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# Atlantic Marine and the Future of Forum Non Conveniens

Robin Effron

*Brooklyn Law School*, [robin.effron@brooklaw.edu](mailto:robin.effron@brooklaw.edu)

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# *Atlantic Marine* and the Future of Forum Non Conveniens

ROBIN EFFRON\*

*This Article explores the impact of the Supreme Court's unanimous opinion in Atlantic Marine Construction Co. v. U.S. District Court on forum non conveniens doctrine. Although Atlantic Marine concerned a § 1404(a) transfer within the federal system, and therefore does not directly address forum-selection clauses pointing to foreign forums, the case will undoubtedly have an impact on how courts treat forum-selection clauses that point to a foreign forum. In this Article, I argue that the Atlantic Marine opinion relies on a strict coupling of § 1404(a) and forum non conveniens for its holding. As a result, lower courts will be more likely to conflate these two doctrines that had been slowly but surely developing on parallel tracks. This Article explains why merging or conflating § 1404(a) and the forum non conveniens doctrine is problematic, both as a general matter and as applied to the specific context of forum-selection clauses. It also demonstrates that the Court's blunder is symptomatic of problems inherent in current interpretations and applications of the § 1404(a) and forum non conveniens doctrines.*

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## INTRODUCTION

The Supreme Court's unanimous opinion in *Atlantic Marine Construction Co. v. U.S. District Court*<sup>1</sup> is deceptively bland. Justice Alito's opinion regarding the procedural niceties of federal venue has received little sustained attention, perhaps because it was hidden in a thicket of contentious and high-profile cases in the Court's October 2013 Term. Even within the community of civil procedure commentators, most scholars have focused their attention on the Court's two newest personal jurisdiction decisions.<sup>2</sup> This oversight is a mistake, and a peculiar one, because oversight and carelessness are the hallmarks of the *Atlantic Marine* opinion itself. Reflecting either sloppiness in research or vocabulary usage, the *Atlantic Marine* Court conflated the doctrines of § 1404(a) transfer and forum non conveniens dismissal. This confusion exposes weaknesses in the current doctrines of § 1404(a), forum non conveniens, and enforcement of forum-selection clauses. It also endangers any efforts to strengthen and solidify the standards for § 1404(a) transfer or forum non conveniens dismissal as distinct doctrines with unique considerations.

*Atlantic Marine* resolved lower court disagreements over the proper procedural mechanism for federal court enforcement of forum-selection

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1. 134 S. Ct. 568 (2013).

2. See *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Walden v. Fiore*, 134 S. Ct. 1115 (2014). The *Hastings Law Journal*, along with Professors Dodson, Sachs, and Shannon, are to be commended for convening this symposium to draw much-needed scholarly attention to the *Atlantic Marine* opinion.

clauses. The case concerned a dispute over a construction contract between Atlantic Marine Construction, a Virginia construction contractor, and J-Crew Management, Inc., a Texas subcontractor.<sup>3</sup> The contract identified Virginia in its forum-selection clause.<sup>4</sup> Following a dispute over payment, J-Crew filed a lawsuit in the Western District of Texas.<sup>5</sup> Atlantic Marine, arguing that the forum-selection clause rendered Texas the “wrong” venue under § 1406(a), moved to dismiss under Federal Rule of Civil Procedure 12(b)(3) for improper venue or, in the alternative, to transfer the case under to the Eastern District of Virginia under § 1404(a).<sup>6</sup> The district court denied both motions.<sup>7</sup>

The case eventually reached the Supreme Court, which held that a forum-selection clause pointing to another federal forum does not render other federal venues “wrong” or “improper” within the meaning of § 1406(a) and Rule 12(b)(3); thus, § 1404(a) is the appropriate procedural vehicle for enforcing forum-selection clauses that name a different federal forum.<sup>8</sup> The Court then held that federal courts should enforce a forum-selection clause “in all but the most exceptional cases,”<sup>9</sup> and that when a court transfers a case as a result of a forum-selection clause, the choice-of-law rules of the original forum will not apply in the transferee forum.<sup>10</sup>

Although *Atlantic Marine* concerned a § 1404(a) transfer within the federal system, and therefore does not directly address forum non conveniens or enforcement of forum-selection clauses pointing to foreign forums, the case will undoubtedly have an impact on how courts treat both of these issues. In this Article, I argue that the *Atlantic Marine* opinion relies on a strict coupling of § 1404(a) and forum non conveniens for its holding. Although these doctrines had been slowly but surely developing on parallel tracks, courts have, on occasion, conflated the two doctrines. Such confusion rarely reflected a considered view of either procedural mechanism, but rather, mirrored underlying weaknesses in the standards that courts had developed for each doctrine. Far from helping to clarify either procedural mechanism, conflating the two doctrines leads only to a state of further confusion. When these two doctrines are merged for the purposes of enforcing forum-selection clauses, this conflation inflicts the harm of further solidifying a procedural mask behind which federal courts can hide a substantive common law of contracts.

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3. *Atl. Marine*, 134 S. Ct. at 575.

4. *Id.*

5. *Id.* at 576.

6. *Id.*

7. *Id.*

8. *Id.* at 575.

9. *Id.* at 581.

10. *Id.* at 582–83.

The Article proceeds in three parts. Part I provides a short history of how Congress drew upon *forum non conveniens* in drafting § 1404(a) and how the result in *Atlantic Marine* hinges on this relationship. Part II argues that, despite their common origins, the standards for considering § 1404(a) motions and *forum non conveniens* motions have not and should not be treated as identical or interchangeable standards. Part III examines the consequences of this argument in the specific context of enforcement of forum-selection clauses, with a particular focus on how the public interest consideration of choice of law can have different and unique consequences when the result of a forum-selection clause is dismissal and refile in a foreign country.

I. *ATLANTIC MARINE* AND THE INEVITABLE COLLISION BETWEEN  
§ 1404(a) AND *FORUM NON CONVENIENS*

The *Atlantic Marine* opinion emphasized that when Congress drafted § 1404(a), the intent was to codify the existing doctrine of *forum non conveniens* for the subset of cases where transfer is sought within the federal system, typically cases in which one or many of the parties believe that a different judicial district would be a more convenient location for litigation.<sup>11</sup> The substantive law of enforcing forum-selection clauses, as well as the procedural mechanisms for doing so, set § 1404(a) and *forum non conveniens* on a collision course that resulted in the *Atlantic Marine* decision. This Part traces the inevitability of the clash, and the reasons why it resulted in a (perhaps unwitting) rebinding of the § 1404(a) and *forum non conveniens* standards in *Atlantic Marine*. This Part will argue that, although Congress drafted § 1404(a) to codify the older common law *forum non conveniens* doctrine, Justice Alito overstated the case for treating the two standards as interchangeable.

Section 1404(a) and the modern *forum non conveniens* doctrine developed from common origins and along parallel paths, but the mechanisms have remained distinct.<sup>12</sup> One might expect for this state of affairs to remain unchallenged, as both doctrines afford district judges a comfortable margin of judicial discretion to determine whether a case should be litigated in a different forum.<sup>13</sup> Since both doctrines engage a

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11. *Id.* at 580 (“Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system . . .”). In many cases, venue will be proper in several judicial districts. Moreover, although transfer motions are usually made by a party to the litigation, judges have the power to initiate transfers on their own.

12. *See infra* Part II.A.

13. For an overview of *forum non conveniens* see, for example, Donald Earl Childress, III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1528–36 (2013); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781 (1985); Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444, 1452–

trial judge's discretion to make a context-specific decision under a general standard to achieve (roughly) the same result, there were few reasons for litigants or other players in the judicial system to demand a unified standard or mechanism.

The use and regulation of forum-selection clauses evolved alongside the development of § 1404(a) and forum non conveniens. The procedural story of forum-selection clauses unfolded during roughly the same time period as the development of the § 1404(a) and forum non conveniens doctrines. The history of forum-selection clauses and their enforceability has been ably documented by prominent scholars who have documented the difficulties that courts have deciding whether and how forum-selection clauses should be enforced.<sup>14</sup> Part of the problem lies in the precarious status of forum-selection clauses as an issue at the intersection of substantive and procedural law. When a court enforces a forum-selection clause, it is choosing to enforce a contract. Contract law governs the formation, validity, interpretation, and enforceability of the terms to an agreement, and forum-selection clauses are usually but one of many terms in a contract.<sup>15</sup> On the other hand, the determination of venue for a lawsuit is a classic question of procedure, and the rules that govern venue generally are typically found in procedural codes.<sup>16</sup> The fact that forum-selection clauses straddle the boundary of substance and procedure has made them a flashpoint for controversy.

State courts tended to treat the matter as one of substantive contract law, with many states developing doctrines that disfavored the enforcement of forum-selection clauses on the grounds that they improperly ousted the court of its jurisdiction,<sup>17</sup> or that enforcing such clauses was otherwise

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60 (2011). Scholarly treatment of § 1404(a) in its own right has been less robust, and the best primer is found in 15 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3841 (4th ed. 2013).

14. See, e.g., Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts After Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55 (1992); David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992); Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422 (1991).

15. Marcus, *supra* note 14, at 980; Lederman, *supra* note 14, at 450–58; see also Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEXAS INT'L L.J. 323, 353–58 (1992) (explaining the relationship of forum-selection clauses to unconscionability doctrine).

16. See 28 U.S.C. § 1391 (2012) (federal venue statute). State venue provisions are also codified. See, e.g., N.Y. C.P.L.R. 503 (McKinney 2015) (New York general venue statute); CAL. CIV. PROC. CODE §§ 392–403 (West 2015) (California venue statutes).

17. See Marcus, *supra* note 14, at 995–96 (summarizing ouster cases); David H. Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, 66 TEMP. L. REV. 785, 793–99 (1993) (describing the rise and fall of ouster doctrine).

contrary to public policy.<sup>18</sup> Additionally, some state legislatures have promulgated codified law addressing forum-selection clauses, banning them in specific contexts.<sup>19</sup> One quirk of *Atlantic Marine* is that Texas has just such a law, which states that forum-selection clauses in construction contracts are voidable at the contractor's option.<sup>20</sup> The district court held that this statute did not apply to the *Atlantic Marine* contract because it called for construction on federal property.<sup>21</sup> But what is notable is that the trial court considered that state law basis for enforcement at all. Perhaps it is the case that, under Texas law, other subcontractors would fall within the meaning of this statute, but the *Atlantic Marine* Court's firm imposition of a presumption of enforceability appears to deter this inquiry for actions brought in federal court.<sup>22</sup>

The federal government did not promulgate any codified law regarding the enforceability of forum-selection clauses. Some federal statutes, however, do have specific venue provisions that have been construed to override forum-selection clauses. In yet another *Atlantic Marine* twist, one such statute is the Miller Act, which governs federal construction contracts.<sup>23</sup> J-Crew had initially brought a Miller Act claim,<sup>24</sup> but dropped that cause of action before the case reached the Supreme Court.<sup>25</sup> These federal statutory exceptions are few, and most cases fall under the Supreme Court's common law formulation that forum-selection clauses are, absent fraud or obvious overreaching, presumptively enforceable as a matter of federal admiralty and maritime law.<sup>26</sup>

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18. Michael Mousa Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 DUQ. L. REV. 1009, 1015-32 (1996); see Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4th 404 § 3 (2015) (annotations of cases holding forum-selection clauses void on the grounds of public policy).

19. For example, many states restrict the use of forum-selection clauses in construction contracts. See *Are Your Construction Contracts' Forum-Selection and Choice-of-Law Clauses Enforceable?*, JONES DAY (June 2014), <http://www.jonesday.com/Are-Your-Construction-Contracts-Forum-Selection-and-Choice-of-Law-Clauses-Enforceable-06-18-2014/?RSS=true> (summarizing state laws). For other compilations of state statutory and case law prohibiting or limiting the enforcement of forum-selection clauses, see 31 A.L.R. 4th 404 § 3, § 4 (2015).

20. TEX. BUS. & COM. CODE ANN. § 272.001 (West 2014).

21. *J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. 12-228, 2012 WL 8499879, at \*3 (W.D. Tex. Aug. 6, 2012).

22. See generally Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (questioning footnote 5 of *Atlantic Marine* that presupposed the validity of the contract).

23. 40 U.S.C. §§ 3131-3134 (2012). See Marcus, *supra* note 14, at 1011 (summarizing Miller Act cases).

24. Complaint at 3, *United States ex rel. J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. A-12-CV-228-LY, 2012 WL 8499879 (W.D. Tex. Aug. 6, 2012).

25. See Notice of Voluntary Dismissal at 1, *J-Crew Mgmt.*, 2012 WL 8499879 (No. A-12-CV-228-LY).

26. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

Federal courts hearing state law cases under diversity jurisdiction also confronted the questions of validity and the enforcement mechanism inherent to forum-selection clauses. This brought the gap between federal and state treatment of forum-selection clauses into sharp relief. Because a federal court sitting in diversity must apply state substantive law and not federal common law,<sup>27</sup> the state contract doctrines regarding the enforceability of forum-selection clauses would seem to control. However, since 1965, the Supreme Court has held that in a direct conflict between state law and codified federal procedural law, federal law governs in diversity cases.<sup>28</sup> In *Stewart Organization, Inc. v. Ricoh Corp.*,<sup>29</sup> the Court treated the enforceability of a forum-selection clause as a problem governed by the request for a § 1404(a) transfer, thus enabling the Court to hold that the federal venue transfer governed the case, and that the standard under § 1404(a) embodied the enforcement of forum-selection clauses.<sup>30</sup>

*Stewart* thus drove a wedge between the many states that refused to enforce forum-selection clauses and state law cases litigated in federal court where such clauses would be enforced, although most states have adopted the federal position either in whole or in part in the years since the *Stewart* decision.<sup>31</sup> But *Stewart* also created a curious inconsistency regarding enforcement of forum-selection clauses *within* federal law. *The Bremen v. Zapata Off-Shore Co.* and *Carnival Cruise Lines, Inc. v. Shute* gave the federal courts a substantive standard that all “reasonable” forum-selection clauses should be enforced, but *Stewart* designated § 1404(a) as a procedural mechanism—a rule in which the forum-selection clause was but one of several factors in a broad discretionary standard.<sup>32</sup> As the authors of Wright and Miller observed:

Put bluntly, the mere existence of the forum-selection clause is more powerful under *M/S Bremen* and *Carnival Cruise* than it is under *Stewart*. Under the former, it is presumptively valid and the resisting party has a heavy burden to overcome it. Under the latter, the clause is simply one (albeit an important one) of a mélange of factors to be assessed in ruling on a Section 1404(a) transfer.<sup>33</sup>

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27. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938).

28. *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

29. 487 U.S. 22 (1988).

30. *Id.* at 30–32. For a detailed scholarly debate about the *Erie* dimensions of enforcing forum-selection clauses in diversity cases, see generally Stanley E. Cox, et al., *Case One: Choice of Forum Clauses*, 29 NEW ENG. L. REV. 517 (1995).

31. Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. L. REV. 265 (2009).

32. *Stewart*, 487 U.S. at 29 (“A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors.”).

33. 14D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3803.1 (4th ed. 2013). For a contrary view, see Marcus, *supra* note 14, at 1015–32.



In sum, prior to *Atlantic Marine*, the federal government developed only a common law of forum-selection clause enforceability, and never promulgated an independent and codified mechanism or coherent doctrine for enforcing forum-selection clauses.<sup>34</sup> As a matter of federal substantive law, enforceability remained a judicially created common law doctrine. As a matter of procedural law, the Court tied an arguably substantive contract law doctrine to § 1404(a) because of the need to utilize a codified federal statute to overcome an *Erie* problem. Under *Hanna v. Plumer*,<sup>35</sup> a federal court will apply a valid federal directive (a codified procedural rule in a federal statute or federal rule of civil or appellate procedure) if it is broad enough to cover the particular procedural situation.<sup>36</sup> This rule does not require a court to engage in the more complex balancing analysis of an “unguided *Erie*” choice. This is what made § 1404(a) an appealing choice for enforcing a forum-selection clause; so long as the Court gave a broad reading to the statute as one that covered everything about transferring venue,<sup>37</sup> the Court gave trial courts an easy tool for enforcing forum-selection clauses, even in the face of a contrary state rule. But § 1404(a) is not necessarily the best fit for this purpose—it just happened to be the most relevant codified federal law. One could imagine a world in which the federal government, either through statute or a Federal Rule of Civil Procedure, promulgated a rule that directly addressed both the standard and mechanism for enforcing forum-selection clauses in all cases litigated in federal court.<sup>38</sup>

The patchwork of substantive and procedural doctrines governing the enforceability of forum-selection clauses left courts with lacunae for the enforceability of forum-selection clauses. Any clause pointing to a nonfederal forum could not be enforced using a § 1404(a) transfer to another federal judicial district. Thus, courts would need to find another codified federal procedural device to enforce the clause without causing an *Erie* problem.

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34. Looking at the disarray in the federal doctrines of forum-selection clause enforcement, at least one scholar has proposed a legislative solution. See Borchers, *supra* note 14, at 93–98. This, itself, could create *Erie* problems depending on the mechanisms (Federal Rule of Civil Procedure or statute). Even a federal statute would need to withstand a constitutional challenge to its validity, but given the Supreme Court’s broadly permissive stance regarding federal laws with any sort of procedural angle, such a law would likely pass constitutional muster. See *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407–08 (2010).

35. 380 U.S. 460 (1965).

36. *Id.* at 470.

37. This includes the consideration of forum-selection clauses.

38. A Federal Rule of Civil Procedure would need to be valid under the Rules Enabling Act, a standard that it would meet if it “really regulates procedure.” *Hanna*, 380 U.S. at 464 (citation omitted) (internal quotation marks omitted). Both a statute and a federal rule would almost certainly be constitutional, as a rule governing enforcement of forum-selection clauses is at least “rationally capable” of being classified as procedural. See *id.* at 471.

This gap left courts with the option of transferring or dismissing a case under § 1406(a) or dismissing the case on a Rule 12(b)(3) motion for improper venue. But this, too, was problematic because both § 1406(a) and Rule 12(b)(3) are mechanisms for remediating an *improper* venue.<sup>39</sup> Some lower federal courts had, nonetheless, used § 1406(a) and Rule 12(b)(3) to enforce forum-selection clauses, even when the initial district was a proper venue within the meaning of 28 U.S.C. § 1391, the general venue provision for federal courts.<sup>40</sup> The Supreme Court granted certiorari in *Atlantic Marine*, in part, to rectify this circuit split. The Court began its opinion by holding that, in cases where the district court would otherwise be a proper venue under § 1391, a court must use § 1404(a) to enforce a forum-selection clause that points to another federal forum.<sup>41</sup> The Court rejected the argument “that § 1404(a) is not a suitable mechanism to enforce forum-selection clauses because that provision cannot provide for transfer when a forum-selection clause specifies a state or foreign tribunal,”<sup>42</sup> and held that “the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.”<sup>43</sup> In Part III of the opinion, the Court resolved the apparent conflict between the *Bremen/Carnival Cruise* doctrinal mandate and the *Stewart* procedural mechanism by holding that, under the § 1404(a) balancing standard, the existence of “a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.”<sup>44</sup>

The *Atlantic Marine* opinion emphasized that when Congress drafted § 1404(a), the intent was to codify the existing doctrine of forum non conveniens for the subset of cases where transfer is sought within the federal system.<sup>45</sup> Justice Alito leant heavily on this relationship, at times implying that the two standards are interchangeable. This is because the Court, having persuasively argued that § 1406(a) and Rule 12(b)(3) should not be used to enforce forum-selection clauses when venue is otherwise proper under § 1391, needed to emphasize this equivalence in order to justify using § 1404(a) as the exclusive mechanism for enforcing forum-

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39. FED. R. CIV. P. 12(b)(3) (motion to dismiss for “improper venue”); 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.”).

40. See Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine*, 82 *FORDHAM L. REV.* 2521, 2539–40 (2014) (describing pre-*Atlantic Marine* circuit splits).

41. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 577–80 (2013).

42. *Id.* at 579.

43. *Id.* at 580.

44. *Id.* at 581 (quoting *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) (Kennedy, J. concurring)).

45. *Id.* at 580.

selection clauses that point to a federal forum. With § 1406(a) and Rule 12(b)(3) unavailable when venue is otherwise proper, and § 1404(a) unavailable when a forum-selection clause points to a foreign or nonfederal forum, the only procedural option for enforcing foreign and nonfederal forum-selection clauses is through forum non conveniens. And to avoid the implication that forum-selection clauses pointing to nonfederal or foreign forums would be evaluated under a different standard than those pointing to a federal forum, the Court stressed the harmony between the two standards.

This line of reasoning necessitated rhetoric that minimizes distinctions between § 1404(a) and forum non conveniens. Justice Alito wrote that “[s]ection 1404(a) is *merely* a codification of the doctrine of *forum non conveniens*,”<sup>46</sup> which reduced the differences between the doctrines by simply “replac[ing] the traditional remedy of outright dismissal with transfer.”<sup>47</sup> Rather than recognizing forum non conveniens as an independent doctrine, Justice Alito characterized it as a “residual doctrine.”<sup>48</sup> Lest the reader remain unconvinced that the Court has collapsed the distinction between § 1404(a) and forum non conveniens, Justice Alito concluded this part of the opinion by announcing that, “both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the *same balancing-of-interests standard*.”<sup>49</sup> Justice Alito elaborated on this supposedly joint standard by noting that “a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations.”<sup>50</sup> While one could read this statement charitably as a general characterization of two standards, Justice Alito betrayed his bias by using a single footnote, in which a forum non conveniens case and a § 1404(a) work in tandem, to illustrate a single standard.<sup>51</sup>

## II. THE UNEASY RELATIONSHIP BETWEEN § 1404(a) AND FORUM NON CONVENIENS

The *Atlantic Marine* opinion relies in part on the idea that § 1404(a) and forum non conveniens decisions are made using roughly the same standard. The conclusion that the two doctrines are more or less interchangeable no doubt aided in the Court’s mission to reconcile the enforcement gap left by the existing codified venue mechanisms of § 1404(a), § 1406(a), and Rule 12(b)(3). However, it also overstated the equivalence between these two doctrines. This equivalence is inconsistent

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46. *Id.* at 580 (emphasis added).

47. *Id.*

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.* at 581.

51. *Id.* at 581 n.6.

with existing Supreme Court and lower court opinions that address § 1404(a) and forum non conveniens. Furthermore, there are good policy reasons for affirming that § 1404(a) and forum non conveniens are parallel but distinct doctrines.

A. SECTION 1404(a) AND FORUM NON CONVENIENS: COMMON ORIGINS AND SUBSEQUENT DIVERGENCE

As the doctrines stand today, the standards for a § 1404(a) transfer and a forum non conveniens dismissal share similarities, but they are distinct doctrines. The standard for transfer under § 1404(a) gives district judges the discretion to consider whether to transfer a case “[f]or the convenience of parties and witnesses” and “in the interest of justice.”<sup>52</sup> By contrast, a court entertaining a forum non conveniens dismissal motion must consider a list of factors with both public and private dimensions.<sup>53</sup> The private factors include,

the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.<sup>54</sup>

The public factors include:

Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. . . . There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial . . . in a forum that is at home with the . . . law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.<sup>55</sup>

District court decisions of both doctrines are reviewed on an abuse of discretion standard,<sup>56</sup> although most courts and commentators agree that judges have greater discretion under § 1404(a) than under forum non conveniens.<sup>57</sup> Although both standards are concerned with ideas of

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52. 28 U.S.C. § 1404(a) (2012).

53. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947)).

54. *Gulf Oil*, 330 U.S. at 508.

55. *Id.* at 508–09.

56. *See, e.g.*, *A. Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439, 444 (2d Cir. 1966) (§ 1404(a) transfers reviewed for abuse of discretion); *Lockman Found. v. Evangelical Alliance Mission*, 930 F.2d 764, 767 (9th Cir. 1991) (forum non conveniens dismissals reviewed for abuse of discretion).

57. *See infra* notes 90–96 and accompanying text.

convenience and economy, the forum non conveniens inquiry encompasses broader policy interests.

Federal district judges did not always have the power to transfer cases to another judicial district. Prior to the enactment of § 1404(a) in 1948, judges had only the doctrine of forum non conveniens at their disposal, and federal forum non conveniens was itself a relatively new phenomenon,<sup>58</sup> having emerged from an amalgam of admiralty and state law doctrines.<sup>59</sup> Whether the preferred alternative forum was a foreign country, a U.S. state court, or another federal judicial district, the process was the same: dismiss the case for forum non conveniens and assume that the parties would file a new case in a different court. Dismissal and filing anew was “a cumbersome and wasteful process.”<sup>60</sup> The advent of liberal venue provisions for federal courts also cluttered the process. In many cases, a number of federal districts would be a proper venue within the meaning of the federal venue statute,<sup>61</sup> thus creating the possibility that plaintiffs might choose a forum that, while proper, was inconvenient and burdensome. There was thus a need for a mechanism within the federal system that could sort the better or even optimal venues from the larger pool of proper venues. To address these issues, Congress passed § 1404(a), which allows the direct transfer of cases from one proper federal judicial district to another.

Because § 1404(a) emerged from the context of, and as a complement to, forum non conveniens, courts had to determine whether § 1404(a) should be interpreted as codifying the forum non conveniens standard. The Supreme Court initially looked favorably upon this position,<sup>62</sup> citing legislative history that “made obvious that § 1404(a) at least partially codified *forum non conveniens*.”<sup>63</sup> This is because § 1404(a) allows federal district judges to capture the purpose and equities of forum non conveniens while streamlining the process for transfers within the federal system.<sup>64</sup> Therefore, it made some sense to conceptualize § 1404(a) as merely a new instrument for implementing the existing forum non conveniens standard. However, even this origin story might have been just that—a

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58. See Stein, *supra* note 13, at 801 (“the doctrine of forum non conveniens was virtually unheard of, outside of the admiralty context, prior to 1929”).

59. See *id.* at 811 (describing how a 1929 law review article collected cases and doctrines to state a theory of forum non conveniens that was then adopted by the Supreme Court).

60. 15 WRIGHT ET AL., *supra* note 13, § 3841.

61. 28 U.S.C. § 1391 (2012).

62. *Ex Parte Collett*, 337 U.S. 55, 58 (1948) (quoting the § 1404(a) Reviser’s Note, which stated that § 1404(a) “was drafted in accordance with the doctrine of forum non conveniens”). Reviser’s Note, H.R. REP. NO. 80-308, at A132 (1947).

63. Marcus, *supra* note 14, at 1010.

64. *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (“[T]he purpose of [§ 1404(a)] is to prevent the waste ‘of time, energy and money’ and ‘to protect litigants, witnesses and the public against unnecessary inconvenience and expense.’” (quoting *Continental Grain Co. v. Barge*, 364 U.S. 19, 26, 27 (1960))).

story. Professor Allan Stein, who documented the origins and development of the forum non conveniens doctrine in meticulous detail,<sup>65</sup> argued persuasively that the annotations to § 1404(a) that “refer to it as a codification of the forum non conveniens doctrine” are a “creative bit of retroactive legislative history” because the text of § 1404(a) was actually drafted several years before the Supreme Court articulated the forum non conveniens doctrine in *Gulf Oil Corp. v. Gilbert*.<sup>66</sup>

In any case, the Supreme Court backed away from the codification view less than a decade later, explaining in *Norwood v. Kirkpatrick* that forum non conveniens is “quite different from Section 1404(a). . . . The notion that 28 U.S.C.A. § 1404(a) was a mere codification of existing law relating to *forum non conveniens* is erroneous.”<sup>67</sup> The Court solidified this view in *Piper Aircraft Co. v. Reyno*, the seminal forum non conveniens case of modern times, stating that the standards in § 1404(a) and forum non conveniens, while similar, are not the same.<sup>68</sup> The Court stressed that § 1404(a) “was intended to be a revision rather than a codification of the common law.”<sup>69</sup>

Lower courts have also stressed the doctrinal distinction between § 1404(a) and forum non conveniens. For example, the Ninth Circuit has held that, unlike a “mere transfer of venue, [forum non conveniens] . . . is an ‘exceptional tool to be employed sparingly,’ and not a ‘doctrine that compels plaintiffs to choose the optimal forum for their claim.’”<sup>70</sup> Similarly, the Tenth Circuit observed that “section 1404(a) intended to *revise* . . . the common law.”<sup>71</sup> Several decisions from other circuit and district courts around the country echo these refrains.<sup>72</sup>

The Wright & Miller treatise, noting the common origins and superficial similarities of the two doctrines, offers this word of caution:

[I]t is preferable that the term “*forum non conveniens*” not be employed in discussing motions to transfer. The danger in conflating language is that it might cause conflation of the two very different doctrines. Although *forum non conveniens* analysis informs the

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65. See generally Stein, *supra* note 13.

66. See *id.* at 807.

67. 349 U.S. 29, 31 (1955) (quoting *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F.2d 360, 362 (4th Cir. 1949)).

68. 454 U.S. 235, 253 (1981).

69. *Id.*

70. *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (quoting *Dole Food Co., v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002)).

71. *Emp’rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1168 n.13 (10th Cir. 2010) (emphasis added).

72. Wright & Miller have an excellent collection of these cases in their annotation. See 14D WRIGHT ET AL., *supra* note 33, § 3828 n.10.

interpretation of the statutory transfer provision, the two are not equivalent and should not be confused.<sup>73</sup>

Despite these seemingly unequivocal statements from both courts and commentators differentiating § 1404(a) from forum non conveniens, from time to time some lower courts have conflated the two doctrines.<sup>74</sup>

Even the Supreme Court has made the occasional stray comment suggesting the equivalency of § 1404(a) and forum non conveniens. In the 2007 *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.* decision, Justice Ginsburg delivered the following rather ambiguous statement concerning the relationship of the two doctrines: “Congress has *codified* the doctrine [of forum non conveniens] and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action.”<sup>75</sup> Almost certainly, the *Sinochem* Court did not mean for this statement to signal a reversal (or even a shift) in the *Norwood/Piper* doctrine that § 1404(a) is not a codification of forum non conveniens.<sup>76</sup> Yet one can still see this as a harbinger of things to come in *Atlantic Marine*. When distracted by other topics, (*Sinochem* was primarily concerned with the complicated issue of jurisdictional sequencing<sup>77</sup>) the Court is just as likely as the occasional errant district court to conflate § 1404(a) with forum non conveniens. *Atlantic Marine* provided another such distraction. The issue of forum-selection clauses and their (supposedly) identical enforcement outcomes under any test distracted the Court from keeping the doctrines of § 1404(a) and forum non conveniens separate. The problem is that, in a case like *Atlantic Marine*, this conflation is more than a minor slip. In *Atlantic Marine*, this conflation was the logical result of how the Court chose to interpret the scope of § 1404(a), § 1406(a), and Rule 12(b)(3).

Given the overall trajectory of lower court and Supreme Court precedent in § 1404(a) and forum non conveniens cases, it is doubtful that the Court intended to use *Atlantic Marine* as an occasion to merge the § 1404(a) and forum non conveniens doctrines. Unfortunately, Justice Alito’s language provides a fairly strong basis for making this exact claim.<sup>78</sup>

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73. *Id.* § 3828.

74. *See id.* at n.12 (listing eight district court cases in which a court analyzed a § 1404(a) transfer motion under the forum non conveniens standard); *see also* Paradis v. Dooley, 774 F. Supp. 79, 82 (D.R.I. 1991).

75. *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 430 (2007) (emphasis added).

76. One could even understand this sentence to mean that § 1404(a) is a codification of transfer itself, and not of forum non conveniens, although this is a rather strained reading.

77. *See* Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1109–10 (2013) (arguing that *Sinochem* concerned jurisdictional sequencing and characterized forum non conveniens at a nonmerits threshold issue).

78. *See supra* notes 28–36 and accompanying text.

## B. THE PROBLEMS WITH MERGING DOCTRINES

Justice Alito's implication that § 1404(a) and forum non conveniens share a common standard misreads the previous case law. It is also wrongheaded as a matter of policy. There are good reasons to keep each standard in its separate (if still parallel) sphere.

The *Atlantic Marine* case itself was about enforcement of forum-selection clauses, a topic which might have misled the Court to conclude that § 1404(a) and the doctrine of forum non conveniens were interchangeable. This idea, however, is far from obvious, even as regards forum-selection clauses. Both § 1404(a) and forum non conveniens govern a far wider array of matters beyond forum-selection clause enforcement. It is quite possible that the Court did not mean to introduce a broad and far-reaching equation of the two doctrines, effectively instructing district courts to use the same inquiry for both § 1404(a) cases and forum non conveniens cases. But, equate the two doctrines they did, and it is worth noting the general reasons why this is problematic.

Treating § 1404(a) transfers as a subset of forum non conveniens or a mere codification of the common law doctrine glosses over the very real differences between these two mechanisms. These differences stem from one key characteristic, namely, that forum non conveniens results in a dismissal<sup>79</sup> and a full exit from the federal court system, whereas a § 1404(a) transfer quite literally changes only the venue.

This means that disposition of a § 1404(a) motion carries with it a fairly high degree of certainty as to how the case will proceed. For one thing, the parties can be assured that the case will continue apace, regardless of what venue it is litigated in, even if only to end shortly thereafter on a motion to dismiss.<sup>80</sup> A forum non conveniens dismissal carries with it no such assurances. Although the forum non conveniens doctrine conditions dismissal on the existence of an "adequate alternative forum,"<sup>81</sup> the action must be brought anew by the parties in the new forum.

The costs of restarting the action, both real and psychological, are likely higher than those associated with continuing to litigate an existing case in a different forum within the same judicial system. There is no guarantee that the case would not settle or languish in the new forum because of differences in the procedural and/or substantive law of the

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79. Other provisional remedies for forum non conveniens are discussed below, but even those remedies support the distinction between § 1404(a) and forum non conveniens.

80. That is, of course, unless the transferee court is more receptive to a forum non conveniens motion than was the transferor court, as happened in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 242-44 (1981).

81. See Joel H. Samuels, *When Is an Alternative Forum Available? Rethinking the Forum Non Conveniens Analysis*, 85 IND. L.J. 1059 (2010) (describing adequate alternative forum doctrine and proposing a six-part alternative to the current test).



jurisdiction from what they would have been in the original forum.<sup>82</sup> Even though the Supreme Court has held that such differences (even if substantial) do not amount to a deprivation of an “adequate alternative forum,”<sup>83</sup> these differences can have a profound impact on the costs of litigation and the expected outcome of a case. This, in turn, changes the incentives of the parties with regards to settling, or even refileing the action at all.<sup>84</sup>

Parties in a § 1404(a) transfer case, on the other hand, do not experience any changes in applicable law. The procedural law of the transferee forum will be largely the same—the codified and common law rules of federal civil procedure. Aside from differences among circuits or applications of local rules, parties can expect roughly the same procedures in the transferee forum.<sup>85</sup> However, the transferee court in a § 1404(a) case must apply the substantive law of the transferor court.<sup>86</sup> This result holds even when it would encourage flagrant forum shopping.<sup>87</sup> Interestingly, the *Atlantic Marine* Court made an exception to this rule with regard to transfers enforcing forum-selection clauses,<sup>88</sup> which I discuss below.<sup>89</sup>

For now, it is sufficient to note that, as a general matter, a forum non conveniens dismissal can have a much greater impact on the outcome of a case, both as to issues of liability and the quantum of recovery. Much scholarship, such as the Clermont and Eisenberg study that demonstrated that § 1404(a) transfers have can have a significant effect on case outcomes, acknowledges that forum non conveniens dismissals are a different world altogether.<sup>90</sup> Not only are the choice-of-law decisions of a foreign or state court apt to result in different

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82. See Thomas Orin Main, *Toward a Law of “Lovely Parting Gifts”: Conditioning Forum Non Conveniens Dismissals*, 18 SW. J. INT’L LAW 475, 478 (2012) (“Defendants often have much to gain from a dismissal even though the action can be refiled in a foreign forum: delay can be useful to a defendant, the substantive or procedural law applied in the foreign forum may favor the defendant, the dismissal could lead the plaintiff to accept a modest settlement, or the plaintiff may abandon the claim altogether.”).

83. *Piper*, 454 U.S. at 254–55.

84. Moreover, the Supreme Court has acknowledged that factors such as statutes of limitations might cause the plaintiff “to lose out completely.” *Norwood v. Kirkpatrick*, 349 U.S. 29, 31 (1955).

85. This is not to minimize the effects of circuit splits or even the application of local rules. See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum Shopping*, 80 CORNELL L. REV. 1507 (1995) (empirical analysis finding a significant drop in the win rate for plaintiffs in transfer cases); see also Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415 (2010) (discussing proliferation of local rules and defending them on the grounds of transparency). However, these differences pale in comparison to the differences between different legal systems entirely.

86. *Van Dusen v. Barrack*, 376 U.S. 612, 642 (1964).

87. *Ferens v. John Deere*, 494 U.S. 516, 528–29 (1990).

88. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 583 (2013) (“[W]e will not apply the *Van Dusen* rule when a transfer stems from enforcement of a forum-selection clause.”).

89. See *infra* notes 133–34 and accompanying text.

90. Clermont & Eisenberg, *supra* note 85, at 1514 n.18 (citing study showing that plaintiffs generally do not win in foreign court following a forum non conveniens dismissal).

applicable law, but the ability to make these choices at all introduces an element of unpredictability into forum non conveniens dismissals that does not exist in the more stable world of § 1404(a) transfers.

Beyond the fact that differences in applicable law produce divergent and unpredictable litigation outcomes, plaintiffs who are shunted to a foreign forum on a forum non conveniens motion are often thrust into the unpredictable realm of enforcing foreign judgments.<sup>91</sup> In a few high-profile cases in which, following a forum non conveniens dismissal, the plaintiffs have litigated successfully in a foreign forum, the same U.S. court that found the foreign forum to be an “adequate alternative” for purposes of forum non conveniens have subsequently refused to enforce the resulting foreign judgment based on deficiencies in the foreign proceedings.<sup>92</sup> Litigants whose cases are transferred per § 1404(a) face no such enforcement gap.<sup>93</sup>

Many federal judges have tried to impose some degree of predictability on forum non conveniens dismissals through the use of conditional dismissals, a practice by which courts extract an agreement from the parties about how the case will be litigated in the alternative forum.<sup>94</sup> Typically, such conditions touch on the defendant’s consent to personal jurisdiction,<sup>95</sup> waiver of statutes of limitations,<sup>96</sup> or a host of other conditions meant to ease the burden on plaintiffs precluded from taking advantage of the permissive procedures of U.S. courts.<sup>97</sup> Conditional dismissals also take away some of the bite of the “adequate alternative forum” doctrine, as the dismissing court more or less convinces itself that it has created or ensured a forum that is more than the bare-bones

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91. See Michael Goldhaber, *Forum Shopper’s Remorse*, CORP. COUNSEL, Apr. 2010, at 63.

92. Whytock & Robertson, *supra* note 13, at 1472–81.

93. 28 U.S.C. § 1963 (2012) (registration of judgments for enforcement in other districts). Incidentally, this is also true of any case that would be dismissed on forum non conveniens and then litigated in a domestic state court. U.S. CONST. art. IV, § 1 (full faith and credit clause). However, forum non conveniens is used almost exclusively for cases where the alternative forum is outside of the United States, unless it is being used to enforce a forum-selection clause.

94. See Julius Jurianto, *Forum Non Conveniens: Another Look at Conditional Dismissals*, 83 U. DET. MERCY L. REV. 369, 399–400 (2006); Main, *supra* note 82, at 578–85.

95. See, e.g., *Banco De Seguros Del Estado v. J.P. Morgan Chase & Co.*, 500 F. Supp. 2d 251, 266 (S.D.N.Y. 2007) (conditioning dismissal on acceptance of personal jurisdiction and service of process in foreign forum); *In re Alcon Shareholder Litig.*, 719 F. Supp. 2d 263, 280 (S.D.N.Y. 2010) (same).

96. See, e.g., *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 246 (S.D.N.Y. 2007) (conditioning dismissal on the defendant “appearing and defending on the merits, without interposing a statute of limitations”); *In re Compania Naviera Joanna*, 569 F.3d 189, 205 (4th Cir. 2009) (dismissal conditional on defendants agreeing not to raise statute of limitations defense in China).

97. Professor Main has compiled a comprehensive list of these conditions. Main, *supra* note 82, at 479–80; see also John Bies, Note, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489, 501–03 (2000). One such popular condition involves requiring the parties to participate in American-style discovery. Some appeals courts, however, have looked warily upon this condition and restricted its application. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195, 205–06 (2d Cir. 1987).

“adequate alternative forum” required by *Piper*, but is instead something approaching an equivalent alternative forum.<sup>98</sup>

The imposition of conditional dismissals, then, shows what odd companions § 1404(a) and the forum non conveniens doctrines really are. While courts right up through *Atlantic Marine* have meandered into the mistake of opining that § 1404(a) is a “mere codification” of forum non conveniens doctrine, it is actually the doctrine of forum non conveniens that judges have tried to hammer, somewhat awkwardly,<sup>99</sup> into a form that mimics a § 1404(a) transfer. Try as they might, however, judges cannot use conditional dismissals to transform forum non conveniens dismissals into a de facto system of international transfer. Enforcing conditional dismissals “can be problematic.”<sup>100</sup> Asking (not to mention ensuring) that a foreign court apply the *substantive* law of the original U.S. forum is nigh impossible. The Supreme Court itself recognized this fact in *Piper* when it refused to extend the *Van Dusen* choice-of-law reasoning to the forum non conveniens context.<sup>101</sup>

Given how different the mechanisms of a § 1404(a) transfer and a forum non conveniens dismissal really are, it is no surprise that the standard for each doctrine is—and should remain—distinct. Under one common formulation, the § 1404(a) standard is different from forum non conveniens because it affords district judges more discretion.<sup>102</sup> Although defining the meaning and boundaries of judicial discretion over procedural matters is notoriously difficult,<sup>103</sup> the world of permissible transfer outcomes is broader than the world of permissible forum non conveniens dismissals.<sup>104</sup>

The broad discretion to transfer pursuant § 1404(a) fits comfortably within the model of managerial judging that underlies many procedural

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98. See Jurianto, *supra* note 94, at 400–01. Jurianto notes that courts have further softened this doctrine by conditioning the dismissal on the foreign court’s acceptance of jurisdiction. *Id.* at 401 nn.301–02.

99. See *id.* at 402 (characterizing the range of conditions imposed by lower courts as “incoherent”); Bies, *supra* note 97, at 490 (“[T]he pattern of conditions imposed by various district courts seems incoherent.”). Professor Main has criticized some of the conditions themselves as being “plagued with the pathogen of vagueness.” Main, *supra* note 82, at 488. Main has questioned whether courts even have the authority to enter such conditional dismissals at all. *Id.* at 491–98.

100. Main, *supra* note 82, at 479.

101. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253 (1981).

102. *Id.* at 265 (“District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.”); see also *Amazon.com v. Cendant Corp.*, 404 F. Supp. 2d 1256, 1259 (W.D. Wa. 2005); *O’Brien v. Goldstar Technology, Inc.*, 812 F. Supp. 383, 385 (W.D.N.Y. 1993).

103. Robin J. Effron, *Reason Giving and Rule Making in Procedural Law*, 65 ALA. L. REV. 683, 695–98 (2014).

104. Because both doctrines are reviewed on an abuse of discretion standard, the practical reality is that neither standard is heavily policed by appellate courts. This does not mean, however, that any distinction between the two is erased by permissive standards of appellate review.

tools that judges have at their disposal.<sup>105</sup> Because transferring a case within the federal system does not end the lawsuit or alter the applicable law, the decision to transfer looks more like the decisions about joining claims or parties, or questions regarding discovery. There is no question that the outcomes of such procedural choices can have profound effects on how cases are litigated and resolved.<sup>106</sup> Nevertheless, these are tools that do not really change the rules of the game. More accurately, they alter how the game will be played within the common and roughly predictable framework of the federal court system. This is why the Supreme Court has described § 1404(a) as a “housekeeping measure.”<sup>107</sup> Forum non conveniens, on the other hand, cannot be so described, and discretion to dismiss under this doctrine is thus more limited.

Section 1404(a) and forum non conveniens also differ in how they treat the idea of (in)convenience itself. Although both standards account for private and public interests, it is forum non conveniens that places convenience at the centerpiece of the inquiry,<sup>108</sup> whereas the § 1404(a) inquiry is directed at ascertaining the “center of gravity” of the litigation,<sup>109</sup> a “core determination under § 1404(a).”<sup>110</sup> The party moving for a forum non conveniens dismissal has a higher burden of showing the *inconvenience* of continuing the litigation in the plaintiff’s chosen forum than a party moving for a § 1404(a) transfer.<sup>111</sup> This is because the “heavy *burden* traditionally imposed upon defendants by the *forum non conveniens* doctrine—dismissal permitted only in favor of a substantially

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105. See Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 472–73 (2003); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (identifying and critiquing the phenomenon of managerial judging).

106. I have documented such outcomes with regard to some of the rules of joinder. Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO. L.J. 759 (2012). Clermont and Eisenberg have done the same for cases transferred under § 1404(a). Clermont & Eisenberg, *supra* note 85.

107. *Ferens v. John Deere Co.*, 494 U.S. 516, 526 (1990).

108. *Coffey v. Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986) (“Less of a showing of inconvenience is needed for a § 1404(a) transfer than that for a *forum non conveniens* dismissal.”). Convenience, however, is not the exclusive area of inquiry in forum non conveniens. See Whytock & Robertson, *supra* note 13, at 1455 (focus on convenience is not “single-minded”).

109. See, e.g., *Audi AG & Volkswagen of Am., Inc. v. D’Amato*, 341 F. Supp. 2d 734, 751 (E.D. Mich. 2004); *Coker v. Bank of Am.*, 984 F. Supp. 757, 767–68 (S.D.N.Y. 1997). Although “center of gravity” is used on occasion in connection with forum non conveniens, see, e.g., *Isr. Disc. Bank, Ltd. v. Schapp*, 505 F. Supp. 2d 651, 661–62 (C.D. Cal. 2007); *Morrison Law Firm v. Clarion Co., Ltd.*, 158 F.R.D. 285, 287 (S.D.N.Y. 1994), it is not the touchstone of the inquiry, but rather, a proxy for the choice-of-law inquiry that might affect the public factors. See William L. Reynolds, *The Proper Forum for a Suit: Transnational Forum Non Conveniens and Counter-Suit Injunctions in the Federal Courts*, 70 TEX. L. REV. 1663, 1679–80 (1992).

110. *Viacom Int’l, Inc. v. Melvin Simon Prods., Inc.*, 774 F. Supp. 858, 867 (S.D.N.Y. 1991).

111. See *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 (5th Cir. 2008) (§ 1404(a) venue transfers may be granted “upon a lesser showing of inconvenience” than forum non conveniens dismissals).

more convenient alternative—was dropped in the § 1404(a) context.”<sup>112</sup> Put another way, both § 1404(a) and forum non conveniens account for convenience, but in notably different ways. Section 1404(a)’s center of gravity inquiry focuses the attention of the court on the relative convenience of the *transferee forum*, whereas the forum non conveniens factors demand closer scrutiny of the inconvenience of the *initial forum*.<sup>113</sup>

One final note about the general differences between § 1404(a) and forum non conveniens is in order before moving on to the specific context of forum-selection clauses. To say that each of these doctrines has (and should have) a distinct standard is emphatically *not* to say that the current standards and formulations of each doctrine are perfect. There is a long scholarly history of criticizing both of these doctrines as unpredictable, incoherent, and even inequitable.<sup>114</sup> The fact that the doctrines may be so easily mistaken as interchangeable is more of a testament to poorly formulated and unevenly applied standards than it is a reflection on the purposes and use of each as its own procedural tool.

### III. SECTION 1404(a), FORUM NON CONVENIENS, AND FORUM-SELECTION CLAUSES

Section 1404(a) and forum non conveniens are not identical mechanisms or doctrines. Although they do not share a single standard, the inquiry under each doctrine is somewhat similar in that they both direct judges to consider both private and public factors in deciding whether to transfer or dismiss a case brought in a forum where venue is otherwise proper.<sup>115</sup> It is this congruity that led the *Atlantic Marine* Court to treat § 1404(a) and forum non conveniens as one. Perhaps, however, Justice Alito is to be forgiven for his statements to the contrary because the two doctrines really are interchangeable in one particular context: the enforcement of forum-selection clauses.

In this Part, I argue that, even as applied to forum-selection clauses, the doctrines are not equivalent. Treating them as such says more about

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112. *Id.* Note, however, the departure from the historical origins of forum non conveniens doctrine which “was not designed to assure trial in the most convenient location” and instead focused more on the public factor of respecting comity and the private factor of ensuring remedies. Stein, *supra* note 13, at 810.

113. Of course, both standards involve a comparison of the initial forum and the proposed new forum. The difference is one of emphasis and burden, not on an exclusive inquiry into one or the other.

114. See, e.g., Michael M. Karayanni, *The Myth and Reality of a Controversy: “Public Factors” and the Forum Non Conveniens Doctrine*, 21 WIS. INT’L L.J. 327, 330 (2003); David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: “An Object Lesson in Uncontrolled Discretion”*, 29 TEX. INT’L L.J. 353, 359 (1994) (the forum non conveniens standard is “non-exhaustive, unweighted, and unranked”); Stein, *supra* note 13; Megan Waples, Note, *The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform*, 36 CONN. L. REV. 1475 (2004).

115. See, e.g., *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988) (discussing the public and private interest factors in the § 1404(a) analysis); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 (1981) (discussing the public and private interest factors in the forum non conveniens analysis).

the Court's faulty approach to enforcing forum-selection clauses than it does about any similarities between § 1404(a) and forum non conveniens. I consider this first in the context of the private factors and then in the context of the public factors.

#### A. THE CASE OF THE VANISHING PRIVATE INTEREST FACTORS

The district court in *Atlantic Marine* refused to transfer the case to Virginia, reasoning that “[a] balancing of the private-interest factors relevant to this case militates against a transfer to Virginia.”<sup>116</sup> The Supreme Court rejected this application of the § 1404(a) balancing test, holding instead that this inquiry is all but unnecessary in forum-selection clause enforcement, acknowledging that “[o]rdinarily, the district court would weigh the relevant factors and decide whether, on balance, a transfer would serve ‘the convenience of parties and witnesses’ and otherwise promote ‘the interest of justice.’”<sup>117</sup> A valid forum-selection clause, however, transforms this balancing act quite dramatically by effectively removing all other private interest factors: “[A] court evaluating a defendant’s § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties’ private interests.”<sup>118</sup> Leaving nothing to chance, Justice Alito immediately reiterated this point with the statement, “[a] court accordingly must deem the private-interest factors to weigh *entirely* in favor of the preselected forum.”<sup>119</sup>

This conclusion was driven by an interpretation of the text of § 1404(a), which states that a transfer should account for the “interest of justice.” According to the Court, the enforcement of a forum-selection clause is so paramount that it crowds out any other possible interests. “The ‘enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system.’”<sup>120</sup> The Court thus transformed forum-selection clause enforcement—undoubtedly *an* interest of justice—into *the only* private interest cognizable under the § 1404(a) standard. The Court also conveniently did away with convenience. Although the text of § 1404(a) reads “[f]or the convenience of parties and witnesses, in the interest of justice,” Justice Alito announced that “the interest of justice” is the “overarching consideration under § 1404(a).” He provided no further

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116. *J-Crew Mgmt., Inc. v. Atl. Marine Constr. Co.*, No. 12-228, 2012 WL 8499879, at \*6 (W.D. Tex. Aug. 6, 2012).

117. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 581 (2013) (quoting 28 U.S.C. § 1404(a) (2006)).

118. *Id.* at 582.

119. *Id.* (emphasis added).

120. *Id.*

insight as to why such a parsing of the language is the best or even a plausible reading of § 1404(a).

Recall that, after the medley of *Bremen*, *Carnival Cruise*, and *Stewart*, many courts and commentators observed that *Stewart* actually softened the doctrine of forum-selection clause enforcement by tying it to the discretionary balancing test of § 1404(a).<sup>121</sup> Thus, although the Court defended this reading of § 1404(a) by repeatedly citing *Stewart*, its conclusion about the force of forum-selection clauses is an overstatement, if not an outright misrepresentation, of *Stewart*'s holding that "[t]he forum-selection clause . . . should receive neither dispositive consideration nor no consideration."<sup>122</sup>

The *Stewart* decision did emphasize that a forum-selection clause would be a "significant" factor in § 1404(a) analysis, but only after stressing that "[s]ection 1404(a) is intended to place discretion into the district court . . . according to an 'individualized, case-by-case consideration of convenience and fairness.'"<sup>123</sup> Justice Marshall explicitly considered that it was "conceivable in a particular case . . . that because of these factors a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause."<sup>124</sup> This delegation of discretion is part of what supports the *Stewart* Court's *Erie* conclusion. Justice Marshall's language bears repeating in full:

Congress has directed that *multiple considerations* govern transfer within the federal court system, and a state policy focusing on a single concern or subset of factors identified in § 1404(a) would defeat that command. Its application would impoverish the *flexible* and *multifaceted* analysis that Congress intended to govern motions to transfer within the federal system.<sup>125</sup>

Therefore, it is far from a foregone conclusion that *Stewart* (and thus federal law) mandates nearly unequivocal enforcement of forum-selection clauses.

What does all of this mean, then, for the continued viability of the private interest factors in forum non conveniens motions to enforce forum-selection clauses? As I have argued above, the *Atlantic Marine* Court tied the use of § 1404(a) as an enforcement mechanism to the existence of forum non conveniens as an equivalent and viable alternative for clauses that point to a foreign or nonfederal forum. Given the Court's insistence that, for purposes of § 1404(a), forum-selection clauses swallow all other private interests whole, it would be surprising if the Court tolerated a more permissive standard for forum non conveniens.

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121. *See supra* notes 27–30 and accompanying text.

122. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988).

123. *Id.* at 29 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

124. *Id.* at 30–31.

125. *Id.* at 31 (emphasis added).

The *Atlantic Marine* Court made it plain that any test that accounts for private interests beyond the forum-selection clause itself is reversible for abuse of discretion. Thus, beyond conflating the two doctrines as it did in the general transfer and dismissal context, the application of these doctrines to forum-selection clause enforcement seems to obliterate them altogether.

#### B. WHITHER THE PUBLIC INTEREST FACTORS?

The *Atlantic Marine* Court eliminated the private interest factors for use in forum-selection clause enforcement, but perhaps it is too soon to conclude that it eradicated § 1404(a) and forum non conveniens altogether. After all, Justice Alito did create a small amount of negotiating room by directing district courts to give a forum-selection clause “controlling weight in all but the most exceptional cases.”<sup>126</sup> Since the Court expressly forbade courts from considering the private interest factors, it is presumably a public interest factor that would constitute one of these “extraordinary circumstances.”<sup>127</sup> And the Court is exceptionally clear in providing no guidance as to what an “exceptional circumstance” might be.<sup>128</sup>

Although the *Gulf Oil* factors and similar public interest factors cited in § 1404(a) cases are not meant to be an exclusive or exhaustive list,<sup>129</sup> the public factors generally coalesce around considerations of whether a case would clog the docket or burden the resources of a jurisdiction with little connection to the case, and the relative interests of the two forums, especially concerning problems that arise when a court must apply difficult and unfamiliar law.<sup>130</sup> As it turns out, *Atlantic Marine* also ensures that the choice-of-law consideration is unavailable as a public interest factor.

The Court used *Atlantic Marine* as an occasion to carve out an exception to the *Van Dusen* rule that the transferee court must apply the choice-of-law rules of the transferor court.<sup>131</sup> It held that “when a party bound by a forum-selection clause flouts its contractual obligation and files suit in different forum, a § 1404(a) transfer of venue will not carry with it the original venue’s choice-of-law rules.”<sup>132</sup> Thus, there is no need

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126. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 134 S. Ct. 568, 579 (2013) (quoting *Stewart*, 487 U.S. at 33).

127. *Id.* at 575.

128. See Mullenix, *supra* note 22, at 727–29.

129. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947) (list of forum non conveniens factors is nonexhaustive); *Powell v. I-Flow Corp.*, 711 F. Supp. 2d 1012, 1015 (D. Minn. 2010) (list of § 1404(a) factors is nonexhaustive).

130. See *supra* note 48 and accompanying text.

131. *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964).

132. *Atl. Marine*, 134 S. Ct. at 582.



for the transferor court to concern itself with problems that the transferee court might have in applying choice-of-law rules, because the transferee court will never have to leave the comfort of the choice-of-law rules of the state in which it sits.

Just like that, a major component of the public interest factors analysis has disappeared. All that is left are the worries about administrative costs and burdens to the public, and because these factors often concern the interests of the *transferor* court, only a small number of situations remain in which the district court is permitted to consider, as an “extraordinary circumstance,” the administrative burden that a transfer might impose on the venue named in the forum-selection clause.

The opportunities for district courts to characterize this one remaining area for analysis as “exceptional” seem dim. Take a moment to consider what a strong statement the *Atlantic Marine* opinion makes about the other public interest factor, choice-of-law problems. The sin of “flout[ing]” a forum-selection clause is apparently so terrible that the plaintiff is made to experience the consequences of filing a lawsuit in an improper venue,<sup>133</sup> even though the entirety of Part II of the *Atlantic Marine* opinion is organized around the idea that the transferor court *is* a proper venue, making § 1404(a) the appropriate mechanism for enforcement. Even the Ferenses were not made to suffer this fate—plaintiffs infamous for filing in Mississippi for the sole purpose of picking up its choice-of-law rules and subsequently returning, via § 1404(a) transfer, to their home state of Pennsylvania with a better statute of limitations.<sup>134</sup> If this is the view of the Court with regard to the public interest value of minimizing the burdens associated with applying the law of another forum, it seems unlikely that the Court would look favorably upon any other administrative burdens as “exceptional.”

Leaving aside the question of whether this is even a good idea for § 1404(a) itself, one is left wondering what this rule might mean for a forum non conveniens analysis. Consideration of the law that the transferee or foreign forum will need to apply have long been considered important aspects of the “public factors” analysis for forum non conveniens. This factor has not gone without criticism; consider Professor Stein’s admonition that “[t]his has resulted in numerous *forum non conveniens* decisions turning, not on a balance of conveniences, but on an informal ‘interest analysis’ that would have done Brainerd Currie proud.”<sup>135</sup> Despite these problems, acknowledging that a transferee or foreign court might have greater facility with the applicable law (or that

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133. Under a § 1406(a) transfer for improper venue, the transferee court does not apply the law of the transferor venue. *See* *Martin v. Stokes*, 623 F.2d 469, 471–72 (6th Cir. 1980).

134. *Ferens v. John Deere Co.*, 494 U.S. 516, 528–29 (1990).

135. Stein, *supra* note 13, at 818.

the opposite might be true) provides a needed counterweight to some of the private factors. It is one way of ensuring that the pure needs and conveniences of the parties (and even witnesses) do not overrun other considerations in the administration of justice.

Just as the collapse of the § 1404(a) private factors could signal that district courts hearing forum non conveniens motions must also discard the private factors, the evisceration of meaningful content from the public interest factors does not bode well for an independent forum non conveniens analysis. It seems that the conclusion for any district court confronted with a forum-selection clause is all but foreordained.

C. BEHOLD: THE MULTIFACTOR TEST WITH ONE FACTOR, THE BALANCING TEST WITH NO BALANCE, THE DISCRETIONARY STANDARD WITH BUT ONE PERMISSIBLE OUTCOME

It is here that the Court's conflation of § 1404(a) and forum non conveniens comes into sharp relief. By the time Justice Alito is done with the opinion, little is left of anything resembling the old § 1404(a) and forum non conveniens doctrines. An explicit prohibition on considering the private interest factors is coupled with permission to consider an anemic public interest factor that is the least likely to appear "exceptional" or "extraordinary."

The final nail in the coffin is the Court's willful ignorance of the word "may" in the text of § 1404(a). For, despite Justice Alito's insistence that enforcement of the forum-selection clause is the one and only "interest of justice," the entirety of § 1404(a) is couched in the language of discretion. The statute simply lists the terms under which "a district court *may* transfer any civil action."<sup>136</sup> Prior case law and commentary were nearly unanimous in agreeing that § 1404(a) conferred a healthy amount of discretion on the district judge.<sup>137</sup>

In choosing § 1404(a) as the mechanism for enforcement, the Court crafted a standard that departs significantly from the standard as it had been previously understood. Thus, there is little surprise that the Court hardly stopped to consider its language in conflating § 1404(a) and forum non conveniens earlier in the opinion. With neither doctrine looking much like its usual self, differences and distinctions would have been hard to detect.

It turns out that with respect to forum-selection clause enforcement, the "balancing tests" of § 1404(a) and forum non conveniens are a sham, a bit of distraction from the main show of applying a substantive contract rule that forum-selection clauses are presumptively enforceable under

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<sup>136</sup> 28 U.S.C. § 1404(a) (2012) (emphasis added).

<sup>137</sup> *See, e.g.*, 15 WRIGHT ET AL., *supra* note 13, § 3847 (summarizing commentary and case law on the judicial discretion granted by § 1404(a)).

federal law. If both tests are not balancing tests, but merely the vehicles for applying this substantive rule, then of course both doctrines will look the same. They are both balancing tests in which nothing is being balanced, multifactor tests in which the “practical result”<sup>138</sup> is that courts may consider only one factor, and authorizations of judicial discretion in which the district judge has the discretion to come to but one conclusion: enforcing the forum-selection clause.

Perhaps this exposes the weakness that federal enforcement of forum-selection clauses has had all along: Without a clear, legislatively authorized procedure for enforcement, federal enforcement of a contract makes for an awkward *Erie* fit. Such a legislative fix is not impossible, although whether it would be a sound policy decision is different question<sup>139</sup> and one about which I am skeptical.

In the absence of such a solution, enforcement of forum-selection clauses will remain in the wheelhouse of § 1404(a) and forum non conveniens. Restoring some measure of balance to each balancing test would allow judges to make more nuanced decisions about the enforcement of forum-selection clauses. It would also bolster any effort to ensure that § 1404(a) and forum non conveniens remain distinct.

#### CONCLUSION

Given the implications of *Atlantic Marine* on the contours of § 1404(a), forum non conveniens, and the substantial expansion of the substantive standard for federal enforcement of forum-selection clauses, it is puzzling why the Justices were unanimous in joining Justice Alito’s opinion. Even if each Justice concurred in the judgment, one wonders why there was nary an objection to the Court’s new choice-of-law rule, his evisceration of any balance or discretion in the § 1404(a) standard, or his carelessness in conflating the distinct doctrines of § 1404(a) and forum non conveniens. Perhaps the Justices were lulled by the “straightforward”-seeming facts of this case, or distracted by the more impressive international and constitutional issues in the personal jurisdiction cases. Whatever the reasons might be, I would not be surprised if some of the Justices experience a bit of buyer’s remorse if it becomes clear that the holding and dicta of *Atlantic Marine* affect far more than just the routine enforcement of presumptively valid forum-selection clauses.

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138. *Atl. Marine*, 134 S. Ct. at 582.

139. See generally Mullenix, *supra* note 22.