

***Erie* and Forum Selection Clauses**

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Since *Erie Railroad Company v. Tompkins*, the U.S. Supreme Court has recognized that federal courts should generally follow state law if not doing so would significantly affect the outcome of the case. This principle suggests that federal courts should apply state law to determine the enforceability of forum selection clauses. Although seemingly mundane, these clauses can make or break a lawsuit. If a clause is enforced, the suit must be filed in a different location. This change in location affects the procedures that will be applied, the substantive law, and the overall cost of litigation. In extreme cases, enforcing a forum selection clause may lead the plaintiff to abandon the case altogether.

Although these clauses are critically important, and although they frequently have a major impact on a case, the federal courts do not follow state law to determine whether they should be enforced. Instead, they apply federal common law. In this Article, we illustrate the real-world consequences of this decision. We draw upon a hand-collected dataset of hundreds of state and federal court decisions to show that federal courts sitting in diversity enforce forum selection clauses at a higher rate than state courts in virtually every state and every federal circuit. This divergence presents obvious opportunities for forum shopping as between state and federal courts in the same state. And yet the federal courts to continue to apply federal law to determine the enforceability of these clauses. The solution to this problem, we argue, is simple. Federal courts should apply state law to determine whether a forum selection clause is enforceable.

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INTRODUCTION

Molly Schwarz worked in North Carolina as a clinical specialist for St. Jude Medical, Inc.¹ Schwarz was terminated after she informed management that a doctor was allegedly involved in an extramarital affair with one of her co-workers. Schwarz subsequently sued St. Jude in North Carolina state court for wrongful discharge from employment. St. Jude moved to dismiss the case based on a forum selection clause in Schwarz's employment contract requiring all actions to be brought in Minnesota.²

Schwarz argued that the clause was unenforceable because the North Carolina legislature had enacted a statute invalidating forum selection clauses in all contracts made in North Carolina. The North Carolina Court of Appeals agreed. The court held that the Minnesota forum selection clause was void and unenforceable under North Carolina law. The case remained in North Carolina.

* * *

Regina Canovai also worked in North Carolina at National Trench Safety ("NTS").³ Canovai was terminated after she informed management the company was allegedly in violation of state occupational safety and health regulations. Canovai subsequently brought a lawsuit against NTS in North Carolina state court alleging wrongful discharge from employment. NTS removed the case to federal court. It then moved to transfer the case to Texas based on a forum selection clause in Canovai's employment agreement requiring all actions to be brought in Texas.

Like Schwarz, Canovai argued that the clause was unenforceable because of the North Carolina statute. In federal court, however, this argument proved unavailing. The federal district court determined that federal law controlled the enforceability of the clause and held, as a matter of federal law, that the statute "is only one of the factors to be considered when evaluating reasonableness for a forum selection clause."⁴ After considering the relevant factors, the court concluded that the Texas forum clause was enforceable under federal law. The case was transferred to Texas.

* * *

¹ Schwarz v. St. Jude Med., Inc., 802 S.E.2d 783, 786 (N.C. App. 2017).

² A forum selection clause is a contract provision that selects a court to resolve disputes. See John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791, 1793 (2019).

³ Canovai v. NTS Mikedon LLC, No. 3:21-CV-00656-MOC-DSC, 2022 U.S. Dist. LEXIS 74424, at *3 (W.D.N.C. Apr. 25, 2022).

⁴ *Id.*

The decision to enforce a forum selection clause selecting the courts of another jurisdiction is hugely consequential.⁵ These clauses determine the location of litigation and, as all seasoned litigators known, the location can make or break a lawsuit. Location dictates the procedures that will be applied to adjudicate the dispute. It also influences the substantive law and the overall cost of litigation.

What is so striking about the pair of North Carolina cases discussed above is that the determinative fact relating to clause enforcement was the court hearing the case.⁶ In both cases, the plaintiff filed suit in North Carolina state court. In both cases, the defendant asserted that the contract with the plaintiff required that suit be filed in another court. The only real difference was that the first case remained in state court while the second was removed to federal court. But that difference mattered. The state court applied state law to void the clause; the federal court applied federal common law to enforce it. The plaintiff in the first case got to litigate at home. The plaintiff in the second case had to go to Texas.

This sort of thing should not happen. As the U.S. Supreme Court has long recognized, federal courts should follow state law that would be controlling if the suit were filed in state court if not doing so would “substantially affect” the result of the litigation.⁷ The theory is that the substantive rules of decision in a given case should not differ depending on whether a suit is heard in state or federal court.⁸ If Congress enacts a law conferring a substantive right, both the state and federal courts must apply that

⁵ It is customary to refer to a forum selection clause selecting the courts of another jurisdiction as an “outbound” clause. These clauses may be distinguished from “inbound” forum selection clauses that select the court in which the suit is filed. This Article is concerned exclusively with outbound clauses. For a discussion of inbound clauses, see John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65 (2021).

⁶ The question of whether a forum selection clause is “enforceable” is distinct and different from the question of how to “interpret” a forum selection clause and whether a forum selection clause is “valid.” See John F. Coyle, *“Contractually Valid” Forum Selection Clauses*, 108 IOWA L. REV. 127, 127-32 (2022). To determine whether a clause is enforceable, the court will query whether it is contrary to public policy or unreasonable. *Id.* at 131. To interpret a clause, the court will look to its language to determine the intent of the party with respect to scope, exclusivity, and other issues. *Id.* at 130-31. To determine whether a clause is valid, the court will consider whether the basic requirements for contract formation have been met. *Id.* at 130. This Article is concerned solely with the difference between state and federal law with respect to the issue of enforceability.

⁷ *Hanna v. Plumer*, 380 U.S. 460, 466 (1965) (“The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?” (quoting *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945)); accord *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010) (“[T]he touchstone was whether it ‘significantly affect[s] the result of a litigation.’”).

⁸ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (“[W]here a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.” (internal quotation marks omitted)).

law.⁹ But federal courts cannot choose to disregard state substantive law that applies in state court through the creation of federal common law that applies in federal court.¹⁰

Of course, even though federal courts must apply state substantive law, they are not obliged to follow state procedures. Instead, they can and do fashion their own procedures as a matter of federal law. To assist in the determination whether a particular issue is substantive, and hence governed by state law, or procedural, and hence governed by federal law, the Supreme Court has identified two functional considerations: whether creating differences in legal rights in state and federal court could give rise to forum shopping as between state and federal courts in the same state and whether those differences would lead to the inequitable administration of the laws.¹¹

In this Article, we argue that the enforceability of forum selection clauses is a substantive matter that should be governed by state law in federal court.¹² Contract law governs these clauses and contract law is substantive. Of course, enforcement has procedural consequences – it determines where a case will be litigated – but the question of whether this type of contract provision is enforceable rests on substantive contract law.

The two considerations identified by the Court – forum shopping and inequitable administration of the laws – also support the conclusion that the enforceability of forum selection clauses is substantive. Ordinarily, determining whether a rule would lead to forum shopping or inequitable administration of the law is difficult to do. Making that determination calls for courts to make empirical assessments. Unfortunately, data about the effect on forum shopping and outcomes of not following particular state law is difficult to obtain.¹³ Courts must follow state law if they *think* that not following that law

⁹ *Hanna*, 380 U.S. at 469-70.

¹⁰ *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

¹¹ *Gasperini*, 518 U.S. at 428 (stating that in applying the tests aimed at distinguishing substance from procedure, courts “must be guided by “the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws” (internal quotation marks omitted)).

¹² We are not the first scholars to argue that federal courts should apply state law to determine whether a forum selection clause is enforceable. See Kevin Clermont, *Forum Selection After Atlantic Marine: Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 666 (2015) (“[A]ny state law of specifically substantive public policy, such as that embodied in a state statute protecting franchisees from having to litigate claims in an out-of-state court, will supplement that federal law in federal court.”); Rachel Kinkaid, *Foreign Forum-Selection Clause Frustrations: Determining Clause Validity in Federal Diversity Suits*, 4 STANFORD J. COMPLEX LITIG. 131, 164 (2016) (“[U]nder the majority of circumstances, any court that performs a rigorous *Erie* analysis on clause validity will find that state law should apply.”); Adam N. Steinman, *Forum Selection After Atlantic Marine: Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 796 (2015) (“For purposes of *Atlantic Marine*’s footnote 5 – at least for diversity cases – a forum-selection clause is contractually valid if and only if it would be deemed . . . enforceable by the state court where the federal district court is located.”). We are, however, the first scholars to use an empirical approach to demonstrate the difference in enforcement rates as between state and federal courts and, therefore, that *Erie* demands that federal courts follow state law to determine enforceability.

¹³ So far as we are aware, there are no empirical studies measuring whether a difference between federal and state law results in forum shopping or inequitable administration of the laws. The only study of which

may result in forum shopping or inequitable administration of justice. Thus, instead of making a quantitative assessment of the actual effect of not following state law, they make a qualitative prediction about the likely effect of not following that law.

Forum selection clauses provides a rare opportunity to bring actual quantitative data to bear on this question. Like the federal court in North Carolina, federal courts generally do not follow state law on the enforceability of forum selection clauses; instead, they have fashioned a federal common law of contracts to determine the enforceability of these clauses.¹⁴ Their decision not to follow state law thus presents an opportunity to gather cases to evaluate the extent to which that decision could lead to forum shopping or inequitable administration of the law. We have done precisely that. We have looked at state and federal cases from across the country to assess empirically the effects of choosing to follow federal common law instead of state law in determining the enforceability of forum selection clauses.

Our data show that the decision to apply federal law instead of state law has a demonstrable impact on enforcement rates. Federal courts sitting in diversity applying federal law enforced clauses in 90% of the cases in our dataset. State courts applying state law enforced clauses in 79% of cases in our dataset. These differences provide obvious incentives for forum shopping. Plaintiffs seeking to avoid forum selection clauses will sue in state court. Defendants seeking to enforce forum selection clauses will remove to federal court or, alternatively, seek declaratory judgments in federal court stating that the clause is enforceable. The differences also raise the possibility that the laws will be applied inequitably, since the decision to enforce a clause often is determinative of whether the litigation will continue.

we are aware is by Professor Hubbard assessing the effects on forum selection of the Supreme Court's decision in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 396 (2010). William H.J. Hubbard, *An Empirical Study of the Effect of Shady Grove v. Allstate on Forum Shopping in the New York Courts*, 10 J.L. ECON. & POL'Y 151, 171 (2013) (analyzing how *Shady Grove* affected forum selection). At issue in *Shady Grove* was whether a New York law prohibiting class action in suits seeking penalties precluded a federal court sitting in diversity from entertaining under Rule 23 a class action seeking a penalty. The lower courts held that New York's rule was substantive and therefore had to be observed by the federal courts. The Supreme Court reversed. It held that Rule 23 set forth the requirements for a class action, and therefore the federal courts could allow class actions under Rule 23 even if they sought penalties under New York law. Professor Hubbard found that *Shady Grove* significantly affected forum shopping. Plaintiffs filed more class actions in federal court, and the rate of removal of actions filed in NY state court dropped. But this study provides little insight on the questions of how much forum shopping or inequitable administration of justice is required to deem a state law substantive instead of procedural. The test for whether a federal rule of procedure is procedural differs from the test for whether a state law is procedural. A federal rule is procedural so long as a rational person could classify it as procedural. Under that test, even rules that result in significant forum shopping may be deemed procedural.

¹⁴ See Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U.L. REV. 390, 441 (2017) ("[W]hen forum selection clauses point to a different sovereign's courts, *Atlantic Marine* told judges to enforce such clauses through invocation of *forum non conveniens*, which lacks § 1404(a)'s legislative pedigree. In the transnational context, then, forum selection clauses are being enforced through an unacknowledged federal common law of contracts via a judge-made doctrine that itself lacks a clear source of authority.").

The Article proceeds in three Parts. Part I begins by providing an overview of the *Erie* framework. Under *Erie*, federal courts may develop their own procedures but must apply state substantive law unless a federal statute or the Constitution provides otherwise. No federal statute or constitutional provision specifically authorizes the creation of a federal common law on the enforceability of forum selection clauses.¹⁵ The relevant question is whether enforceability is substantive or procedural – a question that depends on an assessment of forum shopping and inequitable administration of justice.

Part II provides a comprehensive descriptive account of state and federal practice with respect to the enforcement of forum selection clauses. This account draws upon two hand-collected datasets collected over the course of several years. The first dataset consists of 430 federal cases relating to clause enforcement.¹⁶ The second dataset consists of 330 state cases relating to the same.¹⁷ When these federal and state cases are examined side by side, three truths become apparent. First, federal courts enforce forum clauses at a higher rate than state courts in virtually every federal circuit. Second, the differences in state-federal enforcement rates vary by state. In states where state law mirrors federal law, the gap is small. In states where state law is dissimilar to federal law, the gap is large. Third, the federal courts are much less willing than state courts to invoke a lack of reasonableness as a basis for refusing to enforce a forum selection clause. This is so even though the U.S. Supreme Court has held as a matter of federal law that a forum selection clause should not be enforced if it is unreasonable.

The purpose of this descriptive account is twofold. First, it provides robust evidence to support the claim that state and federal law are not identical across the United States. This finding is important because the Supreme Court has said that there is no need to address the *Erie* question if state and federal law are the same. Second, it demonstrates that these differences actually make a difference in the real world. The data clearly show that federal courts applying federal law to this issue consistently decide cases differently than state courts applying state law.

In light of these facts, there is a compelling argument that the enforceability of forum selection clauses is a question that should be classified as substantive for *Erie* purposes and governed by state law regardless of whether the chosen forum is a federal

¹⁵ The U.S. Supreme Court held in *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) that Section 1404(a) authorizes the creation of federal common law relating to the enforceability of forum selection clauses selecting a federal court. We believe that *Stewart* was wrongly decided for reasons outlined in Part III.

¹⁶ This dataset is comprised of cases decided between 2014 and 2020 where a federal court sitting in diversity considered whether a forum selection clause was enforceable. The process by which these cases were collected is explained in the Appendix.

¹⁷ This dataset is comprised of cases decided between 2010 and 2020 where a state court considered whether a forum selection clause was enforceable. The process by which these cases were collected is explained in the Appendix.

court, a state court, or a foreign court. We sketch in the details of this argument in Part III. A brief conclusion follows.

PART I - *ERIE*

A. The *Erie* Framework

Federal courts have extremely limited power to create federal common law. In criminal cases, that restriction traces back to 1812.¹⁸ The restriction in civil cases came later. For many years, under the rule established by *Swift v. Tyson*,¹⁹ federal courts had broad power to fashion common law doctrines. Federal courts had to apply federal statutes and state statutes.²⁰ But when no statute applied, federal courts could fashion common law.²¹ Even when hearing state-law actions brought under diversity jurisdiction, the federal courts typically were not bound by state common law but instead could recognize federal common law that diverged from state common law.²²

The Court changed course in *Erie*.²³ *Erie* held that, to the extent federal courts can make common law at all, they may do so only in those areas in which the Constitution authorizes federal regulation.²⁴ Outside those areas, federal courts cannot create federal common law, but instead must apply state law, including state common law.²⁵

¹⁸ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

¹⁹ 41 U.S. (16 Pet.) 1 (1842).

²⁰ *Id.* at 18-19.

²¹ *Id.* (holding that federal courts need not defer to state courts on “questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation [such as] questions of general commercial law”).

²² Of course, federal courts did not understand themselves to be making federal common law. The prevailing theory in the 19th century was that courts did not make common law at all but instead discovered common law rules that already existed. *Swift v. Tyson*, 16 Pet. (41 U.S.) at 19; see also 1 W. BLACKSTONE, COMMENTARIES *69-70 (calling judges the “oracles” and “depository of the laws”). Thus, when federal courts announced common law rules that diverged from state common law rules, the justification was that the state had misidentified the platonic common law rule. *Erie* abandoned this theory of discovery of the common law in favor of the view that common law is created by courts. *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78, 90 (1938); see Note, *Judicial Takings, Judicial Federalism, and Jurisprudence: An Erie Problem*, 134 HARV. L. REV. 808, 827 (2020) (“*Erie* embraced a purely realist conception of the common law in which the decisions of state judges themselves establish law.”).

²³ *Erie R. Co. v. Tompkins*, 304 U.S. 64.

²⁴ *Id.* at 77-79.

²⁵ *Hanna v. Plumer*, 380 U.S. 460, 471-72 (1965) (“We are reminded by the *Erie* opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.”)

Erie's holding rests on constitutional grounds.²⁶ The limitations it imposed on the power to make federal common law derived from the fact that the Constitution confers only limited regulatory authority on the federal government and leaves the residual to the states.²⁷ No body of the federal government, including the federal courts, can fashion policy outside those areas.²⁸

But *Erie* gave policy-based reasons for its conclusion as well. One of those reasons was that the practice of allowing federal courts to create their own common law instead of following state common law gave rise to different rights in federal and state court.²⁹ The Court reasoned that the rules of decision that control the outcome of a case should not differ depending on whether a suit is heard in state or federal court.³⁰ If Pennsylvania state courts refuse to recognize common law actions for negligence, so too should a federal court in Pennsylvania hearing the same action.³¹ Requiring different showings to prevail on a cause of action in state court and federal court result in inequitable administration of the laws, as it gives plaintiffs who are not citizen of a state an advantage over citizens of that state by presenting those plaintiffs with the option of filing in state or invoking diversity jurisdiction to proceed in federal court depending on which forum recognized a law more favorable to the plaintiff.³² Differences in legal rights in state and federal court may also give rise to unwelcome forum shopping.³³ Given the choice between filing in state or federal court, a plaintiff would choose the forum in which the law was most favorable to the plaintiff.³⁴

Decisions following *Erie* have further restricted the power of the federal courts to create federal common law. Those cases establish that, even in areas where the Constitution does authorize federal regulation, federal courts still lack the general

²⁶ *Erie* also agreed with the statutory argument that the Rules Decision Act required federal courts to apply state substantive law, but *Erie* did not base its decision on that ground. *Erie*, 304 U.S. at 77-78 ("If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear, and compels us to do so."); Henry J. Friendly, *In Praise of Erie – and of the New Federal Common Law*, 39 N. Y. U. L. REV. 383, 386 (1964) (demonstrating that *Erie* rests on constitutional grounds). Of course, some have criticized the constitutional holding. See e.g. Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 Pepperdine Law Review. 129 (2011).

²⁷ *Erie*, 304 U.S. at 77-78; Friendly, *supra* note 26, at 395-96.

²⁸ *Erie*, 304 U.S. at 78 ("[N]o clause in the Constitution purports to confer such a power upon the federal courts.").

²⁹ *Erie*, 304 U.S. at 75 ("In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the state.").

³⁰ *Id.*; *Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court.").

³¹ *Erie*, 304 U.S. at 80.

³² *Erie*, 304 U.S. at 75 (arguing that differing rights in state and federal court "introduced grave discrimination by noncitizens against citizens").

³³ *Hanna*, 380 U.S. at 468 (noting *Erie*'s goal of discouraging forum shopping).

³⁴ *Id.* at 76.

authority to fashion federal common law. Fashioning laws is the role of Congress, not the federal courts. The only times that federal courts may create common law are when a federal statute authorizes them to do so,³⁵ or when a case involves such uniquely federal interests³⁶ that the Constitution implicitly authorizes the federal courts to protect through the development of federal common law.³⁷ The upshot of *Erie* and these later cases is that, unless the Federal Constitution or a federal statute directly applies or authorizes federal courts to create federal common law, federal courts must apply state law, including state common law.

The primary impact of the *Erie* doctrine is in state-law cases brought under diversity jurisdiction. Because those actions turn on state substantive law, *Erie* requires the federal courts to apply state law, including state common law, as developed by the state courts to resolve the case.

Although *Erie* requires federal courts to apply state substantive law in diversity cases, it does not require federal courts to apply state procedural law.³⁸ Article III's provision for a system of federal courts authorizes the federal government to create rules to administer those courts.³⁹ Congress may enact regulations prescribing federal procedures, but even when no statute or Federal Rule applies, federal courts are not

³⁵ See *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) ("With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress[.]"). A law may explicitly authorize federal courts to make common law, as in the case of Federal Rule of Evidence 501 ("The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege . . ."), which was enacted by Congress; or it may do so implicitly by containing such vague language or statutory gaps that lawmaking is essential to the statute's implementation. See, e.g., *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 457 (1957) (noting the power of federal courts to make federal common law to address "problems" that "lie in the penumbra of express statutory mandates"); see also *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corporation*, 315 U.S. 447, 470, 62 S. Ct. 676, 685, 86 L. Ed. 956 (1942) (Jackson, J., concurring) ("[The common law power] follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.").

³⁶ *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502, 1509 (2022) ("Judicial creation of federal common law to displace state-created rules must be 'necessary to protect uniquely federal interests.'" (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981))

³⁷ See, e.g., *Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1498 (2019); see generally 19 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Areas of Competence for the Formulation of Federal Common Law — Federal Common Law Arising by Implication From the Constitution or Tradition and Necessity*, 19 FED. PRAC. & PROC. JURIS. § 4517 (3d ed. 2013)

³⁸ *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 427 (1996) ("Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law.").

³⁹ *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper clause) carries with it congressional power to make rules governing the practice and pleading in those courts[.]").

bound by state procedural rules but instead may fashion procedural rules to regulate the manner for processing claims in federal court.⁴⁰

Because federal courts must follow state substantive law but may fashion federal procedural law, a critical question in federal cases involving state law is whether a particular issue is substantive, and therefore controlled by state law, or procedural and therefore controlled by federal law.⁴¹ The Court has devised a two-tier approach to assist in answering this question.⁴²

The first question is whether a Federal Rule of Civil Procedure or federal statute applies. In *Hanna v. Plummer*, the Court held that a federal court must follow an applicable federal statute or Federal Rule of Civil Procedure so long as a rational person could classify the requirements of that statute or rule as procedural.⁴³ Thus, in this situation, a court need not determine whether the potentially applicable *state* rule is procedural or substantive; all it must do is determine if the federal statute or Federal Rule could rationally be considered procedural.

Things are more complicated when no federal rule or statute applies.⁴⁴ In that situation, a court must move to the second question, which is whether the potentially applicable state law is procedural or substantive. Over the years, the Court has had difficulty drawing a bright line between substance and procedure.⁴⁵ Instead, it has said that a state rule should be treated as substantive if not following the rule in federal court would “significantly affect” the outcome of the litigation.⁴⁶ But recognizing that the failure to observe any procedure can potentially affect the outcome in a case, the Court has cautioned that this test “must not be applied mechanically” but instead must be

⁴⁰ *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 27 (1988) (“If no federal statute or Rule covers the point in dispute, the district court then proceeds to evaluate whether application of federal judge-made law would disserve the so-called ‘twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.’ If application of federal judge-made law would disserve these two policies, the district court should apply state law.” (quoting *Hanna*, 380 U.S. at 468)); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980)

⁴¹ *Gasperini*, 518 U.S. at 427.

⁴² *Id.* at 428 (stating that in applying the tests aimed at distinguishing substance from procedure, courts “must be guided by ‘the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws’ (internal quotation marks omitted)).

⁴³ *Hanna*, 380 U.S., at 471; see also *Stewart*, 487 U.S. at 27 (stating that if “a federal statute covers the point in dispute,” the court must follow that statute if “the statute represents a valid exercise of Congress’ authority under the Constitution.”).

⁴⁴ *Gasperini*, 518 U.S. at 427 (“Classification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor.”).

⁴⁵ *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949) (noting the “impossibility of laying down a precise rule to distinguish ‘substance’ from ‘procedure.’”)

⁴⁶ *Gasperini*, 518 U.S. at 427 (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945)); *Felder v. Casey*, 487 U.S. 131, 151 (1988) (“[T]he outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”).

guided by the two considerations laid out in *Erie*—discouraging forum shopping and avoiding the inequitable administration of the laws.⁴⁷

Under the first directive, a state rule is substantive if failing to follow it would be so likely to change the outcome of the case that it would lead plaintiffs to file in federal court instead of state court or vice versa.⁴⁸ Under the second directive, a state rule is substantive if applying it would be so likely to change the outcome of the case that it results in undue disparities between state and federal court. These two considerations are disjunctive. A rule will thus be deemed substantive if failing to follow it leads to forum shopping *or* to inequitable administration of the laws.⁴⁹

Of course, even if *Erie*'s two prongs of forum shopping and inequitable administration of justice support the conclusion that an issue is substantive and therefore should be controlled by state law, a federal court may nevertheless create substantive federal common law if doing so is "necessary to protect uniquely federal interests."⁵⁰ The theory, as noted earlier, is that the Constitution implicitly authorizes the courts to create federal common law to protect these uniquely federal interests.⁵¹ For example, the Court has held that federal common law controls the civil liability of federal officials for actions taken in the course of their duty,⁵² reasoning that subjecting the officials to state law could interfere with federal operations.⁵³

As the Court has made clear, this exception to *Erie* is narrow.⁵⁴ Most issues do not involve uniquely federal interests warranting the creation of federal common law. State

⁴⁷ *Gasperini*, 518 U.S. at 427-28

⁴⁸ Of course, not all rules that lead to forum shopping or differences in outcome are substantive. All differences between state and federal court, including procedural differences, may affect outcomes in some cases, *see* *Hanna v. Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) ("[T]he 'outcome-determinative' test. . . if taken literally, proves too much, for any rule, no matter how clearly 'procedural,' can affect the outcome of litigation if it is not obeyed."), which in turn may lead to some degree of forum shopping. For example, a plaintiff may file in state court instead of federal court to avoid the costs of more expansive discovery. A rule will be deemed substantive if the reason for forum shopping is that the difference in the rules in the federal and state court would likely to change the *outcome* of the case that it would lead plaintiffs to file in federal court instead of state court or vice versa.

⁴⁹ *Walker*, 446 U.S. at 753 ("[A]lthough in this case failure to apply the state service law might not create any problem of forum shopping, the result would be an 'inequitable administration' of the law.").

⁵⁰ *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020).

⁵¹ *See supra* note 37 and accompanying text.

⁵² *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 505 (1988) ("[One] area that we have found to be of peculiarly federal concern, warranting the displacement of state law, is the civil liability of federal officials for actions taken in the course of their duty.").

⁵³ *Howard v. Lyons*, 360 U.S. 593, 597 (1959) (stating that displacing state law with federal common law for official action is "designed to promote the effective functioning of the Federal Government").

⁵⁴ *Rodriguez*, 140 S. Ct. at 717 ("[B]efore federal judges may claim a new area for common lawmaking, strict conditions must be satisfied").

law controls most contracts, torts, and property disputes.⁵⁵ Accordingly, in the absence of a federal statute or rule, the critical question in most diversity cases for determining whether state or federal law controls is whether the issue is substantive or procedural.

B. Erie's Shortcomings

The Court has not specified how much forum shopping a difference in rules must create in order for a rule to be deemed substantive. All differences, even procedural ones, can result in some forum shopping, so the amount of forum shopping needed to designate a rule as substantive must be significant. The Court has provided little guidance, however, on how to resolve this question. The Court has been similarly vague in determining whether a difference in rules results in inequitable administration of the laws. All differences between federal and state rules may affect the outcome of a case; it is only when the effects on outcome reach some ill-defined threshold of significance that the rule is deemed substantive.

Further imprecision results from the way courts determine whether the thresholds of forum shopping and inequitable administration of the laws have been met. Whether a difference in rule results in forum shopping and inequitable administration of the laws are empirical questions, but courts do not approach them empirically. Courts do not try to ascertain the number of cases that were actually filed in one system instead of the other because of the differences in federal and state rules, nor do they consider the frequency with which the difference in the rules actually affected outcomes. Indeed, federal courts cannot engage in this empirical assessment because the necessary data has never been collected.⁵⁶ Instead, courts use their judgment to guess whether not adhering to the rule would potentially affect the outcome enough that it would encourage too much forum shopping or result in inequitable administration of the law.

A more fundamental problem with the *Erie* test is that it is relative. One cannot determine whether a state law is substantive or procedural by viewing it in isolation. Instead, it requires a comparison with the rule the federal courts adopt. If the federal rule is similar to the state court rule, the difference between the two might not produce significant forum shopping or substantially differences in outcomes. By contrast, if the federal rule radically differs from the state rule, the difference could result in substantial forum shopping or inequitable administration of the law.

⁵⁵ See, e.g., *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1413 n.1 (2018) ("Federal courts have *jurisdiction* over all kinds of cases—for example, those arising under the law of torts or contracts. Yet following our decision in *Erie R. Co. v. Tompkins*, federal courts are generally no longer permitted to promulgate new federal common law causes of action in those areas.").

⁵⁶ As noted earlier, see *supra* note 13, there are no empirical studies measuring whether a difference between federal and state law results in forum shopping or inequitable administration of the laws.

Because the test is relative, it may work when a federal court is considering whether an *existing* federal rule is procedural or substantive, but not when it is determining in the first instance whether to *create* a federal rule. In that situation, the federal court has no federal law to compare to the state law to determine whether the difference between the federal law and state law results in forum shopping or inequitable administration of the law.

The relative nature of the test also means that the classification of law as procedural or substantive is unstable. A state law that has been deemed procedural may become substantive if federal practice changes in a way that results in more discrepancy with state law. Likewise, differences in state practice may mean that federal law may be deemed substantive in some states but procedural in others. In a state that has laws similar to a federal law, a federal court need not observe the state law because the differences with federal law do not significantly affect outcomes. But in a state that has laws that more significantly differ from the federal law, the federal court may be required to follow the state law.

C. Erie and Forum Selection Clauses

In light of the differences between federal and state law in the enforceability of forum selection clauses – discussed at greater length in the next Part – a critical question for federal courts is whether to apply state law or federal law in making that determination in diversity cases. Answering that question depends on whether enforceability is a matter of procedure or substance under *Erie*. If it is procedural, federal law should apply; but if it is substantive, state law should apply.

The Supreme Court has not resolved this question. It has not said whether the enforcement of a forum selection clause is a matter of substance or procedure; nor has it offered any view on whether federal or state law should control the enforceability of forum selection clauses in diversity actions when raised through a motion to dismiss under the common law doctrine of *forum non conveniens*.⁵⁷

The Court has, however, identified two circumstances in which federal law should be applied to determine the enforceability of forum selection clauses. The first is when a defendant makes a motion to transfer under 28 U.S.C. § 1404(a). Recall that transfers under § 1404(a) are now limited to the narrow circumstance when the forum selection clause designates a different federal court from the federal court in which the action is pending.⁵⁸ Transfer under § 1404(a) is unavailable when the forum selection clause designates a state court or some other non-federal forum.

⁵⁷ *Atl. Marine Constr. Co. v. United States Dist. Court*, 571 U.S. 49, 62 n.5 (2013).

⁵⁸ *Id.* at 59-60.

In *Stewart Organization, Inc. v. Ricoh Corporation*,⁵⁹ the Court held that federal law determines the enforceability of forum selection clauses in a motion to transfer because § 1404(a) itself requires the application of federal law.⁶⁰ Unlike with transfers, no federal statute regulates *forum non conveniens*. That doctrine derives from the common law.⁶¹ *Stewart* therefore provides no insight on whether federal or state law should control the enforceability of forum selection clauses in motions to dismiss for *forum non conveniens* in diversity actions. Nor does it shed any light on whether the enforceability of a forum selection clause is substantive or procedural.

The second circumstance identified by the Court in which federal law controls the enforceability of forum selection clauses is in admiralty actions. In *The Bremen v. Zapata Off-Shore Company*, the Supreme Court applied federal common law to determine the enforceability of a forum selection clause in considering a motion to dismiss under *forum non conveniens*.⁶² But *The Bremen* was a suit in admiralty. Admiralty is one of the few areas in which federal courts have common-law power to make substantive law.⁶³ It was therefore unnecessary for the Court in *The Bremen* to resolve whether the enforceability of the forum selection clause was substantive or procedural — federal common law would control in either event.

The only discussion from the Supreme Court on whether clause enforceability is a matter of substance or procedure is a dissent by Justice Scalia in *Stewart*.⁶⁴ He argued that enforceability of forum selection clauses is a matter of substance. He reasoned that enforceability is a matter of contract law, and state law typically regulates contracts. Moreover, he said, applying federal law could lead to forum shopping and inequitable administration of the law. It could lead to forum shopping because being forced to litigate in a different court can be inconvenient, and plaintiffs may choose to sue in state

⁵⁹ 487 U.S. 22 (1988).

⁶⁰ *Id.* at 28. The Court so determined that 28 U.S.C. § 1404(a) covered the point in dispute and resolved the case on a straightforward *Hanna* analysis. *Id.* Commentators have extensively debated the correctness of this conclusion. See, e.g., Julia L. Erickson, *Forum Selection Clauses in Light of the Eric Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1122 (1988); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 333 (1988); Matthew W. Lampe, *Forum Selection Clauses Designating Foreign Courts: Does Federal or State Law Govern Enforceability in Diversity Cases? A Question Left Open by Stewart Organization, Inc. v. Ricoh Corp.*, 22 CORNELL INT'L L.J. 307, 310 (1989); Eric Fahlman, *Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?*, 64 WASH. L. REV. 439, 447 (1989); Leandra Lederman, *Viva Zapatas: Toward A Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 453 (1991).

⁶¹ *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Ship. Corp.*, 549 U.S. 422, 430 (2007) (describing *forum non conveniens* as a “common-law doctrine”).

⁶² *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

⁶³ *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1945 n.1 (2021) (Sotomayor, J., concurring in part and concurring in the judgment) (recounting that “admiralty law” is one of the few “enclaves in which federal courts [may] develop legal principles in a common-law fashion” (internal quotation marks omitted)).

⁶⁴ *Stewart*, 487 U.S. at 33 (Scalia, J., dissenting).

court instead of federal court based on the likelihood that a forum selection clause might not be enforced.⁶⁵ And given the importance of where a suit is litigated, applying federal instead of state law could lead to inequitable administration by permitting that issue to depend on whether the parties were diverse.⁶⁶ No other justice joined that dissent.

Although the Supreme Court has not resolved whether the enforceability of a forum selection clause is a matter of substance or procedure, several circuit courts have addressed the issue. Four circuits—the Second, Fourth, Eighth, and Ninth—have suggested that enforceability is a matter of procedure instead of substance and consequently controlled by federal law in all cases.⁶⁷ None of those circuits, however, provided an analysis of forum shopping and inequitable administration of justice to support that conclusion.⁶⁸ By contrast, the Third Circuit has said that enforceability is a substantive matter controlled by state law,⁶⁹ though it stated in a subsequent case (that did not discuss the earlier decision) that it was “settled law” in the circuit that the enforceability of forum selection clauses is a matter of federal law.⁷⁰

The other circuits have not squarely addressed whether enforceability of a forum selection clause is substantive or procedural. The First,⁷¹ Tenth,⁷² and Eleventh⁷³ Circuits have explicitly avoided the issue by proclaiming that resolving it was unnecessary because state and federal law on enforceability were identical. The Seventh Circuit has concluded that state law governs the enforceability of the clauses,⁷⁴ but it has done so based not on an *Erie* analysis but instead on the practical concern of avoiding the

⁶⁵ *Id.* at 39-40.

⁶⁶ *Id.*

⁶⁷ *Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014) (stating that applying federal law to the enforceability of forum selection clauses “accords with the traditional divide between procedural and substantive rules developed under *Erie Railroad Co. v. Tompkins*”); *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) (“forum selection clauses implicate the appropriate venue of a court. The appropriate venue of an action is a procedural matter.”); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir.2009) (“[E]nforcement ... of the contractual forum selection clause was a federal court procedural matter governed by federal law.”); *Manetti-Farrow, Inc. v. Gucci Amer., Inc.*, 858 F.2d 509, 513 (9th Cir.1988) (referring to “the federal procedural issues raised by forum selection clauses”).

⁶⁸ The only one of those circuits to even mention the forum shopping and inequitable administration considerations from *Erie* was the Ninth Circuit; but instead of analyzing those factors, it decided that enforceability was procedural because “federal interests outweigh the state interests” *Manetti-Farrow, Inc. v. Gucci Amer., Inc.*, 858 F.2d 509, 513 (9th Cir.1988)

⁶⁹ *In Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 358 (3d Cir. 1986).

⁷⁰ *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 181 (3d Cir. 2017).

⁷¹ *Rivera v. Kress Stores of Puerto Rico, Inc.*, 30 F.4th 98, 102 (1st Cir. 2022) (concluding that it need not determine if enforceability is substantive or procedural); *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 17 (1st Cir. 2009).

⁷² *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997) (concluding that there were “no material discrepancies between Colorado law and federal common law”).

⁷³ *P & S Business Machines, Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003).

⁷⁴ *Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd.*, 476 F.3d 421, 423 (7th Cir. 2007).

complexity of federal law apply to some parts of the contract and state law to other parts of the contract.⁷⁵

The Fifth and Sixth Circuits have avoided the issue by concluding that the enforceability of a forum selection clause is a uniquely federal interest and therefore that federal common law should control regardless whether enforceability is a matter of substance or procedure.⁷⁶ Indeed, all the circuits that have concluded that federal law controls the enforceability of forum selection clauses, including those circuits that described enforceability as procedural, have determined that the enforceability of a forum selection clause involves a uniquely federal interest.⁷⁷ In reaching this conclusion, these circuits followed the Supreme Court's reasoning in *The Bremen* that enforcing a forum selection clause reduces uncertainty by requiring litigation to proceed in the forum designated by the parties and that this predictability will, in turn, promote "trade, commerce, and contracting."⁷⁸

The conclusion that the enforceability of a forum selection clause involves a uniquely federal interest is unwarranted. The federal government has an interest in the predictability resulting from the routine enforcement of forum selection clauses and its associated benefits. But that interest is not uniquely federal. States also have a similar interest in the predictability and its associated benefits that derive from enforcing these clauses.⁷⁹

⁷⁵ *Id.* ("Simplicity argues for determining the validity . . . of a forum selection clause . . . by reference to the law of the jurisdiction whose law governs the rest of the contract.").

⁷⁶ *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008); *Wilson v. 5 Choices, LLC*, 776 Fed. Appx. 320, 327 (6th Cir. 2019).

⁷⁷ *Martinez v. Bloomberg LP*, 740 F.3d 211, 222 (2d Cir. 2014); *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 181 (3d Cir. 2017); *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010) ("Even though *The Bremen* was an admiralty case, its rationale is applicable to forum selection clauses generally. "); *Alliance Health Group, LLC v. Bridging Health Options, LLC*, 553 F.3d 397, 399 (5th Cir. 2008); *Wilson v. 5 Choices, LLC*, 776 Fed. Appx. 320, 327 (6th Cir. 2019); *Fru-Con Const. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009); *Calisher & Associates, Inc. v. RGCM, LLC*, 373 Fed. Appx. 697, 698 (9th Cir. 2010).

⁷⁸ E.g., *Martinez*, 740 F.3d at 219 (quoting the *Bremen*, 407 U.S. at 13–14, 19); *Albemarle Corp.*, 628 F.3d at 650 ("Even though *The Bremen* was an admiralty case, its rationale is applicable to forum selection clauses generally. "); *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114 (5th Cir. 1996) (concluding that there was "no justification" for not extending the *Bremen* to diversity); *Wilson*, 776 F. App'x at 327 ("The Supreme Court has stated that in light of present-day commercial realities, a forum selection clause in a commercial contract should control, absent a strong showing that it should be set aside. *Preferred Capital, Inc. v. Assocs. in Urology*, 453 F.3d 718, 721 (6th Cir. 2006) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972))"); see also *Manetti-Farrow, Inc. v. Gucci Amer., Inc.*, 858 F.2d 509, 513 (9th Cir.1988) (applying federal law based on the conclusion that the "federal interests outweigh the state interests").

⁷⁹ Cf. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941) ("Whatever lack of uniformity [applying state rules relating to conflict of laws] may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.").

More generally, the interest in predictability from enforcing a contractual provision is not idiosyncratic to forum selection clauses.⁸⁰ The enforcement of *any* contractual provision tends to foster predictability and commerce by implementing the bargains struck by parties before litigation. This interest has not, however, led to the creation of a general federal common law of contracts.⁸¹ Contract is a matter of state law. Federal courts foster predictability and orderliness by enforcing the state law of contracts in the same manner as states. By following state law, federal courts avoid creating the situation where different laws apply in different forums, a phenomenon that undermines rather than supports the goal of predictability.⁸²

It is true that *The Bremen* invoked predictability as an important consideration in developing a federal test for determining the enforceability of a forum selection clause. But this consideration was not the basis for the Court's *authority* to fashion a federal test. The Court's authority to create this test derived from the fact that *The Bremen* was an admiralty case.⁸³

PART II – STATE AND FEDERAL LAW

If there is no uniquely federal interest in applying federal law to determine whether a forum selection clause is enforceable, and if there is no federal statute that authorizes the creation of federal common law in cases not involving transfer pursuant to 1404(a), then the federal courts must inquire as to whether state rules are substantive or procedural for *Erie* purposes unless the state and federal laws in question are

⁸⁰ See Kermit Roosevelt III and Bethan R. Jones, *Adrift on Erie: Characterizing Forum-Selection Clauses*, 52 AKRON L. REV. 297, 318 (2019).

⁸¹ Int'l Union of Operating Engineers, Loc. 150, AFL-CIO v. Rabine, 161 F.3d 427, 431 (7th Cir. 1998) ("There is, after all, no general federal power over the law of contract—a proposition that has been clear at least since the Supreme Court decided *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)."); *Ford v. Hamilton Invs., Inc.*, 29 F.3d 255, 258 (6th Cir. 1994) ("There is no federal common law of contracts, of course.").

⁸² That is particularly so for contracts that include choice of law clauses. Choice of law clauses reflect party expectations about the body of law that will be used to assess the contract. Applying a different body of law undermines expectations. See John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 639 (2017).

⁸³ One might argue, just as Section 1404 authorized to develop a federal common law on the enforceability of forum selection clauses in the transfer context, the power to develop a federal law of *forum non conveniens* implies the power to develop a federal common law on the enforceability of forum selection clauses. But the two situations are not comparable. The reason that federal courts can fashion a common law of enforceability in the transfer context is that the courts determined that Section 1404 meant to authorize that authority. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28 (1988). *Forum non conveniens* is a common law doctrine, and the ability to create common law does not imply the ability to create common law on every underlying question that bears on that common law determination. If it were otherwise, federal courts could ignore state substantive law in proceedings seeking equitable remedies, since federal courts may fashion their own rules relating to equitable relief—a proposition that the Supreme Court has rejected. See *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 106, 111-12 (1945).

substantively identical. If the laws are identical, then the Supreme Court has said that there is no need to address this *Erie* question.⁸⁴

A number of lower federal courts have invoked the alleged similarity between state and federal law as a basis for declining to perform an *Erie* analysis with respect to the enforceability of forum selection clauses.⁸⁵ In this Part, we consider whether the federal rules that govern clause enforceability are, in fact, identical to the state rules and whether these differences matter in cases where they are not identical. The answer, as it turns out, depends on the state.

In some states, the state and federal rules are indeed virtually identical. In these cases, the state and federal courts will typically reach the same conclusion as to whether a clause is enforceable. In other states, the rules are quite different. In these states, the state and federal courts will not always reach the same conclusion as to whether a clause is enforceable. The upshot is that incentives for forum shopping and the potential inequitable administration of the law will vary depending on the state in which the suit is brought.

In this Part, we highlight some of the more salient differences between state and federal law when it comes to the question of clause enforceability. We first survey the federal rules that govern this issue. We then review the relevant state law rules and identify instances where they are different from the federal rules. Finally, we draw upon a dataset of state and federal cases to determine whether the differences between state and federal law affect the rates at which state and federal courts enforce these clauses. We show that these differences do, in fact, result in significant differences in enforcement rates between state and federal courts.

⁸⁴ *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981) (“In previous *forum non conveniens* decisions, the Court has left unresolved the question whether under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), state or federal law of *forum non conveniens* applies in a diversity case. The Court did not decide this issue because the same result would have been reached in each case under federal or state law. The lower courts in these cases reached the same conclusion: Pennsylvania and California law on *forum non conveniens* dismissals are virtually identical to federal law. Thus, here also, we need not resolve the *Erie* question.”).

⁸⁵ See *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 611 (7th Cir. 2006) (stating that “Illinois law concerning the validity of forum selection clauses is materially the same as federal law”); *Silva v. Encyclopedia Britannica Inc.*, 239 F.3d 385, 386 n.1 (1st Cir. 2001) (stating that the test under both Puerto Rico and federal law is the same); *Sec. Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 375 (6th Cir. 1999) (stating that “Tennessee law is consistent with the rule of *Zapata*”); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 320 (10th Cir. 1997) (concluding that there were “no material discrepancies between Colorado law and federal common law”); *Lambert v. Kysar*, 983 F.2d 1110, 1116 (1st Cir. 1993) (stating that there is “no material discrepancy between Washington state law and federal law” with respect to the legal test for enforcing forum selection clauses).

A. Federal Law

The Supreme Court has long held that forum selection clauses are presumptively valid as a matter of federal law.⁸⁶ The party resisting enforcement bears a heavy burden of showing that a forum selection clause should not be given effect.⁸⁷ There are, however, three scenarios where a clause may be deemed unenforceable. First, a clause shall not be given effect if “enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”⁸⁸ Second, a clause is unenforceable if enforcement would be “unreasonable” under the circumstances.⁸⁹ Third, a clause is unenforceable when it is the result of “fraud, undue influence, or overweening bargaining power.”⁹⁰ Since there are very few material differences between state and federal law with respect to fraud and undue influence, our discussion below focuses on the public policy and reasonableness.

1. *Federal Public Policy*

A forum selection clause may be deemed invalid on the basis of federal public policy on three different grounds.

First, the federal courts sometimes interpret the special venue provisions in a federal statute to trump a forum selection clause. In *Boyd v. Grand T. W. R. Co.*, for example, the Supreme Court held that the special venue provisions in the Federal Employers’ Liability Act permitted the plaintiff to bring a lawsuit in Michigan notwithstanding the existence of a forum selection clause requiring the case to be brought in Illinois.⁹¹ In the decades after *Boyd* was decided, the lower federal courts have sometimes held the special venue provisions in other federal statutes similarly preclude the enforcement of forum selection clauses.⁹² In these cases, the special venue provisions may be said to reflect a federal policy that permits plaintiffs to bring a suit in the venue

⁸⁶ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972).

⁸⁷ *Id.* (stating that a clause “should control absent a strong showing that it should be set aside”).

⁸⁸ *Id.*

⁸⁹ *Id.* at 10.

⁹⁰ *Id.* at 12.

⁹¹ 338 U.S. 263, 263 (1949). The existence of an anti-waiver provision in the FELA played an important role in the Court’s decision.

⁹² See *Scotlynn USA Div., Inc. v. Singh*, No. 215-CV-381-FTM-29, 2016 WL 8679295, at *2 (M.D. Fla. Sept. 9, 2016) (“Courts that have addressed venue in the context of *household goods* have determined that ‘the Carmack Amendment essentially prohibits enforcement of forum-selection clauses and provides that suit may be brought against a carrier in a forum convenient to the shipper.’” (quoting *Stewart v. Am. Van Lines*, No. 12CV394, 2014 WL 243509, at *4 (E.D. Tex. Jan. 21, 2014))); *Dabecca Nat. Foods, Inc. v. RD Trucking, LLC*, No. 14 C 6100, 2015 WL 2444505, at *6 (N.D. Ill. May 20, 2015) (collecting cases); see also *Thomas v. Rehab. Servs. of Columbus, Inc.*, 45 F. Supp. 2d 1375, 1379 (M.D. Ga. 1999) (“[T]he forum selection clause in the Acknowledgment form allegedly agreed to by the parties is unenforceable under the authority of the Supreme Court’s decision in *Boyd*. . .”).

designated in the statute notwithstanding the existence of a private agreement mandating the claim be filed elsewhere.

Second, the Supreme Court has held that a foreign forum selection clause shall not be given effect when “the choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party’s right to pursue statutory remedies.”⁹³ The Securities Act of 1933 and the Securities Exchange Act of 1934, for example, both contain anti-waiver provisions.⁹⁴ If the parties were to write a forum selection clause selecting the courts of a foreign nation into their contract, and if a U.S. court believed that the foreign court would apply a foreign law that lacked investor protections equivalent to those provided by these Acts, then the foreign forum selection clause would be void as a matter of public policy by operation of the anti-waiver provisions.⁹⁵ A party cannot bargain away non-waivable rights conferred by federal law by agreeing to litigate a dispute in a foreign forum under a foreign law.

Third, the federal bankruptcy courts have consistently held that the federal policy in favor of centralized resolution of claims provides a valid reason not to enforce forum selection clauses in bankruptcy cases.⁹⁶ The purpose of bankruptcy law is to bring all of the debtor’s creditors together into a single forum for purposes of determining how to allocate the assets in the bankruptcy estate. If the bankruptcy court were to enforce forum selection clauses redirecting certain claims to other courts, then this purpose would be thwarted. Accordingly, the federal bankruptcy courts have generally held that the federal policy in favor of centralized resolution of claims in bankruptcy provides a valid basis not to enforce forum selection clauses.

⁹³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624–28 (1985); Coyle, *supra* note 6, at 148.

⁹⁴ 15 U.S.C. § 77n (“Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.”); *id.* § 78cc(a) (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void.”).

⁹⁵ See Darrell Hall, Note, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 COLUM. L. REV. 57, 81–84 (1997); see also *Lipcon v. Underwriters at Lloyd’s*, 148 F.3d 1285, 1297–98 (11th Cir. 1998); *Haynsworth v. Corp.*, 121 F.3d 956, 960–62 (5th Cir. 1997); *Allen v. Lloyd’s of London*, 94 F.3d 923, 927–29 (4th Cir. 1996); *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229–30 (6th Cir. 1995); *Bonny v. Soc’y of Lloyd’s*, 3 F.3d 156, 158–60 (7th Cir. 1993); *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1363–65 (2d Cir. 1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992).

⁹⁶ See e.g., *Walker v. Got’cha Towing & Recovery, LLC* (In re Walker), 551 B.R. 679, 690–91 (Bankr. M.D. Ga. 2016) (“Because the bankruptcy system implicates interests far broader than the private rights of the two parties to the contract in question, it is not unusual for prepetition contractual obligations, particularly those dictating forum or waiving the protections of the automatic stay, to be modified or even ignored in a bankruptcy case.”) (footnotes omitted); *In re John Q. Hammons Fall 2006, LLC*, No. 16-21142, 2017 WL 4620872, at *8 (Bankr. D. Kan. Oct. 13, 2017) (“The Court is persuaded that in this case the strong public policy of centralized resolution of claims supports keeping the matter in bankruptcy court and not enforcing the forum selection clause in the rejected ROFR.”);

2. Reasonableness

Although the Supreme Court has long recognized the possibility that a clause may be unenforceable because it is unreasonable, it has never invalidated a clause on that basis. In *Carnival Cruise v. Shute*, an individual on a cruise from California to Mexico slipped and fell while on board the ship.⁹⁷ Upon returning home to Washington State, she sued the cruise company in federal court in Washington. The company sought to have the case dismissed or transferred to Florida—the jurisdiction where the cruise company was headquartered—on the basis of an exclusive Florida forum selection clause in tiny print on the back of her cruise ticket. The plaintiff argued that the clause was unreasonable, among other reasons, because it would be costly and inconvenient to bring the case in Florida and because the clause was written into a contract of adhesion.

The Court rejected both arguments. It drew from its prior decision in *The Bremen* to hold that the party seeking to invalidate a clause on the grounds of inconvenience must “show that trial in the contractual forum will be so gravely difficult and inconvenient that he will, for all practical purposes, be deprived of his day in court.”⁹⁸ On the facts presented in *Carnival Cruise*, the Court concluded that enforcing the clause would not deprive the plaintiff of her day in court because it was possible for the suit to be brought in Florida. The Court also rejected the plaintiff’s argument that the clause was unreasonable because it was written into the fine print of a consumer contract of adhesion. The Court specifically rejected the argument that a “non-negotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining.”⁹⁹ In rendering this decision, the Court set a high bar for invalidating a clause as unreasonable as a matter of federal law.

In the wake of *Carnival Cruise*, the lower federal courts have held that a forum selection clause is unreasonable in a number of specific fact patterns.¹⁰⁰ First, these courts have consistently held that a clause is unreasonable when the chosen court lacks subject matter jurisdiction to hear a case.¹⁰¹ Second, they have occasionally – though not consistently – held that a clause is unreasonable when enforcement will result in duplicative litigation.¹⁰² Third, they have held that a clause is unreasonable when it was not reasonably communicated to the resisting party.¹⁰³ Fourth, they have held that a clause is unreasonable when enforcement would deprive the resisting party of her day in

⁹⁷ *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

⁹⁸ *The Bremen*, 407 U.S. at 18.

⁹⁹ *Carnival Cruise Lines v. Shute*, 499 U.S. at 593.

¹⁰⁰ See John F. Coyle, “Contractually Valid” Forum Selection Clauses, 108 IOWA L. REV. 127, 156-60 (2022).

¹⁰¹ *Id.* at 156-57.

¹⁰² *Id.* at 157-58.

¹⁰³ *Id.* at 158-59.

court.¹⁰⁴ Fifth, and finally, they have held that a clause is unreasonable when it is fundamentally unfair.¹⁰⁵

B. State Law

There is a considerable diversity of practice among the states when it comes to enforcing forum selection clauses. Some have adopted the elements of the federal test into state law without modification. Others have incorporated elements of the federal test but take a different position on when a clause is unreasonable or contrary to public policy.¹⁰⁶ Still others have adopted statutes stating that forum selection clauses are unenforceable when written into certain types of contracts. We begin with a discussion of these statutes.

1. *State Public Policy*

It is common for states to enact statutes that invalidate forum selection clauses when they are written into particular types of contracts. More than half the states have, for example, passed laws directing their courts not to enforce clauses when they appear in construction contracts relating to the improvement of real estate within the state.¹⁰⁷ A similar number have enacted statutes invalidating these clauses when they are written into franchise agreements.¹⁰⁸ States have also enacted statutes directing courts not to enforce forum selection clauses when they are written into consumer leases, consumer contracts, high-cost home loans, insurance contracts, student loan agreements, foreclosure agreements, child support agreements, sales representative agreements, or timeshare agreements, among others.¹⁰⁹

Other states impose tighter restrictions. North Carolina courts refuse to enforce forum selection clauses that select the courts of other states if the contract containing the clause was made in North Carolina.¹¹⁰ The legislatures in five other jurisdictions—Montana, Louisiana, Oklahoma, South Carolina, and South Dakota—have enacted statutes that facially prohibit the enforcement of forum selection clauses selecting the courts of other states.¹¹¹ These statutes are routinely ignored, however, by state courts in

¹⁰⁴ *Id.* at 159.

¹⁰⁵ *Id.* at 160.

¹⁰⁶ John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1104-1143 (2021).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ N.C. GEN. STAT. § 22B-3 (2020).

¹¹¹ MONT. CODE ANN. § 28-2-708 (2019); LA. CODE CIV. PROC. ANN. art. 44 (2020); OKLA STAT. tit. 15, § 216 (2020); S.C. CODE ANN. § 15-7-120 (2020); S.D. CODIFIED LAWS § 53-9-6 (2020). For a discussion of enforcement practice in each of these states, see Coyle & Richardson, *supra* note 106, at 1125-35.

each of these five states. The only state in the United States that consistently refuses to enforce forum selection clauses regardless of where they are made is Idaho.¹¹²

In addition to these substantive restrictions, some states have passed anti-waiver statutes that have the practical effect of invalidating certain forum selection clauses. The Illinois legislature, for example, has declared that the protections conferred by the Illinois Dating Referral Services Act are non-waivable.¹¹³ The California legislature has declared that the wage and hour protections in the state's Labor Code employees are non-waivable.¹¹⁴ The Colorado legislature has declared that the rights conferred by the Colorado Wage Claim Act are non-waivable.¹¹⁵ In cases where enforcing a forum selection clause selecting the courts of another state seems likely to lead to the waiver of these statutory protections, state courts in each of these states will decline to enforce the forum selection clause on public policy grounds.¹¹⁶

2. Reasonableness

The courts in a number of states have followed the lead of the U.S. Supreme Court to hold, as a matter of state common law, that a clause is unreasonable on the basis of inconvenience only when litigating the chosen forum will deprive the resisting party of its day in court. This is, for example, the prevailing approach in Florida.¹¹⁷ Other states have rejected this approach. The courts in Michigan, Nebraska, North Dakota, New Hampshire, and Tennessee, for example, merely inquire whether the chosen state "would be a substantially less convenient place for the trial of the action."¹¹⁸ This latter test is different—and more favorable to the resisting party—than the one laid down in *The Bremen*.

Other states have taken the position that a forum selection clause is unreasonable when it is written into a contract of adhesion. The courts in Minnesota, Illinois,

¹¹² IDAHO CODE § 29-110(1) (2020).

¹¹³ *Rapo v. Coffee Meets Bagel, Inc.*, 2019 Ill. Cir. LEXIS 1026, *17-18.

¹¹⁴ *Verdugo v. Alliantgroup, L.P.*, 187 Cal. Rptr. 3d 613, 616 (Ct. App. 2015).

¹¹⁵ *Morris v. Towers Finance Corp.*, 916 P.2d 678, 679 (Colo. App. 1996).

¹¹⁶ See generally *Coyle & Richardson*, *supra* note __, at 1117-1121 (collecting cases). If the forum selection clause is enforced, the courts reason, then the choice-of-law clause in the same agreement will likely be enforced. If the choice-of-law clause is enforced, then the law of a state that does not recognize the rights at issue will be applied. If this other state's law is applied, the effect will be the waiver of a non-waivable right. In such cases, the statement of public policy contained in the anti-waiver statute compels the conclusion that the forum selection clause should not be enforced in the first instance. See John F. Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 UNIVERSITY OF MIAMI L. REV. 1087, 1089-91 (2021).

¹¹⁷ *Manrique v. Fabbri*, 493 So. 2d 437, 440 n.4 (Fla. 1986).

¹¹⁸ See MICH. COMP. LAWS § 600.745 (2020); NEB. REV. STAT. § 25-415 (2020); N.H. REV. STAT. ANN. § 508-A:3 (2020); N.D. CENT. CODE § 28-04.1-03 (2020); *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983).

Massachusetts, and Oregon have all adopted this approach.¹¹⁹ In these states, the fact that a forum selection clause was written into a contract by the party with significantly greater bargaining power is compelling evidence that the clause is unreasonable and hence unenforceable. This standard is obviously very different from the rule adopted by the U.S. Supreme Court in *Carnival Cruise*.

State courts regularly hold that clauses are unreasonable when enforcement will result in duplicative litigation. There are decisions to this effect in Alabama, California, Connecticut, Indiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, Pennsylvania, Utah, and Virginia.¹²⁰

¹¹⁹ *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 890-91 (Minn. 1982) (“[C]lauses in contracts which are termed adhesion . . . contracts and which are the product of unequal bargaining power between the parties are unreasonable.”); *IFC Credit Corp. v. Rieker Shoe Corp.*, 881 N.E.2d 382, 389 (Ill. App. 2007) (“[A] forum selection clause contained in boilerplate language indicates unequal bargaining power, and the significance of the provision is greatly reduced.”); *Kirby v. Miami Sys. Corp.*, 1999 Mass. App. Div. 197, 201 (1999) (“[W]here a solitary Massachusetts resident, employed in Massachusetts by a foreign corporation whose ‘national’ activities include three places of business in Massachusetts, brings an action . . . to recover a modest amount of wages and benefits under what is apparently an adhesion contract of employment, Massachusetts courts will not enforce a forum selection clause in that contract.”); *Trinity v. Apex Directional Drilling Ltd. Liab. Co.*, 434 P.3d 20, 22 (Or. 2018) (“[I]f the forum-selection clause is contained in a contract of adhesion that was the product of unequal bargaining power between the parties, the clause should be disregarded.”) (internal quotation marks and citations omitted). The Model Choice of Forum Act states that clauses should not be enforced when obtained by the “the abuse of economic power, or other unconscionable means.” MODEL CHOICE OF FORUM ACT § 2 (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 1977) The comments to the Act provide that a “significant factor to be considered in determining whether there was ‘an abuse of economic power or other unconscionable means’ is whether the choice of forum agreement was contained in an adhesion, or ‘take-it-or-leave-it,’ contract.” *Id.*

¹²⁰ See *F.L. Crane & Sons, Inc. v. Malouf Constr. Corp.*, 953 So. 2d 366, 373 (Ala. 2006) (“A ‘serious inconvenience’ arises if enforcement of the forum-selection clause “would result in two lawsuits involving similar claims or issues being tried in separate courts.”); *Bancomer v. Superior Court*, 44 Cal. App. 4th 1450, 1462 (1996) (“It would be unreasonable and illogical to have an individual involved in simultaneous litigation in two separate forums, over the same issue, because of nothing more than the location of the leasehold interest within the same resort area.”); *Farm Bureau Gen. Ins. Co. v. Sloman*, 871 N.E.2d 324, 331 (Ind. App. 2007) (“[I]mplementation of Farm Bureau’s forum selection clause would result in Sloman having to file two separate yet similar lawsuits emanating from the same accident: one in Indiana against Lund regarding liability and damages, and one in Michigan against Farm Bureau”); *Peabody & Arnold v. Luxury Media Corp.*, 14 Mass. L. Rep. 445 (2002) (refusing to enforce clause when enforcement “would require two civil actions in two states on opposite sides of the United States, where one action would suffice to determine all the issues”); *McGee v. Ferndale History Soc’y*, 2014 Mich. Cir. LEXIS 277, *5 (refusing to enforce clause to prevent a “bifurcated action”); *Personalized Mktg. Serv., Inc. v. Stotler & Co.*, 447 N.W.2d 447, 451-52 (Minn. Ct. App. 1989) (“Here, enforcement of the clause would theoretically result in inconvenience to Stotler by requiring it to defend two separate lawsuits based upon similar claims and common questions of law.”); *Scott v. Tutor Time Child Care Sys., Inc.*, 33 S.W.3d 679, 683 (Mo. Ct. App. 2000) (“[I]t makes sense to keep all the litigation here and it is unreasonable to do otherwise”); *D’Agostino v. Appliances Buy Phone, Inc.*, No. A-2005-13T1, 2016 N.J. Super. Unpub. LEXIS 504, at *31 (Super. Ct. App. Div. Mar. 8, 2016) (observing that “New Jersey’s strong public policy against fractured litigation required that the entire case be litigated in New Jersey, including any claims against Google”). *Franklin v. Pegasus Credit Co., LLC*, 2017 NY Slip Op 30312(U), ¶ 3 (Sup. Ct. Feb. 17, 2017) (“The dismissal of plaintiffs causes of action and compelling him to seek relief in Delaware results in two actions simultaneously conducted in

Some state courts also refuse to enforce forum selection clauses when the plaintiff cannot obtain relief in the chosen court because the statute of limitations has run or because the small size of the claim makes it uneconomical to bring suit in the chosen court.¹²¹ Still other states refuse to enforce forum selection clauses when the chosen forum bears no reasonable relationship to the parties.¹²² The federal courts, by comparison, rarely decline to enforce forum selection clauses on any of these bases.

C. A View from the Trenches

The foregoing discussion suggests that there are important differences between state and federal law when it comes to clause enforceability. That somewhat dry discussion of doctrinal rules, however, sheds little light on how these rules are applied in practice. If these differences do not lead to differences in actual case outcomes, the fact that federal courts apply federal law and state courts apply state law to resolve this issue is of merely academic interest.

In an attempt to determine empirically whether applying state or federal law matters in the real world, we collected two datasets of cases where the courts grappled with the issue of whether a forum selection clause was enforceable. The first dataset consists of 330 cases decided by state courts between 2010 and 2020. The second dataset consists of 430 cases decided by federal courts sitting in diversity between 2014 and 2020. The methods by which we collected these cases are set forth in Appendix A. Our results are reported below.

1. *Overall Enforcement Rates*

Our data suggests that the differences between state and federal law have an impact on case outcomes. State courts enforced forum selection clauses in 79% of cases. Federal courts enforced forum selection clauses in 90% of cases, as shown in Table 1.¹²³

different jurisdictions and is an unreasonable application of the forum selection clauses, warranting denial of the dismissal relief.”); *Phillipsburg Bridge & Constr. Co. v. Whiting-Turner Contr. Co.*, 2005 Pa. Dist. & Cnty. Dec. LEXIS 684, *10 (“This would then cause Phillipsburg to incur the expense of litigating the same issues in two separate forums, with the distinct possibility of inconsistent outcomes. Such a result would be unreasonable.”); *Prows v. Pinpoint Retail Sys.*, 868 P.2d 809, 813, 1993 Utah LEXIS 159, *12-13, 228 Utah Adv. Rep. 23; *Hussain v. ImpactOffice, LLC*, 94 Va. Cir. 443, 446, 2016 Va. Cir. LEXIS 215, *7.

¹²¹ *Coyle & Richardson*, *supra* note 106, at 1128-35.

¹²² *Id.*

¹²³ This difference is doubtless partially attributable to the fact that different types of cases are brought in state and federal court. A case not presenting a federal question, for example, must be brought in state court if the amount in controversy does not exceed \$75,000. 28 U.S.C. § 1332. However, neither the type of case brought nor the amount in controversy should have a significant impact on the court’s decision as to whether a forum selection clause is enforceable. The proportion of plaintiffs in our dataset who were

Table 1: State and Federal Enforcement Rates		
Court	Number of Cases	Enforcement Rate
State Cases (2010-2020)	330	79%
Federal Diversity Cases (2014-2020)	430	90%

These data suggest that, as a general rule, a party resisting enforcement of a forum selection clause would rather be in state court. A party seeking to enforce a clause, by comparison, would rather be in federal court.¹²⁴

2. *Enforcement Rates by Circuit*

The disparity in state-federal enforcement rates is not uniform across the country. There are important variations across the federal circuits. State courts located in the Fourth Circuit, for example, enforce forum selection clauses in 67% of cases. The federal courts in that circuit enforce these clauses in 96% of cases. Indeed, the federal courts enforce forum selection clauses at a rate equal or greater than that of their state court counterparts in every federal circuit, as shown on Table 2.

Table 2: State and Federal Enforcement Rates, by Circuit			
Circuit	State Cases (2010-2020)	Federal Diversity Cases (2014-2020)	Difference
Fourth Circuit	67%	96%	29%
Eighth Circuit	64%	88%	24%
Sixth Circuit	73%	93%	20%
Third Circuit	76%	95%	19%
Eleventh Circuit	78%	96%	18%
Second Circuit	78%	94%	16%
First Circuit	79%	94%	15%
Overall	79%	90%	11%
Ninth Circuit	78%	85%	7%
Tenth Circuit	86%	91%	5%
Fifth Circuit	90%	90%	0%
Seventh Circuit	85%	85%	0%

natural persons (as opposed to entities) was essentially the same in state and federal court. At the state level, 47% of the plaintiffs in our dataset consisted exclusively of natural persons as compared to 53% that involved an entity. At the federal level, 48% of the plaintiffs in our dataset consisted exclusively of natural persons, as compared to 52% that involved an entity.

¹²⁴ The enforcement rate for *all* federal cases in our dataset decided between 2014 and 2020 was 88%.

The absence of any gap between the state and federal enforcement rates in the Seventh and Fifth Circuits is interesting. Unlike its sister circuits, the Seventh Circuit takes the position that federal courts should apply state law to determine whether a clause is enforceable.¹²⁵ In light of this fact, one would expect to find that the difference between state and federal court enforcement rates is smaller in the Seventh Circuit than in other circuits. And this is precisely what the data show. The state and federal courts in the Seventh Circuit both apply state law to this issue and enforce forum selection clauses at the same rate.

The story behind the enforcement rates in the Fifth Circuit is more complicated. Although the rates are reported as identical, we believe that a quirk of Texas procedural law overstates the reported enforcement rate at the state level. When a state court in Texas denies a motion to dismiss on the basis of a forum selection clause, the defendant can ask a state court of appeals to grant a writ of mandamus ordering the case to be dismissed. Unfortunately, the state court of appeals does not explain its reasoning when it denies the request for the writ. There is no way to know, in other words, whether the court denied the writ because it concluded that the clause was deemed unenforceable (which would result in its inclusion in our dataset) or because it concluded that the clause was (a) non-exclusive, or (b) did not cover the claims at issue (which would result in its exclusion from our dataset).

In the course of our search, we identified ten cases where a Texas state court of appeals denied the writ of mandamus and, in effect, declined to give effect to the forum selection clause. Since the court gave no explanation for its decision in any of these cases, we omitted them from our state court dataset because we could not be certain that the court specifically addressed the issue of enforceability. It is likely, however, that the court invoked public policy or a lack of reasonableness in declining to enforce at least some of these cases. Accordingly, we believe that the true enforcement rate in Texas state court is lower than the 90% reported in Table 2.

3. *Enforcement Rates by State*

We next looked at the difference between state and federal enforcement rates in individual states. In calculating these numbers, we only looked at states that had at least 10 state court decisions and 10 federal court decisions. In these states, the biggest difference between state and federal outcomes was in New Jersey. The New Jersey state courts enforced forum selection clauses in 64% of cases. The New Jersey federal courts

¹²⁵ *Abbott Laboratories v. Takeda Pharmaceutical Co. Ltd.*, 476 F.3d 421, 423 (7th Cir. 2007) (“Simplicity argues for determining the validity . . . of a forum selection clause . . . by reference to the law of the jurisdiction whose law governs the rest of the contract.”).

enforced forum selection clauses in 91 % of cases.¹²⁶ In every qualifying state except for Florida, the federal courts enforced forum selection clauses at a higher rate than their state court counterparts, as detailed in Table 3.

Table 3: State and Federal Enforcement Rates, by State			
State	State Cases (2010-2020)	Federal Diversity Cases (2014-2020)	Difference
New Jersey	64%	91%	27%
New York	76%	93%	17%
Overall	79%	90%	11%
Illinois	83%	90%	7%
California	78%	84%	6%
Louisiana	70%	74%	4%
Florida	100%	97%	-3%

Florida is the only state where the enforcement rate in state court was higher than the enforcement rate in federal court. The state courts in Florida enforced the forum selection clause in every case in our dataset. The federal courts in Florida enforced the clause in every dataset case except for one. The state courts in Florida have wholly incorporated the federal test for enforceability into state law and apply it in a similar manner.¹²⁷ The unsurprising result is a state where the state and federal courts agree that forum selection clauses should be enforced in virtually every case.

4. *Non-Enforcement*

We also compared the state and federal cases where the court refused to enforce a forum selection clause. This analysis makes it possible to understand the reasons for the state-federal enforcement gap documented above. The results are detailed on Table 4.

Table 4: Bases for Non-Enforcement				
	Fraud	Public Policy	Unreasonable	Total
Federal Diversity Cases (2014-2020)	1%	7%	2%	10%
State Cases (2010-2020)	2%	10%	9%	21%

¹²⁶ The New Jersey Supreme Court has developed a state law test that much less favorably disposed to forum selection clauses than the test followed by the federal courts in New Jersey. *See* Kubis & Perszyk Assocs. V. Sun Microsystems, 680 A.2d 618, 626 (N.J. 1996).

¹²⁷ *See* Espresso Disposition Corp. v. Santana Sales & Mktg. Grp., 37 Fla. L. Weekly 2642 (Dist. Ct. App. 2012) (“Under Florida law, the clause is only considered unjust or unreasonable if the party seeking avoidance establishes that enforcement would result in ‘no forum at all.’”).

There are three primary reasons why a court may decline to enforce a forum selection clause. The first is fraud.¹²⁸ The second is public policy. The third a lack of reasonableness. Each is discussed below.

a. Fraud

We began by looking at cases where the resisting party invoked fraud as a basis for invalidating a forum selection clause. Since the federal rules relating to fraud are virtually identical to the state rules, we expected to find that the enforcement rates were the same.¹²⁹ And they were essentially the same. The federal courts refused to enforce on this basis in 1 % of cases. The state courts refused to enforce on this basis in 2 % of cases.

b. Public Policy

The state-federal enforcement gap relating to public policy is larger than the gap relating to fraud. This difference is attributable to variation in how state and federal courts deal with state statutes that purport to invalidate forum selection clauses. As discussed above, many states have enacted laws directing their courts not to enforce these provisions. These statutes will always be enforced by state courts because they are bound by state law. Some federal courts have concluded that they are required to apply to these invalidating state statutes as a matter of federal law. Other federal courts, by contrast, have held that federal law allows them to ignore these statutes and to form an independent judgment as to whether the clause should be given effect.

Consider the case of *Gemini Technologies, Inc. v. Smith & Wesson Corporation*.¹³⁰ The Ninth Circuit held that a federal district court sitting in Idaho should give effect to Idaho's invalidating statute and decline to enforce a forum selection clause selecting the state courts of Delaware. The court justified this decision by pointing to language in *The Bremen* stating that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought."¹³¹ Since the suit was brought in Idaho, and since Idaho had a strong public policy against the enforcement of forum selection clauses, the Ninth Circuit reasoned that this particular clause was unenforceable.

¹²⁸ In theory, the courts could also invalidate a forum selection clauses on the basis of other contractual defenses such as mistake, duress, or unconscionability. The cases in our dataset suggest that, in practice, the only contractual defense that is asserted by the resisting party with any regularity is fraud.

¹²⁹ The state and federal courts generally hold that it is not enough for the resisting party to show that the contract containing the clause was procured by fraud. Instead, they must show that the clause *itself* was procured by fraud. This is a difficult standard to satisfy. See Coyle & Richardson, *supra* note 106, at 1145-46. It is the rare case where one party fraudulently induced the other to sign a contract on the basis of misrepresentations relating *specifically* to the forum selection clause.

¹³⁰ *Gemini Technologies, Inc. v. Smith & Wesson Corporation*, 931 F.3d 911, 912 (9th Cir. 2019).

¹³¹ *Id.*

As a point of comparison, consider *Albemarle Corp. v. Astrazeneca UK Ltd.*, where the Fourth Circuit held that federal district courts sitting in South Carolina were not required to apply an invalidating statute enacted by that state's legislature.¹³² In support of this decision, the court characterized the invalidating statute as a state rule that was "preempted" by federal law.¹³³ It further observed that one of the goals of the Supreme Court's decision in *The Bremen* was to overcome "provincial attitude regarding the fairness of other tribunals."¹³⁴ The court also noted that the South Carolina state courts had been inconsistent in their application of the state invalidating statute.¹³⁵ In light of this analysis, the court concluded that the forum selection clause selecting the courts of England was enforceable notwithstanding the state statute.

The state-federal enforcement gap in the areas of public policy is primarily attributable to decisions such as *Albemarle*. In these cases, the federal courts invoke federal common law as a basis for ignoring state statutes that seek to limit the enforceability of forum selection clauses. When these statutes are enforced by state courts sitting in the same state, the enforcement gap is the logical result.

c. Lack of Reasonableness

With respect to reasonableness, the state courts are much more likely to invalidate a clause than the federal courts. In our dataset of state cases, the state courts cited unreasonableness in declining to enforce a clause in 9% of cases. In our dataset of federal cases, the federal courts invoked unreasonableness as a basis for non-enforcement in only 2% of cases. These divergent views as to when a clause is unreasonable – and hence unenforceable – is the most important factor explaining the difference in outcomes between state and federal court.

In explaining this difference, it is important to note that the state and federal courts will sometimes invoke the same reasons for concluding that a clause is unreasonable. Both courts will consider, for example, whether enforcement will result in duplicative litigation. The difference is that the federal courts are *much less likely* to refuse to enforce a clause on any of these bases. Over many hundreds of cases decided over many years, state court judges have shown themselves to be marginally more sympathetic to plaintiffs who wish to bring a lawsuit in their home jurisdiction.

To highlight the differences between state and federal practice on the issue of reasonableness, consider first *Alliance Food Management Corp. v. Rensselaer Hartford Graduate Center, Inc.*¹³⁶ In this case, a Connecticut state court was asked to decide whether

¹³² *Albemarle Corp. v. Astrazeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010).

¹³³ *Id.* at 652.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ No. CV055002441S, 2007 Conn. Super. LEXIS 920, at *8-9 (Super. Ct. Apr. 10, 2007)

to enforce a New York forum selection clause in an action brought by a Connecticut plaintiff against a New York defendant. The court first observed that the number of people employed by the plaintiff – a small, family-owned business – had recently undergone a significant decline. The court then credited the business owner’s testimony that he could not afford to sue the defendant in New York. Finally, the court noted that most of the services under the contract were rendered in Connecticut and that most of the witnesses were Connecticut residents. On this set of facts, the state court concluded that the forum selection clause selecting New York was unreasonable and, hence, unenforceable. This conclusion is curious. Is it really unreasonable to ask a for-profit business to travel to New York – a state that borders Connecticut – to bring a lawsuit? Many would argue that it is not. Nevertheless, the state court ruled in favor of the plaintiff and declared the clause unenforceable. The case remained in Connecticut.

As a point of comparison, consider *Skoglund v. PetroSaudi Oil Services*.¹³⁷ In that case, a federal court in Louisiana concluded that it was reasonable to require the plaintiff to litigate his personal injury case in England. It reached this conclusion notwithstanding the fact that: (1) the plaintiff was an oil rig worker domiciled in Louisiana, (2) the employment contract containing the English forum selection clause was a contract of adhesion, (3) the defendant was neither incorporated nor headquartered in England, (4) the injuries suffered by the plaintiff occurred on an offshore oil rig near Venezuela, (5) the plaintiff suffered the loss of several toes, a traumatic brain injury, a brain bleed, and legal blindness as a result of the accident.¹³⁸ On this set of facts, the federal court concluded that it was reasonable to enforce a forum selection clause selecting England.¹³⁹ This conclusion is also curious. Is it really reasonable to ask a Louisiana worker who suffered brain damage and blindness as a result of his employer’s negligence to travel to England to bring his personal injury claim when the employer has no significant connection to England? Many would argue that it is not. Nevertheless, the federal court ruled against the plaintiff and declared the clause enforceable. The case was dismissed.

D. Wrapping Up

This Part set out to answer two questions. First, it sought to determine whether the state and federal laws relating to the enforcement of forum selection clauses are substantively identical. This inquiry is important because the Supreme Court has said that there is no need to conduct an *Erie* analysis if the laws are the same. The answer to this question is a qualified no. There are some states where the state and federal courts have effectively adopted the same legal test to determine whether a forum selection clause should be given effect. There are, however, a host of other states where the state law test for enforceability is quite different from the federal test. In these states, state and

¹³⁷ *Skoglund v. PetroSaudi Oil Servs. (Venez.)*, No. 18-386, 2018 U.S. Dist. LEXIS 198496, at *18 (E.D. La. Nov. 20, 2018)

¹³⁸ *Id.*

¹³⁹ *Id.*

federal law are not identical. Accordingly, it is necessary for federal courts sitting in diversity in those states to make a threshold determination as to whether the issue of clause enforceability is substantive or procedural for *Erie* purposes.

The second question that this Part set out to answer was whether these differences between state and federal law actually make a difference in practice. Does it matter if the court is applying state or federal law to determine whether a forum selection clause should be given effect? The answer to this question is an unqualified yes. Federal courts applying federal law enforce forum selection clauses at a higher rate than state courts in virtually every federal circuit and state. These differences in case outcomes suggests that applying federal law rather than state law has a real-world impact. The differences between state and federal law in this area are not, in short, merely of academic interest.

PART III – *ERIE* REVISITED

Let's take stock of where we are. First, when considering whether to grant a motion to dismiss based on a forum selection clause designating a state, federal, or foreign court, state courts always apply state law to determine the enforceability of the clause. The federal courts, by comparison, generally apply federal law to resolve that question regardless of whether the defendant is seeking transfer under Section 1404(a) or dismissal under *forum non conveniens*.¹⁴⁰ Second, a major reason given by federal courts for applying federal law—that the enforcement of forum selection clauses involves uniquely federal interests—is unfounded.¹⁴¹ States have similar interests to the federal courts in the enforceability of forum selection clauses. Third, the decision to apply federal law instead of state law to this issue matters. Forum selection clauses are enforced more often by federal courts applying federal law than by state courts applying state law.¹⁴²

These different enforcement rates have two immediate consequences. First, it can significantly affect the outcome of the litigation in which the clause is asserted. Whether to enforce the clause determines the location of the litigation, and that location heavily influences all aspects of how the suit will proceed and, indeed, often determines whether the suit will proceed at all.¹⁴³ Second, the different enforcement rates suggest that parties

¹⁴⁰ See *supra* notes 67-70 and accompanying text.

¹⁴¹ See *supra* notes 79-82 and accompanying text.

¹⁴² See *supra* Part II.C.

¹⁴³ In *Robb v. Island Hotel Co.*, for example, a U.S. plaintiff sued a Bahamian company for negligence in the Southern District of Florida. 2018 U.S. Dist. LEXIS 187320, at *15 (S.D. Fla. Oct. 31, 2018). The company moved to dismiss on the basis of a forum selection clause selecting the courts of the Bahamas. The plaintiff argued that she could not afford to bring the case in the Bahamas because her “discretionary income varied between \$120.00 and \$200.00 per month.” The court rejected this argument. It pointed out that there were attorneys in the Bahamas who charged as little as \$250 per hour and suggested that these attorneys could potentially be persuaded to negotiate their rates. Even if the least-expensive lawyer in

have different contract rights in state and federal court. Forum selection clauses are contractual provisions, and the disparate enforcement rate in state and federal court means that the contracts confer different rights depending on whether they are asserted in state or federal court.

These consequences make clear that the federal courts' decision to apply federal law to resolve the enforceability of forum selection clauses creates a major *Erie* problem. Whether a state law is substantive and, accordingly, must be applied in federal court depends on the functional considerations of inequitable administration of justice and forum shopping.¹⁴⁴ The enforcement gap between state courts and federal courts suggests that both of these undesirable consequences result from not following state law when it comes to enforcing forum selection clauses.

A. Location

The decision whether to enforce a forum selection clause can have major consequences in the suit in which it is asserted. That decision determines the location of litigation. If the clause is enforced, the suit will be dismissed or transferred to the chosen court. If the clause is not enforced, the suit will continue in the court chosen by the plaintiff. The location of a suit is critically important. Indeed, it is precisely because location of litigation is so important that so many contracts now include forum selection clauses.¹⁴⁵ Where a suit is filed affects the costs of litigating the dispute. Among other things, litigating in one forum instead of another will frequently have a significant impact on the cost of transporting evidence, witnesses, and parties. It can also raise a host of other practical, logistical problems.¹⁴⁶ In some cases, particularly those where the chosen forum is located in a foreign country, the expense of litigating in the chosen forum may lead the plaintiff to abandon the suit altogether.¹⁴⁷

the Bahamas were to cut his rates in half, by the court's own math, the plaintiff would only be able to purchase an hour of his time every month. Unsurprisingly, the suit was never refiled in the Bahamas.

¹⁴⁴ *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (stating that the resolution of *Erie* questions "must be guided by the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." (internal quotation marks omitted)).

¹⁴⁵ See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 39 (1988) (Scalia, J., dissenting) ("Venue is often a vitally important matter, as is shown by the frequency with which parties contractually provide for and litigate the issue."); see also John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Dispute Resolution Clauses in International Supply Contracts*, 52 VAND. J. TRANSNAT'L L. 323, 374-75 (2019) (surveying empirical literature relating to prevalence of forum selection clauses).

¹⁴⁶ See, e.g., *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (noting how location of trial can affect "the cost of obtaining attendance of willing witnesses;" the "possibility of view of premises, if view would be appropriate to the action;" and raise "other practical problems").

¹⁴⁷ See, e.g., *Baker v. Adidas America, Inc.*, 335 F. App'x 356, 361 (4th Cir. 2009).

The location of a lawsuit may also have significant bearing on the outcome of the suit.¹⁴⁸ The forum in which suit is pending will influence what law applies to the litigation. Courts generally apply the law of the jurisdiction in which they sit.¹⁴⁹ Even when a court applies the law of a different state, it does so only to the extent that the law of the forum in which the court sits tells it to do so.¹⁵⁰ Needless to say, the outcome of a suit may differ because of the different laws that the courts in different states may apply.¹⁵¹

The choice of location for litigation may also affect the outcome because of its effect on the jury pool. Courts draw jurors from their communities.¹⁵² Different communities may harbor different views that could affect the outcome of litigation.¹⁵³ Some jury pools might be more receptive to conservative arguments while others might favor liberal positions; likewise, some might be more inclined to rule in favor of plaintiffs or give higher awards to plaintiffs than others.¹⁵⁴

Because the decision whether to enforce a forum selection clause can have such a significant effect on the litigation, the different enforcement rates between state and federal courts create major concerns about inequitable administration of justice in the litigation in which they are invoked. The traditional concern about inequitable administration of justice was that plaintiffs who were not citizens of a state would have the ability to discriminate against defendants who were citizens of the state—a plaintiff with the ability to assert diversity jurisdiction could choose to file in state or federal court depending on which forum recognized more favorable rights.¹⁵⁵ The inequity created by

¹⁴⁸ Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79, 81 (1999) (“[M]ost attorneys believe that where an action will be litigated is a significant factor in evaluating the merits of a case.”).

¹⁴⁹ Federal courts, of course, apply the substantive law of the state in which they sit. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹⁵⁰ See, e.g., *Burnett v. Columbus McKinnon Corp.*, 69 A.D.3d 58, 60 (N.Y. App. Div. 4th Dept. 2009) (“[B]ecause New York is the forum state, i.e., the action was commenced here, New York's choice-of-law principles govern the outcome of this matter.”). Federal courts likewise follow the choice-of-law principles that apply in a state. See *Klaxon*, 313 U.S. at 496.

¹⁵¹ *Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (addressing case in which the outcome turned on choice of law).

¹⁵² See, e.g., Alexander E. Preller, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 2 (2012) (“Compiling names from voter registration records is the near-universal method of creating a jury list; forty-two out of fifty states use voter registration lists to form jury lists”).

¹⁵³ Maggie Wittlin, *The Results of Deliberation*, 15 U.N.H.L. REV. 161, 182–83 (2016) (modeling affects of different community preferences on case outcomes).

¹⁵⁴ See Algero, *supra* note 148, at 81 (noting that, in choosing a forum, attorneys may consider whether “awards are traditionally high or the juries are liberal or conservative”).

¹⁵⁵ See *supra* note 32 and accompanying text; see also *Erie R. Co. v. Tompkins*, 304 U.S. at 74–75 (“*Swift v. Tyson* introduced grave discrimination by noncitizens against citizens. It made rights enjoyed under the unwritten general law vary according to whether enforcement was sought in the state or in the federal

the differential enforcement of forum selection clauses is similar. When a non-citizen plaintiff sues a citizen of a state, that plaintiff has the option of seeking to avoid enforcement of a forum selection clause by filing in state court, because removal based on diversity in that situation is prohibited.¹⁵⁶ The differential enforcement rate also creates the possibility for defendants to discriminate in some situations. Defendants who do have the option to remove to federal court may do so in order to enforce a forum selection clause.¹⁵⁷

Although we did not gather data on the specific point, it stands to reason that a plaintiff who wants to be in a jurisdiction different from the one specified in a forum selection clause will file in state court to take advantage of anti-enforcement state law. By the same token, a defendant seeking to enforce a clause should remove to federal court whenever possible to take advantage of pro-enforcement federal law.

B. Varying Rights by Forum

A second consequence of the differential enforcement of forum selection clauses is that it results in the parties having different contract rights in different forums. A forum selection clause is part of the consideration of a contract. A forum selection clause is included in a contract because one of the parties to the contract insisted upon its inclusion. In this respect, a forum selection clause is no different from any other contract term, and the decision whether to enforce a clause is no different from the decision to enforce any other contract provision.

The fact that state court and federal court enforce clauses at different rates means that the choice of forum changes the parties' rights under the contract. In pro-enforcement federal courts, litigants invoking forum selection clauses have stronger contract rights than they would if they were litigating in anti-enforcement state courts. In other words, the rights conferred by the contract differ in federal and state court.

Refusing to enforce a contract right that would be enforced in another court – or vice versa – constitutes inequitable administration of the laws for the same reasons mentioned above. The contract rights of citizen defendants will vary depending on the court in which a non-citizen plaintiff brings suit. In state court, the defendant will have fewer rights, and in federal court they will have more. Likewise, defendants who have

court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen.”).

¹⁵⁶ 28 U.S.C. § 1441(b)(2) (“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”).

¹⁵⁷ With few exceptions, a defendant may remove to federal court “any civil action brought in a State court of which the district courts of the United States have original jurisdiction.” 28 U.S.C. § 1441(a).

the ability to remove are able to change the scope of their contract rights against the plaintiff by doing so.

Again, for similar reasons, the difference in contract rights creates obvious incentives for forum shopping. Plaintiffs wishing to prevent the enforcement of the contractual forum selection clauses should take pains to file in state court (especially one in which removal is not possible) to take advantage of anti-enforcement state law. By the same token, a defendant seeking to enforce a clause should remove to federal court whenever possible to take advantage of pro-enforcement federal law.

C. Contracts

Leaving aside the functional questions of inequitable administration of justice and forum shopping, there is a more basic reason why state law should control the enforceability of a forum selection clauses. Forum selection clauses are part of contracts. Contract law is substantive. It does not set forth the procedures that courts should use to process a claim. Instead, contract law defines the rights and obligations of the parties who enter into binding agreements with one another. Contract law dictates when an agreement can be enforced and what remedies are available in the event of a breach by the counterparty. And as courts have consistently recognized, there is no general federal common law of contract; because contract law is substantive, state law supplies the rules of decision.¹⁵⁸ Accordingly, state law should control the enforceability of forum selection clauses because this inquiry, at its core, requires the application of contract law.

One might argue that forum selection clauses are procedural because they designate which forum may hear a claim, and deciding which forum hears a claim does not bear on the substance of the claim but instead is a procedure for determining who will resolve the claim. But that argument confuses the *consequences* of enforcement with the *act* of enforcement. The content of a contract may set forth procedure. But the reason that the procedure applies is that the contract is enforceable. Enforceability of the contract turns on contract law, not procedural law. That is the case with forum selection clauses. A forum selection clause is in a contract, and a consequence of enforcing that clause is a change in forum. But that consequence is not the reason that the clause is enforceable in the first place. The reason that a forum selection clause is enforceable is that substantive contract law says it is enforceable.

D. Transfer vs. *Forum Non Conveniens*

¹⁵⁸ E.g., *Wilcox v. Arpaio*, 753 F.3d 872, 876 (9th Cir. 2014) (“The parties rightly agree that state contract law governs whether they reached an enforceable agreement settling the federal and state law claims alleged in Plaintiffs’ complaint.”); *Madison Mechanical Inc. v. Twin City Fire Insurance Co.*, No. 9-2406, 2022 WL 17269022, at *3 (4th Cir. Nov. 29, 2022) (“Because this case is in federal court based on diversity jurisdiction, we follow state law in interpreting the insurance contract at issue.”)

In *Stewart Organization, Inc. v. Ricoh Corp.*,¹⁵⁹ the Supreme Court held that federal law determines the enforceability of forum selection clauses in a motion to transfer because Section 1404(a) requires the application of federal law. We believe that *Stewart* was wrongly decided. The plain text of Section 1404(a) does not, in our view, justify the creation of sprawling body of federal common law in this area.¹⁶⁰ Even if one disagrees with our position, however, the logic of *Stewart* requires the federal courts to adopt a bifurcated scheme for enforcing forum selection clauses.¹⁶¹ This creates its own set of problems.

Under *Stewart*, federal courts will apply federal law to determine the enforceability of a forum selection clause that designates another federal court. But if a forum selection clause designates a state or a foreign court, a federal court must apply state law to determine whether that clause is enforceable because there is no federal statute that authorizes the creation of federal common law in this area. The courts cannot rely on the federal doctrine of *forum non conveniens* to justify the creation of a federal common law because that doctrine is itself a type of judge-made law. The end result is a scheme in which federal courts are expected to apply federal law to determine the enforceability of forum selection clauses designating federal forums and state law to determine the enforceability of forum selection clauses designating non-federal forums. This analytical framework is needlessly complicated and cumbersome. It is also widely ignored. Federal courts routinely apply federal law to determine whether a forum selection clause is enforceable even in *forum non conveniens* cases.¹⁶²

The solution to the bifurcation problem is straightforward. Federal courts sitting should *always* apply state law to determine whether a forum selection clause is

¹⁵⁹ 487 U.S. 22 (1988).

¹⁶⁰ Section 1404(a) states: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” The federal courts apply state law to determine whether the parties have “consented” to litigate their dispute elsewhere by entering into a valid forum selection clause. See Coyle, *supra* note 6, at 133-34; Kelley v. MailFinance Inc., 436 F. Supp. 3d 1136, 1141 (N.D. Ill. 2020) (“[D]etermining whether a forum-selection clause is part of a contract is a question of state law.” (citing Bourke v. Dun & Bradstreet Corp., 159 F.3d 1032, 1036 (7th Cir. 1998))); cf. Doctor’s Assocs. v. Casarotto, 517 U.S. 681, 686-87, 116 S. Ct. 1652, 1656 (1996) (applying state law to determine validity of arbitration clauses). If the federal courts apply state law to the issue of party consent, then it is unclear why they would apply federal law to determine whether the clause is enforceable in the absent of some clear statutory authorization mandating this outcome.

¹⁶¹ See Barnett v. DynCorp Int’l, LLC, 831 F.3d 296, 301 (5th Cir. 2016) (“*Atlantic Marine* thus did not answer under what law forum-selection clauses should be deemed invalid – an issue that has long divided courts.”)

¹⁶² See, e.g., Martinez v. Bloomberg LP, 740 F.3d 211, 222 (2d Cir. 2014); Commerce Consultants Int’l, Inc. v. Vetretrie Riunite, S.p.A., 867 F.2d 697, 700, 276 U.S. App. D.C. 81 (D.C. Cir. 1989); Albemarle Corp., 628 F.3d at 651-52; Haynsworth v. The Corp., 121 F.3d 956, 962 (5th Cir. 1997); Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (6th Cir. 2009); Manetti-Farrow, Inc., 858 F.2d at 513; Riley v. Kingsley Underwriting Agencies, 969 F.2d 953, 957 (10th Cir. 1992). This *sua sponte* creation of federal common law to preempt state law in *forum non conveniens* cases is indefensible for all the reasons outlined above.

enforceable even in motions to transfer.¹⁶³ To the extent there is an anomaly in the way federal courts address the enforceability of forum selection clauses, it does not arise out of the application of state law to decide whether a contract provision is enforceable. The anomaly is the application of *federal* law by federal courts to determine the enforceability of a clauses designating another federal court.

E. Federalism

The application of state law to determine the enforceability of a forum selection clause is also consistent with basic principles of federalism. Under the U.S. Constitution, federal power is limited. State law is the default source of legal rules. A validly enacted federal law may displace state law, but that displacement is limited to the scope of the federal statute. It is only because of the Supreme Court's interpretation of § 1404(a) in *Stewart* that a federal court will apply federal law to determine the enforceability of forum selection clauses designating another federal court. That law does not, however, compel the application of federal law to more basic questions relating to the validity of these clauses. Section 1404 does not, for example, require the federal courts to apply federal law to determine whether the contract containing the forum selection clause is supported by consideration. State law properly controls those issues.

Because it divides authority between the states and federal government, federalism inevitably results in some discrepancies in the law. The very reason for leaving some things to the federal government and the rest to the states is that the states and the federal government may choose to do things differently. These discrepancies may be undesirable in some contexts. They are certainly undesirable in the context of forum selection clauses, where predictability and uniformity are important. The way to ameliorate these discrepancies is not to expand the scope of federal common law to apply to the enforcement decision when the clause selects a non-federal forum. Instead, *Erie* and the federalism principles it implements suggest that that the solution is to defederalize and return to state law to determine the enforceability in federal courts of all forum selection clauses regardless of which court they choose.

CONCLUSION

Most *Erie* scholarship operates at the level of concept. This scholarship treats forum shopping and inequitable administration as theoretical problems in need of theoretical solutions. This Article takes a different approach. Through painstaking review of hundreds of state and federal cases, it has shown that there really is a difference in case outcomes depending on whether state or federal law is applied. There can be no serious

¹⁶³ A recent decision by the Ninth Circuit provides strong support for this position. See *Depuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, 28 F.4th 956, 964 (9th Cir. 2022), *cert denied* 143 S. Ct. 536 (2022) (holding that state law controls the validity of FSCs in transfer motions).

question that the status quo raises serious questions under *Erie* and its progeny. The only question is what is to be done.

The answer, we submit, is simple. The federal courts should apply state law – not federal law – to determine when a forum selection clause is enforceable. They should do this because it is the correct doctrinal approach under *Erie* and its progeny. The federal government does not have a uniquely federal interest in enforcing forum selection clauses, there is no statutory basis for creating federal common law to evaluate the enforceability of a clause selecting a non-federal forum, and the differing approaches create a real risk of inequitable administration of the law and forum shopping.

One might argue that our conclusion is self-fulfilling: we should expect different outcomes when different laws apply. But that is not necessarily so. Not all differences in rules affect outcome. Even significant differences in rules might not sway the outcome. When it comes to enforcing forum selection clauses, however, the evidence is clear. Differences in rules *do* affect outcomes. And that's the problem.

APPENDIX

Federal Cases

We collected the case data from the federal courts using the following method. First, we conducted a search in LexisAdvance under “Federal District Courts” in each state for the following terms: “choice of court clause” or “forum selection clause” or “choice of forum clause” or “consent to jurisdiction clause” or “venue selection clause.” We narrowed the timeline to the range between January 1, 2014, and December 31, 2020. We selected January 1, 2014, as the starting date because *Atlantic Marine* was decided in December 2013. In choosing our starting date, we sought to ensure that all of the cases in the dataset were decided under the same set of procedural rules.

We then reviewed the resulting hits for cases where (1) the forum selection clause selected a court located in another U.S. state or a foreign country, (2) the forum selection clause was mandatory, (3) the forum selection clause was broad enough to cover the dispute, (4) the court was asked to transfer the case pursuant to 28 U.S.C. 1404 or to dismiss the case pursuant to the doctrine of *forum non conveniens*, and (5) the court considered the possibility that the motion should not be granted because the clause was unenforceable. We then repeated the process for cases decided by each federal circuit court of appeal. When our review was complete, we had collected 658 federal cases. We then reviewed each of these cases to identify those where the federal court’s jurisdiction was based on diversity. That review resulted in a dataset of 430 federal cases.

In conducting our review of federal cases, we excluded a number of cases even though they presented interesting issues relating to forum selection clauses. First, we excluded cases where one party was seeking to remand the case to a state court in the same state. Second, we excluded cases where one party was seeking to transfer the case to a different federal district in the same state where the forum court was located. Third, we excluded cases where the only issue before the court related to clause interpretation and the court did not consider the enforceability of the clause. Fourth, we excluded cases where the primary issue before the court related to an arbitration clause. Fifth, we excluded cases where the forum selection clause was not mandatory. Sixth, we excluded cases where the resisting party merely argued that the contract was invalid under traditional contract doctrine (e.g., lack of mutual assent). We did, however, keep track of cases where one party argued the clause was unenforceable due to fraud. Seventh, we excluded cases where the only issue before the court was whether a non-signatory was bound by the forum selection clause. Eighth, we excluded cases where the case had already been transferred to the forum from somewhere else. Ninth, we excluded cases where the only issue before the court was whether one party had waived its right to invoke the forum selection clause. Tenth, we excluded cases where the only issue before the court was whether the clause conferred subject-matter jurisdiction upon the forum court. (It does not.) Finally, we excluded cases where the only issue before the court was

whether the party seeking to enforce the clause had done so via the correct procedural mechanism.

State Cases

We collected the case data from the state courts using the following method.¹⁶⁴ First, we conducted a search in LexisAdvance under “Cases by State” in each state for the following terms: “choice of court clause” or “forum selection clause” or “choice of forum clause” or “consent to jurisdiction clause” or “venue selection clause.” We then narrowed the timeline to the range between January 1, 2010, and December 31, 2020. This timeframe is longer than the one used in the federal courts for two reasons. First, the *Atlantic Marine* decision did not have any impact on the state courts and so there was no reason to limit the search to cases decided after 2013. Second, we wanted to collect enough state cases to be able to draw meaningful comparisons with the federal cases. Since there are many more federal cases dealing with forum selection clause enforcement than state cases, it was necessary to adopt a longer timeframe for state cases.

With these search parameters in place, we then used the same basic review criteria listed above in the context of federal cases to identify state cases where the primary issue before the court related to whether the clause was enforceable. This review ultimately resulted in a dataset of 330 state cases.

¹⁶⁴ The authors gratefully acknowledge the work of Katherine Richardson, who collected approximately half of the cases in the state dataset.