

The Forum Selection Defense

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Forum selection is hardly new, but courts still disagree on the basics. What do these agreements really do, and how should they be invoked? This Article suggests a few answers.

First, forum selection is a form of procedural waiver. A permissive agreement waives the parties' objections to litigating in the chosen court. A mandatory one waives their rights to litigate somewhere else. Whether each agreement succeeds in waiving what it purports to waive is a question of procedure, not just contract law. So its validity rests on the procedural law of the forum—including, in a federal forum, federal law.

Second, forum selection can be raised as a defense. When a plaintiff files in the wrong court, a mandatory agreement gives that court a reason to deny recovery. Whatever other remedies are also available, such as venue transfer or forum non conveniens, the agreement can be invoked as an affirmative defense—whether in the answer, on summary judgment, or (under the right circumstances) in a motion to dismiss.

To some, these procedures may seem unwieldy; to others, unduly harsh. Perhaps we should handle forum selection in some other way. If so, we should amend our statutes or our Federal Rules. Until we do, though, we should use the rules we have—under which forum selection is a type of waiver, and a defense.

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INTRODUCTION

What does it mean to select a forum? Lawyers have written forum selection clauses for decades without settling on an answer. Parties often agree that they can or have to sue each other in particular courts. But what is that agreement, legally speaking? Is it just an ordinary contract, to be enforced by damages for breach,¹ or by specific performance in equity?² Is it an invocation of forum non conveniens,³ or a “private expression” of “venue preferences,”⁴ or—as the Supreme Court recently suggested in *Atlantic Marine Construction Co. v. U.S. District Court*—a permanent “waive[r] [of] the right to challenge the preselected forum as inconvenient”?⁵ Is it a matter of substance or procedure, of state law or federal? Or is it something else entirely?

Whatever forum selection might be, lawyers also disagree about how to invoke it. *Atlantic Marine* closed off one method of enforcement in federal court, namely a motion to dismiss on venue grounds—whether under 28 U.S.C. § 1406 or Federal Rule of Civil Procedure 12(b)(3).⁶ Instead, the Court suggested, defendants can try to move the case through a § 1404(a) venue transfer or a dismissal for forum non conveniens.⁷ But are these the only means available? Can a plaintiff’s violation of the agreement simply bar recovery? Would it justify summary judgment under Rule 56, judgment on the

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1. See Scott Dodson, *Atlantic Marine and the Future of Party Preference*, 66 *HASTINGS L.J.* 675, 677, 687 (2015) [hereinafter Dodson, *Atlantic Marine*]; Scott Dodson, *Party Subordination in Federal Litigation*, 83 *GEO. WASH. L. REV.* (forthcoming 2015) [hereinafter Dodson, *Party Subordination*] (manuscript at 29).
 2. Graydon S. Staring, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 *J. MAR. L. & COM.* 405 (1999).
 3. See David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 *TUL. L. REV.* 973, 1014–15 (2008).
 4. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988).
 5. 134 S. Ct. at 582.
 6. *Id.* at 577. (Unless otherwise indicated, subsequent references in the text to U.S. Code sections are to Title 28, and subsequent references to “Rules” are to the Federal Rules of Civil Procedure.)
 7. *Id.* at 579–80.

pleadings under 12(c), or dismissal for failure to state a claim under 12(b)(6)?⁸ Or can defendants simply move “to dismiss,” without citing any Rule at all?⁹

This Article seeks to resolve both disagreements—what forum selection is, and how it can be enforced. To start with, forum selection is best understood as a form of *waiver*. When parties agree to permit suit in a given court, they’re attempting to waive any defenses they might have had to being sued in that court in particular. When they go further and make the agreement mandatory, requiring suit in a particular court, they’re also attempting to waive any rights they might have had to seek relief somewhere else. Whether these agreements are valid—that is, whether they succeed in waiving the rights they purport to waive—is a question of procedure, not just of contract law. And as a procedural question, it depends on the law of the forum: state procedure in state court and federal procedure in federal court, no matter what law gives rise to the claim.

Often a forum selection problem arises the way it did in *Atlantic Marine*, with the plaintiff defying the agreement by suing in some other (and otherwise-appropriate) federal court. If the account above is right, and forum selection is really a matter of waiver, then the agreement provides a reason not to let the suit proceed—at least not in that forum. In fact, if the account above is wrong, and forum selection really is just a matter of contract, then the agreement *still* provides a reason not to let the suit proceed in that forum. Either way, forum selection acts as a *defense*, “a reason why the plaintiff should not recover or establish that which he seeks by his complaint or petition.”¹⁰ More specifically, it’s an *affirmative* defense, one that

8. On Rule 12(b)(6), see *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009).

9. See Bradley Scott Shannon, *Enforcing Forum-Selection Clauses*, 66 HASTINGS L.J. 777 (2015).

10. BLACK’S LAW DICTIONARY 509 (10th ed. 2014) (quoting EDWIN E. BRYANT, *THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE* 240 (Boston, Little, Brown & Co. 2d ed. 1899)).

“will defeat the plaintiff’s . . . claim, even if all the allegations in the complaint are true.”¹¹

The Federal Rules clearly explain how the defendant should raise this defense: by “affirmatively stat[ing]” it in the answer, as Rule 8 requires of “*any* avoidance or affirmative defense.”¹² Often the forum selection issue will be open-and-shut. When there’s “no genuine dispute as to any material fact,” the defendant can move immediately for summary judgment under Rule 56, even before filing an answer.¹³ When the agreement is incorporated in the complaint (as is typical in contract cases), the defendant doesn’t need to file an answer and can simply move to dismiss under Rule 12(b)(6). And when the facts really are contested, the dispute should be resolved through our regular means of finding facts—including, in a jury case, a trial by jury.

Treating forum selection as a defense might seem strange, but there’s nothing theoretically unusual about it. The Federal Rules entertain a vast range of defenses, including arguments that are based on procedure rather than substance, unrelated to the merits of the claim, or valid in some courts but not others. It makes sense to handle forum selection the way we handle other arguments designed to channel litigation. When a plaintiff’s suit is barred by a prior judgment, settlement, or arbitral award, we protect the defendant through the ordinary procedures for advancing defenses. Forum selection doesn’t need any heavier artillery than that.

These procedures supplement rather than supplant the devices discussed in *Atlantic Marine*—namely § 1404 transfer and forum non conveniens. Both sets of remedies are available at once, and defendants and courts can choose among them. If the legal system needs any new procedures, the right way to get them is to amend the Federal Rules. This Article concludes with some suggestions

11. *Id.* at 509; *see also id.* at 361 (defining “confession and avoidance” to include the pleading of “additional facts that deprive the admitted facts of an adverse legal effect”).

12. FED. R. CIV. P. 8(c)(1) (emphasis added).

13. *Id.* 56(a); *see infra* note 186 and accompanying text.

along those lines. But until we do that, we should use the Rules we have—under which forum selection may be raised as a defense.

I. FORUM SELECTION AS WAIVER

This Article contends that forum selection is really a type of waiver, grounded in the forum’s law of procedure, including federal procedure. This claim is hardly obvious. For one thing, asking what forum selection “is really” might sound rather formalist: as a human artifact, forum selection is whatever we say it is, and many people don’t think of it as waiver. If our case law describes waiver as, say, “the ‘intentional relinquishment or abandonment of a known right,’”¹⁴ then small-print forum selection clauses in adhesive contracts ain’t it.¹⁵ For another, the courts are persistently divided about the law that governs a forum selection agreement, as well as the proper role of federal law when state law provides the rule of decision.¹⁶ If anything, given that forum selection clauses show up in contracts, it might seem obvious that they’re creatures of contract law—matters of substance, not procedure.

This Part defends the view of forum selection as procedural waiver. This defense isn’t intended as a normative one, broadly speaking; maybe the world would be a better place if forum selection agreements were enforced as a matter of contract, or of state procedural law, or not at all. Nor is the defense narrowly descriptive, in the sense of predicting future behavior by courts or directly applying existing precedents. (After all, the courts are divided on the subject.) Instead, the argument is a doctrinal attempt to reconcile disparate strands of case law and to explain, in the face of judicial

14. *Wood v. Milyard*, 132 S. Ct. 1826, 1835 (2012) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004)).

15. *Cf. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing such a clause).

16. *Compare* *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014) (federal law), *with* *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774–75 (7th Cir. 2014) (state law).

uncertainty, what view of forum selection best coheres with our other legal commitments.

The argument that “forum selection is waiver” applies both to permissive agreements, which allow resort to a particular court, as well as to mandatory agreements, which bar the use of other courts. While the latter are generally more controversial, the basic argument in each case remains the same. Forum selection clauses might be found in contracts, but that doesn’t mean that their validity is determined by—let alone determined only by—substantive contract law. These contracts are for something unusual, namely the waiver of specific procedural rights. Only procedural law can tell us whether those rights are waivable and, if so, when. Should a forum selection agreement be invoked in federal court, moreover, the rights to be waived are *federal* rights. Only federal law can tell us, at least in the first instance, whether and when parties can waive such rights *ex ante*.¹⁷ As a result, the proper law to govern forum selection in federal court is the law of federal procedure.¹⁸

A. Forum Selection as Attempted Waiver

Agreeing to use a particular forum means waiving certain legal rights. In a permissive agreement, the parties waive their objections to litigating in a particular court. Personal jurisdiction and venue are standard examples of these objections, but there might be others too. What’s less well-recognized is that mandatory agreements, no less than permissive ones, also represent a form of waiver: they waive the parties’ rights to litigate in any *other* courts.

17. The “at least in the first instance” reflects the fact that any federal law on the topic might, in turn, incorporate state law by reference. *See* *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979); Adam N. Steinman, *Atlantic Marine Through the Lens of Erie*, 66 HASTINGS L.J. 795, 803–04 (2015).

18. A separate issue concerns which law should be used to *interpret* forum selection agreements—as opposed to determining whether, once interpreted, they are valid and enforceable. This Article takes no view on the former question, which is discussed extensively in Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015).

Because these agreements concern the parties' procedural rights, they necessarily involve issues of procedural law, not just contract. The point here is that not all "agreements" are "contracts";¹⁹ or, to put it another way, not all agreements have their legal effect determined exclusively by contract law. Under the Federal Rules, when parties "agree" on discovery plans,²⁰ "consent" to amended pleadings,²¹ or "stipulate" to bench trials,²² they may or may not have formed contracts enforceable under state law. But they certainly have, through their voluntary actions, waived certain rights regarding the court's procedures—rights on which they'd otherwise have been entitled to insist. Forum selection agreements work the same way. Functionally, they resemble stipulations more than ordinary contracts, and courts have even described them in those terms.²³ These agreements may be *found* within contracts, they may be closely associated with contracts, but fundamentally they're not just contracts: they're also matters of procedure.

1. *Permissive Agreements*

In a permissive agreement, the parties agree to allow suits in a particular forum without trying to bar them elsewhere. At one level, we might view these agreements as contracts like any other. The parties have made a promise to each other, and if one of them breaches its promise—say, by objecting or opposing transfer to the forum it chose—then the promisee is entitled to some contractual remedy. *What* remedy is a harder question; a court might permit a separate suit for damages,²⁴ it might grant specific performance by

19. I owe this phrasing to William Baude.

20. FED. R. CIV. P. 26(f)(2).

21. *Id.* 15(a)(2).

22. *Id.* 39(a)(1).

23. Cf. *Cent. Contracting Co. v. Md. Cas. Co.*, 367 F.2d 341, 345 (3d Cir. 1966) (describing a forum selection clause as "merely constitut[ing] a stipulation," whereby "the parties join in asking the court to give effect to their agreement").

24. See Dodson, *Atlantic Marine*, *supra* note 1, at 687.

ignoring jurisdiction or venue objections,²⁵ and so on. And maybe, as a matter of substantive contract law, these promises won't be enforced at all. (Texas law, for instance, restricts the choice of an out-of-state forum when the contract concerns an in-state construction project.²⁶)

At the same time, permissive forum selection isn't *just* a matter of contract. It also depends on the forum's procedural law. Just as some substantive rights can't be modified by contract—think of the right to be paid a minimum wage²⁷ or to vote in a public election²⁸—the same can be true of procedure. Subject-matter jurisdiction is the standard example;²⁹ the parties can't confer this jurisdiction on a court by private agreement,³⁰ any more than they can “oust” the jurisdiction of a court that already possesses it.³¹ So a promise to permit suit in a court without subject-matter jurisdiction will *never* be enforced with specific performance: the court can't ignore the promisor's jurisdictional arguments, even if his making the arguments is itself a form of breach.³² And given that the promisee in such a case has no real right to expect performance, maybe damages should be unavailable too—just as they would be for breach of a promise to work at less than the minimum wage, or a promise not to vote.³³

25. See Staring, *supra* note 2, at 409–11; *cf.* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972) (describing an exclusive forum selection clause in such terms).

26. TEX. BUS. & COM. CODE ANN. § 272.001 (Vernon 2011) (making such clauses voidable by the party performing the construction).

27. See Brooklyn Sav. Bank v. O'Neill, 324 U.S. 697, 707 (1945).

28. *Cf.* 18 U.S.C. § 597 (2012) (prohibiting expenditures for withholding votes); RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b (1981) (“[W]hen an agreement involves a serious crime or tort, [its] unenforceability is plain.”).

29. See United States v. Cotton, 535 U.S. 625, 630 (2002) (“[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived.”); *accord* Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006).

30. Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982).

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

32. *Cf.* FED. R. CIV. P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”).

33. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 185 (“To the extent that a term requiring the occurrence of a condition is unenforceable . . . , a court may excuse

In other words, to know whether a permissive agreement has legal effect, we can't just look to the governing contract law; we need to know the procedural law too. While some procedural rules can't be modified by agreement, others can. In federal courts, for example, personal jurisdiction over a defendant can be obtained by consent,³⁴ including consent expressed in a prior agreement.³⁵ Venue objections can also be waived,³⁶ before a dispute as well as after.³⁷ If a party agrees to permit suit in a particular federal district, and is actually sued there, part of why the agreement "works" is that it's understood to waive the defendant's personal jurisdiction or venue objections, allowing the suit to proceed in that forum.

Courts don't recognize these waivers because contract law somehow trumps procedure, or because the parties are somehow entitled to override whatever the law actually requires.³⁸ Rather, our procedural law just happens to recognize a role for private understandings when allowing rights to be waived. Courts have sometimes permitted *ex ante* waivers of various rights relating to discovery, limitations periods, the admissibility of evidence, burdens of proof, jury trials, remedies, cost- or fee-shifting, appeal rights, and so on;³⁹ and, of course, parties are also allowed to settle their underlying claims. People disagree on whether these procedural waivers are good or bad,⁴⁰ just as they disagree about the merits of settle-

the non-occurrence of the condition unless its occurrence was an essential part of the agreed exchange."'). *But cf.* Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253 (1991) (noting that many contracts unenforceable in equity may sometimes still be enforceable at law).

34. *Insurance Corp. of Ireland*, 456 U.S. at 703.

35. *Id.* at 704 (citing *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)).

36. *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960).

37. *Compare* *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 441-44 (1946) (involving consent before suit), *with* FED. R. CIV. P. 12(h)(1) (providing that venue defenses are waived if not timely asserted).

38. On parties trumping law, see generally Dodson, *Atlantic Marine*, *supra* note 1; Dodson, *Party Subordination*, *supra* note 1.

39. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1343-51 (2012).

40. See *id.* at 1333-34 & nn.21-24 (collecting sources).

ment.⁴¹ But for the moment, and subject to various conditions, permissive forum selection agreements usually succeed in waiving what the parties are trying to waive.

2. *Mandatory Agreements*

Understanding permissive agreements as a form of waiver is easy enough. But mandatory agreements close courthouse doors rather than open them; and at first glance they might look less like waivers and more like contractual constraints. What rights, after all, could a mandatory agreement waive?

What mandatory agreements waive is the parties' right to litigate in other courts. We usually don't talk about the right to sue in a particular court as something separate and distinct from the right to sue in general. But as the Supreme Court explained in *CompuCredit Corp. v. Greenwood*, a statute might confer a substantive right and create a cause of action—granting a right to sue, in general—without conferring on the plaintiff an equal right to sue “in all competent courts.”⁴² In fact, even a nonwaivable substantive right needn't imply “a nonwaivable right to initial judicial enforcement in *any* competent judicial tribunal” or “disabl[e] the parties from adopting a reasonable forum-selection clause.”⁴³ It's precisely because the right to sue in a *particular* court is distinct from the right to sue in general—and because the former may be waivable *ex ante*, even when the latter is not—that “the contemplated availability of all judicial forums may be reduced to a single forum by contractual specification.”⁴⁴

This isn't as strange as it sounds, because the law often lets potential plaintiffs waive various litigation rights in advance. For example, they might agree to shorten the relevant time limits on a claim,

41. For canonical statements of the opposing positions, compare Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), with Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19.

42. 132 S. Ct. 665, 671 (2012).

43. *Id.*

44. *Id.*

thereby waiving their otherwise-guaranteed rights to sue during the last portion of the statutory limitations period.⁴⁵ Or they might agree to submit to a pre-suit examination under oath,⁴⁶ effectively waiving their rights to file unverified complaints.⁴⁷ Or they might agree to limit the evidence that they'll introduce⁴⁸ or the remedies that they'll seek.⁴⁹ Each of these represents an *ex ante* waiver of a particular litigation right that might otherwise be considered part of a general right to sue.

These waivers can't be analyzed as simple contract obligations. Some courts have described mandatory forum selection that way—as creating a “condition precedent to suit under the contract,” namely that the suit be brought in a particular place.⁵⁰ But while the Supreme Court has sometimes used similar language, describing forum selection as a “contractual obligation”⁵¹ or a “contractual right,”⁵² it's a very special kind of right—namely, a “right to limit trial to [a particular] forum.”⁵³ Whether a contract succeeds in granting *that* right depends not only on contract law, but also on whether the plaintiff's right to sue in other courts can lawfully be waived. Parties can write whatever conditions precedent they want (say, that in order to recover, they have to abstain from voting in federal elections). But unless those conditions themselves are legally permissible, they'll be unenforceable as against public policy, just as

45. See Bone, *supra* note 39, at 1347 & n.73 (“Parties are free to shorten an applicable statute by agreement as long as the shorter period is reasonable.”); see also 31 RICHARD A. LORD, WILLISTON ON CONTRACTS § 79:10 (4th ed. 2004) [hereinafter WILLISTON]. But cf. Dodson, *Party Subordination*, *supra* note 1 (manuscript at 23) (questioning “what law”—other than the contractual condition—“authorizes such a dismissal”).

46. See *Pervis v. State Farm Fire & Cas. Co.*, 901 F.2d 944, 946–47 (11th Cir. 1990).

47. Cf. FED. R. CIV. P. 11(a) (“Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit.”).

48. See Bone, *supra* note 39, at 1349 & n.80.

49. See *id.* at 1350 & nn.87–88.

50. *Marra v. Papandreou*, 216 F.3d 1119, 1125 (D.C. Cir. 2000).

51. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582 (2013).

52. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499 (1989).

53. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 874 (1994).

forum selection agreements were often held to be under the pre-*Bremen* regime.⁵⁴ So whether a contract actually succeeds in requiring a certain forum isn't just a question of contract.

Viewing mandatory forum selection as a kind of waiver also makes more sense of the Court's reworking of venue transfer in *Atlantic Marine*. Ordinarily, as the Court noted, district courts considering a transfer (or a forum non conveniens dismissal) "evaluate both the convenience of the parties and various public-interest considerations."⁵⁵ The parties to mandatory agreements "waive the right to challenge the preselected forum as inconvenient," leaving the decision subject only to public-interest considerations.⁵⁶ But according to the Court, that's not all they waive. In an ordinary § 1404 transfer, the "state law applicable in the original court also appl[ies] in the transferee court."⁵⁷ Under *Atlantic Marine*, though, a new choice of law is necessary; "[t]he court in the contractually selected venue should not apply the law of the transferor venue to which the parties waived their right."⁵⁸ In other words, even though the plaintiff otherwise had every right to sue in the transferor court, and even though jurisdiction and venue were perfectly proper, the agreement selecting a particular forum waived the plaintiff's right *to any other forum*, and not just its right to raise certain arguments about convenience. By entering the agreement, the Court reasoned, the plaintiff "effectively exercised" its traditional privilege to choose the forum, and so enjoyed no further privilege to choose a different one.⁵⁹

54. See 7 WILLISTON, *supra* note 45, § 15:15.

55. *Atl. Marine*, 134 S. Ct. at 581.

56. *Id.* at 581 n.6, 582.

57. *Id.* at 582.

58. *Id.* at 583.

59. *Id.* at 582 ("[W]hen a plaintiff agrees by contract to bring suit only in a specified forum . . . the plaintiff has effectively exercised its 'venue privilege' before a dispute arises." (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 635 (1964))); see also *id.* at 583 ("[A]s discussed above, a plaintiff who files suit in violation of a forum-selection clause enjoys no such 'privilege' with respect to its choice of forum . . .").

B. *Forum Selection and Forum Law*

Seeing forum selection as attempted waiver helps explain which law governs the attempt's success or failure. Whether a given right can be waived depends in part on the law that confers it. We might look to contract law to identify the parties' promises, but that's not the only place to look. When the underlying rights relate to suit in particular courts (as opposed to the ability to recover in general), they're conferred by procedure, not substantive law.

This has important consequences for choice of law, because the federal government and the several states often enforce forum selection agreements differently. While some courts have mistaken forum selection for a pure contract question, to be determined by whatever state's substantive law "governs the rest of the contract in which the clause appears,"⁶⁰ procedural questions are almost universally determined by *forum* law.⁶¹ Whether permissive or mandatory, a forum selection agreement has its validity determined by the law of the forum.

1. *Permissive Agreements*

To keep things simple, let's start with state courts, avoiding for the moment any issues posed by *Erie Railroad Co. v. Tompkins*.⁶² Suppose that two parties in Texas form a permissive agreement, entitling each to sue the other in a Virginia forum. If that Virginia court would have been available for these lawsuits anyway, then the parties' agreement does no work; it simply preserves the status quo ante, under which they'd have been free to sue there or somewhere else. So the only case that matters is one in which the Virginia court would *otherwise* have been unavailable for some reason, but now might be available as a result of the permissive agreement. But if

60. *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007).

61. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 585 (1934).

62. 304 U.S. 64 (1938).

there's some potential bar to the plaintiff's filing in Virginia, we need to know what that bar is, and whether the agreement is enough to lift it—something that's a question of Virginia procedure, not Texas contract law. For instance, if the Virginia court thinks it lacks subject-matter jurisdiction even after the agreement, then it won't hear the case—no matter how enforceable Texas contract law thinks the agreement *ought* to be. Only Virginia can define the jurisdiction of its own courts.⁶³

On the other hand, if Virginia thinks that (say) parties can consent to personal jurisdiction through an agreement like this one, then it doesn't really matter whether Texas treats forum selection agreements as valid or not. Regardless of whether the parties have a "contract" as Texas defines the term, both of them signed a piece of paper that *purported* to consent to suit in Virginia. That fact, standing alone, might satisfy Virginia's requirements for waiving jurisdiction or venue objections in its own courts. If a defendant manifested consent to jurisdiction by announcing it in an unsolicited letter, writing it in blood on the state capitol, hiring a skywriter to fly over the courthouse, or just shouting it from the rooftops at 3 a.m., that might be enough for Virginia's courts—even if Texas contract law requires mutual assent, consideration, or a writing under the Statute of Frauds⁶⁴ Parties can waive legal arguments in lots of different ways, through many different patterns of conduct, and not just through binding contracts.⁶⁵

At the same time, it's hardly surprising that states might often *choose* to incorporate various aspects of the governing contract law. For instance, to decide whether an agent who signed an agreement actually had power to bind his principal, Virginia needn't generate its own in-house law of "procedural agency"; it might just borrow whatever agency law governs the contract as a whole. And it might

63. See *Marshall v. Marshall*, 547 U.S. 293, 314 (2006) (noting that jurisdiction is controlled "by the law of the court's creation" (internal quotation marks omitted)).

64. Cf. *Kim v. Son*, No. G039818, 2009 WL 597232 (Cal. Ct. App. Mar. 9, 2009) (refusing to enforce a gratuitous promissory note written in blood).

65. See, e.g., *Democratic Republic of the Congo v. FG Hemisphere Assocs.*, 508 F.3d 1062, 1064–65 (D.C. Cir. 2007).

do the same with principles of offer and acceptance (like the mailbox rule), novations, rescission, and so on. The whole point of contract law is to help us attach legal consequences to otherwise-empty promises, so it's natural that we'd look to those doctrines when distinguishing loose words from real waivers. But just as we occasionally suspend our regular contract rules to make some promises atypically enforceable (say, in promissory estoppel) or atypically unenforceable (say, for public policy reasons), so we might occasionally suspend our regular "whole law" of contracts when our procedural doctrines so require.⁶⁶

The exact balance between procedure and other sources of law—and, in turn, between forum law and that of other states—not only depends on which forum we're in, but also on the precise legal question being asked and the precise remedy being sought. When the plaintiff sues in Virginia and the defendant asserts a lack of personal jurisdiction, what weight to give the forum selection agreement is an issue of Virginia personal jurisdiction law—at least to start with. When the plaintiff sues in Texas and the defendant wants a forum non conveniens dismissal, only Texas can say whether its courts recognize forum non conveniens at all, let alone what role the parties' agreement should play in administering it.⁶⁷ And when a party wants to enforce a forum selection agreement through other contractual remedies (like damages for breach) that don't require any change to the procedures, we need to look to the contract law that makes those remedies available. But none of this changes the fact that a permissive forum selection clause purports to waive certain procedural defenses in a particular forum, and whether it "works" to waive those defenses has to be determined by that forum's procedural law.

66. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

67. Though a forum non conveniens analysis in Texas might then cross-reference the law of other states—for instance, asking whether Virginia might be an adequate alternative forum, see *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981), which depends in part on what Virginia courts will do.

2. *Mandatory Agreements*

The case for applying forum law to mandatory agreements takes a little more explanation. If filing in the right court is a “condition precedent to suit under the contract,”⁶⁸ then that condition presumably operates anywhere the contract might be invoked. By disregarding it, a new forum would be unduly enlarging one party’s contract rights to the other’s disadvantage. Likewise, if the condition was invalid where formed, then perhaps it should be equally invalid everywhere, and so on.

But on a closer examination, mandatory agreements look a lot more like permissive ones. Suppose that the two parties in Texas had agreed to sue *only* in Virginia—and that the plaintiff instead filed in Maine. Maybe every state would see Texas law as governing the contract generally and determining the parties’ substantive rights. Yet Texas law can’t always control the list of courts in *other* states in which these rights will be enforced. That’s because the right to sue in some other state’s court is generally determined by that other state’s law. Under traditional conflicts doctrines, the “local law of the forum,” not the law governing the substance of the claim, “determines which of [the forum’s] courts, if any, may entertain an action on a claim involving foreign elements.”⁶⁹ The Maine court, acting under Maine’s law of procedure, may have proper jurisdiction over the parties and subject matter and be otherwise seised of the case, giving the plaintiff a perfectly good right to sue there. Whether and when that right is waivable *ex ante* depends, at least in part, on the Maine law that grants the right in the first place. In other words, even if a contract purported to make suit in the chosen forum a condition precedent to recovery, that condition might still be incon-

68. *Marra v. Papandreou*, 216 F.3d 1119, 1125 (D.C. Cir. 2000).

69. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 123; *accord* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 586 (1934); *cf. id.* § 617 (“An action can be maintained on a foreign cause of action although by the law of the state which created the right, it is required that suit shall not be brought outside the state.”).

sistent with Maine’s public policy,⁷⁰ just like a term claiming to oust the Maine courts of jurisdiction.

Alternatively, suppose that Texas law would call this contractual condition invalid—say, because it showed up in a construction contract, wasn’t in writing, lacked consideration, etc. In that case, it might lack force as a “contract,” but it still might have force as a waiver. Just as Maine can adopt its own statute of limitations to guard against stale claims,⁷¹ or its own doctrines of “unclean hands” to prevent its courts from becoming instruments of injustice,⁷² so too it can adopt its own understanding of civil waiver (absent some federal override),⁷³ and find “justice [to be] served by holding parties to their bargain.”⁷⁴ As in *CompuCredit*, Texas’s mere choice to create a cause of action doesn’t automatically “*guarantee* suit in all competent courts.”⁷⁵ Even if Texas tried to guarantee suit in other courts, it couldn’t make good on that guarantee when those courts are found in other states. This isn’t to say that Maine necessarily will depart from Texas contract law; just that it could, and that the answer depends on forum procedure.

In fact, were we inclined to treat the forum selection agreement as purely contractual, we’d still need to look to Maine law to know how to enforce it. Assuming that the contract were otherwise valid, a defendant trying to bar suit in Maine would be seeking a particu-

70. See *supra* text accompanying notes 50–54; cf. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (including as “factors relevant to the choice of the applicable rule of law” any “relevant policies of the forum”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 612 cmt. a (describing “the procedural policy of the forum” as “requir[ing] the courts to apply certain local rules in the course of the litigation to enforce the local notions concerning the manner and method in which the courts of that state should function”).

71. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142–143 (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 603–604 (1934).

72. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 601.

73. *E.g.*, *Haywood v. Drown*, 556 U.S. 729 (2009) (Supremacy Clause); *Hughes v. Fetter*, 341 U.S. 609 (1951) (Full Faith and Credit Clause).

74. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 583 (2013) (internal quotation marks omitted).

75. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012).

lar kind of remedy for breach, namely specific performance of a promise not to sue there.⁷⁶ But while the validity of a contract, in general, might depend on another state's law, "whether equitable remedies . . . are available" for breach—and, if so, which ones—is traditionally determined by "[t]he local law of the forum."⁷⁷ So here, too, forum law controls.

C. *Forum Selection and Federal Law*

Turning from state to federal courts complicates matters greatly. *Erie* and its progeny generally require federal courts, when not deciding matters of state law, to act like state courts in the states in which they sit.⁷⁸ Is the validity of a forum selection agreement a matter of federal law, or do the federal courts have to copy state practice? The Supreme Court has long avoided the question,⁷⁹ the courts of appeals are divided on it,⁸⁰ and scholarly commentators are

76. See *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (describing the issue as whether the district court should have "specifically enforc[ed] the forum selection clause"); see also Staring, *supra* note 2, at 410–11.

77. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 131 cmt. a (1971); see also RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 590 cmt. a (same rule for "injunction[s]").

78. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (citing *Eric R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938)).

79. See *Atl. Marine*, 134 S. Ct. at 581 n.5; Stephen E. Sachs, *Five Questions After Atlantic Marine*, 66 HASTINGS L.J. 761, 766–68 (2015).

80. The Seventh Circuit takes the agreement's validity as governed by state law, namely "the law of the jurisdiction whose law governs the rest of the contract in which the clause appears." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774–75 (7th Cir. 2014) (quoting *Abbott Labs. v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007)). But many other circuits favor federal law instead. See, e.g., *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014); *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (4th Cir. 2010); *Wong v. Party-Gaming Ltd.*, 589 F.3d 821, 827 (6th Cir. 2009); *Fru-Con Constr. Corp. v. Controlled Air, Inc.*, 574 F.3d 527, 538 (8th Cir. 2009); *Doe I v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009); *Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte*, 536 F.3d 439, 441 (5th Cir. 2008); *P & S Bus. Machs., Inc. v. Canon USA, Inc.*, 331 F.3d 804, 807 (11th Cir. 2003) (per curiam).

no less split.⁸¹ There's a reason for this: as *Erie* questions go, this one is particularly difficult. But if forum selection is really about procedure, then the case for federal law may be stronger than we thought.

1. *Why the Problem Is Hard*

The first thing to note is that this problem is a hard one: the “obvious” arguments for either side generally misfire. On the one hand, it's not enough to argue, as the Seventh Circuit has done, that forum selection agreements are part of contracts, and that “[t]here is no general federal law of contracts after *Erie*.”⁸² As explained at length above, whether parties can waive procedural rights in advance is an issue of procedure, not just contract. The Seventh Circuit has made the same argument—and the same error—with regard to waivers of the federal right to jury trial. There, the right itself is clearly federal in nature (guaranteed by the Constitution and the Federal Rules),⁸³ and federal courts often permit *ex ante* waiver, as a matter of federal rather than state law.⁸⁴ The Seventh Circuit found it “inconsistent[.]” to use federal “standards of ‘waiver’” to assess

81. Compare, e.g., Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses*, 66 *HASTINGS L.J.* 719, 732 (2015) [hereinafter Mullenix, *Gaming the System*] (suggesting that state law applies under *Erie* and *Klaxon*), Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 *FORDHAM L. REV.* 291, 314–15 (1988) [hereinafter Mullenix, *Another Choice*] (same), and Steinman, *supra* note 17, at 804–10, 818–19 (same), with Clermont, *supra* note 18, at 666 (arguing that federal interests in forum selection “should prevail”), and 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, 1092 (1988) (endorsing “limited federal common law”).

82. *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991–92 (7th Cir. 2008).

83. See U.S. CONST. amend. VII; FED. R. CIV. P. 38–39.

84. See, e.g., *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 837 (10th Cir. 1988); *Leasing Serv. Corp. v. Crane*, 804 F.2d 828, 832–33 (4th Cir. 1986).

“components of otherwise-valid contracts” governed by state law.⁸⁵ But it’s not quite so strange, when dealing with a right “essential” to the federal system,⁸⁶ to use federal standards to decide whether and when the right can be waived. So the fact that contract law is generally state law, not federal,⁸⁷ doesn’t tell us what we need to know.

On the other hand, despite what many courts have held, labels like “procedure” don’t answer the question either.⁸⁸ The Rules Enabling Act differentiates between “procedure” and “substantive right[s],”⁸⁹ but those words don’t show up in the Rules of Decision Act,⁹⁰ which applies in the absence of a Federal Rule.⁹¹ Under that statute, federal courts have to use state laws as rules of decision in *all* “cases where they apply.”⁹² And the law that “appl[ies]” to a procedural question has frequently been held, rightly or wrongly, to be the law of the forum *state*—whether the question involves limitations periods,⁹³ the powers of judges and juries,⁹⁴ or even choice of

85. *IFC Credit*, 512 F.3d at 994.

86. *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958),

87. *See Mullenix, Another Choice*, *supra* note 81, at 314–15.

88. *See, e.g., Martinez v. Bloomberg LP*, 740 F.3d 211, 220 (2d Cir. 2014) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature, and therefore should be governed by federal law.” (emphasis and internal quotation marks omitted)).

89. 28 U.S.C. § 2072(a)–(b) (2012).

90. *Id.* § 1652.

91. *See Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1448 (2010).

92. 28 U.S.C. § 1652.

93. *Compare* RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 603–604 (1934) (treating statutes of limitations as procedural matters governed by forum law), *and* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 142–143 (1971) (retaining much of this rule), *with* *Guar. Trust Co. v. York*, 326 U.S. 99, 110 (1945) (requiring federal courts to use the limitations periods of the states in which they sit).

94. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 129 (“The local law of the forum determines whether an issue shall be tried by the court or by a jury.”), *and* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 592 (same), *with* *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) (requiring federal judges to use state standards when reviewing jury awards).

law itself.⁹⁵ So the issue we're left with is whether a federal court in, say, the District of Maine can enforce an independent federal doctrine of forum selection, or whether it has to borrow Maine procedures and ensure consistency with Maine's courts.

2. *The Case for Federal Law*

Notwithstanding the question's difficulty, it still has an answer—namely, that federal law determines validity. That answer might seem surprising. On the modern *Erie* analysis, there's a strong argument for conformity with state procedure. When there's no controlling federal statute or enacted rule, we have to “wade into *Erie*'s murky waters,”⁹⁶ deciding whether the “twin aims” identified in *Hanna v. Plumer*—“discouragement of forum-shopping and avoidance of inequitable administration of the laws”—favor state law.⁹⁷ As both judges and scholars have noted, different rules on forum selection could easily lead to different results in different courts and among different parties.⁹⁸ If the state court would reject an agreement while the federal court would accept it, then who wins or loses the case might come down to the “accident of diversity jurisdiction.”⁹⁹ So, the argument goes, state procedure necessarily applies—or, to say mostly the same thing, the federal court ought to enforce a federal common law rule that incorporates state law by reference.¹⁰⁰

95. Compare RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 2 (describing conflict of laws as “part of the law of each state” that might hear a case), and RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 7 (same), with *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (requiring federal courts to borrow state choice-of-law principles).

96. *Shady Grove*, 130 S. Ct. at 1437.

97. 380 U.S. 460, 468 (1965).

98. See *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37–38 (1988) (Scalia, J., dissenting); Steinman, *supra* note 17, at 804–08.

99. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 751 (2012).

100. See, e.g., *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979); Steinman, *supra* note 17, at 810.

But this modern analysis isn't the only one. The Supreme Court has also recognized a range of "countervailing federal interests" that can justify independent federal rules.¹⁰¹ Forum selection clearly implicates those interests, and the federal courts regularly apply their own set of independent rules. And while the Supreme Court occasionally borrows state standards as a matter of policy, there are strong policy as well as structural arguments for an independent federal standard governing the right to a federal forum.

a. Forum Selection and Federal Interests

To start with, it should be "plain that the Federal Government's interest . . . is implicated" by a forum selection agreement that affects federal litigation, "even though the dispute is one between private parties."¹⁰² A permissive agreement, for example, attempts to lift a procedural bar to suit in a given court. To know whether it succeeds, we need to know what kind of bar we're talking about; and if the bar itself comes from federal law, then federal law ordinarily specifies the conditions under which it lifts. If the parties chose a federal court that lacked subject-matter jurisdiction, for instance, it'd be obvious that state rules on forum selection wouldn't matter; the jurisdiction of any court is always "determined by the law of the court's creation."¹⁰³

Similarly, a mandatory agreement that promised to sue only in certain courts—say, those located in Virginia—necessarily includes a promise not to sue in other courts, including otherwise-appropriate federal courts in Maine. That kind of promise is a natural subject for federal regulation, just like a promise not to vote in certain federal elections for which the party might otherwise be legally eligible. (The parties' agreement might not mention federal courts specifically, but that doesn't mean much; a promise to vote "only in Virginia

101. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432 (1996).

102. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988).

103. *Marshall v. Marshall*, 547 U.S. 293, 314 (2006) (internal quotation marks omitted).

municipal elections” clearly includes a promise not to vote in federal ones, and would be just as illegal to procure.¹⁰⁴)

According to the Supreme Court, this kind of federal interest is “a necessary, [but] not a sufficient, condition for the displacement of state law.”¹⁰⁵ We still need to know whether state law creates any “significant conflict” with “an identifiable federal policy” on the topic.¹⁰⁶ If “there can be no other law” to apply, then state law wins by default.¹⁰⁷ As it happens, though, there *is* other law here, namely the standards of waiver that federal courts apply in cases involving purely federal issues. In fact, there are multiple such standards. Waivers of federal constitutional rights, for example, face a “high standar[d]” of being “knowing, intelligent, and voluntary”;¹⁰⁸ but waivers of less vital rights are handled in a different way. As to permissive agreements, the Court considered it “settled” half a century ago “that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.”¹⁰⁹ And as to mandatory ones, when the forum selection issue is entirely out of the state’s hands (in admiralty cases, for example), the federal courts will enforce the agreement if it’s “unaffected by fraud, undue influence, or overweening bargaining power,” and if it’s neither “unreasonable” nor “unjust.”¹¹⁰ Assuming that these practices are cor-

104. *See* 18 U.S.C. § 597 (2012).

105. *Boyle*, 487 U.S. at 507.

106. *Id.* (internal quotation marks omitted).

107. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37 (Scalia, J., dissenting) (quoting *Hanna v. Plumer*, 380 U.S. 460, 471–72 (1965)).

108. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1219 (2010) (alteration in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 475 (1966)).

109. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315–16 (1964). *But cf. id.* at 332 (Black, J., dissenting) (arguing that “a printed form provision buried in a multitude of words” may be “too weak . . . to be treated as a waiver of so important a constitutional safeguard”).

110. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15 (1972); *accord* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991) (clarifying that forum selection clauses in form contracts are subject to the same standards).

rect—they may not be—there’s a significant potential for conflict between state and federal law.

b. The Merits of a Federal Standard

One might think, given this conflict, that the analysis should be simple. Either the states have power to regulate here—in which case their law controls—or they don’t, and some separate standard has to govern instead. “[B]y definition,” Caleb Nelson has written, “‘federal’ common law operates only where something has displaced or restricted the states’ lawmaking powers.”¹¹¹ In the forum selection context, that “something” is the federal right to a federal forum, which state law can neither extend nor deny. With respect to permissive agreements, for example, to say that state law conclusively determines the agreement’s validity is to say that a state, by legislation, can *force* a federal court to take a case it finds otherwise barred by the federal law of jurisdiction or venue—or can prevent a federal court from lifting the bar, when it’d be otherwise inclined to do so. Letting the state decide might make sense if the bar itself were a creature of state law. But when the bar is federal, it’s hard to see where the state gets this power—“a right,” as *McCulloch v. Maryland* put it, “in one government to pull down, what there is an acknowledged right in another to build up; . . . a right in one government to destroy, what there is a right in another to preserve.”¹¹² A few years later, in *Wayman v. Southard*, Chief Justice Marshall explicitly rejected the idea that states could “control the modes of proceeding in suits depending in the Courts of the United States,” something “[n]o gentleman, we believe, will be so extravagant as to maintain.”¹¹³

111. Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 3 (2015).

112. 17 U.S. (4 Wheat.) 159, 210 (1819).

113. 23 U.S. (10 Wheat.) 1, 49 (1825); cf. Michael S. Green, *Vertical Power*, 48 U.C. DAVIS L. REV. 73, 88 (2014) (arguing that it is “impermissible for state officials to [regulate federal procedure] indirectly, by taking laws that apply to their own courts and extending them to federal courts within the state”).

Under the modern *Erie* analysis, though, the Supreme Court has claimed for itself the right to “adopt[, as the federally prescribed rule of decision, the law that would be applied by state courts,” unless there’s a “need for a uniform federal rule.”¹¹⁴ In other words, while the law of federal forum selection has to be federal, it might copy state-law standards within each state, so long as the Court thinks that that’s a good idea. Borrowing state law has the advantage of unifying the results between diverse and nondiverse parties, and between various courts located in the same state. What advantages does a uniform federal rule confer?

i. Policy.—On a superficial level, a single federal standard has a number of policy advantages. *Hanna*’s language about the “discouragement of forum-shopping”¹¹⁵ seems rather out of place when the whole issue is *about* selecting a forum. *The Bremen* specifically encouraged federal courts to enforce ex ante agreements like these to help the parties avoid surprises. But “[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties”¹¹⁶ is simply impossible if the agreement itself might have to be reviewed under any of fifty different state standards. Indeed, the fact that the parties might specifically choose to litigate *only* in state courts, or *only* in federal ones, makes it far less necessary for those state or federal courts to handle the issues the same way. (An agreement not to remove to federal court, for example, could only be relevant in a federal forum, so it’s not clear a state court needs any opinion at all on what should happen once it’s invoked.)

On this Article’s approach, moreover, there’s less to be feared from a divergence between state and federal courts within the same state. Suppose the parties have a mandatory agreement excluding all courts in their home state, which the federal court there would honor but which a state court would ignore. If, as explained below, the federal court would dismiss an action filed contrary to the

114. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001); *see also* *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979).

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

116. *The Bremen*, 407 U.S. at 13.

agreement, then the plaintiff could simply refile in state court. If the defendant tried to remove, the plaintiff could seek remand or forum non conveniens dismissal in favor of the state court in which, by assumption, he had *not* waived his right to sue.¹¹⁷ (The federal court would have no interest in keeping the case away from the *state* court; waiver is forum law, after all, and the plaintiff hadn't waived any right to sue *there*.¹¹⁸) In other words, both court systems could fully implement their policies at one and the same time; the very structure of forum-selection-as-waiver can often make divergence between state and federal courts a non-issue.

The same goes for the other “aim[] of the *Erie* rule,” the “avoidance of inequitable administration of the laws.”¹¹⁹ The usual worry here is that, in practice, too much of the parties’ legal relationship will rest on the “accident of diversity jurisdiction.”¹²⁰ But forum selection only *arises* as a federal issue if the agreement applies to federal courts in particular. The parties could always agree to sue or not to sue in particular state courts, while wholly disclaiming any effect on federal courts; in that case, their agreement wouldn’t ever be relevant in a federal forum, as it would have deliberately exempted federal courts from its scope. We only get started with the *Erie* question once the parties have made an agreement that addresses the federal courts in particular. (Again, we wouldn’t need any explicit reference to the federal system, any more than a contract to vote “in Virginia municipal elections only” needs to explicitly mention federal elections in order to rule them out.)

117. See 28 U.S.C. § 1447(c) (2012) (discussing motions to remand on bases other than subject-matter jurisdiction); 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 97–98 & nn.140–141 (4th ed. 2009) (discussing remands to enforce waivers of the right to remove); see also *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013) (endorsing forum non conveniens dismissal in favor of state or foreign courts).

118. And if the federal court sends the case elsewhere under § 1404, it does so only according to federal statutory standards, which take independent account of the parties’ desires. See Sachs, *supra* note 79, at 769–71.

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

120. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 751 (2012).

In other words, to make a forum selection agreement relevant to federal courts, the parties have to make a particular choice whether or not to specify a federal forum. But the only parties who could possibly make such an agreement are those whose claims might be eligible for federal jurisdiction in the first place; a promise regarding litigation in federal courts is meaningless if the parties couldn't litigate there anyway. So the standard assumption underlying *Erie*, that diverse and nondiverse parties are similarly situated, no longer applies. If diversity is the only reason why a party *has* a right to a federal forum, then diversity can explain the use of federal standards for whether and when that right is waived. There's nothing accidental about it.

ii. Structure.—On a deeper level, there are strong structural reasons for the federal courts to maintain an independent standard for identifying waiver. As the Court has reminded us, “[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction.”¹²¹ When ordinary tests might call for state law, the federal judiciary can still follow its own standards to preserve an “essential characteristic of that system.”¹²² How to allocate cases across federal districts might not seem quite as “essential” as how to “distribute[] trial functions between judge and jury,”¹²³ the most famous example of this kind. But it's a distinctively *federal* function, one arguably “committed by the Constitution and laws of the United States to federal control.”¹²⁴

In a permissive agreement, for example, defendants might agree to waive their federal venue objections. Those kinds of objections are uniquely federal. States may or may not have any analogues to venue, and such analogues needn't resemble the lines between federal districts. In that case, the direct adoption of state standards would be impossible. Or the parties might consent to personal jurisdiction in the federal courts, whether or not they similarly consent

121. *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

122. *Id.*

123. *Id.*

124. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

to the jurisdiction of state courts. When the Supreme Court approved *ex ante* waivers of personal jurisdiction, for instance, it did so based on “general principles,” refusing to “assume that this uniform federal standard should give way to contrary local policies.”¹²⁵

With respect to mandatory agreements, the conflict between state and federal standards becomes even sharper. These standards might differ in one of two ways: either a state court might enforce the agreement when a federal court wouldn’t, or the other way around.

When the state is the one favoring enforcement, it’s hard to see how its preferences could lawfully interfere with a federal case. Imagine a mandatory forum selection agreement that fails *The Bremen*’s standards—one that’s unjust and unreasonable, that resulted from overweening bargaining power (say, a gun to the plaintiff’s head), and so on. Maybe the state courts would enforce it anyway; but a federal court, seised with jurisdiction and proper venue, couldn’t say that the plaintiff had waived its federal right to litigate in the federal forum. One “essential characteristic”¹²⁶ of the federal system is that its courts “in the main ‘have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given.’”¹²⁷ How and when they’ll step back from their “virtually unflagging obligation . . . to exercise the jurisdiction given them”¹²⁸ is a question of federal law. No state can *stop* a federal court from deciding a case within its jurisdiction, even by enacting a statute to that effect.¹²⁹ Nor can a state make an end-run around this rule by declaring the plaintiff to have “waived” its right to a federal forum, and then expecting federal courts to follow along.

125. *Nat’l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964).

126. *Byrd*, 356 U.S. at 537.

127. *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 747 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

128. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

129. *See Chi. & N.W. R.R. Co. v. Whitton*, 80 U.S. 270, 286 (1871); *accord* *Marshall v. Marshall*, 547 U.S. 293, 313–14 (2006); Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 68 (2012).

The other possibility is that state courts might reject agreements that federal courts would accept as fair. For instance, a state might disregard forum selection entirely, or might limit it in particular fields (such as construction)—ignoring bargains between sophisticated parties that were neither unjust nor unreasonable, that were freely negotiated on a level playing field, and that involved one party making permanent commitments in exchange for another’s promise.¹³⁰ If a plaintiff “flouts” that promise,¹³¹ is the federal court supposed to ignore this unfairness, simply because the state courts would do so?

In many *Erie* cases, the answer is “yes,” because the federal court is obliged to enforce state law. But federal courts typically use federal law to define their own inherent powers, as these are beyond the states’ power to abridge, enlarge, or modify. For example, the Supreme Court has recognized as a general “principle” that “a court may resist imposition upon its jurisdiction”—for instance, when a plaintiff might “vex,’ ‘harass,’ or ‘oppress’ the defendant” by suing in an improper place, “inflicting upon him expense or trouble not necessary to [the plaintiff’s] own right to pursue his remedy.”¹³² Forum non conveniens doctrine is theoretically based on this inherent power to prevent vexatious or oppressive litigation.¹³³ And while the Supreme Court has never decided the *Erie* issue,¹³⁴ federal courts routinely apply this federal version of forum non conveniens as opposed to any conflicting state doctrines.¹³⁵ Likewise, the substantial

130. Cf. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582 (2013) (noting that the plaintiff’s agreement to a forum selection clause is typically given “in exchange for other binding promises by the defendant”).

131. *Id.*

132. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507–08 (1947); *accord Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1218 (11th Cir. 1985).

133. *See, e.g., Gulf Oil*, 330 U.S. at 507–08; *Sibaja*, 757 F.2d at 1218.

134. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 248 n.13 (1981).

135. *See DTEX, LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 793 (5th Cir. 2007); *Esfeld v. Costa Crociere, S.P.A.*, 289 F.3d 1300, 1315 (11th Cir. 2002); *Caribbean Wholesales & Serv. Corp. v. U.S. JVC Corp.*, 24 F. App’x 16, 18 (2d Cir. 2001); *Ravelo Monegro v. Rosa*, 211 F.3d 509, 511–12 (9th Cir. 2000); *Rivendell Forest Prods., Ltd. v. Can. Pac. Ltd.*, 2 F.3d 990, 992 (10th Cir. 1993); *Royal Bed &*

majority of circuits treat the doctrine of judicial estoppel—which the Court has described as necessary “to protect the integrity of the judicial process”¹³⁶—as a matter of federal law for *Erie* purposes, even when state law governs the substance of the claim.¹³⁷ The federal courts’ ability to resist impositions seems to be another “essential” aspect of their “independent system,”¹³⁸ one that it’s hard to imagine them subcontracting out to the states to decide.

These inherent-powers doctrines bear a strong resemblance to forum-related waiver, which is also designed to prevent a party from playing “fast and loose” with the courts and misusing the availability of a federal forum.¹³⁹ As the Court put it in *Atlantic Marine*, the point of enforcing a forum selection agreement isn’t that it always has the force of a state-law contract, but that the parties’ bargain “represents [their] agreement as to the most proper forum,”¹⁴⁰ which affects “their legitimate expectations” as well as “vital inter-

Spring Co. v. Famossul Industria e Comercio de Moveis Ltda., 906 F.2d 45, 50 (1st Cir. 1990); Miller v. Davis, 507 F.2d 308, 316 (6th Cir. 1974); 14D WRIGHT ET AL., *supra* note 117, § 3828.5, at 726 (4th ed. 2013). *But see* Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935 (1991) (arguing for state law).

136. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).

137. *See, e.g.*, *Vehicle Mkt. Research, Inc. v. Mitchell Int’l, Inc.*, 767 F.3d 987, 993 (10th Cir. 2014); *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir.), *cert. denied*, 134 S. Ct. 94 (2013); *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992 (9th Cir. 2012); *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 261 (3d Cir. 2009); *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 332 n.18 (5th Cir. 2007); *Pennycuff v. Fentress County Bd. of Educ.*, 404 F.3d 447, 452 (6th Cir. 2005); *Lowery v. Stovall*, 92 F.3d 219, 223 n.3 (4th Cir. 1996). That said, there is a long-standing circuit split on the issue, as some courts apply state law on judicial estoppel instead. *See Occidental Fire & Cas. Co. v. Soczynski*, 765 F.3d 931, 935 n.3 (8th Cir. 2014); *Original Appalachian Artworks, Inc. v. S. Diamond Assocs., Inc.*, 44 F.3d 925, 930 (11th Cir. 1995); *Konstantinidis v. Chen*, 626 F.2d 933, 937–38 (D.C. Cir. 1980); *cf. Perry v. Blum*, 629 F.3d 1, 8 (1st Cir. 2010) (describing the issue as still open in the First Circuit).

138. *Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 537 (1958).

139. *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted).

140. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013) (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)).

ests of the justice system.”¹⁴¹ Letting a party “flout[.]”¹⁴² a prior agreement, through the specific mechanism of filing a suit in a federal court, may well be the kind of “perversion of the judicial process” that federal courts can legitimately guard against through their own federal standards for waiver.¹⁴³

c. The Federal Standards We Have

Where these unwritten waiver standards come from—whether they’re proclaimed by federal courts like mini-legislatures,¹⁴⁴ or whether they have to be derived from preexisting rules of common law or equity¹⁴⁵—is a more complex topic than can be addressed here. And none of this reasoning tells us what those unwritten standards actually *are*; that is, what kinds of conduct actually cause a party to waive its rights, to what extent these standards incorporate whatever substantive contract law would otherwise apply, and so on. This Article holds no brief for any particular set of standards, and federal waiver law has been extensively criticized on normative grounds—as “a patchwork of concepts drawn from jurisdiction, venue, forum non conveniens[,] and contract law,” lacking in “conceptual clarity,” and “plagued by linguistic and analytical difficulties.”¹⁴⁶

Indeed, some criticisms of the use of federal law in forum selection have been primarily focused on substance, not federalism. Their central claim is that the federal standard developed in *The Bremen*,

141. *Id.* (quoting *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring)).

142. *Id.* at 582.

143. *New Hampshire*, 532 U.S. at 750 (quoting *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990)).

144. *Cf. Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (Scalia, J.) (describing “so-called ‘federal common law’” as being “prescribed (absent explicit statutory directive) by the courts”).

145. *See generally* Nelson, *supra* note III; Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797; Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012).

146. *See* Mullenix, *Another Choice*, *supra* note 81, at 360, 365, 370.

and especially as applied to consumer contracts in *Carnival Cruise Lines Inc. v. Shute*,¹⁴⁷ is too quick to enforce unfair agreements made by unsophisticated parties.¹⁴⁸ True or not, that claim lacks any clear relationship to the *Erie* question. If the difference went the other way—if the federal courts had stuck to their pre-*Bremen* jurisprudence, exercising their statutory jurisdiction to its full extent—it’s hard to imagine a similar *Erie* critique even getting started. (With the federal courts standing ready to exercise their jurisdiction, how could a state’s law take the case away?)

But whatever the applicable federal standards are, the fact that they’re unwritten shouldn’t give us pause. Sometimes procedural rules like these are codified,¹⁴⁹ but they don’t have to be—and, in the federal system, they usually aren’t.¹⁵⁰ That personal jurisdiction and venue “are personal privileges of the defendant, rather than absolute strictures on the court, and both may be waived by the parties,”¹⁵¹ is just something that competent practitioners and judges know, and not something that statutes had to tell us. Whether those standards are written or unwritten, forum selection involves “uniquely federal interests,”¹⁵² and it needs to be assessed under federal law.

II. FORUM SELECTION AS DEFENSE

Recognizing that forum selection is a type of waiver helps explain how the issue should come before a federal court. For permis-

147. 499 U.S. 585 (1991).

148. See generally Mullenix, *Gaming the System*, *supra* note 81.

149. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 2010) (declaring valid certain contracts’ choices of New York courts and New York law).

150. But cf. Dodson, *Atlantic Marine*, *supra* note 1, at 687–88 (arguing that beyond § 1404, “no codified law appears to allow ex ante waiver” in federal courts); *accord* Shannon, *supra* note 9, at 786 n.49 (questioning the grounds for ex ante waiver).

151. *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979).

152. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988) (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

sive agreements, the procedure is usually simple; whatever objections the defendant has waived just go away. For mandatory agreements, though, the matter is often more complex. In one common scenario, a plaintiff subject to a mandatory forum selection agreement nonetheless files in a court other than the one the parties chose. *Atlantic Marine* identified two “appropriate” means of responding: a motion to transfer venue among federal districts under § 1404, or a motion to dismiss in favor of a state or foreign court under forum non conveniens.¹⁵³

Fortunately, though, the Court left the door open to other procedures.¹⁵⁴ If forum selection is really a type of waiver, then a mandatory agreement waiving the right to sue in a given forum ought to serve as a defense to recovery there, and it ought to be asserted like any other defense—affirmatively stated in the answer or raised by appropriate motion. At least three circuit courts of appeals have adopted this approach (or something like it),¹⁵⁵ as has the *Wright & Miller* treatise,¹⁵⁶ and it has both theoretical and practical advantages over its competitors. And while nothing’s perfect, any problems that result from recognizing forum selection as a defense can be corrected through straightforward amendments to the Federal Rules.

A. *Why Forum Selection Is a Defense*

Viewing a mandatory forum selection agreement as a defense follows rather naturally from viewing it as a waiver. A plaintiff that’s given up the right to sue in a particular forum shouldn’t be allowed to recover there. Otherwise, the waiver doesn’t mean very much.

153. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580–81 (2013).

154. *See id.* at 580 & n.4; *see also* Sachs, *supra* note 79, at 763–64.

155. *See, e.g.,* *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 933–34 (6th Cir. 2014); *Rivera v. Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15 (1st Cir. 2009); *Salovaara v. Jackson Nat’l Life Ins. Co.*, 246 F.3d 289, 298–99 (3d Cir. 2001).

156. *See* 14D WRIGHT ET AL., *supra* note 135, § 3803.1, at 93 & n.82 (4th ed. 2013) (“The better view . . . is that a [valid] forum selection clause . . . should be enforced by either a Section 1404(a) transfer or a Rule 12(b)(6) motion to dismiss for failure to state a claim.”) (citing cases).

The fact that this is a forum “to which the parties waived their right”¹⁵⁷ is a reason why the plaintiff should go home without relief. That’s the classic definition of a defense: a reason why this particular court, at this particular time, shouldn’t award the relief that the plaintiff seeks.¹⁵⁸

The same reasoning applies even if Part I of this Article were entirely wrong, and a mandatory forum selection agreement—which, for simplicity’s sake, this Part just calls “forum selection”—were purely a matter of contract. If the parties have a binding contract not to litigate in a particular forum, and the plaintiff files there anyway, then the court ought to award some kind of remedy for that breach. Often the proper remedy, as a matter of equity, will be specific performance of their obligation not to litigate—which is usually achieved by preventing the plaintiff from continuing the suit.¹⁵⁹ Either way, the forum selection agreement serves as a reason why the plaintiff should lose.

In fact, from the standpoint of contract law, specific performance makes far more sense than subsequent claims for damages.¹⁶⁰ Part of the problem is that, in the forum selection context, the standard remedy of expectation damages is very uncertain. If the plaintiff sues somewhere other than the chosen forum, how much has the defendant really lost in dollar terms? Would the defendant need to prove (by a preponderance of evidence) that the case would have come out differently in the chosen court?¹⁶¹ How much should we weigh the uncertainty caused by the change, the defendant’s unfamiliarity with procedures or personnel, the need to find a lawyer

157. *Atl. Marine*, 134 S. Ct. at 583.

158. See BLACK’S LAW DICTIONARY, *supra* note 10, at 509 (defining “defense”).

159. See generally Staring, *supra* note 2; see also *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) (“The correct approach would have been to enforce the forum clause specifically . . .”).

160. Cf. *Dodson, Atlantic Marine*, *supra* note 1, at 677 (discussing contract actions after breach).

161. Cf. 15 WRIGHT ET AL., *supra* note 117, § 3855, at 402–04, 409 n.11 (4th ed. 2013) (describing the difficulty of this inquiry with regard to appealing venue transfer decisions).

admitted to the court's bar, the potential differences in choice of law, and so on? When a damages remedy "affords inadequate protection" against the other party's deliberate breach, we often impose a disgorgement remedy instead, requiring the party at fault to turn over its profits without needing to measure the innocent party's losses.¹⁶² But a plaintiff's profits from the misfiled suit are whatever it recovers in the judgment, minus costs and attorney's fees—meaning that, after the defendant pleads a counterclaim and set-off for breach, the plaintiff's net recovery will always be zero. So instead of going through that pointless exercise, courts usually award specific performance, treating the forum selection clause as a bar to recovery rather than letting the suit go forward and trying to calculate damages afterwards.¹⁶³

While the Supreme Court hasn't explicitly declared forum selection to be a defense, that view underlies some of its cases. In *Lauro Lines s.r.l. v. Chasser*,¹⁶⁴ for example, the Supreme Court indicated that a mandatory agreement can bar the plaintiff's recovery in other courts. The district court in *Lauro Lines* had refused to enforce the parties' agreement, and the defendant tried to appeal under the collateral order doctrine,¹⁶⁵ which addresses errors that are "effectively unreviewable" after final judgment.¹⁶⁶ The Court determined, though, that the issue could be fully addressed in an ordinary appeal. Because the forum selection clause conferred a binding "entitlement to be sued only in a particular forum," any relief that the district court might award would constitute reversible error.¹⁶⁷ In a concurrence, Justice Scalia made clear that the remedy for the dis-

162. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39(1) (2011).

163. See *id.* cmt. *a* (noting that courts often use specific performance "[w]here a party's contractual entitlement would be inadequately protected by the legal remedy of damages for breach," and treat disgorgement as an "after the fact" remedy when "the defendant can no longer be required to perform").

164. 490 U.S. 495 (1989).

165. *Id.* at 497.

166. *Id.* at 498 (internal quotation marks omitted).

167. *Id.* at 501.

district court's mistake was "permitting the trial to occur and reversing its outcome."¹⁶⁸ That remedy can only be available if a judgment for the plaintiff would be legally erroneous, which means that the district court was supposed to have denied relief in the first place—which means that forum selection is a defense. The Court repeated this characterization in *Digital Equipment Corp. v. Desktop Direct, Inc.*, where it rejected collateral-order appeals based on private settlement agreements.¹⁶⁹ The Court explained that settlements, like forum selection agreements, involve "one private party secur[ing] from another a promise not to bring suit" under particular circumstances;¹⁷⁰ such a promise confers a "broad defense to liability,"¹⁷¹ and it supports an appeal from any final "judgment [in] the plaintiff's favor."¹⁷²

The fact that forum selection can be a defense, though, doesn't mean that it can *only* be a defense. There are plenty of procedural means for invoking a forum selection agreement, and a party has the right to elect its remedy. For instance, if the parties agreed to litigate only in state courts (and not to remove), it'd be very strange to deny recovery to a plaintiff who properly sues in state court and then has the case improperly removed by the defendant. In that case, the right response would be for the plaintiff to move for remand (or for dismissal for forum non conveniens),¹⁷³ sending the case back to the forum in which he had the right to sue. Likewise, if the defendant chooses to move for a transfer under § 1404, then some of the considerations usually relevant to § 1404 motions still apply. The plaintiff's waiver of the right to sue might wipe out any "right to challenge the preselected forum as inconvenient,"¹⁷⁴ but it doesn't let the court ignore "public-interest considerations"¹⁷⁵ under a statute

168. *Id.* at 502–03 (Scalia, J., concurring)

169. 511 US. 863 (1994).

170. *Id.* at 880.

171. *Id.* at 871.

172. *Id.* at 881.

173. See sources cited *supra* note 117.

174. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 582 (2013).

175. *Id.* at 581.

that requires action “in the interest of justice.”¹⁷⁶ (Or, if the defendant seeks a transfer to another forum barred by the agreement, the *defendant’s* own waiver could be invoked by the plaintiff.¹⁷⁷)

B. Raising the Forum Selection Defense

The Federal Rules also provide a means of raising the forum selection defense: by pleading it in the answer, seeking summary judgment, or, in many cases, by raising it on motion under Rule 12.

1. Answer and Summary Judgment

If forum selection is a defense, then it has to be pleaded as a defense. The proper way to raise defenses under the Federal Rules is to plead them in the answer. Rule 12 is unequivocal: other than the seven special defenses that “a party may assert . . . by motion”—such as jurisdiction, venue, or improper service—“[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.”¹⁷⁸ That accords with Rule 8’s requirement that a party state in the responsive pleading “its defenses to *each* claim asserted against it.”¹⁷⁹

In fact, if a party fails to plead forum selection in its answer, it ought to forfeit the defense. Under Rule 8, a defendant’s answer has to “affirmatively state *any* avoidance or affirmative defense,”¹⁸⁰ lest the defense be “forfeited” and “exclu[ded] from the case.”¹⁸¹ Forum

176. 28 U.S.C. § 1404(a) (2012). These public-interest considerations might also affect whether the forum selection agreement is enforceable on its own terms. *See* *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972) (discussing whether enforcement might “contravene an important public policy of the forum”).

177. *See, e.g.*, *GDG Acquisitions, LLC v. Gov’t of Belize*, 749 F.3d 1024 (11th Cir. 2014).

178. FED. R. CIV. P. 12(b) (emphasis added).

179. *Id.* 8(b)(1)(A) (emphasis added).

180. *Id.* 8(c)(1) (emphasis added).

181. *Wood v. Milyard*, 132 S. Ct. 1826, 1832 (2012) (alteration in original) (internal quotation marks omitted).

selection is an affirmative defense, according to the ordinary definitions of the term; it can't be raised "by a simple denial in the answer,"¹⁸² and it can bar recovery "even if all the allegations in the complaint are true."¹⁸³ The existence of a forum selection agreement usually doesn't negate any element of the plaintiff's claim. Rather, it's an independent reason for the court to deny relief. Rule 8's non-exclusive list of affirmative defenses even mentions "waiver" as a specific example.¹⁸⁴

Pleading forum selection as a defense, though, doesn't mean that the issue has to wait until trial. Instead, the defendant can get an early ruling on the question by motion. For starters, whatever a party might argue at trial, they can also raise on a motion for summary judgment. Those motions have an end date (30 days after discovery),¹⁸⁵ but no starting date; as the Advisory Committee noted, Rule 56 lets the parties seek summary judgment "at the commencement of an action" if they want.¹⁸⁶ So the defendant can file its motion as soon as the complaint comes in,¹⁸⁷ attaching the forum selection agreement as an exhibit and arguing that it bars recovery. Usually the parties will agree that the exhibit is authentic, and their only real disputes will involve issues of law—how the clause should be interpreted,¹⁸⁸ what standard governs its validity, and so on. If so,

182. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1271, at 585 (3d ed. 2004).

183. BLACK'S LAW DICTIONARY, *supra* note 10, at 509.

184. FED. R. CIV. P. 8(c)(1). This rule has been interpreted as applying not only to substantive waivers (as of contractual rights through subsequent courses of conduct), but also to procedural ones. *See, e.g.,* Zephyr Aviation, L.L.C. v. Dailey, 247 F.3d 565, 571 n.8 (5th Cir. 2001) (failure to exhaust administrative remedies); *see also* R.H. Cochran & Assocs. v. Sheet Metal Workers Int'l Ass'n Local Union No. 33, 335 F. App'x 516, 518–19 (6th Cir. 2009) (failure to raise timely objections in arbitral proceedings).

185. FED. R. CIV. P. 56(b).

186. FED. R. CIV. P. 56 advisory committee's note (2010), 28 U.S.C. app. at 268 (2012).

187. *Cf. id.* (noting that a Rule 56 motion might be "premature until the nonmovant has had time to file a responsive pleading," which won't be a problem if the defendant is the movant).

188. *Cf.* 17A AM. JUR. 2D *Contracts* § 332 (2004) ("As a general rule, the construction of a contract is a question of law for the court.").

there's "no genuine dispute as to any material fact,"¹⁸⁹ and the court can resolve the legal issues directly under Rule 56. If there do happen to be facts in dispute—say, over the parties' relative bargaining power, or the circumstances that might render the agreement unfair or unreasonable—then the court can authorize focused discovery under Rule 56(d)(2) and (3), resolving the forum selection issue without needing to proceed any further in the case.¹⁹⁰

2. *Rule 12 Motion*

Often a defendant can get a quick ruling on forum selection without resorting to summary judgment, by using a Rule 12(c) or 12(b)(6) motion instead. Many complaints in contract cases incorporate the underlying contract as an exhibit, making it part of the pleading for all purposes under Rule 10.¹⁹¹ (Or, if a non-included contract is discussed extensively, many courts will declare it to be incorporated anyway, so long as both parties agree on what it says.¹⁹²) At this point, with the forum selection agreement forming part of the plaintiff's complaint, the defendant has two options. The traditional course would be to raise the forum selection defense in the answer and then file a Rule 12(c) motion for judgment on the pleadings.¹⁹³ But if the complaint already incorporates a valid forum selection agreement, there's no need even to file an answer; the complaint on its face reveals an affirmative defense to liability, which

189. FED. R. CIV. P. 56(a).

190. And even if the court denies or defers the motion under Rule 56(d)(1), the defendant can still get the chance to file others. Courts regularly accept successive summary judgment motions for good cause. *See* 11 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 56.121[1][b], at 300 & n.5 (3d ed. 1997).

191. *See* FED. R. CIV. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.").

192. *See, e.g.,* DiFolco v. MSNBC Cable LLC, 622 F.3d 104, 111 (2d Cir. 2010); *see also* 5B WRIGHT & MILLER, *supra* note 182, § 1357, at 376 & n.1 (3d ed. 2004) (compiling sources).

193. *See* Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 n.1 (7th Cir. 2012).

many courts (including the Supreme Court) take as a failure to state a claim under Rule 12(b)(6).¹⁹⁴

That practice stretches the Rule's language somewhat. Defendants don't have to plead affirmative defenses if they don't want to, and until they do, the complaint really does state a claim on which the court can grant relief. So the practice of raising an affirmative defense on a 12(b)(6) may result from a misreading of the Rule.¹⁹⁵ But the best argument in favor of the courts' position would go something like this. Sometimes, just from reading the complaint, we already know that the plaintiff ought to lose. (Say, because the allegations concern decades-old events way outside the statute of limitations.¹⁹⁶) If the defendant raises the issue by motion, then arguably the plaintiff's claim is no longer one "on which relief can be granted"—which sounds more like 12(b)(6) territory. This was the reasoning employed by the Supreme Court in *Jones v. Bock*: so long as "the allegations in the complaint suffice to establish" a "ground for opposing a claim," that claim can be dismissed, whatever "the nature of the ground in the abstract."¹⁹⁷ And if a valid forum selection agreement is made part of the complaint, then the pleading itself reveals a reason to deny relief, and the case can be dismissed on a 12(b)(6).

Because this kind of 12(b)(6) dismissal will often be available, and because it's highly sought after by defendants, the general approach of viewing forum selection as an affirmative defense sometimes goes by the label of "12(b)(6)."¹⁹⁸ That's somewhat of a mis-

194. See *Jones v. Bock*, 549 U.S. 199, 215 (2007) (quoting *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001)); see also 5B WRIGHT & MILLER, *supra* note 192, § 1357, at 708–10 & nn.62–63 (compiling sources).

195. See *Brownmark Films*, 682 F.3d at 690; 5 WRIGHT & MILLER, *supra* note 182, § 1277, at 626–28; Rhynette Northcross Hurd, Note, *The Propriety of Permitting Affirmative Defenses to Be Raised by Motions to Dismiss*, 20 MEM. ST. U. L. REV. 411 (1990); Michael E. Rosman, *Affirmative Defenses and Rule 12(b)(6): A Plain Meaning Interpretation*, N.Y.L.J., Dec. 20, 2012, at 4, available at <http://ssrn.com/id=2206027>.

196. See 5 WRIGHT & MILLER, *supra* note 182, § 1226, at 306 n.10.

197. 549 U.S. at 215.

198. See, e.g., *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 (2013).

nomer, as a forum selection defense can only be raised on a 12(b)(6) in certain favorable circumstances—when the agreement is itself made part of the complaint, or perhaps is available for judicial notice, and so on.¹⁹⁹ Otherwise, the agreement constitutes “matters outside the pleadings,” which the court has to exclude or convert into a motion for summary judgment.²⁰⁰

In fact, that treatment might also be necessary depending on how the *plaintiff* tries to resist the forum selection agreement. To properly litigate the case, the plaintiff might need to raise factual issues that aren’t found in the pleadings—say, whether the forum selection agreement is unreasonable or unjust under *The Bremen*, whether it’s been subsequently rescinded by the parties, whether it was inserted in the contract through fraud in the factum, and so on. These are all extremely unlikely to be discussed in the complaint, but they can’t easily be excluded from consideration. They go directly to the merits of the motion to dismiss, and Rule 12 requires that “[a]ll parties . . . be given a reasonable opportunity to present all the material that is pertinent to the motion.”²⁰¹

That wrinkle follows directly from the tensions inherent in using Rule 12(b)(6) to enforce affirmative defenses. Even a statute-of-limitations defense, the easiest candidate for this treatment, can require outside facts. (For example, whether the defendant had previously agreed out of court to waive the defense, whether it’s subject to equitable tolling for various reasons, and so on.) Plaintiffs aren’t required to anticipate defenses in their complaints, so these issues aren’t easy to hash out on the pleadings. Nonetheless, because these issues arise relatively rarely, a Rule 12 motion will be available most of the time—and the “12(b)(6)” label is largely accurate.

199. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

200. FED. R. CIV. P. 12(d).

201. *Id.*

C. Criticisms and Responses

Treating forum selection as a defense has attracted the support of several courts and commentators. It's also made an appearance, albeit a silent one, in the Supreme Court's case law; the defendant in *Lauro Lines*, whom the Court considered protected from recovery outside the chosen court, had raised its forum selection defense in a motion to dismiss "pursuant to Rules 12(b) and 56."²⁰²

That said, scholars and judges have been generally hostile to the idea, either because they see it as theoretically confused or as practically awkward. In fact, much of the confusion and awkwardness lies on the other side. Treating forum selection as an affirmative defense is not only correct as a theoretical matter, but provides substantial practical advantages. To the extent that there are any practical defects with this approach (as there always are), they can be corrected with a relatively straightforward amendment to the Federal Rules.

1. Criticisms in Theory

To date, the main objections to treating forum selection as a defense have been theoretical. Defenses, answers, summary judgment, 12(b)(6): these things are all supposed to be about "substantive rights,"²⁰³ not "procedural"²⁰⁴ or "non-merits based"²⁰⁵ issues that apply only "in a particular court."²⁰⁶ At oral argument in *Atlantic Marine*, Justice Kagan went so far as to describe the argument as "a

202. Joint Appendix at 2–3, *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989) (No. 88-23), 1988 U.S. S. Ct. Briefs LEXIS 620, at *2–3.

203. Martin Davies, *Forum Selection Clauses in Maritime Cases*, 27 TUL. MAR. L.J. 367, 375 (2003) (describing the use of Rule 12(b)(6) for forum selection as "heresy").

204. Shannon, *supra* note 9, at 790 (emphasis omitted); *see also id.* (reserving Rule 12(b)(6) "for the enforcement of merits-based defenses," and arguing that forum selection "has nothing to do with the merits, but rather relates only to the identity of the proper forum" (emphasis omitted)).

205. Dodson, *Atlantic Marine*, *supra* note 1, at 686 n.58 (arguing that forum selection "fit[s] uncomfortably within a Rule 12(b)(6) dismissal, to say nothing of a Rule 12(c) or Rule 56 judgment").

206. Staring, *supra* note 2, at 408.

bit of a category error,”²⁰⁷ mixing up questions of who should win and where to hold the fight.

But these worries themselves get the categories wrong. The distinction between merits and non-merits arguments is a distinction between different kinds of *defenses*, not among the particular procedural *vehicles* used to raise them. Answers, summary judgment, and Rule 12(b)(6) are routinely used to litigate defenses that are procedural, that don’t go to the merits, or that might be limited only to a particular court. Using these devices for forum selection is nothing new.

a. Procedural Defenses

Unlike the typical defense raised on a 12(b)(6) motion, a forum selection defense is procedural rather than substantive. But the Federal Rules’ default method for raising defenses doesn’t distinguish between procedure and substance. Rather, it instructs that “[e]very defense to a claim for relief . . . must be asserted in the responsive pleading.”²⁰⁸ The seven special defenses listed in Rule 12(b)—which all happen to be procedural—can be raised by pre-answer motion, but they don’t have to be. So long as the defendant avoids making any Rule 12 pre-answer motions on other grounds, it’s enough to plead jurisdiction, venue, or improper service in the answer, which avoids any waiver and preserves those defenses for future use.²⁰⁹

In fact, the Rules require defendants to plead a number of procedural defenses in the answer, depending on what one calls “procedural.” That the claim is subject to issue preclusion, that it’s barred by laches, that the plaintiff lacks capacity to sue and be sued in this forum, that there’s an unmet condition precedent to suit (like exhaustion of administrative remedies or a pre-filing notice requirement); all of these are usually thought of as issues of procedure, not

207. Transcript of Oral Argument at 14, *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568 (No. 12-929) (2013) [hereinafter *Atlantic Marine* Transcript].

208. FED. R. CIV. P. 12(b).

209. See *id.* 12(h)(1)(A), (B)(ii).

substance. Yet all of them must also be “affirmatively stated”²¹⁰ in the answer, perhaps even “specific[ally]”²¹¹ or “with particularity.”²¹² And if any of these defenses should be apparent from the face of the complaint—say, because it alleges that the plaintiff is only 17 years old, or that the plaintiff has sued and lost before—then that defense can be raised through the vehicle of Rule 12(b)(6), regardless of its “nature.”²¹³ Forum selection is hardly unusual in this regard, and there’s no reason to treat it differently.

b. Non-Merits Defenses

In the *Atlantic Marine* oral argument, Justice Kagan suggested that a Rule 12(b)(6) dismissal is an “on-the-merits determination” with “res judicata effect.”²¹⁴ Forum selection isn’t like that, of course; filing suit in the wrong court won’t always bar you from re-filing in the right court. So, the argument goes, forum selection is an inappropriate ground for 12(b)(6)—much less a judgment under 12(c) or 56.

The problem with this preclusion argument is its first premise. Like an unfavorable judgment, a Rule 12(b)(6) dismissal is only sometimes, not always, preclusive on the merits. Suppose that the contract in a debt collection case, incorporated as an exhibit to the complaint, conclusively reveals that the sued-on debt isn’t due for another month. Rule 12(b)(6) dismissal, judgment on the pleadings, or summary judgment would all be perfectly correct ways to dispose of *this* premature lawsuit; on the face of the complaint, the plaintiff should lose. But none of these procedural vehicles would bar the plaintiff from returning to court in a month’s time if the debt were still unpaid. Rather, the judgment’s preclusive effect is to bind the parties on the issue of when the debt comes due, not whether it’s

210. *Id.* 8(c)(1) (estoppel, laches)

211. *Id.* 9(a)(2) (capacity)

212. *Id.* 9(c) (conditions precedent).

213. *Jones v. Bock*, 549 U.S. 199, 215 (2007).

214. *Atlantic Marine* Transcript, *supra* note 207, at 14.

owed at all.²¹⁵ (The same is true if the plaintiff will be turning 18 next month, or will have exhausted its administrative remedies by then, or . . .)

Under *Semtek International Inc. v. Lockheed Martin Corp.*, the preclusive effect of a dismissal or judgment isn't decided by the Federal Rules, but by separate doctrines of res judicata and collateral estoppel, which look to the type of defense and not to the procedural vehicle by which it's raised.²¹⁶ A statute-of-limitations defense, for example, is the stereotypical affirmative defense raised under Rule 12(b)(6),²¹⁷ yet it doesn't necessarily bar suit in federal courts in other states.²¹⁸ Certain kinds of substantive losses, of course, will wipe out a claim even after a favorable change in substantive law.²¹⁹ But a forum-selection dismissal—like a dismissal for forum non conveniens—“den[ies] audience to a case on the merits,” deciding only “that the merits should be adjudicated elsewhere.”²²⁰ As the Supreme Court held in *Costello v. United States*, a dismissal or other judgment that doesn't reach the substance, one that's ultimately “based on a plaintiff's failure to comply with a precondition . . . to determin[ing] the merits of his substantive claim,” is generally considered to be without prejudice under Rule 41.²²¹ As *Semtek* explains, that “ordinarily . . . [has] the consequence of not barring the claim from other courts.” Because a forum selection agreement makes filing suit in the chosen forum a precondition to reaching the merits, a dismissal on forum selection grounds wouldn't always pre-

215. Cf. Bradley Scott Shannon, *Dismissing Federal Rule of Civil Procedure 41*, 52 U. LOUISVILLE L. REV. 265, 277–81 (2014) (describing a variety of similar nonpreclusive dismissals).

216. See 531 U.S. 497, 506–07 (2001).

217. See *Jones*, 549 U.S. at 215.

218. See *Semtek*, 531 U.S. at 504.

219. See 18 WRIGHT ET AL., *supra* note 117, § 4415, at 369–70 & nn.38–39 (2d ed. 2002).

220. *Sinochem Int'l v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 432 (2007) (alteration in original; quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999)).

221. 365 U.S. 265, 285 (1961).

vent the plaintiff from trying again in another court²²²—or even in the same court, should the defendant be willing to waive this defense.

c. Court-Dependent Defenses

Some commentators have viewed the 12(b)(6) device as “highly strained, because failure to state a claim ordinarily is the apparent lack of any substantial right and not just the inability to enforce it in a particular court.”²²³ But other defenses are also specific to particular courts. For example, a judgment with prejudice under Rule 41 definitely bars the plaintiff from refiling the same claim in the same court, but it doesn’t always serve as a bar in any other courts, state or federal.²²⁴ So if the case had been dismissed by, say, the Central District of California, then preclusion might represent a good defense in the Central District, whether or not it’d work anywhere else. And if the complaint in the second suit happened to describe what went on in the first, then preclusion would be a perfectly good ground for dismissal under Rule 12(b)(6).

More generally, there’s nothing strange about forum selection being a defense to liability that applies only in particular courts. The essence of the Court’s holding in *CompuCredit* is that one may have a substantive right—even a nonwaivable right—“to impose liability” on another party without having a similar right to do so “in all competent courts.”²²⁵ Like venue or personal jurisdiction, forum selection is a good defense in some districts but not others. But unlike those defenses, it hasn’t been given a special status under Rule 12(b), and so should be treated like any other affirmative defense.

222. That said, deliberately abusive suits in multiple courts might produce a different response. See RESTATEMENT (SECOND) OF JUDGMENTS § 20, cmt. *n* (1982) (noting that “estoppel or laches” may bar a second suit when “it would be plainly unfair to subject the defendant to a second action”); Sachs Brief, *supra* note *, at 26 n.14.

223. Staring, *supra* note 2, at 408.

224. See *Semtek*, 531 U.S. at 506.

225. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 671 (2012) (emphasis omitted).

d. The No-Rule Alternative

One other criticism of relying on Rule 12(b)(6) is that we might not need any rule to rely on in the first place. Bradley Shannon has argued that courts can dismiss cases on motion merely for violating a forum selection agreement, without citing any particular provision of the Federal Rules.²²⁶ This, in fact, seems to be common practice in forum non conveniens dismissals²²⁷—perhaps because modern forum non conveniens doctrine only took shape after the Federal Rules were in place.²²⁸ But there’s no obvious legal basis for this practice. If personal jurisdiction, venue, and failure to join a necessary party aren’t too procedural to be called “defenses” by Rule 12(b),²²⁹ then neither is forum non conveniens—in which case it, too, should fall within that Rule’s catchall requirement that “[e]very defense,” other than the special seven, “be asserted in the responsive pleading.”²³⁰ (Judicial estoppel, too, proceeds from the courts’ inherent powers,²³¹ but “estoppel” still has to be pleaded under Rule 8(c).²³²) In any case, even if the courts have created an ad hoc exception for forum non conveniens, there’s no reason to extend their error to forum selection.

2. Criticisms in Practice

Other criticisms of the forum selection defense are based in practice, not theory. Compared to the mechanisms the Court approved in *Atlantic Marine*—of § 1404 transfer or forum non con-

226. Shannon, *supra* note 9, at 792–93.

227. *See id.* at 793; *see also Atlantic Marine* Transcript, *supra* note 207, at 20 (“JUSTICE KENNEDY: You just cite Gulf Oil, and that’s it?”).

228. *See generally* Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

229. *See* FED. R. CIV. P. 12(b) (“But a party may assert the following defenses by motion:”); *id.* 12(b)(2), (3), (7).

230. *Id.* 12(b).

231. *See* Montrose Med. Grp. Participating Sav. Plan v. Bulger, 243 F.3d 773, 779 (3d Cir. 2001); *see also supra* notes 136–137 and accompanying text.

232. FED. R. CIV. P. 8(c)(1) (“estoppel”).

veniens dismissal—advancing a forum selection defense may take too long to resolve; may require a jury trial on contested facts; and may create unfairness when the statute of limitations has lapsed.

In fact, none of these criticisms holds much weight. A forum selection defense can be advanced quickly on motion and may be waived if the defendant delays in raising it. While a jury trial might be necessary in unusual cases, that’s an entirely appropriate way to proceed in a jury case, and it’s the same procedure we use to protect other defendants enforcing prior settlements or arbitration awards. And although plaintiffs who file in the wrong forum may find themselves outside the limitations period, that may not always be unfair—and when it is, judges can invoke § 1404 sua sponte instead.

a. Timing

Transfers under § 1404 have two alleged advantages with respect to timing. First, an eager defendant can get the case transferred quickly, because a § 1404 motion may be made at virtually any time—even before all defendants have been served with process.²³³ Second, a dilatory defendant will have reasons to move quickly, because a court has discretion to deny a § 1404 motion that’s filed too late in the game.²³⁴

By contrast, the argument goes, if the forum selection agreement hasn’t been made part of the plaintiff’s complaint, then ordinarily it wouldn’t be possible to raise the defense until the defendant files an answer. That means the defendant has to “admit or deny” *all* of “the allegations asserted against it,”²³⁵ after conducting an “inquiry reasonable under the circumstances”²³⁶—which could mean an enormous amount of unnecessary investigation. If the defendant wants to raise any other pre-answer motions, it’ll have to

233. See 15 WRIGHT ET AL., *supra* note 161, § 3844, at 64 & n.20.

234. See *id.* at 64 & n.25; see also *In re Apple Inc.*, 456 F. App’x 907, 907 (Fed. Cir. 2012).

235. FED. R. CIV. P. 8(1)(B).

236. *Id.* 11(b).

litigate those first, in a court that ostensibly shouldn't even be hearing the case. Moreover, some claim that even if the agreement were incorporated in the complaint, a dilatory defendant wouldn't have to raise the issue by pre-answer motion; instead, it could raise the affirmative defense in its answer and then wait to litigate the issue at trial.²³⁷

These worries, though, are overblown. If the agreement isn't incorporated in the pleadings, a defendant that wants an early decision on forum selection can bring a pre-answer motion for summary judgment, which can involve as many "matters outside the pleadings"²³⁸ as it likes. As noted above, summary judgment can be sought as soon as the case is filed, even "at the commencement of an action."²³⁹ So eager defendants can bring up forum selection defenses as early as they choose.

Even were summary judgment not available, making defendants wait to process forum selection as a defense would hardly be that much to ask. The Federal Rules expect just the same of defendants that have already settled the case, already completed an arbitration, or already litigated the case to judgment and won: "release," "arbitration and award," "res judicata," and "estoppel" are all ordinary affirmative defenses under Rule 8.²⁴⁰ Each of those defenses involves just as much need for certainty, efficiency, and repose as would a forum-selection agreement.²⁴¹

Nor can a dilatory defendant feel safe bringing up the forum selection issue late in the game. The issue be forfeited if not "affirmatively state[d]" in the answer;²⁴² and while answers can be amended

237. See *Sucampo Pharms., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 549 (4th Cir. 2006) (making this criticism); Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 VAND. L. REV. 1913, 1924 n.70 (2009) (same).

238. FED. R. CIV. P. 12(d).

239. FED. R. CIV. P. 56 advisory committee's note (2010), 28 U.S.C. app. at 268 (2012).

240. FED. R. CIV. P. 8(c)(1).

241. See Sachs Brief, *supra* note *, at 20.

242. FED. R. CIV. P. 8(c)(1).

under Rule 15,²⁴³ leave may be denied after an unnecessary delay.²⁴⁴ And if the defendant waits too long to seek judgment on the issue, continuing to litigate in the “wrong” forum, there’s a strong likelihood that the plaintiff’s waiver of the right to sue may itself be waived. A defendant that sleeps on its rights, proceeding with the suit even while ostensibly objecting to the forum, may be found to have lost any forum selection defense.²⁴⁵

b. Factfinding and Jury Trial

A second difference between forum selection and the other alternatives involves factfinding. Under Rule 43, the court conducts all factfinding relevant to a motion—including a motion under § 1404 or forum non conveniens.²⁴⁶ That’s not the case, though, for motions under Rules 12(b)(6), 12(c), or 56. Under Rule 12(d), if “matters outside the pleading” are involved, the first two motions will be converted into the third; and if those matters present “genuine dispute[s]” as to “material fact[s],” summary judgment will be denied and the issues left for trial.²⁴⁷ As the Court noted in *Atlantic Marine*, the prospect of waiting for a jury trial—as compared to a quick ruling from the bench—will likely encourage many defendants to seek relief by some other motion instead.²⁴⁸

243. See 5C WRIGHT ET AL., *supra* note 117, § 1394, at 555 (3d ed. 2004) (“A party may avoid waiver by seeking leave from the district court to amend his pleading to interpose an affirmative defense that has been inadvertently omitted.”).

244. See 6 *id.* § 1488, at 764 (3d ed. 2010).

245. See 13D *id.* § 3569, at 526–28 & nn.83–84 (3d ed. 2008); *id.* § 3569, at 167–68 (Supp. 2014); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983) (same rule for arbitration); 14D WRIGHT ET AL., *supra* note 135, § 3828, at 627 & n.17 (same rule for forum non conveniens); see also Sachs Brief, *supra* note *, at 23–24.

246. See FED. R. CIV. P. 43(c) (“When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.”).

247. *Id.* 56(a).

248. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 580 n.4 (2013).

The fact that § 1404 or forum non conveniens may sometimes be more useful, though, doesn't mean that the affirmative-defense approach is legally incorrect. Again, the wronged party has an election of remedies, and can choose the one that best suits its purposes. In fact, leaving genuine factual disputes to the jury makes a lot of sense. Suppose that the parties really do disagree about the facts: whether the contract was made under duress, whether the forum selection clause was inserted by fraud, whether that's even the plaintiff's signature, and so on. If the parties have a Seventh Amendment right to a jury trial of the case as a whole, why *shouldn't* the jury determine these questions too—rather than have a judge send the case packing on his or her own authority? Indeed, the real question is why a court is allowed to keep these issues from the jury under § 1404. In the arbitration context, where speed and efficiency are no less important, disputes over the “making of the agreement” are required by statute to proceed to “jury trial.”²⁴⁹ So are any factual questions involved in construing a prior settlement,²⁵⁰ though settlements, too, are designed to avoid further litigation. In any case, the number of truly genuine factual disputes over forum selection is likely to be small; most contracts speak for themselves, and the relatively narrow scope of the “unfair” and “unreasonable” exceptions under *Carnival Cruise*²⁵¹ mean that most objections to enforcement could be addressed as a matter of law.

c. Dismissal and Unfairness

If the wronged party can choose between dismissal and venue transfer, why should it make much difference? In fact, one significant change created by the forum selection defense has to do with the statute of limitations. A § 1404 transfer preserves the original

249. 9 U.S.C. § 4 (2012); *see also* Sachs Brief, *supra* note *, at 24–25.

250. *See* Anthony DiSarro, *Six Degrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation*, 60 AM. U. L. REV. 275, 288 n.77 (2010) (listing cases).

251. *See* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–95 (1991).

dates of filing and service, as far as limitations periods are concerned. But if the case is dismissed and refiled, then the plaintiff may actually be barred forever if the statute of limitations has lapsed. That's why, in § 1406, Congress provided for the option of transfer (and not just dismissal) if venue turns out to have been laid in the wrong district.²⁵²

If, though, a case is mistakenly filed in violation of a forum selection agreement, then a dismissal without *res judicata* effect (as discussed above) may still turn out to be a death sentence if the limitations period has run out. How can this unfairness be justified?

The first thing to note is that the situation isn't always unfair. In the *forum non conveniens* context, courts sometimes require defendants to waive limitations defenses in when the case is refiled²⁵³—but not always.²⁵⁴ Treating forum selection as a defense isn't any less dangerous, limitations-wise, than treating it as a ground for *forum non conveniens* dismissal—a historically accepted approach that the Court specifically approved in *Atlantic Marine*.²⁵⁵ Moreover, if the plaintiff had waived its right to file in that forum—and if this waiver is neither “unreasonable” nor “unjust”²⁵⁶—then the defendant is presumably entitled to have the case dismissed, and the loss of the claim is the plaintiff's own fault. As the Court explained, “when the plaintiff has violated a contractual obligation by filing suit in a forum other than the one specified in a valid forum-selection clause,” a “dismissal would work no injustice on the plaintiff,” even if the statute of limitations has already run.²⁵⁷

252. 28 U.S.C. § 1406(a) (2012) (“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.”); *see* *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) (describing the statute's purposes).

253. *See, e.g., Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242 (1981).

254. *See Atl. Marine*, 134 S. Ct. at 583 n.8 (citing *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955)).

255. *See id.* at 580; *see also* Marcus, *supra* note 3 (describing the history).

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

257. *Atl. Marine*, 134 S. Ct. at 583 n.8.

The second thing to note is that a dismissal remedy can actually enhance fairness rather than undermine it. Under § 1404, a district court can grant a venue transfer at either party's request, or even *sua sponte*. So if dismissal truly would work some great injustice, the court can always intervene to transfer the case instead. But sometimes justice requires dismissal. For example, dismissal might be a more appropriate punishment for a plaintiff that has repeatedly sued in an incorrect forum solely in order to harass. In 1949, Congress amended § 1406 to make sure that the court retained the option of dismissing the action *instead* of transferring, in case that outcome would be more just.²⁵⁸ But if § 1404 were the only remedy for violating a forum selection agreement, then that option would be off the table.

One further problem with relying on § 1404 as the only remedy is that it's ill-suited to complex litigation. As I've noted in other work, in a lawsuit with multiple claims and parties, a forum selection agreement might cover only some of each.²⁵⁹ *Atlantic Marine* instructs courts to grant § 1404 transfers much more freely when there's a mandatory forum selection agreement involved,²⁶⁰ but it didn't specify what to do when the agreement leaves certain claims out. This is a real problem, because § 1404 is an all-or-nothing inquiry: do we transfer the whole action or not? District courts are already struggling with the question of whether to sever claims covered by forum selection agreements from those that are not, applying the Court's new § 1404 standards only to the former, or whether they should consider the transfer motion with respect to the entire action on some sort of amalgamated standard.²⁶¹ By contrast, allowing a district court to dismiss some claims and to retain others

258. See Act of May 24, 1949, ch. 139, § 81, 63 Stat. 89, 101; *Goldlawr*, 369 U.S. at 466; 14D WRIGHT ET AL., *supra* note 135, § 3827, at 555 (noting a pattern of dismissal “if the plaintiff’s attorney reasonably could have foreseen that the forum in which the suit was filed was improper and that similar conduct should be discouraged”); Sachs, *supra* note 79, at 765 & n.25.

259. See Sachs, *supra* note 79, at 771–73.

260. *Atl. Marine*, 134 S. Ct. at 581–83.

261. See Sachs, *supra* note 79, at 773 nn.83 & 86 (collecting sources).

tailors the remedy to the underlying right, and it reduces the risk of hamfisted all-or-nothing decisions. In other words, permitting dismissal, and not merely transfer, enables courts to reach just results in a broader range of cases.

CONCLUSION

Forum selection, whether permissive or mandatory, is best understood as a form of procedural waiver. That means that it's governed by procedural law, and in particular by federal law in a federal court. Under the current structure of the Federal Rules, moreover, mandatory forum selection is a defense, something that can be raised by pleading or by dispositive motion.

This account is offered as the best understanding of current law. That said, current law may not be so great. For example, the requirement that parties plead forum selection in the answer, and that genuine disputes of fact go to a full-blown trial, may interfere with the enforcement of perfectly valid forum selection clauses.

If so, there's an easy remedy. The Judicial Conference could propose an amendment to Rule 12,²⁶² creating a new "12(b)(8)" defense of "violation of a valid forum selection agreement." (To avoid a giant *Erie* kerfuffle, the rule itself could stay agnostic as to what makes such agreements valid.) That defense could be made waivable under Rule 12(h)(1), could be listed as a non-merits defense under Rule 41(b), and would automatically be subject to the judicial fact-finding provisions of Rule 43(c). In other words, we could effectively recreate the system that many courts of appeals maintained before *Atlantic Marine*, by which mandatory forum selection was viewed—without legal basis, alas—as a nonstatutory defect in venue.²⁶³

If we want to amend the Federal Rules, though, the right way to do that is by *amending the Federal Rules*, "not by judicial interpreta-

262. See 28 U.S.C. § 2073(a)(1) (2012).

263. See *Atl. Marine*, 134 S. Ct. at 577–79.

tion.”²⁶⁴ Courts have to decide cases under the rules we have today. And under those rules, forum selection is a form of waiver—and a defense.

264. *Jones v. Bock*, 549 U.S. 199, 213 (2007) (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).