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ADRIFT ON *ERIE*: CHARACTERIZING FORUM-SELECTION CLAUSES

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Since it was decided 80 years ago, *Erie* has grown into one of our greatest, or perhaps most notorious, cases. But what does it stand for? What is it based on? Is it even correct? There is a wealth of scholarship addressing these questions. *Erie* has become something of a Rorschach test: a complex pattern onto which scholars can project a wide array of different concerns.

Here, we aim to offer a very simple view of *Erie*. As we will describe it, *Erie* is a case about power. It is about, first, who has the power to make certain laws, and then, second, who has the power to interpret them. Seen from this perspective, *Erie* has nothing to do with a distinction between substance and procedure. That distinction becomes relevant only later, and only because of the conflict of laws rule that a forum will use its own procedural law, even if deciding a case according to foreign substantive law. This rule, of course, requires a court to decide what is substantive and what is procedural. That is a familiar conflict of laws topic: substance-procedure characterization.

Yet *Erie* analysis—though it is often associated with distinguishing issues of substance from procedure—is different from conflict of law substance-procedure characterization. Indeed, something that is

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procedural from the conflict of laws perspective may still be "substantive for *Erie* purposes." How did this happen? And what insights can be learned from the conflict of laws perspective? In what follows, we will try to answer those questions. We will give the simple reading of *Erie*. We will show how it requires conflict of laws substance-procedure characterization, and how the Supreme Court has started doing something else instead.

Or has it? No one really seems to know what the Court is doing when it engages in *Erie* analysis. Part of what we seek to demonstrate is that *Erie* analysis is just conflict of laws substance-procedure characterization with a few other steps thrown in. It is intelligible, that is, in conflict of laws terms—more intelligible, probably, than on its own terms.

To demonstrate this last point, we will do two things: First, we will describe the approach that the Court has come up with—initially in the way the Court has developed it, and then from a conflict of laws perspective. We believe the conflicts description is far easier to understand and does a better job of illuminating the actual issues at stake. Second, we will turn to a problem that has puzzled both courts and scholars: Is a contractual choice-of-forum clause substantive or procedural for *Erie* purposes? *Erie* analysis struggles with this question but the conflict of laws analysis offers an easier resolution.

I. THE ARGUMENTS OF *ERIE*

The facts of *Erie* are well known and relatively simple; we rehearse them here only briefly.[1] On a dark night, Harry Tompkins was injured by a train operated by the Erie Railroad while walking alongside the tracks in Pennsylvania.[2] Tompkins was a Pennsylvania resident; the railroad company was a New York corporation.[3] Invoking federal diversity jurisdiction, Tompkins filed suit in the Southern District of New York.[4]

A key issue in the case was the duty of care: what degree of fault on the part of the railroad was required for Tompkins to recover? Was mere negligence enough? Or would Tompkins have to show something more—

1. *See, e.g.*, Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1 (2012), for a more extended recital.

2. *See* Erie R. v. Tompkins, 304 U.S. 64, 70 (1938). For an in-depth recounting of the story, see, e.g., Edward A. Purcell, Jr., *The Story of* Erie*: How Litigants, Lawyers, Judges, Politics, and Social Change Reshape the Law*, *in* CIVIL PROCEDURE STORIES 21, 36–38 (Kevin M. Clermont ed. 2d. ed. 2008).

3. *Erie*, 304 U.S. at 69.

4. *See id.*

"willful or wanton injury?"[5] A court addressing this question today would begin by deciding which law governed the issue. Most choice of law systems, modern and traditional, would select the law of the place of the accident: Pennsylvania law.[6]

That was also, more or less, the conclusion of the lower federal courts in *Erie*. Although *Erie* analysis is now used to choose between state and federal law, no one thought that federal law might govern this garden-variety tort issue. (In fact, it couldn't, since there was no federal law setting the duty of care). Nor did anyone think that the law of any state other than Pennsylvania law might govern the question of whether conduct within Pennsylvania was wrongful. The answer to the question of the required degree of fault, then, would have to come from Pennsylvania law.

More or less. That qualification requires a brief explanation of the legal ontology of the pre-*Erie* regime—the one associated with *Swift v. Tyson*.[7] Under the thinking of that time, there were several different types of law that might have governed in a particular case. First, there was federal law: federal statutes, the Constitution, and some judge-made federal law such as admiralty law.[8] This law was made by the federal government (or, in the case of the Constitution, the national People) and federal courts were its authoritative interpreters. The U.S. Supreme Court has the last word on the content and meaning of federal law.

Second, there was state law: state statutes, state constitutions, and some judge-made law, such as rules of real property. This law was made by state governments, and state courts were its authoritative interpreters. A state's court of last resort has the last word on the content and meaning of that state's law.[9]

Third—the category that no longer exists in modern legal thought[10]—there was general law. General law included most of the

5. *See* Tompkins v. Erie R.R., 90 F.2d 603, 604 (2d Cir. 1937).

6. The traditional territorial approach selected the law of the state where the right to redress vested, which, in the case of torts, was generally the location of the tort: *lex loci delicti*. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAWS: WHAT CONSTITUTES AN APPOINTMENT OF MOVABLES § 394 (Am. Law Inst. 1934). Modern approaches would reach this conclusion using interest analysis.

7. Swift v. Tyson, 41 U.S. 1, 18–20 (1842).

8. *See id.*

9. *See id.*

10. Some scholars defend the continued existence of general law. *See, e.g.*, Lea Brilmayer, *Untethered Norm after* Erie Railroad Co. v. Tompkins: *Positivism, International Law, and the Return of the "Brooding Omnipresence*, 54 WM. & MARY L. REV. 725 (2013); Caleb Nelson, *The Persistence of General Law*, 106 Colum. L. Rev. 503 (2006); Stephen E. Sachs, *Finding Law*, 107 CAL. L. REV. (forthcoming 2019). To the extent that these scholars argue that judges making common law (state or federal) sometimes write as though they are finding law rather than making it, they are certainly

classic common law subjects, such as torts and contracts.[11] The distinctive thing about general law was that, although it was the law *in* a state—what degree of fault Tompkins had to show to recover was a general law question[12]—it was not the law *of* a state in the way that local law was: an exercise of that state's sovereign prerogative to make law.[13] General law was not understood to be *made* by state courts or by states at all; instead, it was *found*.[14] And because it was not made by any particular state, no state and no court could claim authority to definitively determine its content. Courts in different states, or state and federal courts within the same state, might disagree about the content of the general law, and no court had the power to bind any other to follow its interpretation.[15]

What that meant for Tompkins was that while all courts agreed which law determined the degree of fault he needed to show, they might still differ on what the content of that law was. And so, by picking the right forum, he could obtain favorable law—or, more precisely, a favorable interpretation of the general law that everyone agreed controlled his claim.[16] That is what he did. Pennsylvania courts had ruled that the

correct. They are also right in arguing that a state could arrange its legal system so that its judges were charged with applying law they had no power to make. Such would be the case if a state legislature enacted a statute providing that the tort law of the state would be identical to that of Ohio, changing with the decisions of Ohio courts. (Something similar actually happens with some state constitutional provisions, if the state court of last resort declares them identical to a similar federal provision and thereby commits itself to follow federal decisions interpreting the federal provision.) The key feature of the general law for our purposes, and the feature that no longer exists, was that it operated as law within the state in the absence of any state act recognizing it as law and was beyond the power of state courts to alter.

11. *See, e.g.*, Edward A. Purcell, Jr., *Ex Parte* Young *and the Transformation of the Federal Courts, 1890–1917*, 40 U. TOL. L. REV. 931, 947 (2009) (describing "'general' law to include most common-law fields, including wills, contracts, [and] torts . . .").

12. Tompkins v. Erie R.R., 90 F.2d 603, 604 (1937).

13. Justice Holmes described general law as "the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" Erie R. v. Tompkins, 304 U.S. 64, 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

14. *See, e.g.*, Baltimore & O. R. Co. v. Baugh, 149 U.S. 368, 378-79 (1893) (explaining how the general law was not created by governments but deduced by judges).

15. *See generally* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1896–97 (2003) (discussing independent interpretation of general law).

16. The railroad actually argued that this was a question of local law. *See* Brief for Petitioner at 23–25, Erie R. v. Tompkins, 304 U.S. 64 (1938) (No. 367), 1938 WL 35347, at *23–25. The brief makes interesting reading. It does not make a frontal attack on *Swift*, but instead argues that courts have misapplied the doctrine, which should distinguish between local and general issues primarily by the criterion of whether state courts have established a firm rule. That is a fair reading of *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910), and would get you most of the way to *Erie* by effectively replacing the local/general distinction with a settled/unsettled distinction. *Id* at 33.

standard was willful or wanton, but most other states and the federal courts had decided that mere negligence was enough. So, by picking the Southern District of New York, Tompkins was able to avoid the unfavorable interpretation of the Pennsylvania courts.

Ultimately, of course, the ploy didn't work. The Supreme Court decided to reject the *Swift* framework. There are many different theories about how exactly the opinion works; *Erie* itself gives three different arguments in support of the decision: one grounded in statutory interpretation, one grounded in policy analysis, and one grounded in the Constitution.

The statutory argument was that, for one hundred years, the Court had been misreading the Rules of Decision Act, which specified that, in cases where federal law did not supply the rule of decision (i.e., diversity cases), federal courts should use the "laws of the several states."[17] "Laws," the Court had thought, meant statutory law, not unwritten law. But, Justice Brandeis wrote, "the more recent research of a competent scholar" (namely, Brandeis's friend Charles Warren), has "established that the construction given to [the Act] by the Court was erroneous."[18]

Academics might hope that their research will induce the Court to abandon a century of precedent (though they might also hope for a loftier accolade than "competent"), but that seldom occurs—especially not in the context of statutory interpretation, where the Court has explained that the principle of stare decisis has exceptional force.[19] Thus, *Erie* also offered a policy basis for rejecting the *Swift* regime. The hope of Justice Story—*Swift's* author—was that state courts would follow federal court explication of the general common law. That would produce nationwide uniformity, which would be desirable, particularly for commercial law, which was at issue in *Swift*. But state courts proved less complaisant than Story had hoped. (This may have been at least in part because federal courts aggressively expanded the category of general law, wresting away from state courts the last word not only over commercial matters but also garden-variety torts.[20]) In consequence, rather than uniformity throughout

17. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.92 (codified as amended at 28 U.S.C. § 1652 (2006)).

18. *Erie*, 604 U.S. at 72–73, 92 n.5.

19. *Id.* at 77 ("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."); *see also, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S.Ct. 2401, 2409 (stating that "*stare decisis* carries enhanced force when a decision . . . interprets a statute").

20. See Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 Tul. L. Rev. 1263 (2000). Justice Brandeis also attributed the *Swift*

the nation, the *Swift* regime produced disuniformity within individual states—something that strikes most observers as at least prima facie undesirable.[21] Policy-*Erie* thus seeks to promote intrastate uniformity. It suggests that, to the extent possible, a federal court exercising diversity jurisdiction should be "only another court of the State."[22]

But even a strong policy argument might struggle to overcome one hundred years of statutory interpretation. Last, *Erie* offers something irresistible: the Constitution. The *Swift* regime, Brandeis proclaims, was not just mistaken in its statutory interpretation and undesirable in its policy consequences.[23] It was unconstitutional. Exactly which constitutional provision was violated has been the subject of some debate,[24] but the basic outlines of the constitutional argument are relatively clear. The argument is about the distribution of power within our constitutional system: who has the authority to make certain kinds of law, and who, concomitantly, has the authority to determine the meaning of those laws.

In order to tee up the question about who can make certain laws, *Erie* requires a preliminary step: the claim that laws are in fact made, rather than found.[25] If the general common law existed independent of state legal

regime's failings to the "[p]ersistence of state courts in their own opinions on questions of common law." *Erie*, 604 U.S. at 74.

21. *See Erie*, 604 U.S. at 74 (noting that "the benefits expected to flow from [Swift] did not accrue"). If you think that the law declared by federal courts was superior in quality to that declared by state courts, or that federal courts were primarily combatting bias against out-of-staters, then the *Swift* regime might actually seem desirable. *See, e.g.*, Michael S. Greve, THE UPSIDE-DOWN CONSTITUTION 149-151 (2012). If you take the modern view of the nature of common law, however, this policy argument is not weighty enough to disrupt the constitutional allocation of authority within our federal system. That, ultimately, is what the *Erie* court concluded.

22. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

23. *See* Erie R. v. Tompkins, 604 U.S. at 77–78 (1938).

24. *See generally* Kermit Roosevelt III, *Valid Rule Due Process Challenges*: Bond v. United States *and* Erie's *Constitutional Source*, 54 WM. & MARY L. REV. 987 (2013).

25. This needn't be the case necessarily or in all conceivable legal systems. The premise that Brandeis needs is not that law cannot be found in an epistemological sense, nor that states could not replicate the situation of found law by instructing federal courts to exercise interpretive independence with respect to state law. *See* Sachs, *supra* note 10. (State X could, presumably, do both these things by enacting a statute specifying that its tort law would be identical to the tort law of sister state Y, as pronounced by Y courts, and that no other courts need defer to X court interpretations of Y law. Some states have in fact done similar things by announcing that the content of their constitutional provisions is identical to that of similar federal constitutional provisions, as articulated over time by the Supreme Court. *See, e.g.*, People v. Caballes, 851 N.E.2d 26, 31–45 (Ill. 2006) (discussing variants of the "lockstep" doctrine)). It is simply that in the world *Erie* confronted, states had the power to make law on certain topics, that they had delegated that power to their judges, and that they had not prescribed federal or sister-state interpretive independence with respect to that law. Holmes, whom Brandeis quoted at length, sometimes wrote as though he was announcing a general jurisprudential principle about the nature of law which states could not alter. *See* Sachs, *supra* note 10. *Erie's* pronouncements

systems—if it was not made by anyone but rather, as the skeptical Holmes put it, a "brooding omnipresence in the sky,"[26] independent of the state but obligatory within it unless and until changed by statute—then arguments about which sovereign had the power to make one of its rules would be beside the point. *Erie* rejected that idea: there may be customs out there in the world; there may be majority rules or consensus among judges, but those things are not the law of a state unless the state makes them so.[27] The first step in *Erie's* argument, then, is the claim that law does not exist as law without some sovereign behind it. There is no general common law[28] that is obligatory of its own force within states unless changed by statute.

So, what was the source of the rule about the degree of fault that Tompkins had to show? With the general common law—a body of law without a sovereign behind it; law without a lawmaker—out of the picture, the possible candidates were federal and state law. The rule plainly was not federal. Congress has the power to prescribe such a rule for interstate railroads, but that does not mean that federal courts have the power to make it in the absence of congressional action. More important, the federal government as a whole lacks the power to make all of the rules

should, perhaps, have been limited to the proposition that the power to make and interpret certain laws was given to the states, not that it had to remain with them. Given the context of *Erie*, in which state and federal judicial systems were fighting for authority over certain issues, it seems reasonable to suppose that states did not intend to disclaim this authority. *See* generally Edward A. Purcell, Jr., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2nd ed. 2000). The best evidence that federal courts were in fact seizing authority against the will of the states is probably the fact that even when state courts characterized some issues as "local"—and hence subject to state and not general law—federal courts rejected that characterization, insisting that the issues were general, and hence that federal courts were independent. *See* generally Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 665, 693–98 (2013) (describing process whereby states attempted to localize general law while federal courts attempted to generalize local law).

26. S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

27. *See Erie*, 604 U.S. at 78. The crucial sense of the made vs. found distinction, then, is not epistemological: it is not how judges go about determining what the law is. (They might look to custom or consensus, or a Restatement, or the words of a statute.) It is ontological: a rule is not the law of a state unless the state says it is. And when the state says it, the state is, at least presumptively, authoritative about what that law means. (States could, as noted above, disclaim interpretive authority. But this is an unusual enough step that it seems wise not to assume they have done so unless they say so explicitly. The mere idea that judges should identify legal norms by a process that looks like finding rather than making is not such a statement. Judges obviously find the law in this sense when they interpret state statutes, but no state of which we are aware has decided that the interpretations of its courts should not be authoritative with respect to its statutes.)

28. *Erie* says that "[t]here is no federal general common law," *id.*, which we view as slightly imprecise: the upshot of *Erie*'s claim about the nature of law is that there is no general common law *at all*.

that federal courts had identified as part of the general law. And if any part of the federal government did make that law, it would be real federal law, preempting inconsistent state law and creating federal question jurisdiction. No one thought that the general common law was that kind of federal law. So, whatever lawmaking power lay with the federal government as to the required degree of fault, that power had not been exercised. The law that prescribed the required degree of fault was not federal law.

That left state law. The first step of the constitutional *Erie* argument is that there must be some sovereign behind the rules previously understood as general common law; the second step is that that sovereign must be a state because federal lawmaking power does not extend to the full body of general common law and, in any case, has not been exercised. And based on the dominant choice of law understanding at the time, the sovereign behind the specific rule in Tompkins's case had to be the State of Pennsylvania. The required degree of fault is an issue of Pennsylvania State law. Who has the authority to decide what the content of Pennsylvania law is? This is the third step of *Erie*: the sovereign that makes a law is the sovereign that gets to have the last word on the content of that law. It is imaginable, of course, that a state might disclaim that power—it might say that sister-state and federal courts were not required to follow the interpretations of the state court of last resort. It might even subordinate its own interpretations by saying that its law was identical to that made by actors outside the state—that its constitutional free speech guarantee was identical to the federal First Amendment as interpreted by the Supreme Court.[29] (A federal statute might say that federal procedural law would be whatever the states used at the time of trial.[30]) But as a starting point, and in the absence of some unusual specification, state courts are authoritative as to what their state law means.

So, the constitutional argument of *Erie*, and the predominant basis on which its outcome rests, is an argument about power—about which sovereigns in our system have the power to make certain laws, and which sovereigns consequently have the power to authoritatively interpret them. The conclusion of the constitutional argument is straightforward and now relatively uncontested. Within the realm of authority reserved to the states—or within the zone where state and federal authority overlap but federal power has not been exercised—states make the law and have the power to say what their law means.

29. *See Caballos*, 851 N.E.2d at 31–45 (discussing lockstep doctrine).

30. *See* The Conformity Act, Act of June 1, 1872, ch. 255, § 6, 17 Stat. 196 (1872). (repealed).

II. THE *ERIE* PROBLEM

Interestingly, the problem that *Erie* analysis is currently understood to address has very little to do with the constitutional argument described in the preceding section. That argument is about power, not policy. In fact, *Erie* was initially understood this way. The earliest Supreme Court citation to *Erie*, *Ruhlin v. New York Life Insurance Company*,[31] described *Erie* explicitly as a case about power—more specifically, about whether federal courts were bound to follow state court interpretations of contracts governed by state law. *Erie*, the Court said, "settles the question of power. The subject is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court."[32] A number of similar decisions swiftly followed *Erie*, vacating lower court decisions that had characterized certain issues as matters of general law, rather than state law.[33] The better-known *Klaxon v. Stentor* decision, likewise, reversed a lower federal court that had assumed the authority to use general law principles of conflict of laws rather than following state court choice-of-law decisions.[34] Again, the main theme of *Klaxon* is deference to state authority. "Our federal system," the Court wrote, "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."[35]

Klaxon did, however, highlight policy-*Erie* in a way that the earlier decisions did not. If federal courts did not follow state court choice-of-law decisions, the Court noted, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."[36] It went on to characterize this "principle of uniformity within a state" as the principle "upon which the *Tompkins* decision is based."[37] Rather than a decision about the relative powers of state and federal courts, then, *Erie* was coming to be seen as a decision based on a policy of uniformity.[38]

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31. Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

32. *Id.* at 205.

33. *See, e.g.*, New York Life Ins. Co. v. Jackson, 304 U.S. 261 (1938); Rosenthal v. New York Life Ins. Co., 304 U.S. 263 (1938); Hudson v. Moonier, 304 U.S. 397 (1938).

34. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941).

35. *Id.* at 496.

36. *Id.*

37. *Id.*

38. *See also* Andrew D. Bradt, Symposium, *Forum Selection After* Atlantic Marine: Atlantic Marine *and Choice-of-Law Federalism*, 66 HASTINGS L. J. 617, 634 (2015) ("One hallmark of the Court's [choice-of-law decisions is] a willingness to accept some degree of interstate disuniformity

As far as the issue that *Erie* itself confronted was concerned, the power perspective aligned perfectly with the policy of uniformity. One way to produce uniformity between state and federal courts is for federal courts to use state law, and all of the decisions holding that a certain issue was not one of general law (because the general law did not exist as law), but rather state law, achieved uniformity while simultaneously recognizing state power over the particular issue and the content of its own law. After *Erie*, the prospect of disharmony appeared not when an issue was governed by general law (because, again, there were no such issues) but when it was governed by *federal* law.

That might be because the substantive law governing the issue was federal—for instance, the issue was related to rights and liabilities of the federal government or its instrumentalities.[39] There are such decisions, but these cases are still recognizably about power: the federal government has the power to displace state law on issues of federal concern, and the cases recognize instances in which it has done so. The possibility that modern *Erie* analysis addresses, however, is a different one: it is that federal law might govern an issue in a diversity case because the issue is procedural.[40]

At this point, *Erie* has (apparently) turned into a familiar choice of law issue: substance-procedure characterization. A court may use foreign substantive law to decide a case, but it will still use its own local procedure.[41] Hence, some means of distinguishing substance from procedure is required.

Again, it should be noted, this is not the problem that *Erie* itself confronted. Substance-procedure characterization has nothing to do with the existence of the general common law, nor with the question of whether state courts have the last word on the meaning of state law. The need for

in exchange for intrastate uniformity."). Constitutional- or power-*Erie* is still present in modern *Erie* analysis via the requirement that a federal rule really regulates procedure. This step recognizes the limited scope of federal lawmaking power. However, it has never affected the outcome in any *Erie* case.

39. Some early *Erie* cases conclude that certain issues, such as contracts with the federal government or its instrumentalities, are governed by federal substantive law. *See, e.g.*, D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942); United States v. Bethlehem Steel Corp., 315 U.S. 289 (1942); Clearfield Trust Co. v. United States, 318 U.S. 744 (1943). The interaction between state substantive law and federal substantive law is indeed an *Erie* problem—it is far closer to the original *Erie* decision than modern *Erie* analysis—but it is not the focus of this article.

40. As we will argue later, characterizing *issues*, rather than state or federal *laws*, as procedural is a mistake: each sovereign is entitled to decide whether its laws are substantive or procedural. That is the import of constitutional *Erie*. But since this is the conventional framing, we use it here.

41. *See, e.g.*, RESTATEMENT (FIRST) OF CONFLICT OF LAW: WHAT LAW GOVERNS PROCEDURE § 585 (Am. Law Inst. 1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS: ISSUES RELATING TO JUDICIAL ADMINISTRATION § 122 (Am. Law Inst. 1971) (stating general principle).

such characterization existed before *Erie*, at least in theory, since a federal court applying state local law or general common law would still have applied federal procedure.[42] What made the problem acute was not *Erie* but the Federal Rules of Civil Procedure, adopted in 1938: before then, federal courts followed the Conformity Act of 1872, which prescribed that federal procedure would conform "as near as may be" to state laws "existing at the time."[43]

The first significant Supreme Court decision describing *Erie* in terms of substance and procedure is *Guaranty Trust v. York*, in which the Court confronted the question of whether a federal court should allow a New York limitations period to foreclose relief on a New York state-law claim.[44] This was a conventional choice-of-law characterization problem with a relatively clear answer: traditional choice-of-law analysis, and apparently New York law too, deemed limitations periods procedural, meaning that a forum would use its own law (rather than the foreign law that created the claim) to determine timeliness.[45]

But *Guaranty Trust* took another tack. *Erie* analysis, the Court said, was not the same as choice of law substance-procedure characterization. True, the principle that courts used local procedure even while deciding substantive issues under foreign law was familiar from conflict of laws.[46] "But," the Court said,

> of course "substance" and "procedure" are the same key-words to very different problems. . . . Each implies different variables depending upon the particular problem for which it is used. . . . It is therefore immaterial whether statutes of limitation are characterized as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us.[47]

Erie, in the eyes of the *Guaranty Trust* Court, was not about power so much as policy: it was dictated less by the Constitution than by a desire to promote uniformity:

42. *See* Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 958 (1988) ("*Erie Railroad v. Tompkins* did not create the *Erie*-procedure/substance distinction").

43. Conformity Act of 1872, ch. 255, §§ 5-617 Stat. 196, 197 (1872) Prior to the Conformity Act, federal procedure was governed by the 1792 Process Act, which required federal courts to use the procedures in place in state courts in 1789, rather than updating as state practice evolved.

44. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).

45. *Id.* at 109.

46. *Id.* at 108.

47. *Id.* at 108-09.

> In essence, the intent of that decision was to insure that, in all case where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in federal court instead of in a State court a block away, should not lead to a substantially different result.[48]

In this way, *Guaranty Trust* made "outcome-determinativeness" part of the *Erie* test. That by itself is puzzling. Outcome-determinativeness has little to do with power and likewise little to do with conflict of laws substance-procedure characterization.[49] Later cases complicated the picture further: sometimes a federal policy would justify overriding an outcome-determinative state law,[50] unless perhaps the state law was *really* substantive;[51] federal rules of civil procedure would always displace contrary state laws,[52] but judge-made procedural common law that filled gaps in the rules might not;[53] sometimes the federal and state rules might combine to form something entirely new.[54]

Erie analysis has thus become confusing and is generally considered unsatisfying. The Court does not seem to have a strong and consistent theory about what it is doing.[55] The next section argues that a choice of law perspective can supply that theory and return *Erie* analysis to its theoretical roots.

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48. *Id.* at 109.

49. Not nothing: one could say that if the claim is based on state law, the state should have the power to determine the outcome, or that laws that determine the outcome are ipso facto substantive in the choice of law sense (and hence that the traditional choice of law characterization of limitations periods is wrong). We will address this latter point in more detail.

50. *See* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 535 (1958).

51. *See id.* (noting that a state rule may be so "bound up with [the definition of the] rights and obligations [of the parties] that its application in federal court is required") (internal quotation marks omitted).

52. *See* Hanna v. Plumer, 380 U.S. 460 (1965). *Hanna* is also notable for the statement that "The broad command of *Erie* was [that] federal courts are to apply state substantive law and federal procedural law." *Id.* at 465. As noted above, that principle existed before *Erie* and played no role in the *Erie* decision itself.

53. *See* Ragan v. Merchs. Transfer & Warehouse Co., 337 U.S. 530 (1949).

54. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996).

55. In addition to its inconsistencies and vacillations about how the analysis is supposed to go and what, exactly, it is supposed to achieve, the Court has never explained how substance and procedure can overlap—how an issue can be deemed procedural by a state and yet substantive under federal law, as in *Guaranty Trust*, or vice-versa.

III. CHOICE OF LAW CHARACTERIZATION REVISITED

Suggesting that the choice of law perspective on substance-procedure characterization can aid *Erie* analysis might seem surprising, for two reasons. First, substance-procedure characterization is murky and unsatisfying within traditional choice of law.[56] And second, *Guaranty Trust* explicitly rejected it. This section, however, aims to demonstrate that a particular understanding of choice of law can in fact be helpful—that it can return *Erie* analysis to the firmer foundations of the original *Erie* problem: the problem of power.

The choice of law perspective we advocate here is what we have called the two-step model.[57] The two-step model, probably best attributed to Brainerd Currie,[58] conceives the choice of law problem as a matter first of determining the scope of relevant state laws—that is, determining which state laws reach the facts of the case—and second, if an issue falls within the scope of more than one state's law, resolving conflicts between those laws by giving priority to one. This perspective has some immediate implications in terms of power. Most notably, it suggests that each state has the authority, within constitutional limits, to determine the scope of its law—that is a question of the content and meaning of that law, of who can and cannot claim rights under it—but that no state has the authority to bind other states to any particular resolution of conflicts between state laws. Which law should be given priority is not a question of the meaning of state law.

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56. *See generally* Herma Hill Kay, Larry Kramer, & Kermit Roosevelt, CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS 50 (9th ed. 2013) (describing literature on characterization as "large but uninformative").

57. *See, e.g.*, Kermit Roosevelt III & Bethan Jones, *What a Third Restatement of Conflict of Laws Can Do*, 110 AJIL UNBOUND 139 (2016).

58. The territorial approach identified a single relevant state by "deduction from territorial postulates." David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933). Rejecting this view, Currie theorized that a court should determine the applicability of a state's law by examining its purposes and whether its application would further those purposes (*i.e.*, by asking whether a certain set of facts fell within the scope of a state's law). *See, e.g.*, Brainerd Currie, *The Constitution and Choice of Law: Government Interest Analysis and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958); Brainerd Currie, *Married Women's Contracts: a Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON CONFLICT OF LAWS, 75, 107–120 (1963); *see also* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1303 (1989) (identifying "Currie's central insight" as the principle "that multistate cases should be resolved by the same methods as domestic cases."). If more than one state is "interested," the conflict must be resolved. Different approaches have different methods of resolving such conflicts. (Currie initially suggested a preference for forum law, then moderated this suggestion by advising that the forum first attempt to eliminate the conflict by adopting a moderate and restrained interpretation of its policies.) But the common analytical step is assigning one law priority over another.

Erie itself is immediately intelligible from this perspective: what *Erie* says is that the required degree of fault is an issue that falls within the scope of Pennsylvania law and Pennsylvania law alone, no general law being in existence and no federal law having been enacted. Pennsylvania law thus must supply the rule of decision, and the content of Pennsylvania law is a question on which Pennsylvania courts have the last word.

What about modern *Erie* analysis? Modern *Erie*, more specifically the substance-procedure distinction, is also intelligible in terms of the two-step model. Substance and procedure can be distinguished in terms of scope. If we begin with the proposition that the scope of a sovereign's law is a question about the rights that law grants, a substantive law gives parties rights that can be asserted in any forum. A procedural law gives rights that are tied to a particular forum and cannot be asserted anywhere else.[59] This perspective immediately resolves some of the confusions around modern *Erie* analysis. It tells us that we should characterize individual laws, rather than issues, as substantive or procedural. It tells us that the power to determine whether a particular law is substantive or procedural, as a matter of the scope of that law, rests with the enacting sovereign. It shows us how substance and procedure can overlap and conflict—a state substantive law, giving rights that can be asserted in federal court, can conflict with a federal procedural law, which also gives rights in federal court. And it tells us that by characterizing an issue as procedural, we are, at least potentially, giving priority to forum law as against conflicting foreign law.[60]

The two-step model thus gives us some conceptual clarity about what is going on in *Erie* analysis. It does not tell us what the right outcome to particular cases is: defining substance and procedure in terms of forum dependence and independence does not tell us how to categorize laws. But it does provide a more useful analytical framework for characterizing laws as substantive or procedural than the traditional notions of primary vs. secondary conduct, or rights vs. remedies.[61] To determine the scope of a law, modern choice of law theory and statutory interpretation generally tell us to look at the policies behind it. In the *Erie* context, we can look at

59. *See* Michael Steven Green, *The Erie Doctrine: A Flowchart*, 52 AKRON L. REV. 215, 216 (2019).

60. Potentially because if the foreign law is procedural, there is no conflict: both states agree that the issue is procedural, and their laws reach only litigation in their own courts.

61. *See, e.g.*, Allen R. Stein, Erie *and Court Access*, 100 YALE L.J. 1935, 1949–51 (1991) (discussing traditional ways of distinguishing substance and procedure); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192–225 (2004) (discussing distinction).

the policies behind particular laws and ask whether they are forum-dependent or not. Procedural policies are those that are limited to litigation in a particular forum; substantive policies are implicated regardless of where litigation takes place. Characterizing those policies may help us to characterize laws. It will also help us remember a principle that will prove important: if we are going to characterize a particular law as procedural—and hence give priority to forum law over foreign substantive law without a more general choice of law analysis—we'd better have a procedural policy behind it.

The value of this approach can be seen specifically in an analysis of *Guaranty Trust*. If we think about procedure and substance in terms of scope, *Guaranty Trust* should look odd, at least based on the account the Court offers. The scope of New York law is a question for New York courts—but the Supreme Court rejects their views.[62] It focuses not on the distribution of power between state and federal courts (constitutional *Erie*) but rather the policy of uniformity. In its enthusiasm for policy-*Erie*, *Guaranty Trust* actually strays from *Erie's* constitutional basis, usurping a power (the determination of the scope of state law) that properly belongs to the states. If New York directs that its limitation period can be invoked only in New York courts, federal courts have no power to construe it differently.[63]

Is there any way to rescue the decision? There are two points worth considering. First, as to the specific issue in *Guaranty Trust* (limitations periods), traditional choice of law characterization was probably wrong in 1945.[64] The modern view is that limitations periods serve both substantive and procedural purposes (they both allow defendants peace of mind and allocate judicial resources to fresh rather than stale claims) and so a claim time-barred under the law that creates it will be held time-barred in another state's courts.[65] Modern choice of law characterization, that is,

62. Perhaps not entirely: *Guaranty Trust* says that the characterizations of state court opinions are immaterial "in any use of those terms unrelated to the specific issues before us." Guaranty Trust Co. v. York, 326 U.S. 99 at 109 (1945). But since state courts lack the opportunity to pronounce on the characterization of their laws for *Erie* purposes, this effectively declares federal independence. *See* Green, supra note 59 at 216.

63. *See Byrd*, 356 U.S. at 535 ("[F]ederal courts . . . must respect the definition of state-created rights and obligations by the state courts."); *see also* Michael Green, Erie's *Suppressed Premise*, 95 MINN. L. REV. 1111, 1167 (2011) (observing that *Erie* requires federal courts to follow state supreme court interpretations of state law).

64. For a classic criticism of the traditional approach, *see* Bournias v. Atlantic Mar. Co., 220 F.2d 152, 154–55 2d Cir. 1955).

65. States have widely rejected the traditional characterization of limitations periods as procedural by enacting borrowing statutes allowing for the state to borrow another state's shorter statute of limitations if the cause of action arises in that jurisdiction. For a general discussion of

gets the answer that *Guaranty Trust* wanted. Had *Guaranty Trust* arisen now, it would not have needed to sever *Erie* analysis from choice of law characterization to get the desired result. [66]

But still, if New York decides that its limitations periods are procedural, that is its right. It is not for federal courts to thwart that policy by expanding the scope of New York law. The second point is that the two-step model would have allowed the Court to accept that allocation of power—it could have recognized that New York has the power to determine the scope of its own law—and still find the claim time-barred. Suppose the New York limitations period is procedural: it gives defendants a defense that can be asserted only in New York courts. Well and good: there still must be some limitations period that operates in federal courts. What should that limitations period be? A federal limitations period used to govern a state claim in federal court is procedural—it is not going to bar litigation in state court—so we should look to procedural policies. Allocation of judicial resources to fresh rather than stale claims is one such policy, but uniformity of result between state and federal courts is another: it is a policy that choice of forum should not be driven by the choice between federal and state law. That is a policy that is about litigation in federal court and nowhere else, so it is properly considered in crafting the federal procedural rule. Thus, it would make sense to say that in deciding the limitations period that would govern in federal court, the federal courts would mirror the limitations period that would govern in state court. The federal courts could make federal procedural law that incorporated the content of relevant state law, as in fact they often do.[67]

Generally, viewing the *Erie* problem through the lens of the two-step model allows us to think about it in terms of power—that is, it returns modern *Erie* analysis to the original *Erie* argument. It also gives us a better understanding of what the Supreme Court has done, and what it might have done better.

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borrowing statutes, *see* Ibrahim J. Wani, *Borrowing Statutes, Statutes of Limitations and Modern Choice of Law*, 57 UMKC L. REV. 681 (1989).

66. Interestingly, before *Guaranty Trust* there was an argument for moving choice of law characterization in the same direction by adopting essentially an outcome-determinative test. *See* Morgan, *Choice of Law Governing Proof*, 58 HARV. L. REV. 153, 195 (1944) ("It is time to abandon both the notion and the expression that matters of procedure are governed by the law of the forum . . . . [courts should apply foreign law] to all such matters of procedure as are likely to have a material influence upon the outcome of litigation except where (a) its application will violate the public policy of the forum or (b) weighty practical considerations demand the application of the law of the forum.").

67. *See, e.g.*, United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979).

Two-step *Erie* also explains what is at stake in the substance-procedure distinction. As we have explained, whether a state law is substantive or procedural is a question of its scope: substantive laws give rights that can be asserted in any court; procedural laws give rights tied to a particular forum. The scope of a state law is up to the state. So, in deciding whether a state law is substantive or procedural, federal courts should be guided by state decisions, to the extent those decisions are about scope, and in the absence of relevant decisions, by an analysis of the policies underlying the law. If a state law is procedural under our definition, it will never be given effect in federal court. In simplest terms, it creates no rights that can be asserted there. The rule that governs an issue will therefore be federal. The content of that federal rule can, of course, mirror the content of state law, and for policy-*Erie* reasons, such mirroring will often be desirable. Calling a state law "substantive for *Erie* purposes" despite indications from state courts that they consider it procedural is best understood as mirroring the content of state law.

If, however, a state law is substantive, it may be given effect in federal court, but it may also be displaced if priority is given to federal procedural law. Federal law can preempt state law if the federal lawmaker so wills. Current *Erie* analysis assumes that the Federal Rules are always intended to preempt, although this is not necessarily as clear as some justices seem to think.[68] But when judges make federal procedural common law to fill gaps in the rules, the preemption decision has clearly not been made, and judges may decide not to preempt, or to make law that takes account of the substance of state law.[69] This decision should be guided by procedural policies, most notably *Erie's* policy in favor of uniformity of result. Other federal policies may at times be relevant, but they should be procedural policies and not substantive ones.

This description, we think, gives a clear picture of what goes on in *Erie* decisions and is a more useful theoretical foundation to guide courts than the Supreme Court's disjointed account. In the next section, we will try to show how two-step *Erie* helps the analysis of a particularly knotty problem.

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68. *See* Hanna v. Plumer, 380 U.S. at 471 (1965). The reason it is not so clear is that the Rules Enabling Act specifies that the federal rules are not to "abridge, enlarge, or modify any substantive right," 28 U.S.C. § 2072(b) (2006), which could well be understood to direct courts to give priority to state substantive law in conflicts. *See* Shady Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010).

69. *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (finding no conflict between Federal Rule of Civil Procedure 3 and determining when an action is commenced for the purpose of tolling Oklahoma's statute of limitations); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (applying New York's standard of review for measuring the excessiveness of a jury verdict).

IV. UNRESOLVED-*ERIE*: FORUM-SELECTION CLAUSES

Erie analysis has any number of vexing problems, but one of the most difficult is one that the Court has yet to fully resolve: the treatment of forum-selection clauses. Such clauses generally prescribe that suit shall be brought only in particular courts.[70] States differ as to whether such clauses are valid as a matter of state contract law.[71] The federal standard, announced by the Supreme Court in *The Bremen*[72] and *Carnival Cruise Lines*,[73] is that such clauses are enforceable unless the resisting party can clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.[74]

That federal standard controls in admiralty jurisdiction, but what about diversity? If suit is brought in federal court on the basis of diversity, and a contract between the parties contains a forum-selection clause, should its validity be determined under the *Bremen* standard, or under the state law that governs the contract?

The Supreme Court has come close to this question, but it has not answered it. In *Stewart Organization v. Ricoh Corporation*, it ruled that if a party moved to transfer a case under 28 U.S.C. § 1404(a) based on the existence of a forum-selection clause, the court should use federal law to decide the motion.[75] That much seems obviously correct: since § 1404(a) is a federal statute, motions under it should be decided under federal law. In *Atlantic Marine Construction Company v. U.S. District Court for*

70. *See forum-selection clause*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining a forum selection clause as a "contractual provision in which the parties establish the place . . . for specified litigation between them"). Forum selection clauses may be "permissive," whereby the parties agree to submit to the jurisdiction of certain courts without prohibiting suit elsewhere, or "mandatory," making selected forum exclusive. *See* Stephen E. Sachs, *The Forum Selection Defense*, 10 DUKE J. CONST. L. & PUB POL'Y 1, 4 (2015); *see also* Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After* Carnival Cruise*: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 56 (1992).

71. For example, some states have passed laws limiting or prohibiting the enforcement of forum selection clauses, particularly in certain contexts. *See* Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court's Pending Review of* Atlantic Marine, THE CONSTRUCTION LAWYER, Fall 2002, at 30 (noting that "at least 24 states have enacted" prohibitions on the enforcement of forum selection clauses in industries such as construction); *see also* Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643, 648 (2015) (noting some states consider forum-selection clauses "per se unenforceable" while others "ignore them by giving less weight" or "subject them to more defenses.").

72. M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 15 (1972).

73. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 586 (1991).

74. *Id.* at 593.

75. 487 U.S. 22, 28 (1988) (concluding "[F]ederal law, specifically 28 U.S.C. § 1404(a), governs the parties' venue dispute.").

Western District of Texas, the Court offered some more clarity about how to make that decision: a valid forum-selection clause, it said, "should control except in unusual cases."[76] But neither *Stewart* nor *Atlantic Marine* addressed the question of what law should be used to determine the validity of the clause.[77] On this issue, the circuits are split and scholars disagree.[78]

It is not surprising that characterization of forum-selection clauses is difficult within the conventional *Erie* framework. From an issue-based, abstract perspective, forum-selection clauses look procedural: they are about the conduct of litigation.[79] Yet they are also arguably outcome-determinative: choice of forum can affect choice of law and hence alter the parties' substantive rights. Forum-selection clauses also limit exposure to the risk of litigation in an undesired location[80] and are sometimes part of the parties' bargained-for exchange.[81] As Stephen Sachs has put it, "the questions posed by forum selection are even murkier than usual."[82]

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76. Atlantic Marine Const. Co., Inc. v. U.S. District Court for Western District of Texas, 571 U.S. 49, 64 (2013).

77. *See, e.g.*, Wong v. PartyGaming Ltd., 589 F.3d 821, 826 (6th Cir. 2009) (explaining the Court has not decided "the *Erie* issue of which law governs when a federal court, sitting in diversity, evaluates a forum selection clause in the absence of a controlling federal statute.").

78. Most federal circuits have held "the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law." *Id.* at 827; *accord* Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009); Phillips v. Audio Active Ltd., 494 F.3d 378, 384 (2d Cir. 2007); Fru-Con Constr. Corp. v. Controlled Air, Inc., 574 F.3d 527, 538 (8th Cir. 2009); Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte, 536 F.3d 439, 441 (5th Cir. 2008); P & S Bus. Machs. v. Canon USA, Inc., 331 F.3d 804, 807 (11th Cir. 2003); *see also* Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 768 (2015) (noting most courts have applied federal law to the question regardless of the law governing the contract or giving rise to the suit). The seventh and tenth circuits have applied the law that governs the whole contract, *see* Jackson v. Payday Fin., LLC, 764 F.3d 765, 774 (7th Cir. 2014); Yavuz v. 61 MM, Ltd., 465 F.3d 418, 428 (10th Cir. 2006). Many scholars agree with this approach, *see* Clermont, *supra* note 71 at 653 (noting "the few scholars who have ventured into the thicket align in favor of applying the parties' chosen law.").

79. For example, the ninth circuit has explained that forum selection clauses implicate federal procedural issues. *See* Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988). Interestingly, the sixth circuit also relied on "the possibility of diverging state and federal law on an issue of great economic consequence, the risk of inconsistent decisions in diversity cases, and the strong federal interest in procedural matters in federal court," to support its holding. *Wong*, 589 F. 3d at 827.

80. *See* Borchers, *supra* note 70 at 57 (stating "The right to litigate in one forum or another has an economic value that parties can estimate with reasonable accuracy."); *see also* Matthew J. Sorensen, *Enforcement of Forum-Selection Clauses in Federal Court After* Atlantic Marine, 82 FORDHAM L. REV. 2521, 2528 (2014).

81. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

82. Sachs, *supra* note 70, at 768.

From the choice of law perspective, however, how courts sitting in diversity should treat forum-selection clauses is clearer. First, a forum-selection clause is substantive in terms of whether the rights it creates are forum-dependent or not. The whole point of a forum-selection clause is to confer a right—the right to dismissal—that can be asserted in any forum other than the chosen one.[83] Since it is a substantive contractual provision, there is no obvious reason why its validity should be determined by any law other than the one that governs the rest of the contract. As to the scope of state laws validating or invalidating such a clause, these laws are also clearly an attempt to determine the parties' substantive rights: they are about rights that can, or cannot, be asserted in any forum. Whether the state's law creates or withholds such rights is a question of state law, beyond the power of federal courts to contradict.

Second, there is a difference between the question of whether a forum selection clause is valid and the question of what effect the clause should have in federal litigation, though this distinction is not always recognized.[84] A motion to transfer under § 1404(a) is not simply an attempt to enforce the clause, and so it makes sense that the analysis under § 1404(a) should not be limited to the question of whether the clause is valid. A valid clause might, in exceptional circumstances, not be enough; an invalid clause might, in some circumstances, carry some weight.[85]

What about a motion that is simply an attempt to enforce the clause? Stephen Sachs has suggested that the most straightforward way to do this in federal court would be to present it as an affirmative defense, either via

83. At least, that is true of mandatory forum selection clauses. Some forum-selection clauses are permissive, rather than exclusive: they provide that the parties agree to submit to the jurisdiction of certain courts without prohibiting suit elsewhere. See Stephen E. Sachs, The Forum Selection Defense, 10 Duke J. Const. L. & Pub Pol'y 1, 4 (2015).

84. In *Atlantic Marine*, the Court assumed the validity of the forum selection clause and went on to address its effect. In fact, generally the Court has approached forum selection clauses from an enforceability perspective, likely on account of the "ouster doctrine." Historically, courts refused to enforce forum selection clauses reasoning that such clauses impermissibly ousted the jurisdiction of the court. *See* M/S Bremen v. Zapata Off-Shore Co , 407 U.S. at 9 (1972). This theory was rejected in *The Bremen*, but its legacy explains why courts might separate the question of enforcement from the question of whether a forum selection clause otherwise meets the prerequisites for contract formation (*e.g.*, mutual consent etc.). As Justice Scalia notes in *Stewart* dissent, the latter question—issues of validity— "are nearly always governed by state law." Stewart Organization v. Ricoh Corporation, 487 U.S. at 36 (1988) (Scalia, J., dissenting). This distinction is, however, suggested by the Court in *The Bremen*: "The correct approach would have been to enforce the forum clause specifically unless [the plaintiff] could clearly show that enforcement would be unreasonable and unjust, *or* that the clause was invalid for such reasons as fraud or overreaching." *The Bremen*, 407 U.S. at 15 (emphasis added).

85. In fact, the Court recognizes that "It is conceivable in a particular case . . . that because of [the § 1404(a)] factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause." *Stewart*, 487 U.S. at 30–31.

a motion to dismiss under Rule 12(b)(6) or perhaps a motion for summary judgment, and we agree.[86] A forum-selection clause can be understood as an affirmative defense that demonstrates a failure to state a claim. The plaintiff may have alleged all the elements of a cause of action, but if he has also promised not to sue at all (if he has settled his claim), the court should dismiss. Likewise, if he has promised not to sue in certain courts, that promise should be a defense to suit in those courts.

In deciding that motion, a federal court should initially determine whether the forum-selection clause is valid under the law that governs the contract. If it is, then that state is attempting to give the defendant a defense. If it is not, the state is not attempting to do so. The existence or non-existence of that state-law defense is a question for the state, and the federal court cannot contradict it by calling the issue procedural.

Again, however, the validity of the clause under state law is not necessarily dispositive. State substantive law and federal procedural law can overlap, and federal procedural law might preempt contrary state law. Whether a particular party can maintain a suit in federal court is a procedural question, in that it is within the procedural lawmaking power of federal courts. As Sachs frames it, a forum-selection clause is an attempt to waive a federal right: the right to sue in a federal court.[87] To maintain federal supremacy, federal law must control the effect of that waiver, just as it had to control the effect of the purported waiver of a FELA claim in *Dice v. Akron, Canton & Youngstown Railroad*.[88]

We thus suggest the following view of the issue of forum-selection clauses in diversity cases. Whether the clause confers rights under state law is a question of state substantive law, to be decided under the state law that governs the contract. The effect of those rights in federal court is a question of federal procedural law. As with a § 1404(a) motion, a federal court might decide that a valid forum-selection clause does not justify dismissal, and it might decide that an invalid clause does.

What, you might wonder, is the point of separating the issues? Does this not just amount to a decision that federal law controls? Not in the sense that most courts and commentators have taken it—it does not mean

86. As an affirmative defense, the forum selection clause could also be pled in an answer and raised in a motion for judgment on the pleadings. *See* Sachs, *supra* note 70 at 32. But this, of course, assumes the forum selection clause is evident on the face of the complaint. And, as the Court notes in *Atlantic Marine*, "unlike a motion under § 1404(a) or the *forum non conveniens* doctrine, [a Rule 12(b)(6) motion] may lead to a jury trial on the venue if issues of material fact relating to the validity of the forum-selection clause arise." Atlantic Marine Const. Co., Inc. v. U.S. District Court for Western District of Texas, 571 U.S. 49 at n.4 (2013)

87. *See* Sachs, supra note 70 at 4–9.

88. Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 362 (1952).

that federal courts should use the standard from *The Bremen* and enforce clauses that meet that standard.[89] What it means is that federal courts should create a procedural rule based on procedural policies—policies that apply in federal court and not elsewhere. The most obvious such policy is the *Erie* policy in favor of uniformity, which counsels simply mirroring state law.[90] This policy suggests that federal courts should dismiss if the forum-selection clause is valid under the appropriate state law and refuse to dismiss if it is not. If we consider only this policy, or if we find it the dominant one, then the effect will be that forum-selection clauses are governed by state law because federal procedural law either gives way to contrary state substantive law or incorporates it.

Are there other policies that federal courts might consider? If the federal policy was strongly against forum-selection clauses on the grounds that they tended to be unfair, that might count as procedural. The policy that the federal courts should not be vehicles for oppression is a policy linked to litigation in federal courts and not elsewhere.[91] We can imagine policies that would justify federal courts in refusing to enforce forum-selection clauses that were enforceable under the state law that governs the parties' contract.[92]

But that is not the situation in the real world. In the real world, the federal policy is more permissive; the issue that arises in diversity cases is whether a federal court should use *The Bremen* standard to enforce a forum-selection clause that is invalid under the state law that governs the contract. Federal courts have the power to do this, we believe—they can create a federal procedural rule that gives such effect to even an invalid forum-selection clause. That is, they can dismiss based on a forum-selection clause that is invalid under the law that governs the contract. But if they are to do so, the characterization of this federal rule as procedural means that they should be able to identify a procedural policy in support of it: a policy that is implicated by litigation in federal court but not elsewhere.

89. Sachs, interestingly, does not seem to assume that the selection of federal law as controlling necessarily leads to application of *The Bremen* standard. Instead, he observes that "any federal law on the topic might, in turn, incorporate state law by reference." *See* Sachs, *supra* note 70 at 5 n.17.

90. *But see* Wong v. PartyGaming Ltd., 589 F.3d 821, 828 (2009), (seeking to maintain "harmony among the Circuits.").

91. This framing suggests that the traditional public policy exception in choice of law is linked to the substance-procedure distinction. Of course, it is: the theory behind the traditional public policy exception is that a state may recognize rights under foreign law but deny a remedy under its own law. *See, e.g.*, Ancile Inv. Co. Ltd. v. Archer Daniels Midland Co., 992 F. Supp. 2d 316, 319 (S.D.N.Y. 2014); Loucks v. Standard Oil Co. of New York, 120 N.E. 198 (1918).

92. For example, some commentators have framed the federal interest as an interest in "choos[ing] to control its own jurisdiction and venue." Clermont, *supra* note 71, at 651.

We do not believe that anyone has done so. At the least, the policies in support of *The Bremen* standard do not fit the bill. They are substantive policies. In *The Bremen*, for instance, the Court wrote, "The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts."[93] Those policies are not limited to litigation in federal court; they apply regardless of where suit is brought. If they govern in diversity cases, they should govern in state court as well; they should govern as federal substantive law, displacing contrary state law. But of course they don't. Congress could prescribe them as a nationwide federal law, but federal courts could not, and in any event neither Congress nor the courts has tried to. From the power perspective, in terms of substantive law, the situation is the same as that in *Erie*. Only one lawmaker has exercised its substantive power, and that is the state.

Can federal courts displace state substantive law without a procedural policy? They have the power to do so—they have in fact done so.[94] But there is a cost, which the conflict of laws perspective also reveals. The cost is that a state substantive policy is thwarted without advancing any other policy.[95] *Ferens v. John Deere Company*[96] provides an analogous, albeit more extreme, example. In *Ferens*, a Pennsylvania resident was injured by a combine manufactured by a Delaware corporation, in Pennsylvania.[97] Pennsylvania tort law granted Ferens a claim, but that grant also provided a two-year statute of limitations, and Ferens did not file suit until three years after the accident.[98] Knowing this, Ferens chose an unlikely forum to file suit: federal court in Mississippi. Mississippi considered limitations periods procedural, and this meant Mississippi applied its six-year statute of limitations to Ferens' Pennsylvania tort claim.[99] Once the tort claim was deemed timely, Ferens transferred the case under § 1404(a) to the Western District of Pennsylvania.[100]

93. *The Bremen*, 407 U.S. at 9.

94. That is what our analysis reveals to have taken place in the cases that use *The Bremen*'s standard to determine validity.

95. In the choice of law vocabulary, this is getting the wrong answer to a false conflict. See Currie, SELECTED ESSAYS ON THE CONFLICT OF LAWS at 93; *see also* Alfred Hill, The Judicial Function in Choice of Law, 85 COLUM. L. REV. 1585, 1590-1591(1985) (discussing false conflicts).

96. Ferens v. John Deere Co., 494 U.S. 516 (1990).

97. *Id.* at 519.

98. *Id.*

99. *Id.*

100. *Id.* at 520.

The outcome in *Ferens* is widely considered bizarre and undesirable. What went wrong, our analysis suggests, is that Mississippi thwarted Pennsylvania's substantive policy (peace of mind for defendants, the substantive policy underlying limitations periods) without advancing any Mississippi procedural policy. (Mississippi has no policy related to litigation in Mississippi courts that is advanced by allowing litigation of claims time-barred under the law that created them.) That is the same thing the Court wisely refused to do in *Guaranty Trust*—there primarily for reasons of uniformity, but also because there was no federal policy that could support displacing the state rule.[101] Using *The Bremen*'s standard to decide the validity of choice of forum clauses in diversity suits repeats those errors.[102] It thwarts the state substantive policy, and it thwarts federal procedural policy (policy-*Erie*'s preference for uniformity), in the name of a policy (a federal substantive one) that should play no role in the analysis.

V. CONCLUSION

Eighty years have passed since *Erie* was decided and the case has become widely regarded as foundational in American jurisprudence. But in these eighty years, courts have lost sight of *Erie's* constitutional underpinnings and a case about power has become a case about policy. In this transition, unnecessary analytical steps have been added which confuse *Erie* analysis.

The conflict of laws perspective, which we have offered here, returns *Erie* to its roots. Fundamentally, *Erie* is a choice of law case. It's a case about which sovereigns have the power to grant rights and who determines the meaning and content of those rights. *Erie* turned out to be a false conflict once general law was removed from the equation. Only one sovereign's laws could apply. But the choice of law perspective still has important implications for characterizing laws as substantive or procedural and can provide a more solid foundation for courts to grapple with even the murkiest of *Erie* issues.

101. This is our reading of the point that "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."—there is no federal substantive interest at stake. Guaranty Trust Co. v. York, 326 U.S. 99 at 108 (1945).

102. There is also an oddity in that, as *Carnival Cruise Lines* recognizes, a choice of forum clause is part of the parties' bargain and may be offset by other contractual provisions: quid pro quo. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 at 601 (1991). (Determining the validity of the quid (the forum-selection clause) under federal law while determining the validity of the quo under state law may have the result of unsettling the bargain—again, without advancing any sovereign's substantive policy, or indeed any policy at all.)

Most important, constitutional *Erie* tells us that characterizing issues in the abstract as substantive or procedural is a mistake. Each law should be considered separately. Each sovereign has the authority to decide whether its laws are substantive or procedural, and federal courts cannot ignore this simply by framing the *Erie* question as unique. This is not to say that federal law cannot prevail when a state deems its law substantive. Federal procedural law can of course preempt state substantive law. What we argue is simply that courts should recognize that priority is often at stake in the substance-procedure characterization and the choice of law determination should be made on the basis of the underlying policies of the relevant laws (so, federal procedural policies in the case of a federal law) rather than abstract labels detached from the content of those laws.