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CARA REICHARD

Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum

ABSTRACT. Choice-of-forum clauses can pose a significant obstacle to individuals hoping to bring claims against corporations. By limiting claims to particular geographic locations, choice of forum is part of a larger trend of constricted access to the courts. Compared to other restrictions, however, the Supreme Court's inconclusive stance on choice of forum means that this is one area where states have room to legislate to protect individual plaintiffs. This Note catalogs the surprising breadth of existing state anti-choice-of-forum statutes and argues that states can and should continue legislating in this area, particularly for contractual relationships most commonly defined by resource and power disparities.

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INTRODUCTION

For an individual in the United States today, harmed at the hands of a corporate actor, the path to justice has never been narrower. Our modern system of civil justice pushes parties into pretrial settlement, imposes significant barriers on class-action certification, and frequently holds up alternative forms of dispute resolution as superior to courtroom adjudication. This systematic dismantling of civil justice is helped along by the ubiquity of standard-form contracts, which utilize, among other tools, mandatory arbitration agreements to keep would-be plaintiffs out of the courtroom.¹ All of these trends make the prospect of success a daunting one for an individual litigant going up against a corporate defendant. But perhaps nothing more directly impacts the first-level issue of *access* to the justice system, in the most literal sense, than the geographic location of the proceedings. A large corporation can deploy its agents to any forum in the world; an individual litigant likely cannot. As a result, a prohibitively distant forum may preclude a civil action altogether.

Choice-of-forum clauses, a prevalent feature of standard-form contracts, dictate the forum in which any dispute resolution between two contracting parties must occur.² These provisions can create a significant obstacle for potential litigants – particularly employees, consumers, or other relatively powerless individuals who might be wronged at the hands of a corporate entity. Tremendous

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1. The implications of mandatory arbitration have been studied extensively. For a sampling of relevant literature, see Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329 (2015); Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5 (2014); Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 LAW & CONTEMP. PROBS. 55 (2004); Christopher R. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695; Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175 (2002); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363 (2018); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437 (2011); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. & PUB. POL'Y 549 (2008); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); and Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).
 2. For an overview of the trend towards forum selection in civil litigation, see Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT'L L.J. 51 (1992).

power and resource disparities are typically already at play when an individual brings a legal challenge against a corporate actor. Shuttling that challenge into a forum that is, almost by definition, less convenient for the claimant and more convenient for the defendant can serve as a significant obstacle to the claimant's chances of a favorable resolution.³

In 2016, the California Legislature attempted to address this issue by enacting Section 925 of the California Labor Code. The new provision made it unlawful for an employer to require an employee who lives and works in California, "as a condition of employment, to agree to a provision that would . . . [r]equire the employee to adjudicate outside of California a claim arising in California."⁴ The law made any contractual term that violates this rule "voidable by the employee."⁵ State and local commentators described the law as "unprecedented" at the time of its enactment.⁶

The law is quite far-reaching, covering the whole field of employment contracts. But it is by no means unique in its goal of using state contract law to prohibit unfair choice-of-forum clauses.⁷ A similarly sweeping Louisiana statute, for example, voids any choice-of-forum clause in an employment contract, unless the clause is "expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil or administrative action."⁸ In fact, dozens of state laws today impose limits, if not outright bans, on contractual choice of forum in a wide range of contracts. But to date, there has been no comprehensive study of these laws, their origins, or their aggregate effect.

Not all of the laws are so far-reaching as those enacted in California and Louisiana, with many focusing instead on narrower categories of contracts. At least seventeen states, for example, have enacted laws limiting or prohibiting choice-

3. See *infra* Part II.

4. CAL. LAB. CODE § 925(a) (West 2019).

5. *Id.* § 925(b).

6. See, e.g., M. Scott McDonald & Jim Hart, *New California Law Prohibits Choice of Law and Venue in Employment Contracts*, LITTLER MENDELSON 2 (Oct. 3, 2016), https://www.littler.com/files/2016_10_insight_new_california_law_prohibits_choice_of_law_and_venue_in_employment_contracts.pdf [<https://perma.cc/6NPZ-JC42>] ("Section 925 appears unique and unprecedented in its extremely broad and sweeping prohibition regarding the use of choice-of-law and venue clauses . . .").

7. I use the words "unfair" and "unjust" in this Note to mean, specifically, choice-of-forum clauses in contracts between parties with unequal bargaining power or other power imbalances. In particular, I am interested in contracts between corporations and individuals. See *infra* Part II.

8. LA. STAT. ANN. § 23:921A(2) (2019).

of-forum clauses in construction contracts; others have legislated against choice of forum in motor-vehicle sales or franchise agreements. These are just a few examples of the nearly fifty anti-choice-of-forum statutes this Note uncovers.⁹

Crucially, states do have the power to regulate choice-of-forum clauses through general contract law. While the Federal Arbitration Act (FAA) has largely preempted state laws regulating arbitration agreements,¹⁰ leaving states powerless to legislate against mandatory arbitration,¹¹ no equivalently far-reaching federal statute applies to choice of forum. The Supreme Court has considered the validity of choice-of-forum clauses on several occasions, but the resulting doctrine has been, at best, inconclusive. The Court has not held definitively whether federal or state law applies to determine the validity of a choice-of-forum clause.¹² Forum-selection clauses are presumptively valid when federal law clearly applies – for example, in admiralty jurisdiction. But the question of what law governs at other times – for example, when federal courts exercise diversity jurisdiction – remains unresolved.¹³

As a result, state anti-choice-of-forum laws have been met with a mixed reception in the lower courts. While not universally upheld, these laws enjoy regular success in state courts and at least occasional success in federal courts. This makes them a powerful tool in the hands of state governments looking to take a stand against the ever-narrowing path to justice for civil litigants.

This Note argues that state anti-choice-of-forum laws represent not only one of the few remaining tools for states to fight back against the constriction of judicial access for individuals harmed by corporations, but also an opportunity to

9. For a comprehensive overview of these statutes, see Appendix.

10. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (2018).

11. See *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 239 (2013) (holding that the FAA compels adherence to class-action waivers in arbitration agreements even when the cost of pursuing the claim would far exceed the possible rewards for any individual plaintiff); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011) (holding a California rule prohibiting class-action waivers in arbitration agreements preempted by the FAA).

12. See *infra* Part IV. The Court's holding in *Atlantic Marine*, for example, "presupp[os]e[d] a contractually valid forum-selection clause" without deciding whether state or federal law governed that question. *Atl. Marine Constr. Co. v. U.S. Dist. Court*, 571 U.S. 49, 62 n.5 (2013).

13. See *infra* Part IV. For more of an overview of the Court's choice-of-forum doctrine, see David Marcus, *The Perils of Contract Procedure: A Revised History of Forum Selection Clauses in the Federal Courts*, 82 TUL. L. REV. 973 (2008); Linda S. Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 FORDHAM L. REV. 291 (1988) [hereinafter Mullenix, *Another Choice of Forum*]; and Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015) [hereinafter Mullenix, *Gaming the System*].

take a stand against a pernicious form of power imbalance. Restricting adjudication to a forum far from the homes or jobs of would-be plaintiffs can place justice, quite literally, beyond their reach. States may be effectively powerless to stop the tide of mandatory arbitration, but they can still act to ensure individuals have the right to adjudication in a convenient forum.

State action carries particular importance given the power and resource disparities between corporate actors and individual plaintiffs. Large corporate powers today have nearly every advantage over the individuals with whom they contract, not least because they prescribe the terms of those contracts. Anti-choice-of-forum laws, including those already adopted by many states, offer a rare opportunity to redistribute power by ensuring that, in the event of a legal claim, the forum is one that does not disadvantage the relatively powerless individual. In litigation against corporate entities, individuals already face enough challenges.¹⁴ When the individual must navigate the legal process far from home, the chance of seeing justice served drops even further. By enacting legislation to keep legal challenges close to home, states can begin to even the playing field between corporations and individuals.

Regulating choice of forum should not and need not be a partisan issue. While expanding access to the courts might be viewed, at first glance, as a pro-

14. See, e.g., Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974). Galanter divides litigants into "one-shotters" who have "only occasional recourse to the courts" and "repeat players . . . who are engaged in many similar litigations over time." *Id.* He then lists the many advantages that repeat players have in the "litigation game," including "advance intelligence" that allows them to, for example, write the form contract; "expertise," "ready access to specialists," and "economies of scale and . . . low start-up costs for any case"; "informal relations with institutional incumbents"; the ability to take greater risks in litigation strategy; and the ability to engage in lobbying and other methods to "influenc[e] the making of the relevant rules." *Id.* at 98-100. Additionally, individual litigants usually have less money to expend on legal representation, the quality of which can often be dispositive in the outcome of a case. See Albert Yoon, *The Importance of Litigant Wealth*, 59 DEPAUL L. REV. 649, 652 (2010) (arguing that the "cost of legal representation . . . places a greater financial burden on parties with less wealth," and "the more a party expends on legal representation, the greater her chances . . . of a favorable legal outcome"); see also Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1319 (2005) ("Individuals . . . are generally represented by lawyers who work in smaller firms—with less sharing of human and organizational capital, and with lower levels of specialization and educational attainment—than the lawyers who represent organizations The more likely source of 'repeat play' benefits may very well be located . . . [in] the repeat play of the large law firm lawyers who represent organizations."); Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 954 (2000) ("[L]egal process has become extraordinarily expensive, for all matters.").

gressive cause, states' regulation of choice of forum also carries significant federalism implications. Among the Supreme Court's opinions on the subject, Justice Scalia gave the most full-throated support of any Justice to the authority of state contract law, not federal law, to determine the validity of choice-of-forum clauses.¹⁵

The Note proceeds as follows: Part I describes the current trend away from civil litigation, with a focus on the ubiquity of mandatory arbitration clauses as a useful comparison to choice of forum. Part II lays out a simple definition of choice of forum and describes the effects that choice-of-forum clauses have on access to justice. This Part shows that choice-of-forum clauses can, and in many cases do, effectively insulate corporations from liability. Part III surveys existing state legislation targeting choice of forum, and offers a case study of anti-choice-of-forum statutes in the construction industry. Part IV describes the four major Supreme Court decisions on choice of forum, showing that the Court has not closed the door on state action regulating choice of forum. It then examines how lower courts have treated these anti-choice-of-forum statutes. Finally, Part V lays out the policy implications of this Note, suggesting that states should more deliberately and thoughtfully enact anti-choice-of-forum statutes, and offering suggestions for how they might do so.

I. NARROWING ACCESS TO THE COURTS: THE ANTI-LITIGATION TREND AND THE IMPOTENCE OF STATES AFTER *CONCEPCION*

Over the last several decades, the civil justice system has experienced a severe constriction of access to the courts. A series of Supreme Court decisions narrowed the path to class-action certification, cutting off a powerful tool for litigants unable or unwilling to bring suit on their own.¹⁶ Plaintiffs who do manage

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15. *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 39-40 (1988) (Scalia, J., dissenting) (describing the “twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws,” and concluding that “state law controls the question of the validity of a forum-selection clause between the parties”).
 16. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (holding that diverse claims of sex discrimination by Wal-Mart employees could not meet the “commonality” requirement for class-action certification under Federal Rule of Civil Procedure 23); *Concepcion*, 563 U.S. at 352 (finding that a California common-law rule, which invalidated as unconscionable class-action waivers in arbitration agreements, was preempted by the FAA). For an assessment of the impact of these cases on class actions, see, for example, John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV. 463 (2013); Suzette M. Malveaux, *How Goliath Won: The Future Implications of Dukes v. Wal-Mart*, 106 NW. U. L. REV. COLLOQUY 34 (2011); and George Rutherglen, *Wal-Mart, AT&T Mobility, and the Decline of the Deterrent Class Action*, 98 VA. L. REV. BRIEF 24 (2012).

to file claims frequently find themselves shuttled away from the courtroom and into forms of alternative dispute resolution – ranging from settlement to negotiation to arbitration – that are institutionally stacked against them.¹⁷

Mandatory arbitration provides a useful point of comparison for contractual choice of forum. Both pose potentially devastating hurdles to would-be civil litigants by requiring a disadvantageous forum that tends to undermine equitable dispute resolution. Defenders of both arbitration and choice of forum describe them as valuable contracting tools that can reduce uncertainty, minimize costs, and pave the way for efficient dispute resolution.¹⁸ In both cases, there *are* undoubtedly circumstances in which these provisions can serve the interests of both contracting parties, such as in the case of two corporations with equal bargaining power.¹⁹ The circumstances are quite different, however, when an unequal distribution of power permits one party to set the terms of the contract unilaterally. In those cases, the repercussions of mandatory arbitration or choice of forum can be harmful.²⁰

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17. For an overview of the alternative dispute resolution movement, see Harry T. Edwards, *Commentary: Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).
 18. Compare *Circuit City, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“[T]here are real benefits to the enforcement of arbitration provisions Arbitration agreements allow parties to avoid the costs of litigation . . .”), and Resnik, *supra* note 1, at 2810 (describing “the heralding of arbitration as a speedy and effective alternative to the courts”), with Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 700 (1992) (“For some parties, the use of forum selection clauses is so convenient that they prefer to include them in every transaction they enter. By guaranteeing that all litigation is in the same state, not only is predictability enhanced, but efficiencies may be created through consolidation of actions and reliance on the same local counsel. By including such clauses in standard form contracts, transaction costs are reduced.”).
 19. For a discussion of the benefits, real and purported, of choice of forum, see *infra* Part II.
 20. See Resnik, *supra* note 1, at 2814–15 (describing how, in the case of arbitration, few individuals choose to pursue arbitration proceedings at all, even when there are no other processes available); *id.* at 2815 (“The lack of use reflects the minimal oversight of arbitration’s fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions requisite to augmenting complainants’ resources, and the limited access accorded third parties to the claims filed, the proceedings, and the results.”). For an overview of the literature on the inequities of mandatory arbitration, see Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014), which argues that employers’ disproportionate power over employees allows them to set the terms of procedural rights, undermining substantive employment rights provided by statute; Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91 (2014), which presents data showing that employees win cases less frequently, and are awarded less money, in arbitration proceedings than through litigation; and Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002),

While arbitration and choice of forum may have similar chilling effects on the fair adjudication of claims, these two contractual tools have been met with notably different treatments at the Supreme Court—suggesting different implications for state legislatures. Though Congress enacted the FAA in 1925,²¹ the Supreme Court only recently began aggressively enforcing arbitration clauses in the absence of meaningful consent between parties.²² In turn, over the last few decades lower courts have also begun upholding mandatory arbitration even in highly one-sided contracts.²³ The result has been a significant obstacle for individuals seeking meaningful justice under the law, and, consequently, increased immunity for harm-creating corporations. State legislatures have few options left to combat this trend. The nail in the coffin came in *AT&T Mobility LLC v. Concepcion*,²⁴ which struck down a California rule invalidating as unconscionable arbitration agreements that waived the right to participate in class actions.²⁵ The Court held that the FAA preempted California’s rule, noting that arbitration agreements may be “invalidated by ‘generally applicable contract defenses . . .’

which describes the movement towards mandatory arbitration as “the abdication of any public responsibility for justice based on something more than raw economic power.”

21. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2018)).
22. See, e.g., Resnik, *supra* note 1, at 2808 (“The United States Supreme Court opened the floodgates during the last three decades, as it reinterpreted [the FAA] to require courts to enforce a myriad of arbitration provisions, promulgated by issuers of consumer credit, manufacturers of products, and employers.”).
23. See David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 462-63 (2014) (describing examples of lower courts enforcing arbitration agreements that could not reasonably have consumers’ consent).
24. 563 U.S. 333 (2011).
25. The rule was formulated in *Discover Bank v. Superior Court*, which held that

when the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from the responsibility for [its] own fraud, or willful injury to the person or property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

113 P.3d 1100, 1110 (2005) (second alteration in original) (citation omitted), *abrogated by Concepcion*, 563 U.S. 333. The Court doubled down on its *Concepcion* decision two years later in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), when it held that class-action waivers in arbitration agreements could not be invalidated even when the cost of bringing an individual claim would far exceed the possible returns for a single plaintiff.

but not by defenses that apply only to arbitration.”²⁶ The Court found that the California rule was an example of the latter, in that it “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”²⁷

Concepcion dealt a major blow to class-action access. More fundamentally, it sounded the death knell for any efforts by state courts or legislatures to use general contract law to invalidate mandatory arbitration. In the wake of *Concepcion*, state courts have still endeavored to find space for their unconscionability doctrines, for example by invalidating arbitration agreements on grounds that are not “fundamental” attributes of arbitration²⁸—but *Concepcion* narrowed severely their ability to do so. Today, states hoping to regulate contracts of adhesion have little remaining power with which to combat mandatory arbitration, even when a contract would be otherwise unenforceable under general principles of contract law.

With arbitration agreements increasingly ubiquitous in consumer and employment contracts,²⁹ states have few policy tools with which to promote open access to the judicial system for individual plaintiffs. The ability of states to regulate unjust choice of forum is one notable exception.

II. CHOICE OF FORUM AND ITS IMPLICATIONS

A. Defining Choice of Forum

Choice of forum, on its face, is a simple concept grounded in an entirely reasonable objective. A choice-of-forum clause—also known as a “forum-selection clause,” a “forum clause,” a “foreign jurisdiction clause,” or a “jurisdiction agreement”—specifies the geographic forum in which disputes arising from the contract must be resolved.³⁰ From a business perspective, the preselection of a

26. *Concepcion*, 563 U.S. at 339 (citing *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

27. *Id.* at 344.

28. See James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233, 236 (2014) (“[S]tate-court judges can use unconscionability rules to police arbitration clauses so long as such rules do not interfere with the ‘fundamental attributes of arbitration.’”).

29. See, e.g., Comsti *supra* note 1, at 6 (“Over the past twenty years, there has been movement away from the public enforcement of statutory workplace rights in favor of a private system of forced arbitration of employment disputes.”); Schwartz *supra* note 1, at 36–37.

30. See M. Richard Cutler, *Comparative Conflicts of Law: Effectiveness of Contractual Choice of Forum*, 20 TEX. INT’L L.J. 97, 98 n.3 (1985) (cataloging the different terms used to describe

friendly – or at least neutral – forum makes a great deal of sense. Assuming equal bargaining power, both parties can avoid litigating in an unfriendly forum by contracting around that possibility from the start. Choice of forum “permits orderliness and predictability in contractual relationships” and “reduces the possibility of parallel lawsuits between parties in different fora.”³¹ These features are particularly valuable for large businesses operating with contacts across the country or the world. Understandably, they may hope to avoid the inconvenience of facing claims in multiple locations, some of which may be less friendly to their business interests.³²

Choice of forum is discussed with particular frequency in the international commercial context, where it offers an obvious advantage.³³ For multinational corporations, the ability to contract around uncertainty and inconvenience in adjudicatory forums holds a particular appeal.³⁴ It is unsurprising that the Supreme Court’s landmark choice-of-forum case, *The Bremen v. Zapata*, dealt with an international contract,³⁵ or that much of the Court’s choice-of-forum doctrine arises from admiralty jurisdiction.

This Note, by contrast, takes a domestic focus. It is not interested in the scenario of two corporate actors, possessed of equal bargaining power and similar resources, selecting a mutually convenient forum to resolve contractual disputes. Forum selection in that case is likely positive, or at least value neutral. Instead,

choice-of-forum clauses). In this Note, I use “choice of forum” and “forum selection” interchangeably. Note that while an arbitration clause might be seen as the selection of an *arbitral* forum over a judicial one, a choice-of-forum clause is conceptually distinct from an arbitration clause. Arbitration clauses may also include a geographic choice of forum within them, but the two should be understood as distinct contractual provisions. Where arbitration clauses deal with the type of dispute resolution available, choice-of-forum clauses specifically address the question of geography.

31. Solimine, *supra* note 2, at 52.

32. See Goldman, *supra* note 18, at 700.

33. For a sampling of literature on choice of forum in the international context, see James T. Gilbert, *Choice of Forum Clauses in International and Interstate Contracts*, 65 KY. L.J. 1 (1976); Michael Gruson, *Forum-Selection Clauses in International and Interstate Commercial Agreements*, 1982 U. ILL. L. REV. 133; Solimine, *supra* note 2; and *The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association*, 13 AM. J. COMP. L. 157 (1964).

34. See Cutler, *supra* note 30, at 97–98 (“Parties to international commercial agreements require confidence in their contractual rights and duties. Much uncertainty and potentially great inconvenience can arise if a suit can be maintained in any court that has jurisdiction. The elimination of this uncertainty by agreeing in advance on a forum is an important tool in international trade and commerce.”).

35. 407 U.S. 1 (1972). I discuss *The Bremen*, a case involving an international towage contract, *infra* Section IV.A.

this Note focuses on the case of *individuals* subjected to standard-form contracts that shuttle disputes into forums that may be so inconvenient as to prevent adjudication altogether. The implications of this situation are discussed in this Part.

One preliminary note: choice of forum is often discussed in conjunction with choice of law,³⁶ the practice of preselecting which jurisdiction's law will apply when adjudicating claims arising out of the contract. Choice of law has been the subject of extensive scholarly attention, and it has its own set of implications for civil litigation and access to justice. Because state law can vary dramatically, the question of which state's laws apply might be dispositive for a plaintiff's claim. For the most part, however, this Note focuses only on choice of forum. This is in part because state laws regulating choice of forum have received considerably less scholarly attention than choice-of-law legislation. But it is also because choice of forum poses a unique problem. While many factors, including choice of law, influence litigants' potential for *success* in their claims, choice of forum deals with *access* in the most literal sense — physical access to the forum for adjudication. This is a threshold issue before which no other questions of “access to justice” can even be reached.

B. Stacking the Odds in Favor of Corporate Actors

The purported advantages of choice-of-forum clauses may be entirely valid in cases where contracting parties possess equal bargaining power and perfect information. In other contexts, however, these clauses can pose a significant procedural obstacle to the pursuit of justice. While they offer an obvious convenience to large corporate entities facing repeated litigation in disparate forums, they place relatively less powerful parties, such as employees and consumers, at a tremendous disadvantage. These litigants often lack full information and meaningful bargaining power, and they are unlikely to have the resources or, given the high cost and long odds, the motivation to bring a claim in an inconvenient forum. As a result, potential plaintiffs may choose not to bring their claims — even meritorious ones — in the first place.

36. See, e.g., Earl M. Maltz, *Choice of Forum and Choice of Law in the Federal Courts: A Reconsideration of Erie Principles*, 79 KY. L.J. 231 (1990); Mullenix, *Another Choice of Forum*, *supra* note 13, at 296 (defining choice of law and choice of forum together as “consensual adjudicatory procedure,” which allows “potential or prospective litigants to choose, in advance of any litigation, the court that will hear the dispute and the law that will govern the substantive merits of the litigation”).

In the era of standard-form contracts, repeat corporate players already enjoy significant advantages in setting contractual terms.³⁷ To take one broad example, standard-form consumer contracts are, almost by definition, unfair to the consumer.³⁸ The average consumer “never even reads the form, or reads it only after [s]he has become bound by its terms.”³⁹ If an individual does read the contract through, she may very well fail to understand many of its terms.⁴⁰ And even for the consumer who both reads and understands the standard-form contract that she signs, the “form may be part of an offer which the consumer has no reasonable alternative but to accept.”⁴¹ In short, while a consumer or employee might sign off on a contract that includes a choice-of-forum agreement, her consent to

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37. Standard-form contracts, sometimes also known as contracts of adhesion, do not have one clearly articulated definition. For one definition, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983).
38. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) (“Forms standardized to achieve economies of mass production and mass merchandising will . . . almost certainly be unfair, because if they were not, their issuers would probably lose money. An unfair form will not deter sales because the seller can easily arrange his sales so that few if any buyers will read his forms, whatever their terms, and he risks nothing because the law will treat his forms as contracts anyway.”). Slawson provides a classic account of the implications of standard-form contracts, but these effects have continued into the internet age. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 433 (2002) (“Even as the electronic environment provides consumers with new tools to protect themselves from businesses, it also creates novel opportunities for businesses to take advantage of consumers. . . . Businesses still know more than consumers, and consumers still fail to read and understand standard terms.”).
39. Slawson, *supra* note 38, at 530. Consumers today are even less likely to have read—or, in many cases, to even be aware of—many of the contracts that bind them. See Charles E. MacLean, *It Depends: Recasting Internet Clickwrap, Browsewrap, “I Agree,” and Click-Through Privacy Clauses as Waivers of Adhesion*, 65 CLEV. ST. L. REV. 45, 48-49 (2016) (“Consumers face [a contract of adhesion] when in the midst of Internet shopping; the shopper must click the ‘I Agree’ button to complete the purchase. . . . [M]ost consumers are completely unaware of the terms they are waiving . . .”).
40. Slawson, *supra* note 38, at 541 (“In the overwhelming majority of such transactions . . . the documents are of such length and complexity that, whether the parties have a fair opportunity to read them or not, no one but a lawyer or an unusually intelligent layman could hope to comprehend the full significance of their terms.”).
41. *Id.* at 530; see MacLean, *supra* note 39, at 48-49 (“The seller drafted the terms of the contract and all the implicit and explicit privacy waivers contained therein, and the consumer is powerless to negotiate any substantive amendments to the waiver which constitutes a contract.”); see also Andrea Doneff, *Arbitration Clauses in Contracts of Adhesion Trap “Sophisticated Parties” Too*, 2010 J. DISP. RESOL. 235 (arguing that even presumptively “sophisticated” parties may have little power to bargain away a mandatory arbitration agreement). The same reasoning can easily be applied to choice of forum.

such a provision “is unlikely to be genuine, and may often be the product . . . of unequal bargaining power.”⁴²

A would-be plaintiff subject to a choice-of-forum clause that she had no power to negotiate is likely to find herself constrained to a forum that is inconvenient for her – but convenient for the corporation that has harmed her. In such a circumstance, the likelihood of the individual bringing any suit – let alone a successful one – drops significantly. As one federal district court explained, when a forum-selection clause “requires the filing of a suit in a distant state[,] it can serve as a large deterrent to the filing of suits by consumers against large corporations.”⁴³

It is not hard to understand why this is the case. Navigating the already burdensome process of litigation (or any alternative form of dispute resolution) in a place far from home is daunting enough to discourage even those individuals most committed to seeking justice. Even such a “threshold task” as finding an attorney in another state can itself seem formidable,⁴⁴ and that is only the beginning. The claimant will “need to travel and communicate over long distances,” while the attorney will “need to communicate with the client’s witnesses.”⁴⁵ Delays can be expected, as the distance is likely to interfere with the natural progression of pretrial activities, adding additional costs. And, in the unlikely event that the claimant makes it to a trial, she will have to contend with “the costs and risks involved in securing the attendance of witnesses” at the trial location.⁴⁶ Further, while businesses may preselect the forums that are most convenient to

42. Solimine, *supra* note 2, at 52.

43. *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986).

44. Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 446-47 (1992) (“The very decision to retain an attorney is so troublesome . . . that most claimants are content to accept a settlement without one. The result of that commonplace decision, as numerous studies have repeatedly shown, is that such claimants almost invariably obtain much less from their adversaries than they otherwise would. If claimants learn . . . that they must retain an attorney in a distant contractual forum in order to initiate a legal action on their claims, that information alone may dissuade a significant number from proceeding and lead them to accept whatever offer, if any, the company might make.” (footnote omitted)). While a plaintiff may be able to retain an attorney in her home state, some states impose restrictions on pro hac vice appearances, and the absence of local counsel might disadvantage the plaintiff. See Timothy Miltenberger, *The Indispensable Local Counsel*, 21 TYL 8, 8-9 (2017) (“Most, if not all courts, have unwritten rules related to filing requirements, service requirements, and appearing in court. . . . A good local counsel will know more than the written and unwritten rules – she will know the people.”).

45. Purcell, *supra* note 44, at 448.

46. *Id.* For more contemporary accounts of the effects of choice-of-forum clauses, among other common features of standard-form contracts, see MARGARET JANE RADIN, *BOILERPLATE: THE*

them—for example, the location of their corporate headquarters—they may also select the forum they know to be most sympathetic to their business interests,⁴⁷ further loading the dice against the plaintiff.

The aggregate cost—both literal and psychological—of undertaking such an ordeal in a distant forum is enough to dissuade all but the most fervent litigants from starting the process. Even absent all the other impediments to litigation that exist today, choice-of-forum clauses offer a potentially insurmountable obstacle to individuals trying to use the legal system to hold corporate entities accountable.

C. Identifying Unjust Choice of Forum

States might reach different policy conclusions about which uses of choice of forum should be subject to regulation. At a general level, however, unjust choice-of-forum clauses are not difficult to identify using traditional indicia of fairness. We already have many tools, such as unconscionability doctrines, with which to identify unfair contractual relationships—even if the law does not always use these tools to invalidate such contracts. The common-law doctrine of unconscionability has several prototypical elements that could be applied here. In determining whether a contract is unconscionable, courts look to such factors as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”⁴⁸ A contract

FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 135 (2012), which explains that choice-of-forum clauses “may make sense for sophisticated commercial parties,” but, “[w]hen extended to boilerplate schemes used by firms with their customers, however, they are problematic, because requiring a consumer to litigate somewhere far away from home may in effect deprive the consumer of any reasonable opportunity to obtain a legal remedy”; and Mullenix, *Gaming the System*, *supra* note 13, at 755, which argues that

forum-selection clauses have contributed much litigation, great expense, and a good deal of delay, usually resulting in dismissal of the plaintiff’s case. . . . [I]n that sense[,] the provisions can be said to have a docket-clearing benefit. But why defendants should be given a preference in where they are sued is inexplicable and ultimately unjustifiable.

47. See, e.g., Michael Elmer & Stacy Lewis, *Where to Win: Patent-Friendly Courts Revealed*, MANAGING INTELL. PROP. 34 (2010).

48. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.” (footnote omitted)). Other definitions of unconscionability vary in their details, but the fundamental principle remains the same. See, e.g., David Horton, *Unconscionability Wars*, 106 NW. L. REV. COLLOQUY 13, 17-18

can be procedurally unconscionable (for example, one party was given no choice but to accept the contract⁴⁹) or substantively unconscionable (for example, the contract is “so one-sided as to shock the conscience”⁵⁰). And the mere fact that courts have been hesitant to apply the doctrine of unconscionability to now-ubiquitous standard-form contracts⁵¹ does not preclude state legislatures from employing a similar standard.

The characteristics that make forum selection unjust are largely procedural. A choice-of-forum clause is unjust, for example, when one party lacks bargaining power and the contract is offered on a take-it-or-leave-it basis. A would-be employee seeking a low-level position, or a would-be consumer in need of a cell phone, may have little choice but to agree to the contract put before her. She is unlikely to have any leverage with which to renegotiate the terms. Even if the employee or consumer were aware of exactly what she was signing—and even if she believed, at the time of signing, that the chance of eventual litigation was high—the nature of an all-or-nothing contract means that she would need to choose whether to take that job or cell phone—which she may well desperately need—or to go without. When bargaining-power disparities exist and the more powerful parties unilaterally set the terms—particularly in contracts for employment or for necessary consumer items—there often can be no meaningful consent.

The substantive question is largely secondary; if the contract is procedurally unjust, any forum selected outside of the less powerful party’s home or place of work is inherently substantively unjust as well. While longer distances may impose an even greater degree of inconvenience, the harm is already done by selecting *any* inconvenient forum, even if it is only one state away.

While unconscionability is a common-law doctrine, similar ideas of fairness can be codified in legislation. Australia, for example, has an aptly named “unfair contract terms law,” under which “a term in a standard form consumer contract

(2011) (describing “the two-pronged test” described in *Walker-Thomas* as “prevail[ing] in most jurisdictions today”).

49. See David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1694-95 (2009) (offering several examples of procedural unconscionability).
50. *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 125 (2d Cir. 2010) (quoting *Sitogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002)).
51. See Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1255 (2003) (“Traditionally, the terms included in a form contract signed by the buyer were enforceable as written absent a valid common law formation defense such as fraud, duress, or undue influence. That is, they were subject to no closer scrutiny than fully dickered contract terms.”).

will be void if the term is unfair.”⁵² A more tailored – but still far-reaching – example is the California labor law described in the Introduction, invalidating any employment contract that requires dispute resolution in a forum outside of California for employees that live and work in the state.⁵³ Such a statute rests on the understanding that an entire category of relationships between contracting parties – in this case, employer-employee relationships – is so inherently unequal that procedural unfairness should be presumed. And as the next Part will discuss, California is not alone in passing legislation that takes aim at unjust choice of forum.

III. EXISTING STATE ACTION AGAINST CHOICE OF FORUM

State anti-choice-of-forum legislation is not just a hypothetical possibility. Many states have passed a wide range of statutes circumscribing contractual choice of forum. But no scholarly work has surveyed this legislation comprehensively.⁵⁴ The statutes vary in scope, with some applying only to contracts in which at least one party is a resident of that state,⁵⁵ while others apply whenever the incident in question occurred in the state, regardless of the residency of either

52. Jeannie Paterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, 33 MELB. U. L. REV. 934, 936 (2009). A term is unfair if “it would cause a significant imbalance in the parties’ rights and obligations arising under the contract,” it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term,” and “it would cause detriment (whether financial or otherwise) to a party if it were applied or relied on.” *Id.* (quoting *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* (Cth) s 2 pt 2(3)(1)(a)-(c) (Austl.)).

53. CAL. LAB. CODE § 925(a) (West 2019).

54. The existence of such statutes has been noted before, and smaller numbers of them cataloged. See Deborah J. Mackay & Jason A. Greves, *Foreign Forum Selection Clauses in Construction Contracts and State Attempts to Limit Their Enforcement*, CONSTRUCTION BRIEFINGS, July 2004 (providing an overview of state laws restricting choice-of-forum clauses in the construction industry); Symeon C. Symeonides, *What Law Governs Forum Selection Clauses*, 78 LA. L. REV. 1119, 1128-29 (2018) (describing how choice-of-law analysis determines the application of choice-of-forum clauses, noting the existence of “statutes that prohibit enforcement of [forum-selection] clauses in certain types of contracts,” and citing several such statutes); James Zimmerman, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759 (1998) (providing an overview of state laws restricting choice-of-forum clauses specifically in franchise agreements).

55. See, e.g., MONT. CODE ANN. § 27-5-323 (West 2019) (“An agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana.”).

party.⁵⁶ Some statutes tackle particularly broad categories of contracts,⁵⁷ though most target contracts in specific industries, such as construction, or specific types of contracts, such as franchise agreements.⁵⁸

A. Overview of State Anti-Choice-of-Forum Statutes

State anti-choice-of-forum statutes take different forms and offer different scopes of coverage, but there are some commonalities that can be highlighted to offer an overview of what these statutes can look like.

First, most state anti-choice-of-forum statutes appear to apply to contracts in specific industries or to specific types of contracts, rather than to *all* contracts with ties to the state. This either suggests that legislatures are careful to narrowly tailor their anti-choice-of-forum legislation, or that the legislation has come about as a result of lobbying by specific industries rather than from general policy goals defined by state lawmakers.⁵⁹

More than a dozen states, for example, have legislated against choice of forum in the construction industry,⁶⁰ voiding choice-of-forum clauses when the parties to a contract are based in the state⁶¹ or the construction project is to be performed there.⁶² Multiple states also regulate the use of choice-of-forum agreements in contracts for motor-vehicle dealers⁶³ or in franchise agreements more broadly,⁶⁴ for contracts for private child support collection,⁶⁵ and for certain kinds of agricultural contracts.⁶⁶ Other states have enacted seemingly idio-

56. See, e.g., IND. CODE ANN. § 32-28-3-17 (West 2019) (“A provision in a contract for the improvement of real estate in Indiana is void if the provision . . . requires litigation, arbitration, or other dispute resolution process on the contract occur in another state.”).

57. See, e.g., N.C. GEN. STAT. § 22B-3 (2019) (banning choice-of-forum clauses in *any* “contract entered into in North Carolina”).

58. See *infra* Appendix (cataloging such state statutes).

59. See *infra* Section III.B (highlighting the role of industry lobbying in bringing about anti-choice-of-forum legislation in the construction industry).

60. See *infra* Appendix, Table 1.

61. See, e.g., CAL. CIV. PROC. CODE § 410.42 (West 2019).

62. See, e.g., 815 ILL. COMP. STAT. 665/10 (2019).

63. See *infra* Appendix, Table A2.

64. See *infra* Appendix, Table A3.

65. See *infra* Appendix, Table A4.

66. See *infra* Appendix, Table A5.

syncratic legislation, voiding forum selection for contracts with foreclosure consultants or for claims against the beneficiary of a transfer on a death security registration.⁶⁷

A few states have enacted legislation regulating broader categories of contracts. At least one state, North Carolina, has a blanket statute invalidating “any provision in a contract entered into in North Carolina that requires” a forum in another state.⁶⁸ This may cast the net too wide since, as noted in Part II, choice of forum can be reasonable and valuable in contracts between parties of equal bargaining power.⁶⁹ More useful are laws that, while still broad, apply only to categories of contracts consistently defined by relationships of unequal resources and bargaining power. As described in the Introduction, for example, California has enacted a law forbidding any employer from requiring “an employee who primarily resides and works in California . . . to adjudicate outside of California a claim arising in California.”⁷⁰ Since employer-employee relationships tend to be unequal, this law takes aim at unjust choice of forum without needlessly interfering with other, legitimate contracting behavior. Similarly, Louisiana law voids provisions in any employment contract in which an employer “includes a choice of forum clause . . . in an employee’s contract of employment or collective bargaining agreement.”⁷¹

Other states focus on consumer contracts, another contractual relationship prone to resource disparities and unequal bargaining power. In Minnesota, for example, a contract “between a consumer short-term loan lender and a borrower residing in Minnesota” may not include “a provision choosing a forum for dispute resolution other than the state of Minnesota.”⁷² In Oregon, “[a] consumer may revoke a provision in a consumer contract that requires the consumer to assert a claim . . . or respond to a claim” in a forum outside of Oregon.⁷³ In Tennessee, choice-of-forum agreements are prohibited “with respect to any claim arising under or relating to the Tennessee Consumer Protection Act of 1977.”⁷⁴

67. See *infra* Appendix, Table A9.

68. N.C. GEN. STAT. § 22B-3 (2019).

69. The North Carolina statute has been consistently overruled by both state and federal courts. This trend is less because of the particular formulation of North Carolina’s statute, and more because of the generally pro-choice-of-forum position of the Fourth Circuit. See, e.g., *Peltier v. Mathis*, No. 15-cv-133, 2016 WL 4386091, at *6 (W.D.N.C. 2016) (“Federal Courts in North Carolina routinely enforce forum selection clauses despite the existence of Section 22B-3.”).

70. CAL. LAB. CODE § 925 (West 2019).

71. LA. STAT. ANN. § 23:921 (2019).

72. MINN. STAT. § 47.601 (2019).

73. OR. REV. STAT. § 81.150 (2017).

74. TENN. CODE ANN. § 47-18-113 (West 2018).

These statutes are wide-ranging. In some cases, they cover contractual relationships that are particularly prone to power or resource disparities. In other cases, they focus perhaps on categories of contracts of particular importance to state legislators or interest groups. In all cases, they represent efforts by state legislatures to circumscribe the use of forum selection and offer potential models for other legislatures looking to do the same. A deeper look into one particularly common category of anti-choice-of-forum laws — those focused on the construction industry — can serve to illuminate the origins and effects of these statutes.

B. Case Study: Choice of Forum in the Construction Industry

As in other industries, choice-of-forum clauses in the construction industry offer an obvious appeal for large companies. Particularly for companies operating at a national scale, they protect against “cases [coming] before judges or juries deemed to be hostile to a particular business entity or inclined to award excessively large money damages” by limiting the venue to “corporate headquarters or other business-friendly location[s].”⁷⁵ For smaller, local parties, however, a forum selected outside of the state or even county where they live or work can preclude any meaningful possibility of successful adjudication.

Owners and contractors seek to use leverage against lower-tier entities by including in their contracts and subcontracts forum selection clauses to dictate the location of dispute resolution and thus obtain “home court advantage” By including these clauses, owners and contractors attempt to alter the risk equation by relying upon the lower-tier entities’ reluctance to travel substantial distances to pursue a lawsuit in a potentially hostile jurisdiction.⁷⁶

At least seventeen states have passed laws limiting or outright prohibiting choice-of-forum clauses in construction contracts.⁷⁷ In California, a provision requiring dispute resolution outside the state is unenforceable in a contract for “construction of a public or private work of improvement” in the state.⁷⁸ In Illinois, such a provision is void “in connection with a building and construction

75. V. Frederic Lyon & Douglas W. Ackerman, *Controlling Disputes by Controlling the Forum: Forum Selection Clauses in Construction Contracts*, 22 CONSTRUCTION L., Fall 2002, at 15, 15.

76. *Id.*

77. See *infra* Appendix, Table A1.

78. CAL. CIV. PROC. CODE § 410.42(a) (West 2019).

contract to be performed in Illinois.”⁷⁹ In Florida, “[a]ny venue provision in a contract for improvement to real property which requires legal action . . . to be brought outside this state is void as a matter of public policy.”⁸⁰ Similar statutes exist in more than a dozen other states.⁸¹

These statutes have largely come about as the result of lobbying by members of the contracting community who are “increasingly opposed to going out of state to resolve disputes.”⁸² An article in *Construction Lawyer* suggests that these statutes were passed “at the urging of local smaller contractors, subcontractors, and suppliers that believed out-of-state forum-selection clauses were fundamentally unfair.”⁸³ State legislators, meanwhile, have both political and ideological motivations for backing this kind of legislation. *First*, they stand to gain the support of the “local contractors’ associations” in future elections.⁸⁴ *Second*, they may be “motivated by the belief that the law will prevent out-of-state contractors from obtaining a home town advantage in a foreign forum.”⁸⁵ In the words of one Illinois state legislator, anti-choice-of-forum legislation protects contractors from “gigantic, behemoth national companies” that in “adhesion-type fashion, thrust” these clauses onto local contractors.⁸⁶

From the industry perspective, these statutes seem to be making a difference. A trade journal for construction lawyers advised that state anti-choice-of-forum statutes are relevant whether the case is filed in federal or state court:

If the case is filed in state court and cannot be removed, there is a strong likelihood the state court will enforce the statute and void the forum-selection clause. If the case is venued in a federal district court, the federal court may also void the forum-selection clause if it applies state law to the enforceability analysis, or applies federal law and finds that the state

79. 815 ILL. COMP. STAT. 665/10 (2019).

80. FLA. STAT. § 47.025 (2019).

81. See *infra* Appendix, Table A1.

82. Lyon & Ackerman, *supra* note 75, at 16.

83. Jason A. Lien, *Forum-Selection Clauses in Construction Agreements: Strategic Considerations in Light of the Supreme Court’s Pending Review of Atlantic Marine*, 33 CONSTRUCTION L., Summer 2013, at 27, 30.

84. Mackay & Greves, *supra* note 54, at 5.

85. *Id.*

86. *Id.* (quoting 92d Gen. Assembly, Reg. Sess., 94th Legis. Day, at 24 (Ill. May 8, 2002) (statement of Sen. Dillard)).

statute expresses a “strong public policy of the forum” that renders the clause unenforceable under *The Bremen*.⁸⁷

This analysis holds true outside the construction industry as well. The full range of state anti-choice-of-forum legislation has been subjected to judicial scrutiny, and in state courts in particular these statutes are likely to be enforced so long as they are not preempted by the FAA. Even in federal court, these statutes may be enforced if the court applies state contract law to determine the validity of the forum-selection clause.

C. Choice of Forum and Arbitration

I have presented choice of forum as a matter largely distinct from—if comparable to—mandatory arbitration. In reality, however, the two may often be intertwined, in contracts and in legislation. Arbitration agreements may specify a specific arbitral forum.⁸⁸ Little empirical research on the use of choice of forum exists; future work might examine exactly how frequently the two types of provisions appear together. Nonetheless, more than a dozen of the state anti-choice-of-forum statutes identified specify that the invalidation of choice of forum applies to arbitration as well as litigation,⁸⁹ while many others use nonspecific descriptions of the legal action implicated by the statutes, such as “dispute arising under the agreement,”⁹⁰ “any cause of action arising under such contract,”⁹¹ “submit a disputed matter,”⁹² “resolve disputes,”⁹³ or “enforcing his rights under

87. Lien, *supra* note 83, at 31 (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

88. See, e.g., *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 540 S.E.2d 864, 865 (S.C. Ct. App. 2000) (per curiam).

89. See *infra* Appendix. For sample language, see OR. REV. STAT. ANN. § 701.640 (West 2018), which declares that a construction contract may not include any provision that “[m]akes the construction contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the construction contract to be conducted in another state.”

90. See, e.g., UTAH CODE ANN. § 13-8-3 (West 2019).

91. See, e.g., VA. CODE ANN. § 8.01-262.1 (West 2019).

92. See, e.g., ARK. CODE ANN. § 4-75-413 (West 2019).

93. See, e.g., CAL. FAM. CODE § 5614 (West 2019).

the contract.”⁹⁴ Very few statutes specify that the prohibition applies only to litigation.⁹⁵ But at least two states have laws explicitly targeting choice of forum only in arbitration agreements.⁹⁶

The frequent reference to all forms of dispute resolution – including arbitration – suggests that state legislatures see choice of forum as a problem that is connected to, and not distinct from, alternative dispute resolution. An example of legislative history is instructive here. Although the anti-choice-of-forum provision of the California Labor Code,⁹⁷ described in the Introduction, does not explicitly mention arbitration, it arose directly out of the state legislature’s concern with the injustice of mandatory arbitration. The statute originated in a package of bills “seeking to address various fairness issues surrounding the rules that govern the conduct and operation of arbitrators and arbitrations in this state.”⁹⁸ The fact that this anti-choice-of-forum statute arose from a package of arbitration-related bills suggests that the legislature saw the two issues as fundamentally interconnected – that choice of forum represented to the legislators not only a concern in and of itself but a practice that could further exacerbate the threat to justice posed by arbitration.

Each of these two contract elements, when wielded by a corporate actor against a relatively less powerful individual, adds hardship to the already cumbersome process of seeking justice. When the two are combined – as in a contract requiring an individual claimant to resolve her dispute through arbitration *and* in a forum far from home – the hurdles might become too high for even the most committed of individuals. For states interested in mitigating some of the unfairness wrought by arbitration agreements after *Concepcion*, anti-choice-of-forum legislation represents one method of ensuring that the scope of these arbitration agreements is at least somewhat circumscribed.

94. See, e.g., IDAHO CODE ANN. § 29-110 (West 2019).

95. For a full list of the legal actions affected by each of the statutes, see *infra* Appendix.

96. See MONT. CODE ANN. § 27-5-323 (West 2019); S.C. CODE ANN. § 15-7-120 (2019).

97. CAL. LAB. CODE § 925 (West 2019).

98. CAL. ST. SEN. COMM. ON THE JUDICIARY, REPORT ON S.B. 1241, 2015-2016 Reg. Sess., at 2 (Apr. 26, 2016). Another piece of legislation in the package, prohibiting arbitration of employment disputes, was vetoed by California Governor Jerry Brown. See Edward Lozowicki, *Governor Brown Vetoes California Bill Prohibiting Arbitration of Employment Claims*, A.B.A. (Jan. 15, 2016), <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2016/gvr-brown-vetoes-ca-bill-prohibiting-arbitration-employment-claims> [<https://perma.cc/8GB4-Z7ZG>]. Governor Brown noted in his statement of veto that “a blanket ban on mandatory arbitration agreements is a far-reaching approach that has been consistently struck down in other states as violating the Federal Arbitration Act.” *Governor’s Veto, Assembly Bill No. 465*, CAL. LEGIS. INFO. (Aug. 31, 2015), http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_04510500/ab_465_cfa_20151021_115834_asm_floor.html [<https://perma.cc/GQ8T-ACA9>].

The connection between arbitration and choice of forum means that state anti-choice-of-forum legislation comes with risks. By circumscribing corporations' ability to solidify their advantage through choice-of-forum clauses, such legislation might further encourage companies to require mandatory arbitration. We currently lack the data to know the likelihood of such backlash. Future empirical research could help illuminate the extent to which choice of forum and mandatory arbitration already go hand in hand in contracts and, consequently, the extent to which one might substitute for the other.

IV. CHOICE OF FORUM AT THE COURTS

The validity of these state anti-choice-of-forum statutes has been considered by many courts at both the state and federal level. The Supreme Court has considered the validity of choice-of-forum clauses on several occasions but has not ruled decisively on whether state or federal law controls to determine their validity. As a result, these many anti-choice-of-forum laws have been met with a mixed reception in the lower courts, enjoying better favor in some circuits than in others. Since they are frequently upheld in state courts, however – and at least sometimes upheld in federal courts – this Section argues that these statutes still represent a valuable tool for state legislatures.

A. The Supreme Court's Choice-of-Forum Doctrine: Leaving the Door Open for State Action

None of the four major choice-of-forum cases over the last forty years satisfactorily addresses the validity of state anti-choice-of-forum legislation. In part, this results from the landscape of federal law. Unlike arbitration, which the Court has found fully controlled by the FAA, there is no equivalently far-reaching federal statute to preempt state legislation on choice of forum. Under current doctrine, a choice-of-forum clause is presumptively valid under *federal* law and ought normally to be upheld in cases controlled by federal law. This proves dispositive when, for example, a federal court exercising admiralty jurisdiction encounters a choice-of-forum provision, even in the face of an unfriendly state law. But where federal courts exercise other jurisdiction, the question of whether federal or state law should determine the validity of a forum-selection agreement remains unresolved, leaving space for state regulation of choice of forum.

1. The Bremen v. Zapata: *The Initial Affirmation of Choice of Forum*

The modern case law begins with *The Bremen v. Zapata Off-Shore Co.*,⁹⁹ before which courts had largely “refused to enforce [forum-]selection clauses as unlawful efforts to reorder procedural rules by contract.”¹⁰⁰ *The Bremen* involved an international towage contract between an American company and a German company, and the Supreme Court ultimately upheld the contract’s choice-of-forum clause designating London as the exclusive forum for all disputes. The ruling, which found forum-selection clauses “prima facie valid” and enforceable “unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances,”¹⁰¹ seemed to offer a strong affirmation of forum selection. At the time, however, *The Bremen*’s broader application remained unclear, for the Court seemed to cabin the holding to federal courts exercising admiralty jurisdiction.¹⁰² *The Bremen* also allowed for the possibility that a choice-of-forum clause could be invalidated under certain circumstances, such as if “enforcement would be unreasonable and unjust”; if there was evidence of “fraud or overreach[]”; if “enforcement would contravene a strong public policy of the forum in which suit is brought”; or if the party seeking to void the forum-selection clause could show that adjudication in the stated forum would “be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”¹⁰³

99. 407 U.S. 1 (1972).

100. Marcus, *supra* note 13, at 976. *But see* Solimine, *supra* note 2, at 54 (arguing that a trend towards greater enforcement of choice of forum had already begun, as the 1971 revision of the Restatement of Conflict of Laws called “for choice-of-forum clauses to be enforced unless they were ‘unfair and unreasonable’”) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 80 (AM. LAW INST. 1971)).

101. *The Bremen*, 407 U.S. at 10.

102. *Id.* at 9 (“We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.”); *see also* Mullenix, *Another Choice of Forum*, *supra* note 13, at 312 (“The fact that *The Bremen* involved an international towage contract was crucial to the Court’s adoption of consensual jurisdiction The Court extolled the virtues of the neutral forum to adjudicate international commercial disputes”).

103. 407 U.S. at 15, 18.

2. *Stewart v. Ricoh: Venue Transfer and the Introduction of the Erie Question*

More than a decade later, in *Stewart Organization v. Ricoh Corp.*,¹⁰⁴ the Court once again faced a choice-of-forum question. Two companies had entered into a contract designating Manhattan as the exclusive forum for resolving disputes. When one party alleged breach of contract and brought suit in the Northern District of Alabama, the other moved to transfer the case based on the forum-selection clause. The district court denied the motion, holding that Alabama law controlled and that “Alabama looks unfavorably upon contractual forum-selection clauses.”¹⁰⁵

The Supreme Court reversed and directed a change of forum, not as a matter of contract law, but by finding a proper venue transfer under Section 1404(a).¹⁰⁶ “[T]he first question for consideration,” the Court held, is “whether § 1404(a) itself controls respondent’s request to give effect to the parties’ contractual choice of venue and transfer this case” to the selected forum.¹⁰⁷ Strangely, however, this line of analysis skipped over the question of whether the forum-selection clause was valid in the first place, and therefore relevant in ruling on the transfer.

Instead, the Court held that Alabama’s public policy against choice of forum undermined the flexibility that Section 1404(a) was meant to provide to federal district courts when weighing transfer requests.¹⁰⁸ When faced with a state law unfriendly to choice of forum, “the District Court will either have to integrate the factor of the forum-selection clause into its weighing of considerations as prescribed by Congress, or else to apply” the state law.¹⁰⁹ “[B]etween these two choices in a single ‘field of operation,’” the Court held, “the instructions of Congress are supreme.”¹¹⁰

104. 487 U.S. 22 (1988).

105. *Id.* at 24.

106. The current version of Section 1404(a) reads, “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.” 28 U.S.C. § 1404(a) (2018). This language is largely the same as it was in 1988, *see* 28 U.S.C. § 1404(a) (1988), at the time of the Court’s *Ricoh* decision, though the final phrase, “or to any district or division to which all parties have consented,” was added in 2011. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 204, 125 Stat. 758, 764.

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

108. *See id.* at 29-30.

109. *Id.* at 30.

110. *Id.* (first quoting and then citing *Burlington N.R.R. Co. v. Woods*, 480 U.S. 1, 7 (1987)).

While this might at first seem like a definitive statement on the validity—or lack thereof—of state anti-choice-of-forum statutes, two ambiguities remain. First, the decision offers no standard for lower courts to follow to determine the validity of a forum-selection clause in cases not involving Section 1404(a).¹¹¹ Second, because the *Ricoh* analysis sidesteps the first-level question whether the choice-of-forum clause is valid to begin with, a more complete analysis could arguably determine that an invalid forum-selection clause should be given no weight in a Section 1404(a) analysis. If state law applies to determine that validity, and if, under state law, the choice of forum is invalid, it should not be considered a valid expression of the parties' preferences and therefore should not be a relevant factor in weighing the transfer. While courts can and should consider a *valid* forum-selection clause under Section 1404(a), an *invalid* forum-selection clause should be irrelevant.

Justice Scalia, dissenting in *Ricoh*, offered the most persuasive approach for determining the underlying validity of a choice-of-forum clause. Under the proper *Erie* analysis, Justice Scalia argued, state law determines the validity of a forum-selection clause. Section “1404(a) was enacted against the background that issues of contract, including a contract’s validity, are nearly always governed by state law,” and it is “contrary to the practice of our system that such an issue would be wrenched from state control in absence of a clear conflict with federal law or explicit statutory provision.”¹¹² Unlike the FAA, which explicitly preempts state contract law, Section “1404(a) is simply a venue provision that nowhere mentions contracts or agreements, much less that the validity of certain contracts or agreements will be matters of federal law.”¹¹³ Because a broad reading of Section 1404(a) to encompass forum-selection clauses “is neither the plain nor the more natural meaning,” Justice Scalia would have “construe[d] it to avoid . . . significant encouragement to forum shopping.”¹¹⁴ If federal courts give weight to choice-of-forum clauses that the relevant state law would invalidate, forum shopping between state and federal courts will be the natural result.

Meanwhile, in the absence of an applicable federal rule or statute, federal common law substitutes for state law only if the matter is procedural rather than substantive. Because state contract law is substantive, state law should apply. In applying the “twin aims of the *Erie* rule: discouragement of forum-shopping and

111. In some cases, Section 1404(a) transfer requests are inappropriate procedural mechanisms to attempt to enforce forum-selection clauses. *See infra* note 128.

112. *Ricoh*, 487 U.S. at 36 (Scalia, J., dissenting).

113. *Id.* at 37.

114. *Id.* at 38.

avoidance of inequitable administration of the laws,”¹¹⁵ Justice Scalia determined that “state law controls the question of the validity of a forum-selection clause between the parties.”¹¹⁶

The majority in *Ricoh* assumed the validity of a choice-of-forum agreement but chose not to grapple with how that validity is meant to be determined—including for choice-of-forum cases not involving a Section 1404(a) transfer. Though argued in the dissent, Scalia’s *Erie* analysis fills the gap left by the majority opinion, offering a more compelling approach for federal courts applying state contract law. Because there is no federal statute or rule that determines the validity of forum-selection clauses—and because state contract law is substantive law, not procedural—a federal court sitting in diversity jurisdiction should apply state law to determine the validity of a forum-selection clause. If, under state law, the forum-selection clause is invalid, then, at least in cases not involving a Section 1404(a) transfer, such a clause should certainly not be enforced. Even in cases of a Section 1404(a) transfer, an invalid forum-selection clause should arguably not be given weight, as it cannot be said to represent a valid statement of the parties’ preferences.

The *Ricoh* decision left enough questions unanswered that a circuit split exists today over whether to apply federal or state law to determine the validity of forum-selection clauses. Some courts have directly applied *Ricoh* when faced with a Section 1404(a) venue transfer.¹¹⁷ Others have undertaken the *Erie* analysis that the *Ricoh* majority neglected, with some finding that *Erie* requires application of federal law because forum selection is fundamentally a procedural issue,¹¹⁸ and some holding the opposite.¹¹⁹ Other courts have held that, despite

115. *Id.* at 39 (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

116. *Id.* at 39-40.

117. See *Brock v. Entre Comput. Ctrs., Inc.*, 933 F.2d 1253, 1258 (4th Cir. 1991) (“The *Stewart* Court rejected a focus on state law and directed courts faced with § 1404(a) motions for change of venue to conduct a proper analysis under that section.”).

118. See, e.g., *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 653 (4th Cir. 2010) (describing South Carolina venue rules as “a procedural matter”); *Jones v. Weibrecht*, 901 F.2d 17, 19 (2d Cir. 1990) (“Questions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature. Moreover, this and other circuits have continued to apply the *Bremen* standard, rather than state law, in diversity cases after *Stewart*.” (citation omitted)).

119. See, e.g., *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007) (“In diversity actions, federal courts apply state law to determine questions of personal jurisdiction Because it violates the public policy of the state of Ohio, the Norvergence forum selection clause is not enforceable.”); *J3 Eng’g Grp., LLC v. Mack Indus. of Kalamazoo, LLC*, No. 18-cv-1240, 2019 WL 2746262, at *3 (E.D. Wis. July 1, 2019) (“[B]efore examining the

a federal presumption of enforceability of forum-selection clauses, a state's public policy to the contrary is an important factor to weigh in the analysis.¹²⁰ Still other appellate courts have declined to take a stance on the question or have found the Court's rulings ambiguous at least where Section 1404(a) does not apply.¹²¹

3. *Carnival Cruise Lines v. Shute: Extending The Bremen to Domestic Consumer Contracts*

A few years after *Ricoh*, the Court gave its strongest affirmation of choice of forum with its decision in *Carnival Cruise Lines, Inc. v. Shute*.¹²² The Shutes had purchased tickets for a cruise, and those tickets required any claim coming out of the cruise be brought in Florida. During the cruise, Eulala Shute slipped and fell, sustaining an injury, and the Shutes subsequently filed suit in Washington, where they resided. Carnival Cruise Lines moved for summary judgment under the forum-selection clause.

The Supreme Court affirmed *The Bremen* and extended the decision to the realm of consumer standard-form contracts. The Court found that because there

validity of the forum-selection clause, 'we must first identify the law that governs [its] validity.' As a general rule, '[i]n diversity cases, we look to the substantive law of the state in which the district court sits.'" (alterations in original) (footnote omitted) (citations omitted) (first quoting *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774 (7th Cir. 2014); and then quoting *Pomerantz v. Int'l Hotel Co.*, 359 F. Supp. 3d 570, 577 (N.D. Ill. 2019))).

120. See *Union Elec. Co. v. Energy Ins. Mut.*, 689 F.3d 968, 974 (8th Cir. 2012) ("While *Bremen* provides the proper analysis for determining the enforceability of a forum selection clause, in this circuit, consideration of the public policy of the forum state must be part of that analysis.").

121. See *Barnett v. DynCorp Int'l LLC*, 831 F.3d 296, 303 (5th Cir. 2016) ("[T]hough many courts have done so, treating federal law as governing the validity of forum-selection clauses in diversity cases is not unproblematic either. *The Bremen* and *Carnival Cruise Lines* were admiralty cases, and federal common law developed in that context is 'not freely transferrable' to diversity cases We need not—and therefore do not—resolve this issue today." (quoting *Ricoh*, 478 U.S. at 28)); *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 609 (7th Cir. 2006) (stating that to apply either state law or federal law is an "arbitrary" decision); *Lambert v. Kysar*, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993) ("The Supreme Court has yet to provide a definitive resolution of the *Erie* issue, which has divided the commentators and split the circuits This court has yet to take a position on the issue" (citations omitted)); *Instrumentation Assocs., Inc. v. Madsen Elecs. (Canada) Ltd.*, 859 F.2d 4, 7 n.5 (3d Cir. 1988) ("*Ricoh* leaves open the question of whether the holding in [*The Bremen*], applying federal judge-made law to the issue of a forum selection clause's validity in admiralty cases, should be extended to diversity cases.").

122. 499 U.S. 585 (1991).

was “no indication that petitioner set Florida as the forum . . . as a means of discouraging . . . legitimate claims,” there was “no evidence that petitioner obtained respondents’ accession to the forum clause by fraud or overreaching,” and the Shutes “conceded that they were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity,” the forum-selection clause should be enforced.¹²³

The *Carnival Cruise* decision was a major blow to consumer rights, and scholars have viewed it as a sharp restriction of the Court’s personal-jurisdiction doctrine.¹²⁴ But as in *The Bremen*, the Court was exercising admiralty jurisdiction¹²⁵ and could therefore apply federal law without question. *Carnival Cruise* did not need to address the question that Justice Scalia answered in *Ricoh*: For a court sitting in diversity jurisdiction, what law determines the validity of the choice-of-forum clause in the first place?

4. *Atlantic Marine v. U.S. District Court: Clarifying Procedure*

The Court’s most recent choice-of-forum decision in *Atlantic Marine Construction v. U.S. District Court*¹²⁶ also failed to clarify this point. The case arose when a civil defendant attempted to enforce a contractual forum-selection clause through a motion to dismiss under Federal Rule of Civil Procedure 12(b)(3).¹²⁷ The Court held that a choice-of-forum clause is not a basis for dismissal. Instead, it should be enforced only through a motion to transfer under Section 1404(a).¹²⁸ The Court’s ruling “resolved a conflict among the lower federal courts concerning the appropriate procedural means” for dealing with a choice-

123. *Id.* at 595.

124. See, e.g., Charles L. Knapp, *Contract Law Walks the Plank: Carnival Cruise Lines, Inc. v. Shute*, 12 NEV. L.J. 553 (2012); Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT’L L.J. 323 (1992); Linda S. Mullenix, *Carnival Cruise Lines, Inc. v. Shute: The Titanic of Worst Decisions*, 12 NEV. L.J. 549 (2012); Purcell, *supra* note 44.

125. *Carnival Cruise Lines*, 499 U.S. at 590.

126. 571 U.S. 49 (2013).

127. *Id.* at 52; see FED. R. CIV. P. 12(b)(3) (permitting a motion to dismiss for improper venue).

128. *Atlantic Marine* also clarified that Section 1404(a), which governs transfer between federal district courts, is the appropriate procedure for enforcing a forum-selection clause only if the clause selects a federal forum. If the clause selects a state court or foreign tribunal, it should be enforced through *forum non conveniens*. 571 U.S. at 60.

of-forum provision.¹²⁹ It failed, however, to resolve any larger questions. Instead, the Court explained in a footnote that its “analysis presupposes a contractually valid forum-selection clause,”¹³⁰ without providing guidance on how to determine validity.

5. *The Court’s Choice-of-Forum Doctrine Today*

Taken together, these four cases demonstrate broad judicial support for choice of forum. But they also leave open space for anti-choice-of-forum action at the state level. Even assuming the application of federal law, a state’s anti-choice-of-forum policy remains under *Ricoh* a viable factor to consider in determining the validity of a Section 1404(a) venue transfer, if not a particularly persuasive one.¹³¹ And if a court sitting in diversity jurisdiction finds that state contract law, not federal law, applies to determine the validity of a choice-of-forum clause, then a state law against such provisions should be dispositive.

Although the Supreme Court has been reluctant to rule decisively on the question, Justice Scalia’s *Erie* analysis offers the clearest and most logical approach to the use of choice of forum in the federal courts. While *Atlantic Marine* explained the procedure for enforcing a valid choice-of-forum clause, Section 1404(a) speaks only to the procedural piece of the puzzle. There is no choice-of-forum analogue to the FAA. That is, there is no federal statute that could be read as preempting any state action on the subject. And in the absence of a relevant federal statute, state contract law, not federal common law, ought to apply.¹³² If a forum-selection clause is invalid under state contract law, then at least in cases not involving a Section 1404(a) transfer, such a clause should not be enforced.

129. Mullenix, *Gaming the System*, *supra* note 13, at 721 (“We now know that when a party invokes a forum-selection clause, the proper means for locating the appropriate forum is through a transfer of venue under 28 U.S.C. § 1404(a) In addition, a court’s consideration of the transfer motion is governed by the jurisprudence for § 1404(a) transfers, and not jurisprudential principles governing motions to dismiss for lack of venue, improper venue, or failure to state a claim upon which relief can be granted.”).

130. *Atl. Marine*, 571 U.S. at 62 n.5.

131. See *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22 (1988).

132. See 28 U.S.C. § 1652 (2018) (“The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”). For a lengthier explanation of why federal common lawmaking is inappropriate in this case, see Solimine *supra* note 2, at 69-77.

Even in cases of a Section 1404(a) transfer, an invalid forum-selection clause arguably should not be given weight, as it does not represent a valid statement of the parties' preferences.

The Court has not clarified the *Erie* question since *Ricoh*, and, as noted above, the federal appellate courts are divided as to which law applies to determine the enforceability of forum selection. Many lower courts have found the Court's choice-of-forum doctrine after *Atlantic Marine* ambiguous as to what law should be applied to determine the validity of these provisions.¹³³ While the Court has ruled decisively that the FAA preempts state laws targeting mandatory arbitration, it has not taken so strong a stance on forum selection. As a result, in contrast to their impotence in the face of forced arbitration, states *do* have legal space to take action against unjust choice of forum and prevent further erosion of the civil-justice system.

B. Choice of Forum in the Lower Courts

Courts at the state and federal levels have reviewed a wide range of state anti-choice-of-forum statutes. The treatment of these statutes is somewhat uneven, with state courts more likely than federal courts to apply such statutes in order to invalidate a contractual choice-of-forum clause. Even federal courts, however, may agree to enforce these statutes if they believe the matter to be governed by state contract law. Below is an overview of the different treatments these statutes have received.

1. State Courts

State courts, free to apply state contract law, will often enforce state anti-choice-of-forum statutes. To highlight a few examples, in *Overton v. Westgate*

133. See, e.g., *Barnett v. DynCorp Int'l, LLC*, 831 F.3d 296, 301 (5th Cir. 2016) ("*Atlantic Marine* thus did not answer under what law forum-selection clauses should be deemed invalid—an issue that has long divided courts. Consequently, courts and commentators have continued to express uncertainty about 'whether a federal court in a diversity case should look to federal law, state law or both when deciding whether a forum selection clause is valid.'" (citations omitted)); *In re Union Elec. Co.*, 787 F.3d 903 (8th Cir. 2015) ("Although the Court in *Atlantic Marine* resolved several questions, it left other questions unanswered. For example, the Court assumed the existence of a valid forum-selection clause for the purpose of its analysis, thereby providing no direct holding as to when such clauses should be deemed invalid.").

Resorts, Ltd.,¹³⁴ a Tennessee appeals court applied the Tennessee Consumer Protection Act¹³⁵ to rule that “a contractual forum selection clause ‘cannot defeat the ability of a Tennessee consumer to bring an action under the [Act] within the appropriate forum in this state.’”¹³⁶ In *Michels Corp. v. Rockies Express*, an Ohio appeals court affirmed the state “legislature’s intent to make a construction contract’s forum selection and choice of law clauses void and unenforceable as against public policy.”¹³⁷

Both of these examples involve a state court upholding its own state’s laws, but courts may also uphold another state’s anti-choice-of-forum law, depending on the outcome of its choice-of-law analysis.¹³⁸ In *Dancor Construction, Inc. v. FXR Construction, Inc.*, for example, a New York construction contract designated Illinois the exclusive forum for disputes.¹³⁹ An Illinois appeals court applied Illinois’s choice-of-law doctrine to determine that a New York law invalidating choice-of-forum provisions represented “a fundamental public policy in New York” and that New York therefore had “a materially greater interest than Illinois in the determination of th[e] [forum-selection-clause] issue.”¹⁴⁰ The court applied the New York law and refused to enforce the choice-of-forum clause. In *Oxford Global Resources, LLC v. Hernandez*, a California employee of a Massachusetts-based company signed an employment contract requiring a Massachusetts forum for disputes.¹⁴¹ When the employer sued the employee for breaching the contract, it brought the claim in Massachusetts, but the employee moved to dismiss under *forum non conveniens*. The Massachusetts Supreme Court, applying California law, disregarded the forum-selection clause and dismissed the case, basing its decision in part on the fact that California’s anti-choice-of-forum statute reflected “a California public policy to protect employees who reside and work in California.”¹⁴² In *T3 Enterprises, Inc. v. Safeguard Business Systems, Inc.*, the Idaho Supreme Court, faced with a contract that spec-

134. No. E2014-00303-COA-R3-CV, 2015 WL 399218 (Tenn. Ct. App. Jan. 30, 2015).

135. TENN. CODE ANN. § 47-18-113 (West 2018).

136. *Overton*, 2015 WL 399218, at *12 (quoting *Walker v. Frontier Leasing Corp.*, No. E2009-01445-COA-R3-CV, 2010 WL 1221413, at *5 (Tenn. Ct. App. Mar. 30, 2010)).

137. 34 N.E.3d 160, 165 (Ohio Ct. App. 2015).

138. For a closer look at how choice of law interacts with forum-selection clauses to determine which state’s law governs enforcement, see Symeonides, *supra* note 54.

139. 64 N.E.3d 796 (Ill. App. Ct. 2016).

140. *Id.* at 813.

141. 106 N.E.3d 556 (Mass. 2018).

142. *Id.* at 570.

ified Dallas, Texas as the forum, applied Texas law, which “states that forum selection clauses will not be enforced when ‘enforcement [of the forum-selection clause] would contravene a strong public policy of the forum where the suit was brought.’”¹⁴³ Because the suit was brought in Idaho, and Idaho itself “has a strong public policy against forum selection clauses as evidenced” by a state statute invalidating choice of forum, the Idaho court refused to enforce the forum-selection clause.¹⁴⁴

These statutes can influence state courts even when there is otherwise a strong presumption of enforceability. In California courts, contractual forum-selection clauses are presumed valid “so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable”¹⁴⁵ – yet the same courts have deferred to state laws that express a public-policy preference against the use of choice of forum.¹⁴⁶

2. Federal Courts

Federal courts are more likely than state courts to be skeptical of state anti-choice-of-forum laws, and some circuits remain reluctant to give weight to these statutes. The circuits remain split on the question of whether federal or state law applies to determine the validity of a forum-selection clause.¹⁴⁷ But courts do not look only to *Ricoh* and *Erie* to address choice of forum. In the absence of a Section 1404(a) issue, for example, courts can still look to *The Bremen* – which, despite declaring the presumptive validity of forum selection, also listed several factors under which a choice-of-forum clause could be invalidated.¹⁴⁸ The Ninth Circuit, for example, recently held that a state anti-choice-of-forum statute “suffices under *Bremen*’s public policy factor” to invalidate a forum-selection clause,¹⁴⁹ the

143. 435 P.3d 518, 529 (Idaho 2019) (quoting *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 231-32 (Tex. 2008)).

144. *Id.* at 530.

145. *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 707 (Ct. App. 2001).

146. *See Vita Planning & Landscape Architecture, Inc. v. HKS Architects, Inc.*, 192 Cal. Rptr. 3d 838 (Ct. App. 2015) (deferring to CAL. CIV. PROC. CODE § 410.42 (West 2019) and invalidating a forum-selection clause requiring a subcontractor performing work in California to litigate in a different state).

147. *See supra* notes 117-121 and accompanying text.

148. *See supra* note 99 and accompanying text.

149. *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 916 (9th Cir. 2019) (finding a choice-of-forum clause unenforceable under *The Bremen* because of an Idaho statute prohibiting choice-of-forum clauses in franchise agreements).

most decisive statement yet by a federal appeals court in favor of state anti-choice-of-forum laws.

In other jurisdictions, a state anti-choice-of-forum statute may not represent a significantly strong public-policy preference to invalidate a contract,¹⁵⁰ or the statute might be a factor that can weigh against enforcement of forum selection, but cannot itself be dispositive.¹⁵¹ Other courts operate from the assumption that “[s]tate statutes that expressly prohibit certain forum-selection clauses ordinarily are preempted by federal laws and procedures governing venue in federal courts.”¹⁵²

At least in some jurisdictions, however, federal courts have proven willing to enforce these state statutes. Courts in at least the Seventh and Ninth Circuits have upheld such statutes. To take a few examples: In *Harding Materials, Inc. v. Reliable Asphalt Products, Inc.*, a federal district court in Indiana denied a motion to dismiss based on a forum-selection clause, noting that *Ricoh* had “expressly left open the question of what law applies to the validity of forum-selection clauses ‘other than in the specific context’” of *Ricoh* itself.¹⁵³ Another Indiana court in *Pirson Contractors, Inc. v. Scheuerle Fahrzeugfabrik GmbH* declared that “the ability of the state to regulate contracts is a countervailing force to this freedom of contract.”¹⁵⁴ In *J. Lilly, LLC v. Clearspan Fabric Structures, International, Inc.*, an Oregon district court, faced with a Section 1404(a) venue transfer, found the forum-selection clause invalid under Oregon law and therefore irrelevant as a factor in weighing the transfer request.¹⁵⁵ In *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, a Hawaii district court denied a motion to transfer a case to Wisconsin pursuant to a forum-selection clause, in part because of Hawaii’s statute invalidating such clauses.¹⁵⁶ Courts that do not automatically uphold state anti-

150. See, e.g., *WCC Cable, Inc. v. G4S Tech. LLC*, No. 17-cv-52, 2017 WL 6503142 (W.D. Va. Dec. 15, 2017); *Bowen Eng’g, Corp. v. Pac. Indem. Co.*, 83 F. Supp. 3d 1185 (D. Kan. 2015); *Brahma Grp., Inc. v. Benham Constructors, LLC*, No. 08-cv-970, 2009 WL 1065419 (D. Utah Apr. 20, 2009).

151. See, e.g., *Brand Energy Servs., LLC v. Enerfab Power & Indus., Inc.*, No. 15-cv-1530, 2016 WL 10650607 (M.D. Tenn. Oct. 28, 2016).

152. *Whiting-Turner Contracting Co. v. Westchester Fire Ins. Co.*, No. 13-cv-328, 2013 WL 3177881, at *3 (D. Md. June 20, 2013); see also, e.g., *Sundowner Trailers, Inc. v. Snyder Servs., Inc.*, No. 09-cv-360, 2010 WL 3834415 (E.D. Okla. Sept. 30, 2010) (demonstrating federal preemption of state statutes prohibiting forum-selection clauses).

153. No. 16-cv-2681, 2017 WL 495787, at *2 (S.D. Ind. Feb. 6, 2017) (emphasis omitted) (quoting *IFC Credit Corp. v. Aliano Bros. Gen. Contractors*, 437 F.3d 606, 609 (7th Cir. 2006)).

154. No. 07-cv-123, 2008 WL 927645, at *2 (N.D. Ind. Apr. 3, 2008).

155. No. 18-cv-1104, 2018 WL 4773545 (D. Or. Oct. 2, 2018).

156. 81 F. Supp. 3d 993 (D. Haw. 2014).

choice-of-forum laws may still give these laws consideration in weighing their ultimate decisions.¹⁵⁷

While these statutes do tend to face more of an uphill battle in federal courts than they do in the state system, they do sometimes succeed. And this occasional success in federal courts, paired with regular success in state courts, makes them a worthwhile tool for state legislatures to employ.

C. *Anti-Choice-of-Forum Laws and the FAA*

State anti-choice-of-forum laws risk judicial invalidation if they run afoul of the FAA. This risk further reflects the interconnectedness of arbitration and choice of forum and of the policies that regulate them.

As noted above, anti-choice-of-forum statutes frequently apply—whether explicitly or implicitly—to mandatory arbitration agreements, theoretically ensuring that contracts cannot specify both an arbitral forum *and* a geographic one. However, given the Court’s expansive interpretation of the FAA, this application to arbitration can cause courts to view these statutes with greater skepticism. This might be more obvious when a statute explicitly targets arbitration agreements, but the issue also arises where a statute is applied in such a way that it would, in the particular case at hand, invalidate an agreement to arbitrate. As the First Circuit explained, “[T]o the extent that the Rhode Island [anti-choice-of-forum statute] is construed to prohibit any provision . . . which designates a forum for arbitration outside of Rhode Island, it presents an obstacle to the achievement of the full purposes and ends which Congress set out to accomplish in enacting the FAA.”¹⁵⁸

A few examples may be illustrative. A case in South Carolina state court involved a Georgia contractor and a South Carolina subcontractor who had entered into an arbitration agreement listing Georgia as the forum for all disputes.¹⁵⁹ When the South Carolina party filed suit for breach of contract, the Georgia

157. See, e.g., *Fred Montesi’s, Inc. v. Centimark Corp.*, No. 04-2957 Ma/A, 2006 WL 1174480, at *5, *8 (W.D. Tenn. May 2, 2006) (finding that Tennessee’s anti-choice-of-forum law was a “factor [that] weighs against transfer,” and ultimately deciding, “[a]fter considering the relevant factors, . . . that transferring this action would be contrary to the interests of justice”). *But see* *Brand Energy Servs., LLC v. Enerfab Power & Indus., Inc.*, No. 15-cv-1530, 2016 WL 10650607 (M.D. Tenn. Oct. 28, 2016) (enforcing the forum-selection clause, despite a state law that weighed against it).

158. *KKW Enters. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 49–50 (1st Cir. 1999).

159. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 540 S.E.2d 864 (S.C. Ct. App. 2000).

party filed a motion to dismiss and compel arbitration. The state trial court denied the request, finding the arbitration agreement to be in violation of a South Carolina anti-choice-of-forum statute.¹⁶⁰ Citing the FAA, the state appeals court reversed. “Where a contract evidencing interstate commerce contains an arbitration clause,” the court held, “the FAA preempts conflicting state arbitration law.”¹⁶¹

Similarly, a case before a federal district court in North Carolina involved a North Carolina statute voiding forum-selection provisions applying to “the prosecution of any action or the arbitration of any dispute.”¹⁶² When one party to the contract sought to have the arbitration agreement found unenforceable under North Carolina law, the court ruled that where the enforcement of the statute “would require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration, the statute is preempted by the FAA.”¹⁶³

To avoid conflict with the FAA, some state statutes explicitly reference it, clarifying that the state law should not be read in violation of the federal law. A South Carolina statute, for example, declares that any “provision in an arbitration agreement that arbitration proceedings must be held outside this State is not enforceable,” but added that the “enforceability of the remaining provisions . . . is as provided in this title, the Federal Arbitration Act, and any applicable rules of arbitration.”¹⁶⁴ This acknowledgment of the FAA’s authority may help states avoid judicial scrutiny, but evidence suggests that it has little practical effect. A state court in South Carolina, for example, weighed the application of

160. *Id.* at 866.

161. *Id.*

162. N.C. GEN. STAT. § 22B-3 (2019).

163. United States *ex rel.* TKG Enters. v. Clayco, Inc., 978 F. Supp. 2d 540, 548 (E.D.N.C. 2013) (citation omitted). For more examples of courts finding an anti-choice-of-forum law preempted by the FAA, see *Bradley v. Harris Research, Inc.*, 275 F.3d 884 (9th Cir. 2001); *Sterling Constr. Corp. v. SOS Constr. & Roofing, Inc.*, No. 14-cv-1959, 2015 WL 2189588 (N.D. Ind. May 11, 2015); *Cahill v. Alternative Wines, Inc.*, No. 12-cv-110, 2013 WL 427396 (N.D. Iowa Feb. 4, 2013); *HOODZ Int’l, LLC v. Toschiaddi*, No. 11-cv-15106, 2012 WL 883912 (E.D. Mich. Mar. 14, 2012); *GEM Mech. Servs., Inc. v. DV II, LLC*, No. 12-cv-93, 2012 WL 4094476 (D.R.I. Sept. 17, 2012); and *TGI Friday’s Inc. v. Great Nu. Rests., Inc.*, 652 F. Supp. 2d 750 (N.D. Tex. 2009). See also *SOS Constr. & Roofing Inc. v. Sterling Constr. Corp.*, 2015 WL 12564176, at *4 (D. Neb. Feb. 17, 2015) (collecting cases in several different jurisdictions that found anti-choice-of-forum laws to be preempted by the FAA).

164. S.C. CODE ANN. § 15-7-120 (2019); see also VA. CODE ANN. § 8.01-262.1 (West 2019) (indicating the same).

the above statute to an arbitration agreement designating New York as the judicial forum for vacating, modifying, or confirming the arbitral award.¹⁶⁵ Since the FAA explicitly provides that the parties to an arbitration agreement may specify which court may provide the order confirming the arbitral award,¹⁶⁶ the court found that this application of the statute “would directly conflict with the Federal Arbitration Act” and was therefore preempted.¹⁶⁷

This does not mean that anti-choice-of-forum laws are inevitably preempted by the FAA, however. Some courts have instead held that anti-choice-of-forum statutes, when applied to arbitration, may be valid so long as they are grounded in principles of general contract law. The Ninth Circuit, for instance, has stated that “as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA.”¹⁶⁸ The Tenth Circuit “requires that a party seeking to avoid a forum selection clause produce evidence showing that the arbitration provision is a product of fraud or coercion.”¹⁶⁹

In the Ninth Circuit, at least, the more general the better. The binding precedent, *Bradley v. Harris Research*, held that the FAA preempted a California statute invalidating choice of forum in franchise agreements, at least as applied to

165. *Ashley River Props. I, LLC v. Ashley River Props. II, LLC*, 648 S.E.2d 295 (S.C. Ct. App. 2007).

166. 9 U.S.C. § 9 (2018).

167. *Ashley River Props.*, 648 S.E.2d at 300; see also *TGK Enters.*, 978 F. Supp. 2d at 548 (“[W]here enforcement of the North Carolina statute . . . would ‘require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration,’ the statute is preempted by the FAA.” (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984))); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 540 S.E.2d 864, 866 (S.C. Ct. App. 2000) (“Where a contract evidencing interstate commerce contains an arbitration clause, the FAA preempts conflicting state arbitration law.”).

168. *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001); see also *Cahill*, 2013 WL 427396, at *2 (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements . . .” (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))). Too narrow a statute, however, may not rise to the level of a generally applicable contract defense. See, e.g., *Bradley*, 275 F.3d at 892 (“Although a generally applicable contract defense, such as unconscionability, can invalidate an arbitration agreement without contravening the FAA, the sole issue raised on this appeal is the validity of the forum selection clause in light of the pre-emption of [section 20040.5 of the California Business and Professions Code] by the FAA, not the validity or enforceability of the contract as a whole.” (citation omitted)).

169. *Presidential Hosp., LLC v. Wyndham Hotel Grp., LLC*, 333 F. Supp. 3d 1179, 1211 (D.N.M. 2018).

arbitration agreements.¹⁷⁰ While state law can avoid preemption if it is a “generally applicable” contract defense applying to “any contract,”¹⁷¹ the court in *Bradley* found that the California law in question did not fall into that exception. Because the law “applies only to forum selection clauses and only to franchise agreements,” the court found that it “does not apply to ‘any contract’” and was therefore preempted.¹⁷² District courts in the Ninth Circuit have followed this standard, finding that a state law cannot be generally applicable if it applies only to a subset of contracts.¹⁷³

V. IMPLICATIONS FOR STATE LEGISLATURES: KEEPING LITIGATION AT HOME

From the extensive catalog of existing state anti-choice-of-forum statutes, several specific best practices emerge that states might take into account as they consider further legislation.

First, anti-choice-of-forum legislation is most useful when it focuses on contractual relationships that are most prone to unequal bargaining and other power and resource disparities.

On the one hand, choice of forum offers legitimate and uncontroversial benefits to corporations possessed of equal bargaining power that would like to contract around uncertainties by preselecting a neutral forum.¹⁷⁴ Legislation that

170. 275 F.3d 884.

171. *Id.* at 890 (first quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); and then quoting 9 U.S.C. § 2 (2000)).

172. *Id.*

173. *See, e.g.*, *Bell Prods., Inc. v. Hosp. Bldg. & Equip. Co.*, No. 16-cv-04515, 2017 WL 282740, at *3 (N.D. Cal. Jan. 23, 2017). State courts too look to general contract principles. Montana’s Uniform Arbitration Act declares that any “agreement concerning venue involving a resident of this state is not valid unless the agreement requires that arbitration occur within the state of Montana.” MONT. CODE ANN. § 27-5-323 (West 2019). Another state statute places the same restrictions on general contracts. *Id.* § 28-2-708 (“Every stipulation or condition in a contract by which any party to the contract is restricted from enforcing the party’s rights under the contract by the usual proceedings in the ordinary tribunals or that limit the time within which the party may enforce the party’s rights is void.”). When the Montana Supreme Court examined the question of whether the forum-selection provision in the state Arbitration Act was preempted by the FAA, it determined that Montana law “does not distinguish between forum selection clauses which are part of contracts generally and forum selection clauses found in agreements to arbitrate” and that this “lack of such a distinction is evidence that the statute does not conflict with the FAA.” *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1245 (Mont. 1998). By creating parity between the treatment of the two forms of dispute resolution, the state legislature had seemingly managed to keep its anti-choice-of-forum policies within the bounds of the FAA.

174. *See supra* Section II.A.

overreaches by preventing this use of forum selection is not useful and likely counterproductive, as it may provoke unnecessary backlash in the business community. Instead, these statutes should focus specifically on contractual relationships where inequities can be assumed, such as relationships between large corporations and their employees or consumers.

On the other hand, many of the existing state statutes are so narrow in scope that they affect only a small subset of the parties most in need of state assistance. By narrowing in on highly specific contractual relationships—contractor and subcontractor in a construction project or franchiser and franchisee of a motor-vehicle dealership—many of these statutes protect members of small interest groups with lobbying power, while leaving many more vulnerable groups exposed to the pernicious effects of unjust choice of forum. Instead, statutes should target larger categories of relationships that are prone to inequity and exploitation (such as employer-employee relationships or corporation-consumer relationships) in order to catch more vulnerable parties in their net. Statutes like those found in California and Louisiana—invalidating forum selection specifically in employment contracts—represent the type of statutes that are simultaneously far reaching and appropriately targeted. While these statutes might be overinclusive—capturing, for example, high-powered executives along with low-wage hourly workers—this is arguably better than if they were underinclusive, relying on hyper-specific categories of contracts that risk overlooking parties that would benefit from these protections.

Second, anti-choice-of-forum statutes should be grounded, to the greatest extent possible, in principles of general contract law—such as, for example, unconscionability. This is particularly relevant in situations where state anti-choice-of-forum laws are applied to arbitration agreements, thereby risking preemption by the FAA. As noted in Section IV.C, at least some federal courts have ruled that “as long as state law defenses concerning the validity, revocability, and enforceability of contracts are generally applied to all contracts, and not limited to arbitration clauses, federal courts may enforce them under the FAA.”¹⁷⁵ A statute that is too narrowly focused—for example, limiting only the use of choice of forum in franchise agreements—may seem too far removed from *general* principles of contract law to rise to this standard of compatibility with the FAA.¹⁷⁶ If a legislature could instead ground an anti-choice-of-forum statute explicitly in terms of unconscionability or another generalized contract defense,

175. *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001); *see also supra* text accompanying note 168.

176. *See Bradley v. Harris Research, Inc.*, 275 F.3d 884, 892 (9th Cir. 2001) (holding that section 20040.5 of the California Business and Professions Code “is not a generally applicable contract defense that applies to any contract, but only to forum selection clauses in franchise agreements,” and therefore was preempted by the FAA when applied to an arbitration agreement).

courts may be more likely to hold that the statute expresses general state contract law.

Third, to further avoid preemption by the FAA, states should avoid singling out arbitration. Legislators may want to make explicit mention of arbitration in anti-choice-of-forum statutes to avoid the double burden for plaintiffs of being forced into both an arbitral forum and a geographic one. But they should be sure that any provisions that apply to arbitration apply equally to litigation and to other forms of dispute resolution.

Finally, in drafting this kind of legislation, states should be explicit in stating that these statutes represent the public policy of the state. In *The Bremen v. Zapata*, the Supreme Court noted that a “contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.”¹⁷⁷ Courts that fail to uphold these anti-choice-of-forum statutes frequently do so in part on the basis that it does not represent a sufficient public policy of the state. While it is left largely ambiguous what exactly is required to meet this public-policy standard, at least one federal court has suggested that a more forceful declaration of “state policy in the text of the statute” might help to “confirm[] the statute is evidence of the state’s strong public policy.”¹⁷⁸

One additional point to highlight is that the onus here lies not only on the legislatures. The case study of the construction industry in Part IV demonstrates that these statutes come about in part by lobbying efforts by the groups adversely affected by unjust choice of forum. The California labor statute above was similarly brought about in part by the support of interest groups like the California Employment Lawyers Association, the Consumer Attorneys of California, and the Consumer Federation of California, as well as Small Business California, whose membership was concerned by the competitive advantage choice-of-forum clauses offer to large corporations over small local businesses.¹⁷⁹

These examples show the influence that interest groups whose members are adversely affected by unjust choice of forum have on the enactment of anti-choice-of-forum clauses. By bringing to the legislature’s attention the inherent inequities of choice of forum – and by leveraging whatever political influence they have to offer – unions, interest groups, and community organizations can help put anti-choice-of-forum policies on the legislative agenda. At the same

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

178. *T.R. Helicopters, LLC v. Bell Helicopter Textron, Inc.*, No. 10-cv-2250, 2010 WL 4781158, at *4 (D.S.C. Nov. 17, 2010).

179. See CAL. ST. ASSEMB. COMM. ON THE JUDICIARY, REPORT ON S.B. 1241, 2015-16 Reg. Sess., at 8-9 (June 19, 2016) (explaining the supportive comments provided by these organizations).

time, the groups that are most powerless – and therefore the most vulnerable to the effects of one-sided contracts – are the ones that are least likely to have access to institutional support to lobby on their behalf. Legislatures must ensure that these groups too can reap the benefits of these protective statutes.

Anti-choice-of-forum statutes will not always be successful. In certain federal circuits, or under certain circumstances, courts will be unwilling to enforce them in the face of seemingly valid forum-selection agreements. But the opportunities for success are significant enough that state legislatures should promote more legislation in this area. When a federal court applies federal law, a choice-of-forum clause is likely to be found valid and enforceable, regardless of a state law to the contrary. But because federal circuit courts remain split on the open question of whether to apply federal or state law when determining the validity of a forum-selection clause, at least some of the time, state law will be applied.

Although politically salient, choice-of-forum issues need not split down any particular political fault line if the question reappears on the Supreme Court's docket. The framework of access to justice and accountability for corporations may suggest a liberal skew. But the issue is also one of federalism. In the absence of a relevant federal statute, should state governments have the power to formulate their own contract-law regimes? Just as Justice Scalia supported deference to the states in *Ricoh*, other conservative Justices too may be persuaded that federal law need not control.

For states seeking to preserve the rights of individuals to access fair and equitable adjudication of their claims against corporate powers, anti-choice-of-forum legislation offers a valuable and under-considered policy tool. These statutes might not invalidate all unjust choice-of-forum clauses – but they certainly have the power to invalidate some.

CONCLUSION

Narrowing access to the courts has closed the door for many potential litigants to bring claims for harms inflicted upon them by corporate actors. This anti-litigation trend includes increased use of pretrial settlements, an increasingly high bar for class-action certification, and the increasing popularity of alternative dispute resolution.

The use of choice-of-forum clauses is one more example of this trend. An inconvenient forum stands as an often-insurmountable obstacle to potential litigation and can effectively seal off corporations from liability for civil harms. By contrast to other examples of that trend, the Court's choice-of-forum doctrine leaves open significant space for state action to fight back against the use of unjust choice-of-forum clauses. States concerned about access to justice can and should take decisive action to enact restrictions on unjust choice of forum.

APPENDIX: STATE ANTI-CHOICE-OF-FORUM STATUTES

TABLE A1.
CHOICE OF FORUM IN CONSTRUCTION CONTRACTS

State	Statute	Relevant Content	Affected Actions
California	CAL. CIV. PROC. CODE § 410.42 (West 2019)	voids the forum-selection provision if the selected forum is outside of California for a contract between a contractor and a subcontractor based in California, for a construction project located in California	“litigated, arbitrated, or otherwise”
Florida	FLA. STAT. ANN. § 47.025 (West 2019)	voids the forum-selection provision if the selected forum is outside of Florida for a contract for improvement of real property involving a resident contractor, subcontractor, sub-subcontractor, or materialman	“legal action”
Illinois	815 ILL. COMP. STAT. 665/10 (2019)	Holds unenforceable the forum-selection provision if the selected forum is outside of Illinois for a building and construction contract to be performed in Illinois	“litigation, arbitration, or dispute resolution”
Indiana	IND. CODE ANN. § 32-28-3-17 (West 2019)	voids the forum-selection provision if the selected forum is outside of Indiana for a contract for the improvement of real estate in Indiana	“litigation, arbitration, or other dispute resolution”
Minnesota	MINN. STAT. ANN. § 337.10 (West 2019)	voids the forum-selection provision if the selected forum is outside of Minnesota for a building or construction contract to be performed in Minnesota	“litigation, arbitration, or other dispute resolution”
Montana	MONT. CODE ANN. § 28-2-2116 (West 2019)	voids the forum-selection provision if the selected forum is outside of Montana for a construction contract for a project in Montana	“litigation, arbitration, or other dispute resolution”

Nebraska	NEB. REV. STAT. ANN. § 45-1209 (West 2019)	Voids the forum-selection provision if the selected forum is outside of Nebraska for a contract for construction work performed in Nebraska	“court or arbitration hearing”
Nevada	NEV. REV. STAT. ANN. § 108.2453 (West 2019)	Voids the forum-selection provision if the selected forum is outside of Nevada for a contract “for the improvement of property or for the construction, alteration or repair of a work of improvement”	“litigation, arbitration or other process for the dispute resolution”
New York	N.Y. GEN. BUS. LAW § 757 (McKinney 2019)	Voids the forum-selection provision if the selected forum is outside of New York for a construction contract	“litigation, arbitration or other dispute resolution”
North Carolina	N.C. GEN. STAT. § 22B-2 (2018)	Voids the forum-selection provision if the selected forum is outside of North Carolina in a contract for the improvement of real property in North Carolina	“litigation, arbitration, or other dispute resolution”
Ohio	OHIO REV. CODE ANN. § 4113.62 (West 2018)	Voids the forum-selection provision if the selected forum is outside of Ohio for a construction contract	“litigation, arbitration, or other dispute resolution”
Oregon	OR. REV. STAT. ANN. § 701.640 (West 2018)	Voids the forum-selection provision if the selected forum is outside of Oregon for a construction contract	“litigation, arbitration or other dispute resolution”
Rhode Island	6 R.I. GEN. LAWS ANN. § 6-34.1-1 (West 2018)	Makes voidable the forum-selection provision if the selected forum is outside of Rhode Island for a contract principally for the construction of or repair of improvements to real property located in Rhode Island	“litigation,” “arbitration”
Tennessee	TENN. CODE ANN. § 66-11-208 (West 2018)	Voids the forum-selection provision if the selected forum is outside of Tennessee for a contract for the improvement of real property in Tennessee	“litigation, arbitration or other dispute resolution process”

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Utah	UTAH CODE ANN. § 13-8-3 (West 2019)	voids the forum-selection provision if the selected forum is outside of Utah for a construction agreement where one of the parties is domiciled in Utah and the contract involves a construction project in Utah	“dispute arising under the agreement to be resolved”
Virginia	VA. CODE ANN. § 8.01-262.1 (West 2019)	Holds unenforceable the forum-selection provision if the selected forum is outside of Virginia for a construction contract for a project physically located in Virginia, when one party has its principal place of business in Virginia	“any cause of action arising under such contract”
Wisconsin	WIS. STAT. ANN. § 779.135 (West 2019)	voids the forum-selection provision if the selected forum is outside of Wisconsin for a contract for the improvement of land in Wisconsin	“litigation, arbitration or other dispute resolution process”

TABLE A2.
CHOICE OF FORUM IN MOTOR-VEHICLE-DEALER CONTRACTS

State	Statute	Relevant Content	Affected Actions
Arkansas	ARK. CODE ANN. § 4-75-413 (West 2019)	Holds that a contract for the sale of a motor vehicle may not require a forum outside the county in which the automobile dealer resides or does business	“submit a disputed matter”
Hawaii	HAW. REV. STAT. ANN. § 437-52 (West 2019)	Holds that a manufacturer or distributor of motor vehicles cannot require a dealer in Hawaii to enter into any agreement that requires a forum outside Hawaii	“bring an action”
Mississippi	MISS. CODE ANN. § 63-17-119 (West 2019)	voids the forum-selection provision if the selected forum is outside of Mississippi for a motor-vehicle-dealer-ship franchise agreement	“arbitration or litigation”

Tennessee	TENN. CODE ANN. § 47-25-1913 (West 2018)	voids any contractual term that re- stricts the procedural or substantive rights of a motorcycle dealer, includ- ing a choice-of-forum clause	Not specified
Washington	WASH. REV. CODE ANN. § 46.96.240 (West 2018)	voids the forum-selection provision if the selected forum is outside of Wash- ington for a motor-vehicle-dealership franchise agreement	“arbitration or litigation”

TABLE A3.
CHOICE OF FORUM IN FRANCHISE AGREEMENTS

State	Statute	Relevant Content	Affected Actions
California	CAL. BUS. & PROF. CODE § 20040.5 (West 2019)	voids the forum-selection provision if the selected forum is outside of Cali- fornia for a franchise agreement where the franchise business is oper- ating within the state	“any claim”
Idaho	IDAHO CODE ANN. § 29-110 (West 2019)	voids any provision for a franchise agreement that waives jurisdiction of Idaho’s court system	“enforcing his rights under the contract”
Iowa	IOWA CODE ANN. § 537A.10 (West 2019)	voids the forum-selection provision if the selected forum is outside of Iowa for a franchise agreement	“claim otherwise en- forceable under this section”
Iowa	IOWA CODE ANN. § 523H.3 (West 2019)	voids the forum-selection provision if the selected forum is outside of Iowa for a franchise agreement	“claim otherwise en- forceable under this section”
Michigan	MICH. COMP. LAWS ANN. § 445.1527 (West 2019)	voids the forum-selection provision if the selected forum is outside of Mich- igan for a franchise agreement	“arbitration or litiga- tion”
Rhode Island	19 R.I. GEN. LAWS § 19-28.1-14 (West 2018)	voids the forum-selection provision if the selected forum is outside of Rhode Island for a franchise agree- ment	“claim otherwise en- forceable under this act”

TABLE A4.
CHOICE OF FORUM IN CHILD-SUPPORT CONTRACTS

State	Statute	Relevant Content	Affected Actions
California	CAL. FAM. CODE § 5614 (West 2019)	Holds that private child-support col- lectors cannot require a forum outside of California	“resolve disputes”
Louisiana	LA. STAT. ANN. § 51:1444 (2018)	Holds that a private child-support- enforcement service contract cannot require a forum other than the resi- dence of the obligee of the contract	“resolve disputes”

TABLE A5.
CHOICE OF FORUM IN LABOR CONTRACTS

State	Statute	Relevant Content	Affected Actions
California	CAL. LAB. CODE § 925 (West 2019)	Holds that an employer cannot re- quire an employee who primarily lives and works in California to agree to a forum outside California for a claim arising in California	“adjudicate”
Louisiana	LA. STAT. ANN. § 23:921 (2019)	voids a choice-of-forum clause for an employment contract	“any civil or adminis- trative action”

TABLE A6.
CHOICE OF FORUM IN CONSUMER CONTRACTS

State	Statute	Relevant Content	Affected Actions
Delaware	DEL. CODE ANN. tit. 6, § 12A-117 (West 2019)	A choice of forum is not enforceable for an electronic consumer contract if the choice is unreasonable and unjust	Not specified
Minnesota	MINN. STAT. ANN. § 47.601 (West 2019)	Holds that a contract between a consumer short-term lender and a borrower residing in Minnesota cannot select a forum outside of Minnesota	“dispute resolution”
Oregon	OR. REV. STAT. ANN. § 81.150 (West 2017)	A consumer may revoke a provision in a consumer contract that requires a forum outside of Oregon	“assert a claim” or “respond to a claim”
Tennessee	TENN. CODE ANN. § 47-18-113 (West 2018)	voids the forum-selection provision if the selected forum is outside of Tennessee with respect to any claim arising under or relating to the Tennessee Consumer Protection Act of 1977	“any claim”

TABLE A7.
CHOICE OF FORUM IN AGRICULTURAL CONTRACTS

State	Statute	Relevant Content	Affected Actions
Indiana	IND. CODE ANN. § 15-15-6-9 (West 2019)	If a forum-selection clause in a contract for seeds, is not printed conspicuously in immediate proximity to the space reserved for the signature of the farmer, the choice is not enforceable	Not specified
Vermont	VT. STAT. ANN. tit. 9, § 2389 (West 2018)	If the parties to an agricultural-finance lease choose a judicial forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable	Not specified

TABLE A8.
CHOICE OF FORUM IN ARBITRATION AGREEMENTS

State	Statute	Relevant Content	Affected Actions
Montana	MONT. CODE ANN. § 27-5-323 (West 2019)	Invalidate a choice-of-forum clause for an arbitration agreement involving a Montana resident, unless the specified forum is in Montana	Arbitration
South Carolina	S.C. CODE ANN. § 15-7-120 (2019)	Holds that a provision in an arbitration agreement requiring that the arbitration proceedings must be held outside of South Carolina is unenforceable	Arbitration

TABLE A9.
MISCELLANEOUS CHOICE-OF-FORUM CLAUSES

State	Statute	Relevant Content	Affected Actions
Arizona	ARIZ. REV. STAT. ANN. § 44-6709 (2018)	voids the forum-selection provision if the selected forum is outside of Arizona for a contract between dealers of equipment (defined as machines used for agriculture, livestock, grazing, light industrial and utility purposes) and a supplier	“a claim otherwise enforceable under this chapter”
Iowa	IOWA CODE ANN. § 633D.8 (West 2019)	voids the forum-selection provision if the selected forum is outside of Iowa for a claim against a beneficiary of a transfer on death security registration	“a claim”
Mississippi	MISS. CODE ANN. § 75-77-17 (West 2019)	voids any contractual term restricting the procedural or substantive rights of a retailer under this chapter [Repurchase of Inventories Upon Termination of Contract], including a choice of forum	Not specified

New Mexico	N.M. STAT. ANN. § 47-15-5 (West 2019)	Establishes that it is a violation of the Mortgage Foreclosure Consultant Fraud Prevention Act for a foreclosure consultant to require in a foreclosure-consulting contract a venue in a county other than the county in which the residence in foreclosure is located; requires owner consent to jurisdiction in another state	Litigation
South Dakota	S.D. CODIFIED LAWS § 37-5-11 (2018)	voids the forum-selection provision if the selected forum is outside of South Dakota for a franchise agreement, sales agreement, security agreement, or other agreement between any wholesaler, manufacturer, distributor of farm machinery or implements, or distributor of industrial or construction equipment and a retail dealer	Not specified

TABLE A10.
GENERAL BAN ON CHOICE-OF-FORUM

State	Statute	Relevant Content	Affected Actions
North Carolina	N.C. GEN. STAT. § 22B-3 (2019)	voids the forum-selection provision if the selected forum is outside of North Carolina for a contract entered in North Carolina	“the prosecution of any action or the arbitration of any dispute”

TABLE A11.
ANTI-CHOICE-OF-FORUM PROVISIONS IN THE UCC¹⁸⁰

State	Codified At	Relevant Modifications (in Italics)
Alaska	ALASKA STAT. ANN. § 45.12.106 (West 2019)	
Arkansas	ARK. CODE ANN. § 4-2A-106 (West 2019)	
California	CAL. COM. CODE § 10106 (West 2019)	<p>“ . . . or within 30 days thereafter, in which the goods are to be used, <i>or in which the lease is executed by the lessee</i>, the choice is not enforceable.”</p> <p>“If the judicial forum chosen by the parties to a consumer lease is in a <i>county other than the county in which the lessee in fact signed the lease, the county in which the lessee resides at the commencement of the action, the county in which the lessee resided at the time the lease contract became enforceable, or the county in which the goods are permanently stored</i>, the choice is not enforceable.”</p>
Colorado	COLO. REV. STAT. ANN. § 4-2.5-106 (West 2019)	
Connecticut	CONN. GEN. STAT. ANN. § 42a-2A-106 (West 2019)	
Delaware	DEL. CODE ANN. tit. 6, § 2A-106 (West 2019)	
Florida	FLA. STAT. ANN. § 680.1061 (West 2019)	<p>“ . . . or within 30 days thereafter in which the goods are to be used <i>or in which the lease is executed by the lessee</i>, the choice is not enforceable.”</p>

¹⁸⁰. See U.C.C. § 2A-106 (AM. LAW INST. & UNIF. LAW COMM’N 1990) (“(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, the choice is not enforceable. (2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.”).

Georgia	GA. CODE ANN. § 11-2A-106 (West 2019)	
Hawaii	HAW. REV. STAT. ANN. § 490:2A- 106 (West 2019)	
Idaho	IDAHO CODE ANN. § 28-12-106 (West 2019)	
Illinois	810 ILL. COMP. STAT. ANN. 5/2A- 106 (2019)	
Indiana	IND. CODE ANN. § 26-1-2.1-106 (West 2019)	
Iowa	IOWA CODE ANN. § 554.13106 (West 2019)	
Kansas	KAN. STAT. ANN. § 84-2a-106 (West 2019)	
Kentucky	KY. REV. STAT. ANN. § 355.2A-106 (West 2019)	
Maine	ME. REV. STAT. ANN. tit. 11, § 2- 1106 (2019)	
Maryland	MD. CODE ANN., COM. LAW § 2A- 106 (West 2019)	“(1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction: (a) in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter; (b) in which the goods are to be used; or (c) if the goods are to be used in more than one jurisdiction, none of which is the residence of the lessee, in which the lease is executed by the lessee, the choice is not enforceable.”

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Massachusetts	MASS. GEN. LAWS ch. 106, § 2A-106 (2019)	
Michigan	MICH. COMP. LAWS ANN. § 440.2806 (West 2019)	
Mississippi	MISS. CODE ANN. § 75-2A-106 (West 2019)	
Missouri	MO. ANN. STAT. § 400.2A-106 (West 2019)	
Montana	MONT. CODE ANN. § 30-2A-106 (West 2019)	
Nebraska	NEB. REV. STAT. ANN. § 2A-106 (West 2019)	
Nevada	NEV. REV. STAT. ANN. § 104A.2106 (West 2019)	
New Hampshire	N.H. REV. STAT. ANN. § 382-A:2A- 106 (2019)	
New Jersey	N.J. STAT. ANN. § 12A:2A-106 (West 2019)	
New Mexico	N.M. STAT. ANN. § 55-2A-106 (West 2019)	<i>“(3) If the forum for an arbitration or mediation hearing chosen by the parties to a consumer lease is in a state or in a similar political subdivision in a foreign country other than the state or the similar subdivision in the foreign country in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days thereafter or in which the goods are to be used, the choice is not enforceable.”</i>

New York	N.Y. U.C.C. LAW § 2-A-106 (McKinney 2019)	
North Carolina	N.C. GEN. STAT. ANN. § 25-2A-106 (2019)	
North Dakota	N.D. CENT. CODE ANN. § 41-02.1-06 (West 2019)	
Ohio	OHIO REV. CODE ANN. § 1310.04 (West 2019)	
Oklahoma	OKLA. STAT. ANN. tit. 12a, § 2A-106 (West 2019)	
Oregon	OR. REV. STAT. ANN. § 72A.1060 (West 2019)	
Pennsylvania	13 PA. STAT. AND CONS. STAT. ANN. § 2A106 (West 2019)	
Rhode Island	6a R.I. GEN. LAWS ANN. § 6A-2.1-106 (West 2019)	“ . . . or within 30 days thereafter, in which the goods are to be used, <i>or in which the lease is executed by the lessee</i> , the choice is not enforceable.”
South Carolina	S.C. CODE ANN. § 36-2A-106 (2019)	
South Dakota	S.D. CODIFIED LAWS § 57A-2A- 106 (2019)	“ . . . or within thirty days thereafter, in which the goods are to be used, <i>or in which the lease is executed by the lessee</i> , the choice is not enforceable.”
Tennessee	TENN. CODE ANN. § 47-2A-106 (West 2019)	

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Texas	TEX. BUS. & COM. CODE ANN. § 2A.106 (West 2019)	“(b) If the judicial forum chosen by the parties to a consumer lease is a forum <i>located in a jurisdiction other than the jurisdiction in which the lessee in fact signed the lease agreement, resides at the commencement of the action, or resided at the time the lease contract became enforceable or in which the goods are in fact used by the lessee, the choice is not enforceable.</i> ”
Utah	UTAH CODE ANN. § 70A-2a-106 (West 2019)	“ . . . or within 30 days thereafter or in which the goods are to be used or if the goods are to be used in more than one jurisdiction none of which is the residence of the lessee in which the lease is executed by the lessee, the choice is not enforceable.”
Vermont	VT. STAT. ANN. tit. 9A, § 2A-106 (West 2019)	
Virginia	VA. CODE ANN. § 8.2A-106 (2019)	
Washington	WASH. REV. CODE ANN. § 62A-2A-106 (West 2019)	“(1) . . . (a) in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days thereafter, (b) in which the goods are to be used, or (c) in which the lessee executes the lease, the choice is not enforceable.” “(2) If the judicial forum or the forum for dispute resolution chosen by the parties to a consumer lease is a jurisdiction other than a jurisdiction (a) in which the lessee resides at the time the lease agreement becomes enforceable or within thirty days thereafter, (b) in which the goods are to be used, or (c) in which the lease is executed by the lessee, the choice is not enforceable.”
Washington, D.C.	D.C. CODE ANN. § 28:2A-106 (West 2019)	
Wisconsin	WIS. STAT. ANN. § 411.106 (West 2019)	
Wyoming	WYO. STAT. ANN. § 34-1-2.A-106 (West 2019)	

TABLE A12.
STATUTES BY STATE AND CATEGORY

State	Construction	Motor Vehicle	Franchise	Child Support	Labor	Consumer	Agriculture	Arbitration	UCC
Alabama									
Alaska									*
Arizona									
Arkansas		*							*
California	*		*	*	*				*
Colorado									*
Connecticut									*
Delaware						*			*
Florida	*								*
Georgia									*
Hawaii		*							*
Idaho			*						*
Illinois	*								*
Indiana	*						*		*
Iowa			*						*
Kansas									*
Kentucky									*
Louisiana				*	*				*
Maine									*
Maryland									*
Massachusetts									*
Michigan			*						
Minnesota	*					*			*

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Mississippi		*		*
Missouri				*
Montana	*		*	*
Nebraska	*			*
Nevada	*			*
New Hampshire				*
New Jersey				*
New Mexico				*
New York	*			*
North Carolina	*			*
North Dakota				*
Ohio	*			*
Oklahoma				*
Oregon	*		*	*
Pennsylvania				*
Rhode Island	*		*	*
South Carolina			*	*
South Dakota				*
Tennessee	*	*	*	*
Texas				*
Utah	*			*
Vermont			*	*
Virginia	*			*
Washington		*		*
West Virginia				*
Wisconsin	*			*
Wyoming				
Washington, D.C.				*