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### Civil Procedure and Contract Law—Contractual Forum-Selection Clauses in Erie Cases: More than Substance or Procedure

James C. McNeal

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CIVIL PROCEDURE AND CONTRACT LAW—CONTRACTUAL FORUM-  
SELECTION CLAUSES IN *ERIE* CASES: MORE THAN SUBSTANCE OR  
PROCEDURE

I. INTRODUCTION

The enforceability “of forum-selection clauses is now one of the most frequently litigated jurisdictional issues in the lower federal courts.”<sup>1</sup> For at least four reasons, this should be no surprise. First, particularly in the context of international transactions, uncertainties regarding the potential forum can create a significant obstacle to reaching an agreement. Because of this uncertainty, contract drafters find that designating a forum adds predictability to a deal. Second, the world is trading at unprecedented levels. Global advances in telecommunications and transportation have created a world that is, as Thomas Friedman famously put it, “flat.”<sup>2</sup> By virtue of these advances, one can only expect a proliferation of forum-selection clause cases.

Third, notwithstanding the utility of forum-selection clauses, they can present unique problems, and courts do not always enforce them. Historically, courts thought forum-selection clauses usurped their jurisdiction and refused to enforce them as a matter of law.<sup>3</sup> Today, however, modern courts—both state and federal—liberally enforce forum-selection clauses,<sup>4</sup> using the framework created in the watershed Supreme Court of the United States case, *The Bremen v. Zapata Off-Shore Co.*<sup>5</sup> Despite the broad acceptance of its framework, state-to-state application of *The Bremen* varies in important ways.<sup>6</sup>

Fourth, and the focus of this note, the enforcement of forum-selection clauses is especially complex when the suit is in federal court. After *The Bremen*, federal courts had to wrestle with whether to apply the federal standard from *The Bremen*, or the applicable state standard in diversity cases, assuming the standards differed. The framework for answering this question is provided by the complex and ever-developing doctrine of *Erie*

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1. Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 342 (1992).

2. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* 5 (1st rev. and expanded ed. 2006).

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

4. See, e.g., *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 496 (Mo. 1992).

5. 407 U.S. 1 (1972).

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

*Railroad Co. v. Tompkins*<sup>7</sup> and its progeny. Today, federal courts unanimously hold that the validity of forum-selection clauses is a procedural question and, therefore, subject to federal law.<sup>8</sup> However, this was not always so. A minority formerly held that the validity of forum-selection clauses is a contracts question and, therefore, subject to state law.<sup>9</sup> As will be demonstrated later in this note, the minority view came to the correct conclusion, but unfortunately based on flawed premises.<sup>10</sup>

This note will argue that, despite the procedural qualities of forum-selection clauses, adherence to *Erie* and its progeny requires that state rather than federal law govern the enforceability of forum-selection clauses in diversity cases. This note will first provide background on the applicable law, including the doctrinal and historical development of the *Erie* doctrine,<sup>11</sup> the evolving treatment of forum-selection clauses,<sup>12</sup> and the controversy over *Erie*'s application to forum-selection clauses.<sup>13</sup> This background will then be used to make this note's two principle arguments: First, the validity of forum-selection clauses is an issue of procedure,<sup>14</sup> and second, state law should, nevertheless, determine the validity of forum-selection clauses.<sup>15</sup>

## II. BACKGROUND

This section will discuss three foundational issues that are essential to this note's principal thesis. First, it will cover the most relevant cases that have established the modern-day *Erie* doctrine.<sup>16</sup> Then, this section will provide a background on forum-selection clauses<sup>17</sup>—their evolving acceptance in state and federal courts<sup>18</sup> and a few of the nuanced approaches by various state courts in specific circumstances.<sup>19</sup> Finally, after having discussed the *Erie* doctrine and forum-selection clauses, the section will ad-

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7. 304 U.S. 64 (1938).

8. See, e.g., *Jones v. Weibrecht*, 901 F.2d 17, 18–19 (2d Cir. 1990); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512–13 (9th Cir. 1988); *Stewart Org., Inc. v. Ricoh Corp.*, 810 F.2d 1066, 1067–68 (11th Cir. 1987).

9. *General Eng'g Corp. v. Martin Marietta Alumina, Inc.* 783 F.2d 352, 357 (3d Cir. 1986).

10. See *infra* Part II.C.2.

11. See *infra* Part II.A.

12. See *infra* Part II.B.

13. See *infra* Part II.C.

14. See *infra* Part III.A.

15. See *infra* Part III.B.

16. See *infra* Part II.A.

17. See *infra* Part II.B.

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

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

dress the controversy regarding whether federal or state law should apply in diversity cases.<sup>20</sup>

### A. The *Erie* Doctrine

The *Erie* doctrine is complex and vague, so much so that it has been described as “unguided.”<sup>21</sup> Discussion of the *Erie* doctrine must begin with *Swift v. Tyson*,<sup>22</sup> which *Erie Railroad Co. v. Tompkins*<sup>23</sup> overturned.<sup>24</sup> As will be shown, *Erie* and *Swift* represent distinctly different judicial values.<sup>25</sup> Overturning *Swift* represented a decisive judicial value shift, a point that will be given significant treatment<sup>26</sup> as it seems to have been lost on the majority in forum-selection clause diversity cases. Following the discussion of *Erie* and *Swift*, this section will analyze the three famous substance-procedure cases, paying particular attention to the value shift from *Swift*.<sup>27</sup> These cases provide the primary framework of modern *Erie* jurisprudence.

#### 1. *Swift v. Tyson*

When *Swift* was decided, as surprising as it may sound today, many notable jurists viewed forum shopping positively, at least in commercial cases,<sup>28</sup> arguing that federalism increased the cost of doing business.<sup>29</sup> In his history of the *Swift* and *Erie* cases, Tony Freyer attributes this inclination to several causes: state courts’ perpetual legal errors;<sup>30</sup> outright local prejudices;<sup>31</sup> discrepancies in the treatment of various commercial instruments;<sup>32</sup> and differing views on the applicability of *stare decisis* to commercial law.<sup>33</sup>

The complete facts of the *Swift* case are complicated and a bit murky, but a synopsis is necessary to illustrate the unpredictable character of state-to-state commercial law of its time. Jarius Keith and Nathaniel Norton, two land speculators in northeastern Maine, paid a creditor with a promissory

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20. See *infra* Part II.C.

21. See, e.g., *Hanna v. Plumer* 380 U.S. 460, 471 (1965).

22. 41 U.S. 1 (1842).

23. 304 U.S. 64 (1938).

24. *Id.* at 79–80.

25. See *infra* Part II.A.1–2.

26. See *infra* Part II.A.1–2.

27. See *infra* Part II.A.4.

28. Tony Freyer, *Harmony & Dissonance: The Swift & Erie Cases in American Federalism*, in *NEW YORK UNIVERSITY SCHOOL OF LAW SERIES IN LEGAL HISTORY* 19 (1981).

29. *Id.*

30. *Id.*

31. *Id.* at 20.

32. *Id.* at 21–23.

33. *Id.* at 23–24.

note.<sup>34</sup> The note was cashed at the creditor's bank and eventually sold to Joseph Swift, the cashier of Keith and Norton's bank.<sup>35</sup> Keith and Norton paid Swift by endorsing to him a bill of exchange that had been accepted by a George Tyson as part of a separate transaction.<sup>36</sup> The deal, which indebted Tyson to Swift, almost certainly included fraud and possibly even collusion between Swift and Norton.<sup>37</sup> At the time, states did not uniformly favor negotiability.<sup>38</sup> Consequently, there was uncertainty as to whether holders of these instruments possessed an absolute right of recovery against debtors, even when there might have been fraud.<sup>39</sup>

While several legal theories were pursued, Swift's suit against Tyson was essentially for recovery of the debt from the bill of exchange.<sup>40</sup> Tyson won at trial after the district judge gave a jury instruction that was consistent with New York case law, but that was not favorable to the principle of negotiability.<sup>41</sup> On appeal, Swift's attorney raised a novel argument that, for almost a century, would govern diversity cases. He argued that section 34 of the Judiciary Act of 1789<sup>42</sup> did not require local New York law to govern the case.<sup>43</sup> At the time, section 34 read, "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."<sup>44</sup> Because Swift would stand a better chance on remand if the district court was unconstrained by New York case law, Swift's attorney argued that by "laws" section 34 referred only to state statutes and not to case law.<sup>45</sup>

The Supreme Court ruled in Swift's favor, reasoning that state court decisions are not themselves laws but merely "evidence of what the laws are."<sup>46</sup> Negotiable instruments, then, were held to be governed by "general commercial law," not section 34.<sup>47</sup> In so holding, the Court decided that creditors in Swift's position had an absolute right of recovery.<sup>48</sup>

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34. Freyer, *supra* note 28 at 23–24.

35. *Id.* at 5.

36. *Id.*

37. *Id.* at 6.

38. *Id.* at 10–11.

39. *Id.* at 6.

40. Freyer, *supra* note 28, at 7.

41. *Id.* at 14.

42. 1 Stat. 92 (1789) (current version at 28 U.S.C. § 1652 (2006)).

43. Freyer, *supra* note 28, at 13.

44. 1 Stat. 92 (1789) (current version at 28 U.S.C. § 1652 (2006)). Today, the section is referred to as the "Rules of Decision Act" and the words "trials of common law" have been replaced with "civil actions." 28 U.S.C. § 1652.

45. Freyer, *supra* note 28, at 14.

46. *Swift v. Tyson*, 41 U.S. 1, 18 (1842).

47. *Id.* at 19.

48. *See id.* at 19–22.

The notion of “general law,” which remained the accepted view in diversity cases for almost a century, allowed parties to circumvent the uncertainties of state courts. As long as the issue at hand was not unambiguously governed by a state statute, federal courts were free to create their own common law. However, because the Court had subordinated federalism to commercial concerns, significant equitable problems arose.

## 2. Erie Railroad Co. v. Tompkins

Reacting to *Swift*, corporations began reorganizing in states with more relaxed incorporation laws in order to artificially create diversity of citizenship between themselves and local residents.<sup>49</sup> This conduct ignited a firestorm among legal scholars.<sup>50</sup> But the final days of the *Swift* doctrine came almost a century later when twenty-seven year-old Harry Tompkins was hit by the protruding door of an Erie Railroad Company train while walking on a path running parallel to the tracks.<sup>51</sup> Tompkins sued Erie for negligence in the United States District Court for the Southern District of New York.<sup>52</sup> Bringing the suit in diversity was strategic in light of the *Swift* doctrine: Pennsylvania state cases held that travelers on a path running parallel to railroad tracks were trespassers,<sup>53</sup> but the then-modern trend considered such travelers licensees.<sup>54</sup>

Unfortunately for Tompkins, when the case made it to the Supreme Court, the Court was bent on overturning *Swift*.<sup>55</sup> Justice Brandeis lamented the pervasive general practice of corporations to artificially create diversity

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49. Freyer, *supra* note 28, at 102.

50. *Id.* at 105–22. Oliver Wendel Holmes, who dissented in *Taxicab*, wrote that judges were “simply directors of a force that comes from the source that gives them their authority,” that there is no “mystic overlaw” that federal judges are privy to, and that the “common law in a state is the common law of that state deriving all its authority from the state.” *Id.* Charles Warren, assistant attorney general under President Woodrow Wilson, pointed out that the original draft of section 34 read “the Statute law of the several [s]tates in force for the time being *and their unwritten or common law now in use*, whether by adoption from the common law of England, the ancient statutes of the same or otherwise,” rather than reading “the laws of the several states . . . shall be regarded as rules of decision . . . in cases where they apply.” Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923) (emphasis added). From this, Warren concluded that the more concise version was a stylistic summary of the longer original. *Id.*

51. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938).

52. *Id.*

53. *Id.* at 70; Freyer, *supra* note 28, at 124–25.

54. *Erie*, 304 U.S. at 70.

55. Freyer, *supra* note 28, at 131. During judicial conference, before *Erie* was decided, Chief Justice Hughes apparently announced, “If we wish to overrule *Swift v. Tyson*, here is our opportunity.” *Id.*

jurisdiction<sup>56</sup> and concluded that section 34 applied to more than mere statutes.<sup>57</sup> Brandeis's holding in *Erie* was as follows:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.<sup>58</sup>

*Erie* was one of the most significant decisions in the last century to alter the distribution of power between the federal government and the states.<sup>59</sup> However, despite its emphatic holding, *Erie* left many important questions unanswered.

### 3. *Klaxon Co. v. Stentor Electric Manufacturing Co.*<sup>60</sup>

Although *Erie* held that the applicable law in diversity cases is state law, it never specified *which* state. The Supreme Court resolved this question in *Klaxon*, a diversity case initiated in the United States District Court for the District of Delaware between a New York corporation and a Delaware corporation.<sup>61</sup> Before addressing the underlying controversy, the court considered a dispute over whether New York or Delaware law should apply.<sup>62</sup> Both the district court and United States Court of Appeals for the Third Circuit employed their own conflict of laws principles to determine that New York law was applicable.<sup>63</sup>

The Supreme Court reversed, holding that a federal court must follow the conflicts rules of the state in which it sits.<sup>64</sup> Thus, "[t]he ruling in *Klaxon* allows us to restate the rule of *Erie* as follows: [A] federal district court sitting in diversity must apply the substantive law that would have been applied had the case been filed in a court of the forum state."<sup>65</sup> In other words, a district court in Arkansas does not necessarily apply Arkansas substantive

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56. *Erie*, 304 U.S. at 74–77.

57. *Id.* at 72–73.

58. *Id.* at 78.

59. 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4503 (2d ed. 1996).

60. 313 U.S. 487 (1941).

61. *Id.* at 494.

62. *Id.* at 495.

63. *Id.* at 495–96.

64. *Id.* at 496.

65. Allan Ides, *The Supreme Court and the Law to Be Applied in Diversity Cases: A Critical Guide to the Development and Application of the Erie Doctrine and Related Problems*, 163 F.R.D. 19, 34 (1995).

law, but instead the substantive law that an Arkansas court would have applied.<sup>66</sup>

The twin holdings of *Erie* and *Klaxon* compel two reliable conclusions. First, on the hierarchy of constitutional values, uniformity and predictability lie well below federalism.<sup>67</sup> Attorneys attempting to anticipate the applicable substantive law of a future lawsuit arguably must complete a four-step process, in which they determine whether *Erie* would apply, establish which states might have jurisdiction, predict the outcome of a conflict-of-laws analysis, and ascertain the applicable state law. If uniformity and predictability had any comparable value to federalism, as the *Swift* opinion implies, *Erie* and *Klaxon* surely would have been resolved differently.

Second, *Klaxon* cemented the relationship between the forum state and the applicable substantive law.<sup>68</sup> Prior to *Klaxon*, a federal court could use its own conflict-of-laws principles to determine which state's law to apply, arguably attenuating the relationship between the forum state and the applicable substantive law. *Klaxon* effectively forged a strong bond between the forum state and the applicable substantive law, removing whatever attenuation might have been present. If a case is brought in diversity, the substantive law to govern the case is the entire law of the state. These two principles provide a foundation for any *Erie* analysis.

#### 4. *The Substance-Procedure Cases*

Despite resolving the conflicts issue in *Klaxon*, a significant issue remained. It was not clear whether *Erie* commanded adherence to state rules of procedure. After all, procedural laws are still laws. Beginning with *Guaranty Trust Co. of New York v. York*,<sup>69</sup> subsequent *Erie* cases struggled to articulate a framework for determining when to apply state procedural law.

The following cases cannot be read in isolation.<sup>70</sup> Their inconsistencies and arguable shortcomings must be read with reference to each other because the cases "buil[t] upon and inform[ed] one another."<sup>71</sup> The underlying principle of the first case, *Guaranty Trust*, has not technically been overturned, but it has been considerably refined.<sup>72</sup> Nevertheless, these cases are

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66. See *id.*

67. See *Klaxon*, 313 U.S. at 496. For further discussion regarding the inevitable lack of uniformity, resulting from the holding in *Klaxon*, between federal courts in different states, see WRIGHT, MILLER & COOPER, *supra* note 59, § 4506.

68. See *Klaxon*, 313 U.S. at 496.

69. 326 U.S. 99 (1945).

70. WRIGHT, MILLER & COOPER, *supra* note 59, § 4504.

71. *Id.*

72. See *infra* Part II.A.4.b-c.



the most important in resolving whether state or federal law should apply to the validity of forum-selection clauses.

a. *Guaranty Trust Co. of New York v. York*

*Guaranty Trust*, like *Swift*, involved fraud and complicated commercial transactions, but the sole question before the Court was whether state statutes of limitation apply in diversity cases.<sup>73</sup> Justice Frankfurter, writing for the majority, affirmed, famously reasoning that “so far as legal rules determine the outcome of litigation,” the outcome in a diversity case “should be substantially the same” as it would have been in a state court.<sup>74</sup>

Criticizing a crude substance-or-procedure dichotomy, Frankfurter pointed out that what is procedural in one situation might be substantive in another.<sup>75</sup> Instead, Frankfurter focused on whether a rule of procedure would affect the outcome of the case.<sup>76</sup> This outcome-determination test had an undeniably federalist allure. After all, federalism was the principal policy aim of *Erie*.<sup>77</sup> As Frankfurter said,

[S]ince a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State.<sup>78</sup>

Critical legal scholars, however, were wary of the outcome-determination test; they were concerned that the literal limits of the test could reach absurd dimensions since anything can theoretically affect the outcome in a given case.<sup>79</sup> Determining whether a rule could never, under any circumstances, alter the outcome in a given case would require impossible hairsplitting.<sup>80</sup> Even if the *Guaranty Trust* Court did not intend to apply its test to its literal limits, it provided little if any guidance on how far the test should be extended.<sup>81</sup> The test needed substantial elaboration, which eventually came from the ingenuity of two famous justices.<sup>82</sup>

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73. *Guaranty Trust*, 326 U.S. at 99–100.

74. *Id.* at 109.

75. *Id.* at 108.

76. *See id.* at 109.

77. *See id.* at 110.

78. *Id.* at 108–09.

79. *See* WRIGHT, MILLER & COOPER, *supra* note 59, § 4504.

80. *Id.*

81. *Id.*

82. *See infra* Part II.A.4.b–c.

b. *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*<sup>83</sup>

*Byrd* is the most important case in this discussion, providing the essential foundation for the conclusion that forum-selection clauses in diversity cases should be governed by state law. *Byrd* began as a seemingly ordinary, work-related negligence suit, but several issues had to be addressed before the underlying merits of the case could be decided. First, for statutorily defined “employees,” South Carolina’s Workmen’s Compensation Act confined recovery for work-related injuries to compensation benefits, and thus, statutorily barred such employees from raising negligence claims.<sup>84</sup> Therefore, as an affirmative defense to the negligence claim, Blue Ridge asserted that *Byrd* was an employee within the Act and could not sue for negligence.<sup>85</sup> Whether *Byrd* was in fact an employee within the statute was, however, an open question. Yet, even before this question could be resolved, the court had to decide whether this was a question for a judge or a jury.<sup>86</sup> The South Carolina Supreme Court had determined that this issue should be decided by a judge,<sup>87</sup> but in federal practice, all factual questions are answered by a jury.<sup>88</sup> This led to the issue before the Court: Whether *Erie* compelled federal courts to adhere to state jury practices—practices widely considered procedural and, even by a conservative reading of *Guaranty Trust*, outcome determinative.<sup>89</sup>

Early in the opinion, Justice Brennan reformulated the *Guaranty Trust* test, which asks whether a procedural rule is outcome determinative, to instead consider whether the procedural rule is “bound up” with the substantive right or remedy being sought in court.<sup>90</sup> Under this reformulation, the mere fact that some difference in outcome could be imagined is necessary to require application of the state law, but is not sufficient; there must also be some “special relationship” between the procedural rule or practice and the substantive right or remedy.<sup>91</sup> Applying this reformulated test, the Court

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83. 356 U.S. 525 (1958).

84. *Id.* at 527.

85. *Id.*

86. *Id.* at 533.

87. *Adams v. Davison-Paxon Co.*, 96 S.E.2d 566, 571 (S.C. 1957) (“It has been consistently held that whether the claim of an injured workman is within the jurisdiction of the Industrial Commission is a matter of law for decision by the court, which includes the finding of facts which relate to jurisdiction.”).

88. *See Byrd*, 356 U.S. at 537 (“An essential characteristic of [the federal] system is the manner in which, . . . under the influence—if not the command—of the Seventh Amendment, [it] assigns the decisions of disputed questions of fact to the jury.”).

89. *See id.* at 537 (“[W]ere ‘outcome’ the only consideration, a strong case might appear for saying that the federal court should follow the state practice.”).

90. *See id.* at 535.

91. *See id.* at 536.

found that “the requirement [was] merely a form and mode of enforcing [the substantive right], and not a rule intended to be bound up with the definition of the rights and obligations of the parties.”<sup>92</sup>

*Byrd* did not overturn *Guaranty Trust*; a party seeking to apply a state procedural rule must still demonstrate the outcome-determinative effect of the procedure.<sup>93</sup> However, by also requiring that a party show a special relationship between the procedural practice and the right or remedy being sought, *Byrd* successfully eliminated the hairsplitting calculations of *Guaranty Trust*. Admittedly, *Byrd* never clarified what constitutes a “special relationship,” but the *Byrd* test continues to be applicable today<sup>94</sup>—save one significant refinement.<sup>95</sup>

c. *Hanna v. Plumer*<sup>96</sup>

The defendant-respondent in *Hanna* was the executor of an alleged tortfeasor’s estate.<sup>97</sup> The petitioner served the summons and complaint by leaving copies at the executor’s residence.<sup>98</sup> Under Rule 4(d)(1) of the Federal Rules of Civil Procedure, this would have been adequate,<sup>99</sup> but under the Massachusetts rules, service was not adequate unless it was made by an in-person delivery.<sup>100</sup> Here, even more so than in *Byrd*, the decision as to which procedural rule to apply was outcome determinative.

In his majority opinion, Chief Justice Warren introduced two ideas that have since remained undisturbed. First, he affirmed the Court’s observation in *Guaranty Trust* “that Erie-type problems [are] not to be solved by reference to any traditional or common-sense substance-procedure distinction.”<sup>101</sup> Warren wrote, “The ‘outcome-determination’ test . . . cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”<sup>102</sup> The fact that this statement has endured is surprising in light of Warren’s

92. *Id.* (citing *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945)).

93. *See id.* at 537, 539–40. This proposition is evidenced in two places. First, Brennan observed that “were ‘outcome’ the *only* consideration, . . . the federal court should follow the state practice.” *Id.* at 537 (emphasis added). Second, Brennan emphasized factors that could reduce the possibility of an affected outcome. *Id.* at 539–40. It appears then that outcome determination, while not dispositive, remains a part of the consideration.

94. WRIGHT, MILLER & COOPER, *supra* note 59, § 4511.

95. *See infra* Part II.A.4.c.

96. 380 U.S. 460 (1965).

97. *Id.* at 461.

98. *Id.*

99. *Id.*

100. *Id.* at 462.

101. *Id.* at 465–66.

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

second pronouncement that *Erie* did not apply in *Hannah* at all.<sup>103</sup> Instead, Warren said, when a state rule conflicts with the Federal Rules of Civil Procedure, the federal rule should control.<sup>104</sup> This is because the accompanying Rules Enabling Act provided,

[T]he Supreme Court shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.<sup>105</sup>

Federal courts continue to cite *Hanna* for the twin aims test<sup>106</sup> despite its initial use arguably being dicta. Additionally, the primary holding from *Hanna*, that the Federal Rules of Civil Procedure trump state rules of procedure, continues to stand as long as there is a “direct collision between the [f]ederal rule and the state law.”<sup>107</sup> When there is not a direction collision, traditional *Erie* analysis applies.<sup>108</sup>

## B. Forum-Selection Clauses

Forum-selection clauses are “provision[s] in a contract [that] designate[ ] a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of . . . their contractual relationship.”<sup>109</sup> Because they provide additional certainty should a business relationship turn sour, they are popular in agreements between interstate or foreign parties.<sup>110</sup> This section provides a background on the increasingly liberal acceptance of fo-

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103. *Id.* at 469–70.

104. *Id.* at 471.

105. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

106. *E.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 428 (1996) (citing *Hanna*, 380 U.S. at 468).

107. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (citing *Hanna*, 380 U.S. at 472).

108. *Id.* at 752–53.

109. 17A AM. JUR. 2D *Contracts* § 259 (2011). This is not to be confused with a “choice-of-law provision,” which “names a particular state and provides that the substantial laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of any conflicts between the laws of the named state and the state in which the case is litigated.” 17A AM. JUR. 2D *Contracts* § 261 (2011).

110. *See* Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* 161 (2007).

rum-selection clauses,<sup>111</sup> followed by a survey of the states' varying approaches to different forum-selection clause issues.<sup>112</sup>

### 1. *Evolving Acceptance*

Historically, forum-selection clauses were widely disfavored by courts.<sup>113</sup> An oft-cited nineteenth century English case, *Scott v. Avery*,<sup>114</sup> is known for its declaration that "[t]here is no doubt of the general principle . . . that parties cannot by contract oust the ordinary courts of their jurisdiction,"<sup>115</sup> a principle later adopted by the Supreme Court of the United States in 1874.<sup>116</sup> Courts reasoned that the law prescribes the remedy in a given case, not the contract.<sup>117</sup> After all, because parties have no right to provide by contract a remedy prohibited by law, the Court reasoned that parties should neither have the right to contract away a remedy provided by law.<sup>118</sup> As recently as 1964, Willis L. M. Reese, reporter of the Second Restatement (Second) of Conflict of Laws, concluded that "[i]n the United States the effect of a choice of forum clause . . . is uncertain. In the great majority of instances, the state courts have entertained suits brought in violation of such a clause."<sup>119</sup>

This posture remained intact until the 1970s when the Supreme Court made a sudden turnaround in *The Bremen v. Zapata Off-Shore Co.*,<sup>120</sup> which established the modern federal standard regarding forum-selection clauses.<sup>121</sup> *The Bremen* was an admiralty suit arising out of a contract between Zapata, a Houston-based corporation, and Unterweser, a German corporation.<sup>122</sup> Under the terms of their agreement, Unterweser was to tow Za-

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

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

113. Willis L. M. Reese, *The Contractual Forum: The Situation in the United States*, 13 AM. J. COMP. L. 187, 188-89 (1964). "Judge Learned Hand once [said] that it was his guess that this judicial aversion dates from the time when, according to him, judges were paid by the case and accordingly viewed arbitration and choice of forum provisions as devices that were likely to curtail their income." *Id.* at 189.

114. 10 Eng. Rep. 1121 (1856).

115. *Id.* at 1135.

116. *Home Ins. Co. of New York v. Morse*, 87 U.S. 445, 451 (1874) ("Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights.").

117. *Id.* at 452.

118. *Id.* at 452-53.

119. Reese, *supra* note 113, at 187.

120. 407 U.S. 1 (1972).

121. Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291, 307 (1988).

122. *The Bremen*, 407 U.S. at 2.

pata's drilling rig from Louisiana to Italy, "where Zapata had agreed to drill certain wells."<sup>123</sup> The contract required any dispute arising out of the agreement to be resolved before the High Court of Justice in London, England.<sup>124</sup>

A storm caused damage to Zapata's rig in the Gulf of Mexico,<sup>125</sup> and Zapata, ignoring the forum-selection clause, brought suit in the United States District Court for the Middle District of Florida seeking to recover damages.<sup>126</sup> Unterweser moved to dismiss the case, invoking the forum-selection clause, and then brought suit in London.<sup>127</sup> The district court denied Unterweser's motion, and the United States Court of Appeals for the Fifth Circuit affirmed.<sup>128</sup>

In a criticized opinion, allegedly decided by "policy considerations rather than doctrinal support,"<sup>129</sup> the Supreme Court vacated the Court of Appeals' judgment.<sup>130</sup> In doing so, the Supreme Court created a new rule: Forum-selection clauses are presumptively valid unless "enforcement would be unreasonable and unjust or [unless] the clause [is] invalid for such reasons as fraud or overreaching."<sup>131</sup> Most prominent among the Court's considerations were "commercial realities," which expand international trade and international parties' need for the assurance of a neutral forum for dispute resolution.<sup>132</sup> Additionally, the Court regarded enforcement of forum-selection clauses as in accord with "freedom of contract."<sup>133</sup> Applying these rules to the facts of *The Bremen*, the Court noted that the two parties were sophisticated businessmen,<sup>134</sup> the contract was not established by fraud,<sup>135</sup> most witnesses in maritime cases are deposed anyway,<sup>136</sup> and England had a well-established body of maritime jurisprudence.<sup>137</sup> Therefore, the Court ruled in Unterweser's favor.<sup>138</sup>

The policy justifications for the Court's ruling were consistent with its maritime nature.<sup>139</sup> It is questionable, however, whether the same justifica-

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123. *Id.*

124. *Id.*

125. *Id.* at 3.

126. *Id.* at 3-4.

127. *Id.* at 4.

128. *The Bremen*, 407 U.S. at 6-7.

129. Mullenix, *supra* note 121, at 312.

130. *Bremen*, 407 U.S. at 20.

131. *Id.* at 10, 15.

132. *Id.* at 11-12, 15.

133. *Id.* at 11.

134. *Id.* at 12.

135. *Id.* at 12-13.

136. *The Bremen*, 407 U.S. at 19.

137. *Id.* at 12.

138. *Id.* at 15.

139. See Mullenix, *supra* note 121, at 313.

tions are present in domestic cases.<sup>140</sup> While there certainly exist insecurities in the American federal system, they pale in comparison to those of the international legal setting.<sup>141</sup> Despite this, “federal courts [have] routinely and uncritically import[ed] *The Bremen*’s rule on forum-selection clauses into the full range of domestic federal cases.”<sup>142</sup>

Most states have followed federal courts in abandoning the traditional approach to forum-selection clauses.<sup>143</sup> Many have even appropriated the language of *The Bremen* or substantially similar language.<sup>144</sup> Nevertheless, as will be discussed below, there are subtle, yet significant differences in states’ interpretations of *The Bremen*.<sup>145</sup>

## 2. *Forum-Selection Clauses in State Courts*

This section will briefly address the unique ways in which different states evaluate the validity of forum-selection clauses. This section is by no means exhaustive and need not be. A mere acknowledgment that states differ in their treatment of forum-selection clauses suffices for present purposes.

To begin, states are split regarding the enforceability of forum-selection clauses when the contractually designated state would deny the plaintiff a particular cause of action or remedy. For example, the Florida District Court of Appeal for the Third District enforced a forum-selection clause in a class action breach of contract suit<sup>146</sup> despite the fact that the clause designated Virginia, a state that does not recognize class actions, as the appropriate forum.<sup>147</sup> The court effectively deprived the plaintiffs of a class action remedy by requiring the parties to move their suit to Virginia.<sup>148</sup> On the other hand, in an essentially identical case, the Washington Supreme Court held the opposite.<sup>149</sup> The court refused to enforce a forum-selection

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140. *Id.* at 313–14.

141. *See id.* at 314 (reasoning that “the continued vitality of international law in large measure depends on consensual relationships” since there is no sovereign).

142. *Id.* at 314, 314 n.88.

143. *See, e.g.*, *Gen. Eng’g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 358 (3d Cir. 1986) (citing many cases that have been influenced by the Supreme Court’s decision in *The Bremen*).

144. *See* Walter W. Heiser, *Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 553, 603 (1993).

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

146. *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001).

147. *Id.* at 424.

148. *See id.*

149. *Dix v. ICT. Grp., Inc.*, 161 P.3d 1016, 1022 (Wash. 2007).

clause in a class action suit because the designated state—again Virginia—did not recognize class actions.<sup>150</sup>

Additionally, states consider different factors in determining whether a forum-selection clause is reasonable. Alabama, for example, considers the following five factors:

1. whether “the parties are business entities or businesspersons;”<sup>151</sup>
2. “the subject matter of the contract;”<sup>152</sup>
3. whether “the chosen forum has any inherent advantages;”<sup>153</sup>
4. whether “the parties have been able to understand the agreement as it was written;”<sup>154</sup> and
5. whether “extraordinary facts have arisen since the agreement was entered that would make the chosen forum seriously inconvenient.”<sup>155</sup>

Illinois courts, on the other hand, consider a different set of factors:

1. “which law governs the formation and construction of the contract;”<sup>156</sup>
2. “the residency of the parties involved;”<sup>157</sup>
3. “the place of execution and/or performance of the contract;”<sup>158</sup>
4. “the location of the parties and witnesses participating in the litigation;”<sup>159</sup>
5. “the inconvenience to the parties of any particular location;”<sup>160</sup> and
6. “whether the clause was equally bargained for.”<sup>161</sup>

Whereas Alabama seems to emphasize the characteristics of the parties and the subject matter, Illinois seems more concerned with logistical considerations.

Next, courts following *The Bremen* would clearly invalidate a forum-selection clause for fraud,<sup>162</sup> but states are deeply split over several issues of fraud. Even when states agree regarding what constitutes fraud, they do not always agree as to the situations in which fraud is relevant. For example, in

150. *Id.* at 1019, 1022 (“[A] forum selection clause that seriously impairs a plaintiff’s ability to bring suit to enforce the [Consumer Protection Act] violates the public policy of this state.”).

151. *Ex parte N. Capital Res. Corp.*, 751 So. 2d 12, 14 (Ala. 1999).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Yamada Corp. v. Yasuda Fire & Marine Ins.*, 712 N.E.2d 926, 931 (Ill. App. Ct. 1999).

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

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



many states, it is not sufficient for a party to demonstrate fraud in the inducement of the contract as a whole in order for the court to invalidate the forum-selection clause.<sup>163</sup> Rather, the specific clause designating the forum must *itself* have been obtained by fraud.<sup>164</sup> On the other hand, Texas courts adhere to a rule that where the asserted wrong is fraud in the inducement and not a general breach, the “remedies and limitations specified by the contract do not apply.”<sup>165</sup> The effect of this rule is that “Texas courts will not apply forum selection clauses to tort actions alleging fraud in the inducement.”<sup>166</sup> The Texas rule might invite courts to disregard forum-selection clauses more frequently than might be expected in other states.

Finally, some jurisdictions continue to reject forum-selection clauses as a matter of law. Idaho declares forum-selection clauses void by statute.<sup>167</sup> Similarly, Montana statutorily invalidates forum-selection clauses except upon the advice of counsel as evidenced by counsel’s signature on the agreement.<sup>168</sup> While most states utilize some reasonableness-fraud-overreaching inquiry,<sup>169</sup> fringe states such as Montana and Idaho continue to adhere to the traditional view.

These aforementioned examples are but a few of the varied approaches to forum-selection clauses. Even though most state courts have appropriated much of the language from *The Bremen*,<sup>170</sup> that language constitutes a mere starting point. As has been shown, states apply that language in remarkably different ways. The existence of these differences is crucial to the *Erie* analysis in Part III of this note.<sup>171</sup>

### C. Application of the *Erie* Doctrine to Forum-Selection Clauses

Having provided a background on the most relevant *Erie* and forum-selection clause cases, this section will discuss the controversy over *Erie*’s specific application to forum-selection clauses. The *Erie* issue presented by diversity jurisdiction is the most perplexing issue raised by forum-selection cases in federal courts.<sup>172</sup> As will be shown, courts uniformly hold that federal law should govern forum-selection clauses in diversity cases, but a mi-

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163. *Karty v. Mid-America Energy, Inc.*, 903 N.E.2d 1131, 1135 (Mass. App. Ct. 2009).

164. *Id.*

165. *Busse v. Pac. Cattle Feeding Fund No. 1, Ltd.*, 896 S.W.2d 807, 813 (Tex. Ct. App. 1995).

166. *S.W. Intelcom, Inc. v. Hotel Networks Corp.*, 997 S.W.2d 322, 324 (Tex. Ct. App. 1999).

167. IDAHO CODE ANN. § 29-110(1) (2010).

168. MONT. CODE ANN. § 27-5-323 (2011).

169. See 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 15:15 (4th ed. 2010).

170. See *id.*

171. See *infra* Part III.B.

172. *Mullenix*, *supra* note 121, at 332.

nority formerly held that state law should control them.<sup>173</sup> Both sides' analyses, however, are subject to substantial criticism.

1. *The Current Consensus*

a. *Stewart Organization, Inc. v. Ricoh Corp.*<sup>174</sup>

Containing a discussion of the *Ricoh* case to the Supreme Court's opinion is not feasible.<sup>175</sup> The difficulty stems from the fact that the Supreme Court effectively created a second holding when it reframed the issue that had been decided by the Eleventh Circuit.<sup>176</sup> In *Ricoh*, the Stewart Organization, an Alabama corporation, entered into a dealership agreement with the Ricoh Corporation.<sup>177</sup> The contract contained forum-selection and choice-of-law provisions, designating New York's law as operative and New York City as the appropriate forum.<sup>178</sup> Thus, when Stewart later sued in the United States District Court for the Northern District of Alabama, alleging breach of contract, breach of warranty, fraud, and antitrust violations, Ricoh moved to transfer to New York or, in the alternative, to dismiss.<sup>179</sup>

At the time *Ricoh* was decided, Alabama courts invalidated forum-selection clauses as a matter of law,<sup>180</sup> and at trial, the court applied the Alabama rule rather than the liberal federal rule from *The Bremen*.<sup>181</sup> On appeal, however, the Eleventh Circuit reversed.<sup>182</sup>

i. *Eleventh Circuit Opinion*

The Eleventh Circuit's *Ricoh* opinion is often cited as the genesis of the majority view even though its reasoning was not adopted by the Supreme

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173. See *infra* Parts III.C.1–2.

174. 810 F.2d 1066 (11th Cir. 1987), *aff'd*, 487 U.S. 22 (1988).

175. In a London broadcast in 1939, Winston Churchill described Russia as “a riddle, wrapped in a mystery, inside an enigma.” NEVER GIVE IN!: THE BEST OF WINSTON CHURCHILL'S SPEECHES 199 (Winston S. Churchill, ed. 2003). The Supreme Court certainly made analysis of forum-selection clauses an enigma, which, coming from the Eleventh Circuit, was already a riddle, wrapped in a mystery.

176. *Ricoh*, 487 U.S. 22, 29. See also *infra* note 183 and accompanying text.

177. *Ricoh*, 810 F.2d at 1067.

178. *Id.* at 1067, 1070.

179. See *id.* at 1070.

180. *Id.* at 1067, 1069. See also *Redwing Carriers, Inc. v. Foster*, 382 So. 2d 554, 556 (Ala. 1980), *overruled by Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347 (Ala. 1997) (“We consider contract provisions which attempt to limit the jurisdiction of the courts of this state to be invalid and unenforceable as being contrary to public policy.”).

181. *Ricoh*, 810 F.2d at 1067.

182. *Id.* at 1071.

Court.<sup>183</sup> The court found that *Hanna* should apply not only when a state law conflicts with the Federal Rules of Procedure, but should also apply anytime there is conflict between a state law and a federal statute relating to federal procedure.<sup>184</sup> The Eleventh Circuit reasoned that, because Congress had enacted rules of venue,<sup>185</sup> federal law should resolve all questions of venue, such as the validity of forum-selection clauses.<sup>186</sup> This reasoning, however, runs contrary to *Hanna*.

In the court's *Erie* discussion, it created a new rule that contradicted *Hanna* and then misapplied its own rule. The explicit basis of *Hanna*'s holding was that the Rules Enabling Act preempted the *Erie* Doctrine.<sup>187</sup> Because the Rules Enabling Act applies only to the Federal Rules of Civil Procedure, it was wrong to apply *Hanna* in this case because it did not involve the Federal Rules of Civil Procedure. But even assuming this rule does not conflict with *Hanna*, it is irrelevant: *Ricoh*—like virtually every forum-selection clause case in federal court—involved a conflict between competing court decisions, not venue statutes.<sup>188</sup> Despite the court's insistence that "Congress . . . specifically provided . . . rules of venue to govern federal district courts in diversity actions,"<sup>189</sup> it applied none of them and instead applied *The Bremen*.<sup>190</sup> Therefore, *Hanna*'s command regarding the Rules Enabling Act should have had no application.

After its treatment of *Hanna*, the court claimed that *The Bremen* was instructive because forum-selection clauses are gaining in acceptance.<sup>191</sup> In other words, the court subordinated federalism to commercial expediency

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183. See, e.g., *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512 (9th Cir. 1988).

184. *Ricoh*, 810 F.2d at 1068.

185. See 28 U.S.C. §§ 1391–1413 (2006).

186. *Ricoh*, 810 F.2d at 1068.

187. See *supra* notes 103–05 and accompanying text.

188. One author noted:

The majority inappropriately lumped all existing federal venue rules together to preempt the application of a state rule which relates to, but does not control venue, thereby bootstrapping the arguably procedural venue rules up to the level of a *Hanna* directly applicable procedural rule. The majority's discussion fails to heed the warning in *Hanna* not to read federal procedural rules too broadly and also gives courts the green light to disregard state rules, thus contravening *Erie*.

Julia L. Erickson, Comment, *Forum Selection Clauses in Light of the Erie Doctrine and Federal Common Law: Stewart Organization v. Ricoh Corporation*, 72 MINN. L. REV. 1090, 1108–09 (1988) (footnotes omitted).

189. *Ricoh*, 810 F.2d at 1068.

190. *Id.* at 1069. The court stated: "Applying federal law to this question, the inquiry is whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*." *Id.* The court's own statement thus undercuts any relevance from *Hanna*.

191. *Id.*

and state-to-state uniformity—a stark retreat from the values of *Erie* back to those of *Swift*.

ii. *Supreme Court opinion*<sup>192</sup>

The Eleventh Circuit's *Ricoh* opinion has been subject to numerous criticisms, but its holding was clear. Clarity, however, could hardly characterize the opinion handed down by the Supreme Court.<sup>193</sup> The Eleventh Circuit unsurprisingly framed the issue as whether the validity of forum-selection clauses should be determined by federal law or by state law.<sup>194</sup> Justice Marshall, however, reframed the issue in his opinion, deciding instead “whether [28 U.S.C.] § 1404(a)<sup>195</sup> itself controls respondent’s request to give effect to the parties’ contractual choice of venue.”<sup>196</sup> Citing a vague notion of the “supremacy of federal law,” the majority concluded that it did.<sup>197</sup> What exactly that means, however, was left to speculation.

A cursory reading of the majority opinion suggests that *The Bremen* does not determine the validity of forum-selection clauses in diversity cases. After all, Marshall wrote: “Although we agree with the Court of Appeals that the *Bremen* case may prove ‘instructive’ in resolving the parties’ dispute, we disagree with the court’s articulation of the relevant inquiry as ‘whether the forum selection clause in this case is unenforceable under the standards set forth in *The Bremen*.’”<sup>198</sup> According to Marshall, the court should instead determine whether a balance of any number of factors would compel the transfer according to “an ‘individualized, case-by-case consideration of convenience and fairness.’”<sup>199</sup> In other words, one might say § 1404(a) is not merely the authorization for transfer, it is the governor.

However, this interpretation is problematic. In his dissent, Justice Scalia argued that § 1404(a) concerns itself with factors in the present and future, whereas forum-selection clause analysis concerns itself with factors as they existed at the time the contract was formed.<sup>200</sup> Furthermore, given that any application of § 1404(a) to forum-selection clauses originated from

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

193. *See Mullenix, supra* note 121, at 334–39.

194. *Ricoh*, 810 F.2d at 1067.

195. “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 . . . .” 28 U.S.C. § 1404(a) (2006) (emphasis added).

196. *Ricoh*, 487 U.S. at 29.

197. *Id.* at 29, 31.

198. *Id.* at 28–29 (internal citations omitted).

199. *Id.* at 29 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). Some factors mentioned included the presence of a forum-selection clause, convenience of the parties, the policy of the forum state, and other considerations. *Id.* at 29–31.

200. *See id.* at 34–35 (Scalia, J., dissenting).

this judge-made rule, the question of which federal law to apply should be secondary to the question of whether federal law should apply at all.<sup>201</sup>

In addition, and most significantly, using § 1404(a) allows, if not invites, forum shopping. The Court held in *Van Dusen v. Barrack*<sup>202</sup> that when cases are transferred pursuant to § 1404(a), “the transferee district court must . . . apply the state law that would have been applied if there had been no change in venue.”<sup>203</sup> For example, if a plaintiff in diversity brings suit in state *A* and the defendant, pursuant to § 1404(a), successfully transfers the case to state *B*, state *B* must then apply the law of state *A*.<sup>204</sup> The court reasoned “that the ‘accident’ of federal diversity jurisdiction [should] not enable a party to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the [s]tate where the action was filed.”<sup>205</sup>

However, if *Ricoh* indeed requires that all forum-selection clause disputes be governed solely by and transferred according to § 1404(a), *Van Dusen* would inevitably compel the following perverse hypothetical. Suppose a particular contract designates state *A* as the sole forum, but the law of state *B* would be more favorable to the plaintiff. In order to avoid the law of state *A*, the plaintiff could bring suit in state *B*, and if the defendant moved to enforce the forum-selection clause and transfer the case to state *A*, the courts in state *A*, abiding by *Van Dusen*, would be forced to apply the law of state *B*. Thus, regardless of whether the court would enforce the forum-selection clause, the law of state *B* would be applied.

This is quintessential forum shopping, striking at the heart of everything *Erie* intended to prevent. Such was not lost on the United States District Court for the Northern District of Texas in *Hoffman v. Burroughs Corp.*,<sup>206</sup> however. In deciding whether to transfer pursuant to § 1404(a) or § 1406(a),<sup>207</sup> the court identified the problem acutely: “The statutory selection may be more than academic. The statutory basis for transfer in a diversity of citizenship case may determine what the applicable law is, including whether the choice of law rules of the state of the transferee court or the transferor court apply.”<sup>208</sup> It then pointed out that the language of § 1406(a)

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201. *Id.* at 35 (Scalia, J., dissenting).

202. 376 U.S. 612 (1964).

203. *Id.* at 639.

204. See *id.*

205. *Id.* at 638.

206. 571 F. Supp. 545 (1982).

207. “The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). Importantly, *Van Dusen* does not apply to § 1406. See *Van Dusen*, 376 U.S. at 634.

208. *Hoffman*, 571 F. Supp. at 550 (citing *Ellis v. Great Sw. Corp.*, 646 F.2d 1099, 1109 (5th Cir. 1981)). The court also seemed to suggest that 28 U.S.C. § 1391 does not control

is more appropriate to forum-selection clause transfers where the suit is initially brought in the *wrong* court, a different inquiry than the § 1404(a) consideration of *convenience*.<sup>209</sup>

Before *Ricoh* was decided, cases were split regarding whether forum-selection clauses should be enforced pursuant to § 1404(a) or § 1406(a). If *Ricoh* had authoritatively declared § 1404(a) to be the sole arbiter in forum-selection cases, then courts would have discontinued invoking § 1406(a). Yet, even after *Ricoh*, attorneys and judges invoke § 1404(a), § 1406(a), and Rule 12(b) alike.<sup>210</sup> As the following majority-view cases suggest, it is doubtful whether *Ricoh* has any enduring meaning at all.

*b. Manetti-Farrow, Inc. v. Gucci America, Inc.*<sup>211</sup>

*Gucci* was a suit arising out of a dealership agreement between Manetti-Farrow and Gucci America.<sup>212</sup> The contract provided, “For any controversy regarding interpretation or fulfillment of the present contract, the Court of Florence has sole jurisdiction.”<sup>213</sup> A power struggle ensued, and Gucci terminated the agreement and brought suit in Italy, alleging breach of contract, whereupon Manetti-Farrow brought suit in the United States District Court for the Northern District of California, alleging several tortious interference claims.<sup>214</sup> The district court dismissed the case, and Manetti-Farrow appealed.<sup>215</sup>

The Ninth Circuit panel held that the forum-selection clause was enforceable.<sup>216</sup> Its justification sheds light on the Supreme Court’s decision in *Ricoh*. The panel reasoned that, because a Rule 12(b)(3) motion to dismiss was made rather than a § 1404(a) motion to transfer, the *Ricoh* opinion in the Supreme Court did not apply.<sup>217</sup> Instead, the court cited the Eleventh

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when venue is wrong in the first instance. *Id.* at 551 (citing 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3847 (1st ed. 1982)).

209. *Hoffman*, 571 F. Supp. at 550–51.

210. See *TradeComet.com LLC v. Google, Inc.*, 647 F.3d 472, 478–79 (2d Cir. 2011) (transferring pursuant to Rule 12(b) and rejecting the argument “that a district court is . . . required to enforce a forum-selection clause only by transferring a case pursuant to § 1404(a)”; *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 875 (3d Cir. 1995) (transferring on appeal pursuant to § 1404(a), after the district court had ruled to transfer pursuant to § 1406(a)); *Lemoine v. Carnival Cruise Lines*, 854 F. Supp. 447, 448 (E.D. La. 1994) (transferring pursuant to § 1406(a)); see also *Mullenix*, *supra* note 121, at 327–29.

211. 858 F.2d 509 (9th Cir. 1988).

212. *Id.* at 510.

213. *Id.* at 511.

214. *Id.*

215. *Id.* at 511–12.

216. *Id.* at 515.

217. *Gucci*, 858 F.2d at 512 n.2.

Circuit's *Ricoh* opinion and applied virtually identical reasoning.<sup>218</sup> As a result, *Gucci* importantly nullifies any notion that *Ricoh* declared § 1404(a) to be the sole arbiter in federal forum-selection cases. The following case reinforces this point.

*c. Jones v. Weibrecht*<sup>219</sup>

In 1989, Nettie Jones commenced suit against Edwin Weibrecht in the United States District Court for the Northern District of New York, seeking to rescind two agreements related to the sale of certain stocks.<sup>220</sup> “Both agreements contain[ed] identical forum-selection clauses, designating the Supreme Court of New York, Essex County, as the exclusive venue for any action between the parties on the basis of the agreements.”<sup>221</sup> The district court remanded the case to the state court, citing the forum-selection clause, and Jones appealed.<sup>222</sup>

The Second Circuit acknowledged the holding in *Ricoh* but, without explanation, decided that a broad § 1404(a) standard is inappropriate “where . . . a party seeks to have an action dismissed or remanded to a state court, rather than transferred.”<sup>223</sup> The court further noted that it and other circuits have continued to apply *The Bremen* in diversity cases even after *Ricoh*.<sup>224</sup>

*d. TradeComet.com LLC v. Google, Inc.*<sup>225</sup>

In *TradeComet.com*, TradeComet.com sued Google in New York for alleged anti-competitive activity in violation of the Sherman Act.<sup>226</sup> The agreement between the two companies, however, contained a forum-selection clause, which specified Santa Clara County, California as the appropriate forum.<sup>227</sup> Accordingly, “Google filed a motion to dismiss for lack of subject matter jurisdiction and improper venue, pursuant to Rules 12(b)(1) and 12(b)(3) of the Federal Rules of Civil Procedure.”<sup>228</sup>

TradeComet.com, invoking the typical *Ricoh* argument, contended that a district court may enforce a forum-selection clause pursuant to § 1404(a) only.<sup>229</sup> On appeal, the United States Court of Appeals for the Second Cir-

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218. *Id.* at 512–13.

219. 901 F.2d 17 (2d Cir. 1990).

220. *Id.* at 18.

221. *Id.*

222. *Id.*

223. *Id.* at 19.

224. *Id.*

225. 647 F.3d 472 (2d Cir. 2011).

226. *Id.* at 474.

227. *Id.*

228. *Id.*

229. *Id.* at 474–75.

cuit disagreed.<sup>230</sup> The court pointed out that a variety of procedural mechanisms are available for enforcing forum-selection clauses.<sup>231</sup> It then remarkably stated that “[w]e have noted, however, that neither the Supreme Court, nor this Court, has ‘specifically designated a single clause of Rule 12(b)’—*or an alternative vehicle*—‘as the proper procedural mechanism to request dismissal of a suit based upon a valid forum selection clause.’”<sup>232</sup> The court then explicitly held that § 1404(a) is not the only vehicle for enforcing forum-selection clauses.<sup>233</sup>

*Gucci*, *Weibrecht*, and *TradeComet.com* have chipped away at the *Ricoh* case, compelling a conclusion that § 1404(a) did not replace *The Bremen*. Instead, these cases suggest a narrow and circular true holding from *Ricoh*: § 1404(a) is the appropriate standard for evaluating forum-selection clauses when a transfer is appropriate pursuant to § 1404(a). Consequently, because it is questionable as to when a § 1404(a) transfer is appropriate, if ever in forum-selection disputes, it is likewise unclear as to when *Ricoh* is applicable.

Another twist further complicates this manifestly unhelpful formula.<sup>234</sup> State courts apply two steps in forum-selection clause analysis.<sup>235</sup> First, courts apply general contract principles, such as fraud, duress, overreaching, and other such principles, in order to determine “validity.”<sup>236</sup> Second, courts consider principles of unfairness, unreasonableness, and public policy to determine the “enforceability” of the clause.<sup>237</sup> This suggests that, because there is only scant language on point in § 1404(a), *Ricoh*’s test only applies to enforceability, and state contract law best resolves the validity test.<sup>238</sup> At least one author has asserted that the “convenience of the parties” language of § 1404(a) is broad enough to cover principles of unfairness, unreasonableness, and public policy.<sup>239</sup> But this logic is questionable at best because these principles involve much more than mere “convenience.” Nevertheless, the contention that *Ricoh* did not clearly differentiate between the aspects of validity and enforceability is undeniably sound, as evidenced by *Gucci* and

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230. *Id.* at 478–79.

231. *TradeComet.com*, 647 F.3d at 475.

232. *Id.* (citing *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817, 822 (2d Cir. 2006) (emphasis added)).

233. *Id.* at 478 (“For these reasons, we reaffirm our prior precedents and hold that a district court is not required to enforce a forum selection clause only by transferring a case pursuant to § 1404(a) when that clause specifies that suit may be brought in an alternative federal forum.”).

234. Heiser, *supra* note 144, at 575.

235. *Id.*

236. *Id.* at 574–75.

237. *Id.* at 574–76.

238. *Id.* at 576–77.

239. *Id.* at 576.



*Weibrecht*. Consequently, it is unclear when and to what extent the Supreme Court's opinion in *Ricoh* applies. Given these deficiencies, a more doctrinally sound approach is needed and such an approach will be discussed in Part III, following the discussion of the former minority view.<sup>240</sup>

## 2. *The Former Minority View*

The minority view, which has since been abandoned, diverted from the majority at the very outset of the *Erie* analysis.<sup>241</sup> Rather than engaging in any discussion about the Rules of Decision Act, Rules Enabling Act, or venue statutes, the minority simply held that forum-selection clauses are matters of contract law, are substantive rather than procedural, and therefore should be governed by state law.<sup>242</sup> This view was espoused by the Third Circuit in *General Engineering Corp. v. Martin Marietta Alumina, Inc.*,<sup>243</sup> as well as by Justice Scalia in his *Ricoh* dissent.<sup>244</sup>

In *Martin*, Justice Hunter, writing for the United States Court of Appeals for the Third Circuit, began by characterizing the issue as one of contract construction.<sup>245</sup> Then he said that *The Bremen* was based in admiralty, and therefore, its power to create federal common law was limited.<sup>246</sup> By implication then, whether other courts choose to import *The Bremen* is discretionary. Next, the court, quoting *Erie*, claimed that there was not a sufficiently "strong federal interest or policy that would displace state law in the present case."<sup>247</sup> This is certainly true so far as contract construction goes, but the court assumes that forum-selection clause controversies concern contract construction and not venue. The court characterized the controversy in this way without further explanation.

Justice Scalia, who reached the same conclusion in his dissenting opinion in *Ricoh*, claimed that *Hanna*'s twin aims test—discouragement of forum shopping and avoidance of inequitable administration of the laws—was *the* test to differentiate between substance and procedure.<sup>248</sup> He then pointed out that the rule from the Eleventh Circuit Court of Appeals encourages

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240. See *infra* Part III.B.

241. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 33–41 (1988) (Scalia, J., dissenting); *Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.* 783 F.2d 352, 357 (3d Cir. 1986).

242. *Id.*

243. See *Martin*, 783 F.2d at 357. The Third Circuit no longer follows the minority view. See *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1994).

244. See *Ricoh*, 487 U.S. at 33–41 (Scalia, J., dissenting).

245. *Martin*, 783 F.2d at 356.

246. *Id.* at 356–57.

247. *Id.* at 357 (“[F]ederal jurisdiction alone does not create a sufficiently strong federal policy to deny the application of state law.”).

248. *Ricoh*, 487 U.S. at 39 (Scalia, J., dissenting).

forum shopping,<sup>249</sup> and from these premises, Scalia implicitly concluded that forum-selection clauses are substantive.<sup>250</sup>

The *Erie* Court was certainly concerned with the twin aims identified in *Hanna*, but it is a stretch to say, as Scalia did, that *Hanna*, let alone *Erie*, concerned substance-procedure distinctions. The law at issue in *Hanna* was unambiguously procedural, and the law at issue in *Erie* was unambiguously substantive.<sup>251</sup> Thus, the twin aims test was not the appropriate test in *Ricoh*, regardless of how well Scalia may have applied it.

In sum, the majority and minority approaches alike are prone to questionable applications of *Erie*, *Byrd*, *Hanna*, and § 1404(a). Consequently, *Erie* cases in the forum-selection context have been made unnecessarily confusing and doctrinally unsound, and many of the policy aims of *Erie* have been thwarted. In an attempt to correct these problems, this note proposes an analysis that holds more true to *Erie* and its progeny.<sup>252</sup>

### III. ANALYSIS

Justice Frankfurter was prescient enough to appreciate the deficiencies of a pure substance-procedure dichotomy,<sup>253</sup> even if his outcome-determination test had to be tweaked over the years. Despite Justice Frankfurter's warning, courts have been content with the sole inquiry as to whether forum-selection clauses are substantive or procedural.<sup>254</sup> Unfortunately, *Erie* analysis is not content with this inquiry<sup>255</sup>; *Guaranty Trust*, *Byrd*, and *Hanna* compel the conclusion that, while critical, the substance-procedure question is just the beginning of the *Erie* analysis.

This section will apply a more faithful and complete *Erie* analysis of forum-selection clauses than has been demonstrated in federal courts. Of course, the inquiry begins with the substance-procedure question, which will constitute the first part of this section.<sup>256</sup> The second part will complete the *Erie* analysis, paying careful attention to subtleties of the *Erie* doctrine that courts consistently overlook.<sup>257</sup>

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249. *Id.*

250. *Id.* at 39–41.

251. In *Erie*, the underlying legal issue was whether an individual walking along a path parallel to train tracks is a licensee or a trespasser. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70 (1938). In *Hanna*, the underlying legal issue was whether leaving copies of summons at an executor's residence is adequate service. *Hanna v. Plumer*, 380 U.S. 460, 461–62 (1965).

252. *See infra* Part III.

253. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945).

254. *See supra* Part II.C.

255. *See supra* Part II.A.

256. *See infra* Part III.A.

257. *See infra* Part III.B.

## A. The Validity of Forum-Selection Clauses Is a Question of Procedure

While the minority has reached the correct outcome, the majority begins with the correct premise: The validity of forum-selection clauses is a question of procedure. This conclusion is based on critical legal scholarship and early cases.

### 1. A Substance-Procedure Paradigm More In Touch With Reality

Justice Reed's concurrence in *Erie* got right to the heart of the modern problem: "The line between procedural and substantive law is hazy . . ." <sup>258</sup> Justice Frankfurter elaborated,

Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key-words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best, for the terms are in common use in connection with situations turning on such different considerations as those that are relevant to questions pertaining to ex post facto legislation, the impairment of the obligations of contract, the enforcement of federal rights in the State courts and the multitudinous phases of the conflict of laws. <sup>259</sup>

Professor Lawrence Solum identified the problem using an ingenious thought experiment. <sup>260</sup> Solum describes an imaginary world in which there is a cone of silence between the government and the citizenry. <sup>261</sup> In this world, the government is bound by, among other things, the Code of Adjudication, <sup>262</sup> whereas a Code of Conduct binds citizens—but the citizens have no knowledge of anything inside the cone of silence that encloses the government, including the Code of Adjudication. <sup>263</sup> Only three things pass through the cone of silence: the Code of Conduct (going out); "information relevant to particular legal disputes" (going in); and judgments (going out). <sup>264</sup>

It is easy to distinguish substantive law from procedural law with this experiment. Substantive law is comprised of the rules that exist outside the

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258. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring).

259. *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108 (1945) (internal citations omitted).

260. Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 206–14 (2004).

261. *Id.* at 207.

262. *Id.* at 207, 211.

263. *Id.* at 207, 210–11.

264. *Id.* at 207.

cone of silence, whereas procedural law consists of the rules that exist inside the cone of silence.<sup>265</sup> Thus, the inherent difficulty in distinguishing substance from procedure is diminished.<sup>266</sup> In the real world, the lack of a cone of silence causes substance and procedure to become entangled<sup>267</sup>—procedures are used for substantive purposes and vice-versa.<sup>268</sup>

Some laws are clearly procedural or substantive; the reasonable person standard in negligence cases has never been confused as procedural, and service of process is clearly not substantive.<sup>269</sup> But there also is an unmistakable gray area.<sup>270</sup> Fortunately, Professor Solum has suggested a more sophisticated model for classifying laws in the gray area. Solum suggests that there should be four classifications of laws having characteristics of both substance and procedure: substantive procedure, of which he identifies two types, and procedural substance, of which he also identifies two types.<sup>271</sup>

Type one substantive-procedure laws (SP1) are “procedural rules with intentionally substantive functions.”<sup>272</sup> The parol evidence rule is a classic example.<sup>273</sup> In form, the parol evidence rule is a rule of evidence, but in function it is a rule meant to regulate the conduct of parties to a contract.<sup>274</sup> This is illustrated by Solum’s thought experiment.<sup>275</sup> In his imaginary world, the parol evidence rule, being a rule of evidence, would be part of the Code of Adjudication as a procedural rule, and in the Code of Conduct as a substantive rule.<sup>276</sup> In Solum’s imaginary world and in the real world, contracting parties are aware of the parol evidence rule and, thus, conform their primary conduct—that is, conduct outside the adjudicatory process<sup>277</sup>—to the rule.

Type two substantive-procedure laws (SP2) are “particularized conduct rules.”<sup>278</sup> SP2s are mechanisms that “take a general legal rule and apply it to a particular factual context” and “can resolve a dispute by guiding primary conduct.”<sup>279</sup> An injunction is a good example of a SP2.<sup>280</sup> Injunctions are

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265. See *id.*

266. See Solum, *supra* note 260, at 213–14.

267. *Id.* at 215.

268. *Id.* at 216.

269. See *id.* at 216, 221.

270. See *id.*

271. *Id.* at 215–22.

272. Solum, *supra* note 260, at 216.

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.* at 216–17.

277. Solum, *supra* note 260, at 204.

278. *Id.* at 219.

279. *Id.*

280. *Id.* at 220.

undoubtedly procedural mechanisms—a private citizen cannot issue one. However, their function is to apply some general substantive rule to a particular context and, thus, alter the primary conduct of individuals.<sup>281</sup> Like SP1s, SP2s are procedural in form and substantive in function.

Type one procedural-substance laws (PS1) are “formal conduct rules with intentionally procedural functions.”<sup>282</sup> These laws are substantive in form but are created to serve the adjudicatory system.<sup>283</sup> Examples include laws “prohibiting obstruction of justice, witness tampering, and destruction of evidence.”<sup>284</sup> PS1s undoubtedly alter the primary conduct of individuals but have a purpose of serving the administration of justice.<sup>285</sup>

Lastly, type two procedural-substance laws (PS2) are “particularized decision rules.”<sup>286</sup> “[T]hey are procedures that transform the abstract and general principles of substantive law into concrete and particular guidelines for deliberation.”<sup>287</sup> Examples include judgment as a matter of law and jury instructions.<sup>288</sup> Like PS1s, PS2s are substantive in form, but procedural in function.

Perhaps future jurists will better conform the *Erie* analysis to these realities. However, the purpose of this note is not to suggest an alternative to the *Erie* doctrine but rather to apply it more faithfully, and, despite its shortcomings, the *Erie* analysis begins with the substance-procedure dichotomy. To reconcile this crude dichotomy with legal and practical realities, judges should give less consideration to the form of a law than to its intended function. Thus, laws with procedural functions (PS1s and PS2s) should be treated as “procedural,” and laws with substantive functions (SP1s and SP2s) should be treated as “substantive.”

Rules governing forum-selection clauses are characterized by qualities common to SP1s and PS1s. Like SP1s, forum-selection clauses are procedural rules that undoubtedly alter conduct. For example, contract drafters in Montana are less likely to include forum-selection clauses because Montana has declared them invalid. But it does not follow that Montana enacted its rule to alter primary conduct. After all, there is no penalty for including a forum-selection clause; the clause will simply not be enforced. Had the intent of the Montana legislature been to deter drafters from including forum-selection clauses, the law probably would have been written as follows: “It shall be punishable by law for a contractual agreement to include a provi-

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281. *Id.* at 219.

282. *Id.* at 221.

283. Solum, *supra* note 260, at 221.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 222.

288. *Id.* at 221–22.

sion designating the venue for adjudication.” By punishing the inclusion of a forum-selection clause, regulation of primary conduct would clearly have been the intent of the law. However, being that the regulation of primary conduct is probably not the intent of rules governing forum-selection clauses, classification of such rules as SPIs is not proper.

Forum-selection clauses should be classified as PSIs. First, even though they are found in contracts, giving the appearance of a substantive law issue, the aim of rules governing forum-selection clauses is more to serve the adjudicatory system than to alter primary conduct. The modern rules of forum-selection gravitate around the idea of procedural fairness. Second, it is hard to imagine that when a party contemplates their obligations under a contract, forum selection is among them. Forum selection is an issue that typically arises only after the initiation of a lawsuit. These two considerations, based on the Solum model, weigh heavily towards a determination that forum-selection clauses are procedural in nature.

## 2. *History*

In addition to modern critical analysis, the earliest treatment of forum-selection clauses in English and American courts supports the conclusion that they are procedural. Certainly, courts never directly addressed the question, but this understanding is implicit in their aversion to forum-selection clauses.

The central premise of the Lord Chancellor’s opinion in *Scott v. Avery* was: “[P]arties cannot by contract oust the ordinary courts of their jurisdiction.”<sup>289</sup> If forum-selection clauses were merely substantive provisions creating rights, duties, and remedies among the parties, courts would not have feared loss of jurisdiction. But Justice Hunt made it clear that was not the case: “Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him.”<sup>290</sup> Further, and arguably even more on point, “parties have no more right to enter into stipulations against a resort to the courts for their remedy in a given case than they have to provide a remedy prohibited by law.”<sup>291</sup> Illegal remedies and forum-selection clauses were similar in that they would not be enforced. They differed, however, in the bodies of law that they contravened. Illegal remedies were repugnant to substantive contract principles; forum-selection clauses were repugnant to procedural considerations of jurisdiction and venue.

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289. 10 Eng. Rep. 1121 (1856).

290. *Home Ins. Co. of N.Y. v. Morse*, 87 U.S. 445, 451 (1874).

291. *Id.* at 452–53.

Therefore, history, in addition to modern critical analysis, lends support to the notion that forum-selection clauses are best classified as procedural.

#### B. State Law Should Govern the Validity of Forum-Selection Clauses in *Erie* Cases

Having concluded that rules governing forum-selection clauses are procedural, we find ourselves in the same position as that of the parties in *Byrd* and *Hanna*. The question then, according to *Byrd*, is whether rules governing forum-selection clauses are bound up with the underlying rights and remedies of contracts—specifically whether these rules are outcome determinative and whether they possess a special relationship to those rights and remedies. First, despite some commentary to the contrary,<sup>292</sup> the rules governing forum-selection clauses are outcome determinative. Second, these procedural rules possess a special relationship to substantive contract law.

The outcome-determinative nature and special relationship of forum-selection clause rules to substantive contract law are readily apparent when framed in light of *Byrd*'s qualifications to the outcome-determination test of *Guaranty Trust*. As previously mentioned, *Guaranty Trust* was concerned with unnecessarily applying state procedural law in diversity cases, and *Byrd* was a reaction to the impracticability of the *Guaranty Trust* test. *Byrd* did not overturn *Guaranty Trust*; it merely refined it. Outcome determination is still good law, subject to *Byrd*'s qualifications.

The potential for outcome determination in the immediate context stems from the possibility that a change of forum could bring a change in law. Because this analysis is tricky, one must remember that *Erie*'s value is federalism, not simplicity. According to *Klaxon*, federal courts must apply the prevailing conflict-of-laws doctrine of the state in which they sit.<sup>293</sup> However, the question of which conflict-of-laws doctrine to apply depends on the validity of the forum-selection clause.

For example, suppose that a particular forum-selection clause is contested in a case brought in state *A*, and that state *A*, applying *The Bremen*'s standard, would for some reason require a transfer from state *A* to state *B*. In that case, if the court properly transfers pursuant to § 1406(a), the conflicts doctrine of state *B* would determine the substantive law. On the other hand, suppose the court instead uses the state standard and suppose that state *A*'s standard would for some reason invalidate the same forum-selection clause as above, keeping the case in state *A*. In that case, adherence to *Klaxon*

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292. Eric Fahlman, Note, Forum-Selection Clauses: Should State or Federal Law Determine Validity in Diversity Actions?—*Stewart Organization, Inc. v. Ricoh Corp.*, 108 S. Ct. 2239 (1988), 64 WASH. L. REV. 439, 453 (1989).

293. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

would require use of state *A*'s conflict-of-laws doctrine to determine the substantive law. Because the question as to whether the state or federal standard is applied can determine, in turn, which conflict-of-laws doctrine will be applied, a concrete possibility exists that rules governing forum-selection clauses are outcome determinative.

An argument has been made that forum-selection clauses are not outcome determinative, however, based on the following syllogism: If *Ricoh* held that § 1404(a) categorically governs forum-selection clauses and if *Van Dusen* held that transfers pursuant to § 1404(a) must retain the law of the transferring forum, then forum-selection clauses are not outcome determinative because a transfer would not lead to a change in law.<sup>294</sup>

This syllogism presents three problems. First, *Ricoh*'s holding is too flimsy to be decisive here. As shown earlier, courts today continue to transfer and dismiss pursuant to statutes other than § 1404(a), such as § 1406(a) and Rule 12(b)(3),<sup>295</sup> and, even when transferring under § 1404(a), many courts use the *Bremen* test for forum-selection validity anyway.<sup>296</sup> As long as a reliable holding from *Ricoh* is so elusive, it should not stand as a bed-rock principle that forum-selection clauses are not outcome determinative.

Second, there are strong arguments to suggest that *Ricoh* was incorrectly decided.<sup>297</sup> By the plain language of the statutes, § 1406(a) is more appropriate for transferring cases than § 1404(a) in the forum-selection clause context. Forum-selection clauses are not validated or invalidated because of convenience.<sup>298</sup> If they are given effect, it is because the words of the contract indicate that the suit was brought in the "wrong" forum.<sup>299</sup> Additionally, as Justice Scalia argued, while the venue statutes may provide courts with the power to enforce transfers, the separate question of whether they must transfer is answered elsewhere, be it from *The Bremen* or from the applicable state law.

Finally, this syllogism runs into problems with the twin aims test of *Hanna*. The holding in *Van Dusen* was intended to prevent litigants from forum shopping.<sup>300</sup> As previously mentioned, however, the logic of *Van Dusen* gets inverted in the forum-selection clause context.<sup>301</sup> If § 1404(a) is used to transfer the case, a plaintiff facing unfavorable law in the designated

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294. See Fahlman, *supra* note 292, at 454.

295. See *supra* Parts II.C.1.b–d.

296. See, e.g., *Terra Int'l Inc. v. Miss. Chem. Corp.* 922 F. Supp. 1334, 1367–68 (N.D. Iowa 1996).

297. See Ryan T. Holt, Note, *A Uniform System For the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1930–33 (2009) (arguing that § 1404(a) is inadequate to resolve forum-selection clause disputes).

298. See *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 550 (1982).

299. *Id.*

300. See *Van Dusen v. Barrack*, 376 U.S. 612, 633–34 (1964).

301. See *infra* notes 202–09 and accompanying text.



forum could bring suit in a favorable forum knowing in advance that the case would be transferred and that the court designated in the contract would have to apply the law of the transferor court. This is forum-shopping and inequitable administration of the laws for the sole reason of the "accident of diversity." If § 1404(a) is not used, the syllogism breaks down and forum-selection clause rules become outcome determinative.

Because these rules are manifestly outcome determinative, the next question is whether there is a special relationship between forum-selection clauses and substantive contractual rights and remedies. In *Byrd*, the Court felt that South Carolina's practice of having judges decide the factual question as to whether an individual was an "employee" within the Workmen's Compensation Act was not a procedural practice bound up with the underlying substantive remedy that *Byrd* sought.<sup>302</sup> However, rules governing forum-selection clauses are the quintessential procedural rule to have a special relationship to a substantive right.

Forum-selection clauses are part of the private law of the contract as a whole. A drafter cannot consider the substantive provisions of the contract without some thought to forum selection and its sister provision, choice of law. It is a way of saying, "In exchange for the promises I am receiving, I give up my right to bring suit in any forum but the one designated within the contract." Thus, the designated forum is part of the consideration for the agreement. This truth, first recognized in *The Bremen*, is the primary justification for the liberal modern trend.<sup>303</sup> If the justification for a liberal standard is that the parties are getting what they bargained for, then we are implicitly recognizing that the forum-selection clause is just as much a part of the private law of the contract as any other part. Therefore, any argument that rules governing forum-selection clauses are merely a "form and mode" of enforcing the substantive rights of contracts is inconsistent with *The Bremen*. It is not just a form of enforcing contracts; it is an essential part of the contract itself. This quality compels the conclusion that forum-selection clauses are bound up with the rights and obligations of contractual agreements. Therefore, because forum-selection clauses are outcome determinative and because they are uniquely characterized as having a special relationship to underlying rights, state law should govern their validity in diversity cases.

#### IV. CONCLUSION

Forum-selection clauses are a legal anomaly with which jurists have struggled to reconcile several legal theories. They appear substantive and

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302. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 536 (1958).

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

often have substantive effects, yet they operate procedurally. Despite their essential nature as private law, they displace the public law of personal jurisdiction. Further, the complications of forum-selection clauses are made even more difficult by the complications of the *Erie* doctrine and the flawed legal conclusions appropriated by jurists at almost every stage in the analysis.

Forum-selection clauses and the rules that govern them function more procedurally than substantively. However, because of their special relationship to the substantive rights inherent in contracts, a faithful adherence to *Erie* and its progeny requires that state laws be used to govern forum-selection clauses in federal cases resting in diversity.

*James C. McNeal\**

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