying § 1404(a)); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 875, 880 (3d Cir. 1995).

220. See *supra* notes 204–14 and accompanying text.

221. It should be noted that many courts employ a patchwork of approaches, allowing the procedural mechanism chosen by the parties seeking enforcement to dictate the underlying analysis. See, e.g., *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 475 (2d Cir. 2011) (“We have affirmed judgments that enforced forum selection clauses by dismissing cases for lack of subject matter jurisdiction under Rule 12(b)(1), . . . for improper venue under Rule 12(b)(3), . . . and for failure to state a claim under Rule 12(b)(6).” (citations omitted)); *Slater v. Energy Servs. Grp. Int’l, Inc.*, 634 F.3d 1326, 1333 (11th Cir. 2011) (applying Rule

section surveys cases from various courts and mines the arguments made in Professor Sachs's amicus brief in *Atlantic Marine* to explain the nuances of the Affirmative Defense Approach.

A. *The Choice of Law Split: Does Federal or State Law Govern the Validity of Forum-Selection Clauses?*

In spite of Justice Scalia's strong dissent in *Stewart* and the choice-of-law arguments raised by J-Crew at the district court level in *Atlantic Marine*,²²² the Supreme Court has left open the question of whether state or federal law governs the validity of forum-selection clauses in diversity cases.²²³ Many courts, even in diversity cases, uncritically assume that since the enforcement of forum-selection clauses is sometimes governed by federal law,²²⁴ the validity must also be a question of federal law.²²⁵ Such a conclusion, however, is not compelled by *Stewart* or *Atlantic Marine*.²²⁶

While many courts attempt to avoid the issue of deciding whether state or federal law should govern the validity and enforceability²²⁷ of forum-

12(b)(3) when the enforcing party is seeking dismissal, but § 1404(a) when the enforcing party seeks transfer). Since each of these mechanisms is explored independently in the Procedure Split section or has been overruled by *Atlantic Marine*, courts that take a patchwork approach are not treated separately in this Note.

222. See *supra* note 177.

223. See Borchers, *supra* note 9, at 78 (“*Stewart* did not decide whether state or federal law applies if enforcement of a forum selection agreement is attempted by some method other than a transfer under section 1404.”).

224. See generally *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988).

225. See Borchers, *supra* note 9, at 78–79; see also *Alliance Health Grp., LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008) (“Federal law applies to determine the enforceability of forum selection clauses in both diversity and federal question cases.” (quoting *Braspetro Oil Servs. Co. v. Modec (USA)*, 240 F. App'x 612, 615 (5th Cir. 2007)); *Jones v. Weibrecht*, 901 F.2d 17, 18–19 (2d Cir. 1990) (holding that federal law applies). *But see* *Licensed Practical Nurses, Technicians & Health Care Workers of N.Y., Inc. v. Ulysses Cruises, Inc.*, 131 F. Supp. 2d 393, 396 (S.D.N.Y. 2000) (Lynch, J.) (“[T]his court has a lingering doubt whether, if the issue came before the Supreme Court, the *Jones* decision [applying federal law] would prevail.”).

226. See, e.g., *Instrumentation Assocs., Inc. v. Madsen Elecs. (Can.) Ltd.*, 859 F.2d 4, 7 n.5 (3d Cir. 1988) (arguing that *Stewart* “leaves open the question of whether the holding in [*The Bremen*], applying federal judge-made law to the issue of a forum selection clause's validity in admiralty cases, should be extended to diversity cases. . . . ‘The construction of contracts is usually a matter of state, not federal, common law’” (quoting *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356 (1986)); *U.S. Bank Nat'l Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 612 (S.D.N.Y. 2008) (Chin, J.) (“I will apply New York law to determine the validity of the forum selection clause”); see also *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 386 (2d Cir. 2007) (noting that “we cannot understand why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole,” but applying federal law because neither party “objected to the district court's citation to federal precedent in its interpretation of the clause”).

227. A brief clarification of terminology: courts often use the terms “validity” and “enforceability” or “enforcement” of forum-selection clause interchangeably. See *Stewart*, 487 U.S. at 38–41 (Scalia, J., dissenting). There is, however, a meaningful difference between the terms. See *id.*; Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133, 136 n.8; Mullenix, *supra* note 14, at 293 n.2; *cf.* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (“The correct

selection clauses,²²⁸ there are frequent instances where such avoidance will not be possible.²²⁹ For example, many states have passed laws that limit or categorically prohibit forum-selection clauses in certain contexts.²³⁰ The choice of law issue emerges in stark relief in cases where, unlike *Stewart*, the party seeking to enforce the forum-selection clause (usually the defendant) resorts to a procedural mechanism other than § 1404(a).²³¹ Without the majority's interpretation of § 1404(a) in *Stewart* to guide them, courts are largely in agreement that they are "require[d] . . . to make a 'relatively unguided *Erie* choice'" with regard to validity and

approach would have been to enforce the forum clause specifically unless [the plaintiff] could clearly show that *enforcement* would be unreasonable and unjust, or that the clause was *invalid* for such reasons as fraud or overreaching." (emphasis added)). This Note uses the term "validity" to describe the inquiry into whether a given forum-selection clause is effective and binding as a matter of substantive law and uses the term "enforceability" to describe the inquiry into whether a given forum-selection clause should be enforced. In practical effect, there is some overlap between these concepts. A forum-selection clause may be unenforceable because it is invalid as a matter of substantive law (i.e., because it was procured by fraud, etc.). See *The Bremen*, 407 U.S. at 15. Yet, a valid forum-selection clause is not always enforceable. For example, under *Atlantic Marine* there could be a forum-selection clause that, while valid as a matter of substantive law, is nevertheless unenforceable because "public interest factors overwhelmingly disfavor a transfer." *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 16 (U.S. Dec. 3, 2013); cf. *The Bremen*, 407 U.S. at 15. For a discussion of the impact of conflating these concepts, see *infra* Part III.A.

228. *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 609 (7th Cir. 2006) (Posner, J.) ("It seems that either position is arbitrary. If federal law governs, an arbitrary difference between a federal and a state litigation is created. If state law governs, an arbitrary difference between a dismissal (followed by a refiling) and a transfer is created. Prudence in this situation counsels us to reserve decision and instead consider how the appeal would be decided under either view and hope that the result will be the same.").

229. See V. Frederic Lyon & Douglas W. Ackerman, *Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts*, CONSTRUCTION LAW., Fall 2002, at 15, 18 ("[P]ractitioners in Idaho, Iowa, Michigan, Montana, and Texas and their corresponding federal circuits must be particularly careful because of the potential *Erie* problem that may arise. If the forum selection clause is deemed substantive, the state law of Idaho, Iowa, Michigan, Montana, and Texas will apply and the clause will be void; however, if the forum selection clause is deemed procedural, federal law will apply and the clause generally will be enforceable. Federal courts addressing this issue generally have tried to avoid this vexing problem.").

230. See *Lien*, *supra* note 48, at 30 ("[A]t least 24 states have enacted" statutes that "prohibit . . . enforcement [of forum clauses] in certain industries, including the construction industry.").

231. See *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 306 (6th Cir. 2007) ("When deciding to apply federal or state law to a forum selection clause, the context in which the clause is asserted can be determinative. For example, when a party moves to transfer a case on the basis of a forum selection clause, the federal statute governing transfer motions controls the clause's interpretation." (citing *Stewart*, 487 U.S. at 29–30)); Blair, *supra* note 13, at 815 (suggesting that a court may or may not enforce a forum-selection clause "depending on which procedural motion the defendant chooses"); Wright, *supra* note 22, at 1916 (noting that "whether [the defendant] would be successful in moving litigation [pursuant to the forum-selection clause] would turn on the procedural device it employed to enforce the clause," because if the defendant "files a motion to dismiss, the district court . . . would likely apply state [as opposed to federal] law in its determination as to dismissal").

enforceability.²³² In making this choice, courts also seem to agree that they “should strive for uniformity of outcomes between federal and state courts,”²³³ and that “when deciding what is procedural and what is substantive . . . [they must] apply a functional test based on the ‘twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.’”²³⁴

What, then, explains the split between courts that apply federal law and those that apply state law? The disagreement is rooted in two distinct qualities of forum-selection clauses: (1) they are agreements relating to the forum for adjudication which may or may not be enforceable;²³⁵ and (2) they are contractual agreements which may or may not be valid.²³⁶ Courts that dwell on the first quality reason that forum-selection clauses are simply venue agreements, i.e., they indicate the parties’ agreed-upon venue for adjudication of their disputes.²³⁷ Then, eliding the distinction between validity and enforceability, these courts assert that, since venue is manifestly a question of federal procedural law, enforcement *and* validity of such clauses is a question also governed by federal law.²³⁸ Thus, the *Bremen* standard as modified by *Carnival Cruise* determines whether a

232. *Preferred Capital*, 489 F.3d at 308 (quoting *Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); *see also* *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir. 1988) (“[O]ur decision must be guided by ‘the twin aims of the *Erie* rule’” (quoting *Hanna*, 380 U.S. at 468)).

233. *Preferred Capital*, 489 F.3d at 308 (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)); *see also* *Manetti-Farrow*, 858 F.2d at 513.

234. *Preferred Capital*, 489 F.3d at 306 (quoting *Hanna*, 380 U.S. at 471); *Manetti-Farrow*, 858 F.2d at 513 (same).

235. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987), *aff’d en banc*, 810 F.2d 1066 (11th Cir. 1987), *aff’d*, 487 U.S. 22 (1988) (applying federal law to determine “whether these two parties may choose the courts of Manhattan as the appropriate venue to try the controversy arising from this contract” because “venue in a diversity case is manifestly within the province of federal law”).

236. *Stewart*, 487 U.S. at 36 (Scalia, J., dissenting) (“[I]ssues of contract, including a contract’s validity, are nearly always governed by state law.”).

237. *See Manetti-Farrow*, 858 F.2d at 513 (“We conclude that the federal procedural issues [of venue] raised by forum selection clauses significantly outweigh the state interests, and the federal rule announced in *The Bremen* controls enforcement of forum clauses in diversity cases. Moreover, because enforcement of a forum clause necessarily entails interpretation of the clause before it can be enforced, federal law also applies to interpretation of forum clauses.” (citation omitted)); *Stewart*, 810 F.2d at 1067–68 (“Our decision as to the choice of forum clause boils down to whether these two parties may choose . . . the appropriate venue to try the controversy arising from this contract. . . . [W]e hold that venue in a diversity case is manifestly within the province of federal law. . . . [F]ederal law . . . must be applied to determine the effect of forum selection clauses. . . . Venue is a matter of federal procedure”); *see also* *Gruson*, *supra* note 227, at 158 (“Characterization of the issue as one of ‘venue’ . . . probably has influenced the decision of some courts to apply federal rather than state law . . .”).

238. *See Manetti-Farrow*, 858 F.2d at 513; *Stewart*, 810 F.2d at 1068–69; *Brahma Grp., Inc. v. Benham Constructors, LLC*, No. 2:08-CV-970TS, 2009 WL 1065419, at *3–4 (D. Utah Apr. 20, 2009) (applying federal law and enforcing a forum-selection clause in spite of a Utah statute that made the forum clause void and unenforceable); *see also* *Martinez v. Bloomberg LP*, 740 F.3d 211, 222 (2d Cir. 2014) (noting that courts also have a “tendency to blur the distinction between enforceability and interpretation”).

clause is valid and enforceable and *Stewart* determines whether the clause will be enforced when it is raised in the context of § 1404(a).²³⁹

Courts that dwell on the second quality, i.e., the fact that forum clauses are *contractual provisions* whose validity is determined by substantive law, recognize that the “construction of contracts is usually a matter of state, not federal, common law,” and that the “policies behind *Erie* [demonstrate an absence of] a federal interest that displaces the state’s interest in formulating its own laws.”²⁴⁰ Under this interpretation, the validity of forum-selection clauses is a question of state law.²⁴¹ Accordingly, these courts look to the states’ substantive contract law to make the validity determination.²⁴² Thus, while the difference in the application of state or federal law to the validity question is often immaterial,²⁴³ it can lead to vastly inconsistent results where, for example, state statutes make forum clauses voidable or where the state’s common law validity standard deviates materially from *The Bremen*.²⁴⁴

B. The Procedural Split

While the Procedural Split was at one time extraordinarily complicated and multifaceted,²⁴⁵ it has been simplified by the Court’s holding in *Atlantic Marine*. Section 1404(a) and the doctrine of forum non conveniens are now firmly established as appropriate procedural mechanisms for enforcement of forum-selection clauses.²⁴⁶ But the Court has explicitly left open the possibility that using Rule 12(b)(6), and other means of raising forum clauses as an affirmative defense, may be “ultimately correct.”²⁴⁷ Since the Court’s § 1404(a) approach, as modified when enforcing a valid forum-selection clause (the *Atlantic Marine* Approach), has been explored

239. See *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 609–10 (7th Cir. 2006); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature. . . . In short, we find nothing in *Stewart* or anywhere else that would compel us to reject the well established rule of this Circuit that *Bremen* applies with equal force in diversity cases.”).

240. *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356–57 (3d Cir. 1986); see also *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (“[State] law should apply to the interpretation of this forum selection clause. To apply federal law would undercut both aims of the *Erie* test—it would encourage forum shopping by providing differing outcomes in federal and state court.”).

241. *Preferred Capital*, 489 F.3d at 308; *Stewart*, 810 F.2d at 1076–77 (Godbold, J., dissenting) (“The fallacy in characterizing the problem as ‘just a dispute over venue’ is that it leads [one] to conclude that because there is a federal venue statute the dispute is a procedural matter and therefore a federal matter. . . . *This case is not about what court is suitable. It is about an agreement to choose between suitable courts.*”).

242. *Gen. Eng’g Corp.*, 783 F.2d at 356–57.

243. See *IFC Credit Corp.*, 437 F.3d at 612–13.

244. *Preferred Capital*, 489 F.3d at 308; *Gen. Eng’g Corp.*, 783 F.2d at 356–57.

245. See *Holt*, *supra* note 13, at 1918–28.

246. See *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 6–12 (U.S. Dec. 3, 2013).

247. *Id.* at 11 n.4.

in detail above,²⁴⁸ this section focuses on explaining the Affirmative Defense Approach, as employed by the First, Third, and Sixth Circuits and as articulated by Professor Sachs in his amicus brief submitted in *Atlantic Marine*. It concludes by identifying the reasons why litigants might choose one procedure over the other.

1. The Affirmative Defense Approach

Advocates of the Affirmative Defense Approach and courts that have adopted it extend the reasoning of *Stewart's* footnote eight and recognize that “[t]o argue . . . that [a] forum selection clause . . . deprives [a] federal district court . . . of jurisdiction and venue is simply off the mark.”²⁴⁹ Instead, they understand an exclusive forum-selection clause as a *contractual* agreement to resolve disputes in the designated forum to the exclusion of all others²⁵⁰ and is thus a type of *contractual waiver*.²⁵¹ Hence, if a party files a lawsuit in violation of its obligations under a forum-selection agreement, the defendant can seek dismissal of the suit for “failure to state a claim upon which relief can be granted”²⁵² pursuant to Rule 12(b)(6) because the plaintiff has waived his right to maintain suit anywhere but the forum designated by the clause.²⁵³

Under the logic of this interpretation, a defendant is not limited to Rule 12(b)(6) for relief.²⁵⁴ If an exclusive forum-selection clause is a form of contractual waiver then it must be raised in the same manner as other affirmative defenses: a defendant must include the forum-selection clause defense in its Rule 8 answer and may move to enforce the clause through a motion for judgment on the pleadings pursuant to Rule 12(c) or even a motion for summary judgment pursuant to Rule 56.²⁵⁵ In fact, there is support for the Affirmative Defense Approach in the Supreme Court’s forum-selection clause jurisprudence. For example, the forum-selection

248. See *supra* notes 200–17 and accompanying text.

249. *LFC Lessors, Inc. v. Pac. Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984); see also *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 387–88 (1st Cir. 2001).

250. Brief of Sachs, *supra* note 36, at 12 (“An exclusive forum-selection clause is . . . a contractual agreement that consents to litigation in a particular forum.”).

251. *Id.* (“The exclusive nature of the clause makes it a form of waiver, ‘the intentional relinquishment or abandonment of a known right.’” (quoting *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012)) (internal quotation mark omitted)).

252. FED. R. CIV. P. 12(b)(6).

253. See Brief of Sachs, *supra* note 36, at 12–13; see also *Westerberg v. Home Depot USA, Inc.*, No. CV-94-16630, 1996 WL 43512, at *1 (9th Cir. Feb. 1, 1996) (applying substantive state contract law in affirming a Rule 12(b)(6) dismissal). See generally *Impossible Elec. Techniques, Inc. v. Wackenhut Protective Sys., Inc.*, 610 F.2d 371 (5th Cir. 1980) (applying substantive state contract law and reversing a Rule 12(b)(6) dismissal).

254. See Brief of Sachs, *supra* note 36, at 12–13.

255. *Id.* at 13–15; see also *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588–89 (1991) (enforcing a forum-selection clause through a motion for summary judgment); *Silva v. Encyclopedia Britannica, Inc.*, 239 F.3d 385, 388 (1st Cir. 2001) (“Accordingly, a motion to dismiss based on a forum-selection clause may be raised at any time in the proceedings before disposition on the merits.”); *Kasper Global Collection & Brokers, Inc. v. Global Cabinets & Furniture Mfrs. Inc.*, 952 F. Supp. 2d 542, 567–68 (S.D.N.Y. 2013) (noting the procedural split and enforcing a forum-selection clause via summary judgment).

clause in *Carnival Cruise* was raised on a motion for summary judgment, and the Court addressed the validity and enforcement of the clause without comment, suggesting that the procedural mechanism chosen by the defendant was appropriate.²⁵⁶

2. Implications of the *Atlantic Marine* and Affirmative Defense Approaches

While recognizing that the Affirmative Defense Approach may be “ultimately correct,” the Supreme Court observed in *Atlantic Marine* that “defendants would have sensible reasons to invoke § 1404(a) or the forum non conveniens doctrine in addition to Rule 12(b)(6).”²⁵⁷ Perhaps the most obvious is that the Affirmative Defense Approach “may lead to a jury trial . . . if issues of material fact relating to the validity of the forum-selection clause arise.”²⁵⁸ In contrast, treating enforcement as a venue-transfer inquiry is purely judicial and does not require presentation to the factfinder.²⁵⁹ Thus, a defendant seeking swift enforcement of a forum-selection clause would likely prefer relief under § 1404(a) transfer or the doctrine of forum non conveniens.²⁶⁰ Moreover, courts may also be more willing to enforce forum clauses via the doctrine of forum non conveniens and § 1404(a) because they are permitted to condition these dismissals and transfers on the defendant’s consent to jurisdiction in the alternative forum and waiver of certain affirmative defenses like the statute of limitations.²⁶¹

Rule 12(b)(6) dismissals, Rule 12(c) judgments on the pleadings, or Rule 56 grants of summary judgment, however, also carry with them certain procedural advantages which may be compelling to defendants. First, courts do not condition these dismissals on defendants’ waiver of statute-of-limitations defenses and consent to jurisdiction. Second, in diversity actions, such dismissals have res judicata effect to the extent a state court dismissal would.²⁶² Finally, courts that follow the Affirmative Defense Approach do not engage in the balancing of public and private interests mandated by the § 1404(a) and forum non conveniens inquiries.²⁶³ Instead,

256. See *Carnival Cruise*, 499 U.S. at 588–89; Brief of Sachs, *supra* note 36, at 2, 13–14.

257. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, slip op. at 11 n.4 (U.S. Dec. 3, 2013).

258. *Id.*

259. See *id.*

260. See *id.*

261. See *Hoffman v. Blaski*, 363 U.S. 335, 365 (1960) (Frankfurter, J., dissenting) (collecting cases and noting that “it is almost necessary to suppose . . . as in accordance with the doctrine of forum non conveniens, that transfer under section 1404(a) may likewise be made where the defendant consents to going forward with the case in the transferee court” (internal quotation marks omitted)); *Schertenleib v. Traum*, 589 F.2d 1156, 1166 (2d Cir. 1978) (affirming the district court’s grant of forum non conveniens dismissal on condition of consent to jurisdiction in Switzerland and adding “the condition that defendant must waive any statute of limitations defense that has arisen since the commencement of th[e] action”). See generally Tim A. Thomas, Annotation, *Validity and Propriety of Conditions Imposed upon Proceeding in a Foreign Forum by Federal Court Dismissing Action Under Forum Non Conveniens*, 89 A.L.R. FED. 238 (1988) (collecting cases).

262. See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–09 (2001).

263. See *supra* notes 249–56 and accompanying text.

their inquiry focuses primarily on the validity of the forum-selection clause as a matter of substantive law—if the clause is valid it will be enforced.²⁶⁴ This could make enforcement more predictable, because plaintiffs would not have the opportunity to argue that “extraordinary circumstances unrelated to the convenience of the parties” mandate nonenforcement.²⁶⁵

III. ANALYZING *ATLANTIC MARINE*: RESOLVING THE CHOICE OF LAW SPLIT, THE TROUBLE WITH FORUM NON CONVENIENS, AND WHY COURTS SHOULD ADOPT THE AFFIRMATIVE DEFENSE APPROACH TO ENFORCE FORUM-SELECTION CLAUSES

This Part explores the implications of *Atlantic Marine* for the remaining choice-of-law and procedural circuit splits. The choice-of-law circuit split as to validity of forum-selection clauses raises serious concerns about disuniformity of enforcement of forum-selection clauses in diversity cases.²⁶⁶ Likewise, the procedural circuit split leaves defendants with a number of confusing options for enforcing forum-selection clauses.²⁶⁷

Part III.A argues that *Atlantic Marine* has implicitly provided a mechanism for resolution of the choice of law circuit split discussed *supra* in Part II.A. It proposes that the judicial inquiry underlying enforcement of forum-selection clauses should proceed as a validity-enforceability two-step. Step one is to determine the validity of the forum-selection clause. Part III.A.1 argues that *Atlantic Marine* implies that validity should be determined according to state substantive law. Step two is to decide whether to enforce the forum-selection clause, i.e., enforceability. Part III.A.2 argues that *Atlantic Marine* has firmly established that enforceability of forum-selection clauses in diversity cases should be determined as a matter of federal procedural law. Part III.A.3 discusses the application of the validity-enforcement two-step to a hypothetical partially based on the facts of *Atlantic Marine*.

A. Choice of Law and the Validity-Enforcement Two-Step

Many courts conflate the questions of validity and enforceability of forum-selection clauses.²⁶⁸ This is unfortunate because such conflation is at least partly to blame for the existing choice-of-law split.²⁶⁹ To remedy this split, courts and litigants should treat the two concepts as distinct with

264. *See* Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc., 783 F.2d 352, 357–58 (3d Cir. 1986) (holding that the “interpretation of forum selection clauses in commercial contracts is not an area of law that ordinarily requires federal courts to create substantive law” and reversing the denial of a motion for summary judgment).

265. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 13 (U.S. Dec. 3, 2013).

266. *See supra* notes 227–44 and accompanying text.

267. *See supra* notes 256–62 and accompanying text.

268. *See supra* note 238 and accompanying text.

269. *See supra* notes 238–44 and accompanying text.

each worthy of its own legal analysis.²⁷⁰ In other words, the enforcement analysis should proceed in two steps.

1. Step One: Validity

Step one is to determine the validity of the forum-selection clause between the parties and its scope.²⁷¹ Logically, the validity question should be addressed first, because if the forum-selection clause at issue is invalid then there is likely no reason to enforce it.²⁷² Both Justice Scalia's dissent in *Stewart* and the Supreme Court's opinion in *Atlantic Marine* support this proposition.²⁷³ Indeed, the Court's analysis in *Atlantic Marine* presupposed a valid forum-selection clause²⁷⁴: if the forum clause in that case were invalid there would have been no reason for the Court to alter the typical § 1404(a) analysis.²⁷⁵ Likewise, there would be no reason for a district court to engage in *Atlantic Marine*'s modified forum non conveniens analysis if the forum-selection clause is invalid.²⁷⁶ *Atlantic Marine* would not apply.

Courts sitting in diversity should apply substantive state law in determining the answer to the validity question.²⁷⁷ The continued application of a federal common law standard to the validity question is improper. The reasoning of those courts that apply federal law has been significantly undermined by *Atlantic Marine* generally and its narrow interpretation of federal venue laws particularly.

First, as noted above, courts that apply federal law to the validity question conflate the concepts of validity and enforceability.²⁷⁸ The fact that the Supreme Court's analysis in *Atlantic Marine* presupposes a *valid*

270. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 35 (1988) (Scalia, J., dissenting); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (“The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that *enforcement* would be unreasonable and unjust, or that the clause was *invalid* for such reasons as fraud or overreaching.” (emphasis added)).

271. See *Cline v. Carnival Corp.*, 2014 WL 550738, at *2 (N.D. Tex. Feb. 12, 2014) (“[T]he Court must first determine whether the forum selection clause is valid and enforceable under applicable contract law, and assuming it is, the Court must next evaluate whether to enforce the clause under *Atlantic Marine*'s analytical framework.”).

272. See *Stewart*, 487 U.S. at 35 (Scalia, J., dissenting).

273. See *id.* (“If [the clause] is invalid, *i.e.*, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination.”); see also *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 11 (U.S. Dec. 3, 2013) (“When the parties have agreed to a *valid* forum-selection clause, a district court should ordinarily [enforce it.]” (emphasis added)).

274. *Atl. Marine*, No. 12-929, slip op. at 11 n.5 (“Our analysis presupposes a *contractually valid* forum-selection clause.” (emphasis added)).

275. See *id.* at 11–12 (“The presence of a *valid* forum-selection clause requires district courts to adjust their usual § 1404(a) analysis” (emphasis added)).

276. See *supra* notes 200–12 and accompanying text.

277. See *infra* notes 279–98 and accompanying text; see also *Martinez v. Bloomberg LP*, 740 F.3d 211, 217–22 (2d Cir. 2014).

278. See *supra* note 238 and accompanying text.

forum-selection clause demonstrates that validity and enforceability are *distinct concepts that demand separate legal inquiries*.²⁷⁹

Second, those courts that apply federal law to the validity question do so because they interpret forum-selection clauses to be matters of venue, which is “manifestly within the province of federal law.”²⁸⁰ This interpretation is not supported by Supreme Court precedent.

In *Stewart*, the Supreme Court recognized that a forum-selection clause is partly an expression of the parties “venue preference” and held that the inquiry under § 1404(a) “encompasses *consideration* of the parties’ private expression of their venue preferences” where one party has moved to transfer.²⁸¹ Its holding, however, was narrow: § 1404(a) “governs the District Court’s decision *whether to give effect* to the parties’ forum-selection clause” and transfer.²⁸² In other words, § 1404(a) governs enforceability, *not validity*.²⁸³ Furthermore, § 1404(a) is a *transfer* statute writ large, which includes transfer to “any other district or division where it might have been brought,” i.e., a proper venue, “*or to any district or division to which all parties have consented*.”²⁸⁴ Thus, making an enforceability determination with regard to a forum-selection clause *via* § 1404(a) *transfer* is manifestly within the province of federal law,²⁸⁵ but this is not the same thing as calling a forum-selection clause a *venue* matter and declaring that every aspect of that provision, including whether it is *valid*, is subject to federal law.²⁸⁶

The Supreme Court confirmed this narrow interpretation of federal venue laws with respect to forum clauses in *Atlantic Marine*.²⁸⁷ There, it held that “forum,” the place of litigation, is a broader term than “venue,” a term of art.²⁸⁸ It followed that an interpretation of the venue statutes that “conflates

279. *See Atl. Marine*, No. 12-929, slip op. at 11 n.5; *Martinez*, 740 F.3d at 217–22; *see also* *Bright v. Zimmer Spine, Inc.*, No. 14-CV-00095-WMA, 2014 WL 588051, at *2 (N.D. Ala. Feb. 14, 2014) (noting that in *Atlantic Marine* “the Court was meticulous in specifying that its holding was that a district court should transfer a case “[w]hen the parties have agreed to a valid forum-selection clause,” . . . qualifying ‘forum-selection clause’ with the word ‘valid’ eleven times” and hypothesizing that “[i]f a court must determine that a forum-selection clause is valid *before* the clause is enforced with a § 1404 transfer order, it follows that the court must look to state contract law to determine the validity of the clause *before* it applies § 1404” (first alteration in original) (citations omitted)).

280. *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987) (en banc), *aff’d*, 487 U.S. 22 (1988); *see also supra* notes 227, 237, 239 and accompanying text.

281. *Stewart*, 487 U.S. at 29–30.

282. *Id.* at 33 (emphasis added).

283. *See id.*; *supra* note 227, 237 and accompanying text.

284. 28 U.S.C. § 1404(a) (2006) (emphasis added); *see also Atl. Marine*, No. 12-929, slip op. at 11–16.

285. *See supra* notes 200–17 and accompanying text.

286. *See Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1068–70 (11th Cir. 1987) (en banc), *aff’d*, 487 U.S. 22; *see also Bright v. Zimmer Spine, Inc.*, No. 14-CV-00095-WMA, 2014 WL 588051, at *2 (N.D. Ala. Feb. 14, 2014) (“In such a case, the state issue, [validity], is first and separate from the federal issue, and federal law could not be said to preempt applicable state law.”).

287. *See supra* notes 190–98 and accompanying text.

288. *Atl. Marine*, No. 12-929, slip op. at 5.

the special statutory term ‘venue’ and the word ‘forum’” is improper.²⁸⁹ Hence, the Court’s unequivocal holding with respect to § 1391, § 1406, and Rule 12(b)(3): those *venue* provisions do not implicate forum-selection clauses.²⁹⁰ In short, because these federal venue laws “say nothing about a forum-selection clause”²⁹¹ and § 1404(a)’s application is limited to *enforceability* via transfer, federal law cannot be fairly construed to govern the *validity* of such clauses.²⁹²

Without a broad interpretation of federal venue laws, district courts must engage in a complicated *Erie* analysis.²⁹³ As many have noted, the application of federal law to the validity question creates a host of messy *Erie* concerns.²⁹⁴ They have also noted that *Erie* points to the application of state law, as “nothing authorizes the federal courts to create federal common law contract principles to govern the essentially private contractual relationship between private citizens” in diversity cases.²⁹⁵ The Third, Sixth, and, arguably, the Second Circuit agree.²⁹⁶ Substantive state law should also govern the interpretation of the scope of a forum-selection clause—there is no compelling reason “why the interpretation of a forum selection clause should be singled out for application of any law other than that chosen to govern the interpretation of the contract as a whole.”²⁹⁷ Justice Scalia agreed that *Erie* requires application of state law to the validity question.²⁹⁸

Thus, the court should first look to substantive state law to determine if the forum-selection clause at issue is valid and interpret its scope.

2. Step Two: Enforceability

Step two is to determine whether the forum-selection clause should be enforced—the enforceability question. If *Stewart* and *Atlantic Marine* stand for anything, it is the proposition that federal law governs the enforcement of valid forum-selection clauses—at least in the context of a motion to transfer pursuant to § 1404(a) or a motion to dismiss pursuant to

289. *See id.* at 5–8.

290. *Id.* at 4.

291. *See id.* at 4–8.

292. *See id.*; *supra* notes 227, 237 and accompanying text.

293. *See supra* note 232 and accompanying text.

294. *See generally* Brief of Sachs, *supra* note 36, at 30–31; Blair, *supra* note 13; de By, *supra* note 13; Wright, *supra* note 22.

295. Mullenix, *supra* note 14, at 363–64 & n.397.

296. *See supra* notes 226, 240.

297. Phillips v. Audio Active Ltd., 494 F.3d 378, 386 (2d Cir. 2007); *see also* Martinez v. Bloomberg LP, 740 F.3d 211, 220–21 (2d Cir. 2014) (noting both that “distinguishing between the enforceability and the interpretation of forum selection clauses . . . accords with the traditional divide between procedural and substantive rules developed under [the *Erie* Doctrine],” and that “[c]ontract law—including the rules governing contract interpretation—is quintessentially substantive for *Erie* purposes, and therefore primarily the realm of the states”).

298. *See generally* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32–38 (1988) (Scalia, J., dissenting).

the doctrine of *forum non conveniens*.²⁹⁹ Thus, in the context of a motion to enforce a forum-selection clause through a § 1404(a) transfer, the district court should engage in the modified inquiry dictated by *Atlantic Marine*.³⁰⁰ That is, if step one determined that the forum-selection clause is valid as a matter of state law, then private-interest factors should be deemed to weigh entirely in favor of the requested transfer.³⁰¹ Transfer will only be denied in extraordinary circumstances where public-interest factors unrelated to the convenience of the parties weigh heavily against a transfer.³⁰² Furthermore, the party resisting the forum-selection clause will bear the burden of proving that enforcement is unwarranted.³⁰³ The same inquiry applies to a *forum non conveniens* dismissal motion seeking to enforce a forum-selection clause which designates a state or foreign court system as the exclusive forum.³⁰⁴

Under the Affirmative Defense Approach, the inquiry under step two is much simpler: if step one has determined that the forum-selection clause is valid as a matter of state law, then the clause should be enforced in nearly all circumstances. A Rule 12(b)(6) motion to dismiss for failure to state a claim or Rule 12(c) motion for judgment on the pleadings should be granted unless the plaintiff has plausibly pleaded facts alleging a legally valid reason to avoid enforcement, for example, if the defendant waived its right to enforce or should be estopped from enforcing the otherwise valid clause on account of undue delay.³⁰⁵ The same can be said for a motion for summary judgment pursuant to Rule 56—relief is appropriate unless the plaintiff can prove there are disputed issues of material fact as to whether enforcement is warranted as a matter of law.³⁰⁶

3. The Validity-Enforceability Two-Step Applied

The validity-enforceability two-step will be easy for a court to apply. A hypothetical loosely based on the *Atlantic Marine* case can be used to illustrate how the two-step should proceed. Suppose a Virginia prime contractor enters into a subcontracting agreement with a Texas subcontractor for construction work to be performed on private property in Dallas, Texas. The agreement contains no choice-of-law clause, but has a

299. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 8 (U.S. Dec. 3, 2013) (“[A forum-selection] clause may be enforced through a motion to transfer under section 1404(a) [Section 1404(a)] permits transfer to any district where venue is also proper . . . or to any other district to which the parties have agreed by contract or stipulation. Section 1404(a) therefore provides a *mechanism for enforcement*.” (emphasis added)).

300. *See supra* notes 200–17 and accompanying text.

301. *See Atl. Marine*, No. 12-929, slip op. at 13.

302. *See id.* at 11.

303. *See id.* at 13.

304. *See id.* at 12; *see also id.* at 15 n.8 (“[T]he same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums.”).

305. *See* Brief of Sachs, *supra* note 36, at 12–27.

306. *See Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 359 (3d Cir. 1986) (noting that the district court held an evidentiary hearing and “predicated its conclusions . . . on two findings of fact”).

forum-selection clause that designates the federal or state courts sitting in Norfolk, Virginia, as the exclusive fora for litigation of any disputes between the parties.³⁰⁷ Section 272.001 of the *Texas Business and Commerce Code*, however, permits any person “obligated by the contract to perform the construction or repair” to void the forum-selection clause.³⁰⁸ The subcontractor performs the work, but the prime contractor fails to make payments required by the contract.³⁰⁹ The subcontractor files suit in Texas state court and argues that he is exercising his right under Texas law to void the forum-selection clause.³¹⁰ The contractor removes to federal court and, pursuant to § 1404(a), moves to enforce the forum-selection clause and transfer to the Eastern District of Virginia under *Atlantic Marine*.³¹¹

Under step one of the validity-enforceability two-step, the district court in Dallas should first look to Texas state law to determine the validity of the forum-selection clause and its scope.³¹² Step one would lead the district court to section 272.001 of the *Texas Business and Commerce Code* and the court would have to decide if that statutory provision applied to the case at bar.³¹³ It would have to determine if the contract at issue was “principally for the construction or repair of an improvement to real property” in the State of Texas.³¹⁴ In the actual *Atlantic Marine* case, the district court decided that section 272.001 did not govern because the work was performed on Fort Hood, which was a federal enclave.³¹⁵ In our hypothetical case, however, the construction work was performed on private property in Dallas. Thus, assuming the contract was principally for the construction of an improvement to real property under Texas law, section 272.001 would govern and the scope of the forum-selection clause would be limited by the subcontractor’s right to void the clause.³¹⁶ Our hypothetical plaintiff-subcontractor has exercised this right and voided the clause.

Now the question becomes: what weight should the voided forum-selection clause be given in step two, the enforceability determination? The

307. See *Atl. Marine*, No. 12-929, slip op. at 2–4.

308. TEX. BUS. & COM. CODE ANN. § 272.001 (West 2012).

309. See *United States ex. rel. J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879, at *1 (W.D. Tex. Aug. 6, 2012), *mandamus denied sub nom. In re Atl. Marine Constr. Co.*, 701 F.3d 736 (5th Cir. 2012), *rev’d sub nom. Atl. Marine*, No. 12-929.

310. See *id.*

311. See *id.*

312. See generally *supra* Part III.A.1. As per *Klaxon*, the district court must apply Texas choice of law rules. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). Texas follows the “most significant relationship” test of the *Restatement (Second) of Conflict of Laws* to determine which state’s law governs a given contract. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420–21 (Tex. 1984). Since all of the work in this hypothetical is performed in Texas, a Texas corporation is doing the work, and there is a Texas statute directly on point, the district court is likely to conclude that Texas law governs the contract.

313. See *United States ex. rel. J-Crew*, 2012 WL 8499879, at *2–3. See generally *supra* Part III.A.1.

314. TEX. BUS. & COM. CODE ANN. § 272.001 (West 2012).

315. *United States ex. rel. J-Crew*, 2012 WL 8499879, at *2–3.

316. See TEX. BUS. & COM. CODE ANN. § 272.001.

prime contractor is likely to argue that the clause should still weigh heavily in favor of a transfer to Virginia. It was voided on a technicality of Texas law after all and still represents the parties' "venue preferences."³¹⁷ The prime contractor is likely to point to *Stewart* where the Supreme Court found the forum-selection clause enforceable under § 1404(a) despite the policy of the Alabama court system of refusing to enforce forum-selection clauses.³¹⁸ The subcontractor is likely to point to the Supreme Court's disclaimer in *Atlantic Marine* that the section 1404(a) "analysis presupposes a contractually valid forum-selection clause"³¹⁹ and Justice Scalia's dissent in *Stewart* arguing that if the forum-selection clause "is invalid, *i.e.*, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination."³²⁰

The subcontractor probably has the stronger argument, and is likely to prevail even if the district court gives the voided forum-selection clause some weight. *Atlantic Marine* specifically conditioned its analysis on the presence of a valid forum-selection clause and reasoned that, "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system."³²¹ Here, the forum-selection clause is not valid, but void,³²² and given that it was voided pursuant to Texas statutory law governing construction contracts it cannot be said that enforcement would protect the legitimate expectations of the parties.³²³ The contractor's expectation of enforcement is not legitimate where statutory law of the state where the work is performed gives the subcontractor the right to void and the contractor failed to bargain for a choice-of-law provision or arbitration clause in the contract.

B. Applying Federal Common Law Forum Non Conveniens Standards to Forum-Selection Clauses May Raise Concerns Under the Erie Doctrine

Atlantic Marine holds that forum non conveniens is an appropriate mechanism for enforcement when a forum-selection clause designates the courts of a particular state or foreign country as the exclusive forum.³²⁴ While the Court was likely trying to avoid having a different enforcement standard for forum clauses that designate a federal court versus those that designate a state or foreign court,³²⁵ application of forum non conveniens in this context is potentially problematic because it arguably violates the *Erie*

317. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988).

318. *Id.* at 30–31.

319. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929, slip op. at 11 (U.S. Dec. 3, 2013).

320. *Stewart*, 487 U.S. at 35 (Scalia, J. dissenting).

321. *Atl. Marine*, No. 12-929, slip op. at 12 (quoting *Stewart*, 487 U.S. at 33 (Kennedy J., concurring)).

322. See TEX. BUS. & COM. CODE ANN. § 272.001 (West 2012).

323. See *Softchoice Corp. v. MacKenzie*, 636 F. Supp. 2d 927, 940 (D. Neb. 2009) (holding that the plaintiff had no legitimate expectation of performance of a void and unenforceable contract provision).

324. See *supra* note 200 and accompanying text.

325. See *Atl. Marine*, No. 12-929, slip op. at 10.

doctrine.³²⁶ This is because the doctrine of *forum non conveniens* is a federal common law principle and thus is not subject to the same *Hanna* analysis grounded in statutory interpretation as articulated by the Supreme Court in *Stewart* with respect to § 1404(a).³²⁷

While Congress has, via § 1404(a), codified “the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system, [for the remaining cases] the residual doctrine of *forum non conveniens* ‘has continuing application in federal courts.’”³²⁸ Yet, because it is a federal common law principle, its application to forum-selection clauses must, arguably,³²⁹ satisfy the “twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”³³⁰ In light of the fact that many state courts have adopted the *Bremen* standard to determine both validity and enforceability of forum-selection clauses,³³¹ the application of *forum non conveniens* in federal court actions could lead to inequitable administration of states’ substantive contract law and encourage forum shopping in the rare event that plaintiff prevails under *Atlantic Marine*’s modified analysis.³³²

These concerns are valid, but likely overstated. First, as noted by the Court in *Atlantic Marine*, Congress has expressed implicit approval of the *forum non conveniens* doctrine by codifying it at § 1404(a).³³³ Such approval provides support for the proposition that federal courts should have control over which litigants will have access to the courtroom and which will not.³³⁴ Thus, because the “[f]orum non conveniens doctrine concerns the administration and self-management of the federal courts, [it] does not implicate state-created substantive rules of decision.”³³⁵

Moreover, after *Atlantic Marine*, it is not clear that the *forum non conveniens* inquiry as modified for enforcement of forum-selection clauses would deviate materially from most existing state law standards. Before *Atlantic Marine*, it was unclear whether a federal court sitting in diversity was permitted more discretion by the *forum non conveniens* inquiry, which

326. Lee, *supra* note 13, at 674–79; see also Brief of Sachs, *supra* note 36, at 28–31 (noting that there is “much uncertainty over which body of law governs”).

327. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 38–41 (1988) (Scalia, J., dissenting).

328. *Atl. Marine*, No. 12-929, slip op. at 10 (quoting *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007)).

329. See Lee, *supra* note 13, at 674–79; see also *Schertenleib v. Traum*, 589 F.2d 1156, 1162 n.13 (2d Cir. 1978) (declining to “decide the intriguing question . . . whether, in diversity cases[,] . . . state law or federal law is the source of the rules governing the *forum non conveniens* doctrine”); Gruson, *supra* note 227, at 153–63 (explaining the problematic application of the federal common law *Bremen* standard before *Stewart* in diversity cases).

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

331. See generally Dougherty, *supra* note 55.

332. See *Atl. Marine*, No. 12-929, slip op. at 11–16; Lee, *supra* note 13, at 674–79.

333. See *Atl. Marine*, No. 12-929, slip op. at 10 (“Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* . . .”).

334. See *id.*; *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1313–14 (11th Cir. 2002) (citing § 1404(a) as evidence supporting the application of federal *forum non conveniens* standards in diversity cases).

335. 14D WRIGHT & MILLER, *supra* note 105, § 3828.5 (3d ed. 2007).

required the court to consider balancing of public, private, and third-party interests, than the *Bremen* standard adopted by many states.³³⁶ Additionally, “the presumption underlying any *forum non conveniens* determination is the fundamental respect accorded the plaintiff’s original choice in forum,” a presumption in no way shared with *The Bremen*.³³⁷ If a federal court considers these interests instead of the limited *Bremen* factors, then there could be a strong possibility of inequitable administration of the laws and corresponding forum shopping, and enforcement would be far less certain in federal court.³³⁸ However, the newly articulated § 1404(a) and forum non conveniens inquiry under *Atlantic Marine* brings enforcement via these mechanisms into greater uniformity with the *Bremen* standard adopted by many states.³³⁹ The presence of a valid forum-selection clause transforms the analysis because all private interests will weigh in favor of dismissal and only overwhelming public interests will prevent it.³⁴⁰ Furthermore, the Supreme Court has now declared in *Atlantic Marine* that the plaintiff’s original choice of forum merits no consideration at all when there is a valid forum-selection clause.³⁴¹ This significantly decreases the risk of violating the twin aims of *Erie*, at least with respect to those states that have adopted the *Bremen* standard. These concerns will remain, however, for situations where states have adopted limitations on the validity and enforceability of forum-selection clauses in certain contexts.³⁴² In these situations, the forum non conveniens inquiry under *Atlantic Marine* is likely to produce wildly different outcomes, especially if the choice-of-law circuit split as to validity is not resolved in favor of applying state law.³⁴³

C. Raising the Forum-Selection Clause As an Affirmative Defense Is a Superior Procedural Mechanism for Enforcement

In light of these *Erie* concerns and the strained interpretation of § 1404(a) in *Stewart*, the Supreme Court gave too little consideration in *Atlantic Marine* to the Affirmative Defense Approach followed by the First, Third, and Sixth Circuits and as articulated by Professor Sachs.

In addition to the arguments raised by the circuit courts and Professor Sachs in his amicus brief before the Court in *Atlantic Marine*,³⁴⁴ enforcing a forum-selection clause via the Affirmative Defense Approach avoids the *Erie* concerns raised by enforcement using forum non conveniens. This is because Rule 12 and Rule 56 are federal rules and are thus permissible

336. See Lee, *supra* note 13, at 688 & n.161 (“[T]he *Bremen* holding was produced under a motion to dismiss for lack of jurisdiction or on *forum non conveniens* grounds, [but] the Court made no mention of a determination under *forum non conveniens* and thus did not establish a place for forum selection clauses in the federal *forum non conveniens* standard.”).

337. *Id.* at 689.

338. See *id.* at 674–89.

339. See *supra* notes 200–17 and accompanying text.

340. See *supra* notes 200–17 and accompanying text.

341. See *supra* notes 200–17 and accompanying text.

342. See *supra* notes 229–30 and accompanying text.

343. See *supra* Parts II.A.1, III.A.1.

344. See generally *supra* Part II.B.1.

exercises of authority so long as they comport with the Rules Enabling Act.³⁴⁵ Evaluating the forum-selection clause as an affirmative defense under Rules 12 and 56 would require the court to examine substantive state contract law to determine whether the plaintiff had plausibly pleaded avoidance of the forum-selection clause³⁴⁶ or raised sufficient disputed issues of material fact to avoid the clause.³⁴⁷ As noted above, the Affirmative Defense Approach could also substantially avoid the enforceability determination required by § 1404(a) and forum non conveniens approaches under *Atlantic Marine*.³⁴⁸ It is also superior to those solutions that propose statutory reform or the promulgation of a new Federal Rule of Civil Procedure, because it does not depend on legislative action.³⁴⁹

Finally, concerns that defendants will have to commit significant resources litigating in the noncontractual forum are overstated. Defendants are permitted, indeed required, to bring a Rule 12(b)(6) motion before answering the complaint and the court may, pursuant to Rule 12(d), convert such a motion to one for summary judgment if it must consider matters outside the pleadings.³⁵⁰ Furthermore, even if a plaintiff's defense to enforcement requires discovery, a court is permitted to favor jurisdictional discovery and thus can proceed with discovery related to the forum-selection clause before that relating to the more substantive merits of the case at bar.³⁵¹ After this discovery, the district court can conduct an evidentiary hearing and make relevant findings of fact.³⁵² Finally, a defendant may be able to file a breach of contract action of its own and obtain damages, i.e., its litigation costs in the noncontractual forum.³⁵³

345. See *supra* notes 326–32, 342 and accompanying text.

346. See generally *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). In the case of allegations of fraud, the plaintiff would have to plead those allegations with particularity as required by Rule 9. See *Jalee Consulting Grp., Inc. v. XenoOne, Inc.*, 908 F. Supp. 2d 387, 394–95 (S.D.N.Y. 2012) (holding that Rule 9(b) applies to fraudulent inducement claims concerning forum-selection clauses).

347. See FED. R. CIV. P. 56(a).

348. See *supra* Part II.B.2; *supra* notes 200–17 and accompanying text.

349. See *supra* note 40.

350. See FED. R. CIV. P. 12(d).

351. See *id.* R. 16(b)(3)(B)(i)–(ii) (permitting the judge to “modify the timing of disclosures [and] the extent of discovery”); Brief of Sachs, *supra* note 36, at 22.

352. See *supra* note 306.

353. See *In re Atl. Marine Constr. Co.*, 701 F.3d 736, 749 n.5 (2012) (Haynes, J., specially concurring) (“[N]othing . . . would preclude [the defendant’s] seeking of some other remedy for the clear breach. . . . [The plaintiff’s] disregard for the parties’ bargained-for agreement . . . may result in [the defendant] incurring substantial litigation costs that it would have otherwise avoided. [The defendant] is free to seek damages for those costs.”), *rev’d sub nom.* *Atl. Marine Constr. Co. v. U.S. Dist. Court*, No. 12-929 (U.S. Dec. 3, 2013). See generally Daniel Tan, *Damages for Breach of Forum Selection Clauses, Principled Remedies, and Control of International Civil Litigation*, 40 TEX. INT’L L.J. 623 (2005).

CONCLUSION

Enforcement of forum-selection clauses in federal court has come a long way since the era of the ouster doctrine. Federal courts now strongly recognize the ability of parties to contract for rights relating to the forum where they will litigate disputes. The disuniformity of approaches to enforcement of such clauses in federal courts raises a threat that litigants will see different results in state and federal courts. In *Atlantic Marine*, the Supreme Court explicitly put to rest some of the circuit splits regarding the proper procedural mechanisms for enforcement. Furthermore, *Atlantic Marine*'s narrow reading of federal venue and transfer provisions provides implicit guidance to lower courts as to the question of whether federal or state law should govern the validity of forum-selection clauses—state law should apply.

In adjudicating a motion to enforce a forum-selection clause, a district court should first address the question of the clause's validity under state law. Only after determining the clause's validity should a district court engage in the enforceability inquiry dictated by *Atlantic Marine* with respect to § 1404(a) transfer and forum non conveniens dismissal.

The Supreme Court has left open the question as to whether a forum-selection clause may be raised as an affirmative defense and a defendant may then seek dismissal under Rule 12(b)(6), Rule 12(c), and Rule 56. This approach is superior to other available methods. It avoids the problematic *Erie* concerns of using forum non conveniens and promotes uniform enforcement of forum-selection clauses by ensuring that they are treated in the same manner courts treat other contractual rights.