Civil Procedure Below-the-Radar: A Comment on John Coyle's *"Contractually Valid" Forum Selection Clauses*

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ABSTRACT: Litigation over forum selection clauses raise significant issues about fairness in contract doctrine, procedural machinations, and federalism. John Coyle's important Article, "Contractually Valid" Forum Selection Clauses, *homes in on the problem of enforcing these clauses in federal court, particularly the issue of how federal courts should decide whether the clause is valid in the first place. This Response to Coyle's Article highlights its accomplishments and pays particular attention to the choice-of-law issue: to what extent does state contract law control the validity, interpretation, and enforcement of a forum selection clause. This Response also ventures an explanation for why federal courts so often disregard state law and the federalism values that ought to give state law priority in this context.*

INTRODUCTION

We've all entered into contracts that contain choice-of-forum clauses. Often, they appear in contracts of adhesion, typically alongside a choice-of-

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law clause.[1] Even when noticed or—rarely—negotiated, they are not the focus of the deal. Although they are one of the contract's terms, they address a procedural issue that will matter only if the deal or transaction goes bad.

Civil Procedure professors know all too well that our issues often fly below-the-radar, but we also know the truth of the claim that "if I write the procedure, and you write the substance, I'll win every time."[2] Litigation over choice-of-forum clauses proves that adage all too well.[3] Falling into the gap between the silos of contracts and procedure, these clauses and their enforcement have created a procedural barrier for plaintiffs who seek to vindicate substantive rights that appear on the face of the contract. Consider an individual who lives in Maine and gets into a dispute with Google that results in Google wrongly terminating their access to Google services.[4] If that person wants to sue Google, they have to do it in California—something that

1. *See, e.g.*, *Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM (May 3, 2021) [https://perma.cc/6MT8-TMNP] ("Any dispute or claim relating in any way to your use of any Amazon Service will be adjudicated in the state or Federal courts in King County, Washington, and you consent to exclusive jurisdiction and venue in these courts. . . . By using any Amazon Service, you agree that applicable federal law, and the laws of the state of Washington, without regard to principles of conflict of laws, will govern these Conditions of Use and any dispute of any sort that might arise between you and Amazon."); *Terms of Service*, GOOGLE, https://policies.google.com/terms?hl=en-US#toc-problems [https://perma.cc/8KSP-XEB3] ("California law will govern all disputes arising out of or relating to these terms, service-specific additional terms, or any related services, regardless of conflict of laws rules. These disputes will be resolved exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.").

2. For the precise language, see Jay Tidmarsh, *Procedure, Substance, and* Erie, 64 VAND. L. REV. 877, 889 n.57 (2011) (quoting *Regulatory Reform Act: Hearing on H.R. 2327 Before the H. Subcomm. on Admin. Law & Governmental Rels.*, 98th Cong. 312 (1983) (statement of Rep. John Dingell)) ("I'll let you write the substance on a statute and you let me write the procedure, and I'll screw you every time."); *see also* Leah Litman, *The Substance of the Supreme Court's Procedure*, TAKE CARE BLOG (Feb. 13, 2019), https://takecareblog.com/blog/the-substance-of-the-supreme-court-s-procedure [https://perma.cc/3NNJ-Q69D] ("It was the great John Dingell (RIP) who said 'If you let me write the procedure, and I let you write the substance, I'll screw you every time.'").

3. *See* John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, 96 IND. L.J. 1089, 1091 (2021) ("The existing literature contains virtually no discussion about state practice with respect to forum selection clauses after the turn of the twenty-first century.").

4. *See* GOOGLE, *supra* note 1 ("Google reserves the right to suspend or terminate your access to the services or delete your Google Account if any of these things happen: you materially or repeatedly breach these terms, service-specific additional terms or policies; we're required to do so to comply with a legal requirement or a court order; your conduct causes harm or liability to a user, third party, or Google—for example, by hacking, phishing, harassing, spamming, misleading others, or scraping content that doesn't belong to you.").

could be pretty difficult for the average person.[5] In other words, a choice-of-forum clause can deter or prevent meritorious litigation by magnifying its costs and inconvenience.[6]

But if it's true that choice-of-forum clauses operate below-the-radar, John Coyle has been working hard to bring them into focus. In a series of articles, Professor Coyle and his coauthors have unearthed and explored the various forms of forum selection clauses, and they have documented in detail the ways in which courts interpret and apply them.[7] More articles are on the way.[8] Although these are not the only publications that analyze the issues raised by

5. *See* John F. Coyle, *"Contractually Valid" Forum Selection Clauses*, 108 IOWA L. REV. 127, 159 (2022) (citing cases in which courts declined to enforce forum selection clauses because of distance costs, or other issues) [hereinafter Coyle, *"Contractually Valid"*]; *see also* Cara Reichard, Note, *Keeping Litigation at Home: The Role of States in Preventing Unjust Choice of Forum*, 129 YALE L.J. 866, 869 (2020) ("[Forum selection clauses] 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."). Reichard explains that "finding an attorney in another state can itself seem formidable," that the plaintiff and their attorney "will 'need to travel and communicate over long distances,' while the attorney will 'need to communicate with the client's witnesses,'" that "distance is likely to interfere with the natural progression of pretrial activities, adding additional costs," and that "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." *Id.* at 880 (quoting Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 446–48 (1992)).

6. *See* Reichard, *supra* note 5, at 880 ("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.'") (quoting Yoder v. Hein old Commodities, Inc., 630 F. Supp. 756, 759 (E.D. Va. 1986)); *id.* at 881 (concluding that "[t]he 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"). John Coyle highlights *Skoglund v. PetroSaudi Oil Services (Venezuela) Ltd.*, No. 18-386, 2018 WL 6112946 (E.D. La. Nov. 20, 2018), in which the plaintiff sued his employer over a workplace accident off the coast of Venezuela that "result[ed] in the loss of several toes, a traumatic brain injury, a brain bleed, legal blindness, and other injuries." *Id.* at *1; *see* Coyle, *"Contractually Valid," supra* note 5, at 169 n.233. He received treatment in Louisiana, where he was domiciled, and filed suit there under the Jones Act. *Skoglund*, 2018 WL 6112946, at *1.The court enforced the forum selection clause in the employment contract and dismissed the case, leaving the plaintiff to file suit in England, roughly four thousand miles away. *See id.* at *6–*8. The court also held that it lacked personal jurisdiction over the defendant. *See id.* at *4–*6.

7. *See generally* John F. Coyle, *Interpreting Forum Selection Clauses*, 104 IOWA L. REV. 1791 (2019); Coyle & Richardson, *Enforcing Outbound Forum Selection Clauses in State Court*, *supra* note 3; John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65 (2021); John Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 U. MIA. L. REV. 1087 (2021); John F. Coyle & Robin J. Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 187 (2021).

8. *See generally* John F. Coyle & F. Andrew Hessick, Erie *and Forum Selection Clauses*, U. ILL. L. REV. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4417491 [https://perma.cc/VLH2-JQYG]; John F. Coyle & Robin J. Effron, *The Puzzle of Floating Forum Selection Clauses*, N.Y.U. J. INT'L L. & POL. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4487419 [https://perma.cc/2ABL-RSLU]; John Coyle, *Financial Hardship and Forum Selection Clauses* (Working Paper No. 4522749), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4522749 [https://perma.cc/2JQ2-V79Q].

forum selection clauses,[9] collectively, they provide the most wide-ranging and extensive analysis. Coyle's exploration of forum selection clauses provides a model of legal realist scholarship: deeply researched accounts of what courts are actually doing ("the law in action"), combined with proposals for doctrinal reform or modification that take account of the valid purposes of forum selection clauses, the reasonable expectations of contracting parties, and basic ideas of due process and fairness.[10]

Professor Coyle's recent Article, *"Contractually Valid" Forum Selection Clauses*,[11] provides an excellent entry into this growing library. Coyle's focus here is the doctrine that has grown out of a single sentence of the Supreme Court's unanimous 2013 opinion in *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas*.[12] The focus of the case was the enforcement of a forum selection clause in federal court, where venue was otherwise proper under 28 U.S.C. § 1391.[13] If the clause identifies a federal court, the Court held, 28 U.S.C. § 1404(a) governs the decision whether to transfer the case pursuant to the clause,[14] but the transfer analysis is truncated

9. For other relatively recent articles, see generally Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses under U.S. Law*, 66 AM. J. COMP. L. SUPPL. 127 (2018); Kevin M. Clermont, *Governing Law on Forum-Selection Agreements*, 66 HASTINGS L.J. 643 (2015); Kevin M. Clermont, *Reconciling Forum-Selection and Choice-of-Law Clauses*, 69 AM. U. L. REV. 171 (2020); Tanya J. Monestier, *When Forum Selection Clauses Meet Choice of Law Clauses*, 69 AM. U. L. REV. 325 (2019); Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015); Reichard, *supra* note 5; Adam N. Steinman, Atlantic Marine *Through the Lens of* Erie, 66 HASTINGS L.J. 795 (2015); Symeon C. Symeonides, *What Law Governs Forum Selection Clauses?*, 78 LA. L. REV. 1119 (2018).

10. Coyle himself invokes the distinction "between the 'law on the books' and the 'law in action.'" *See* Coyle, *"Contractually Valid," supra* note 6, at 160 (citing Rebecca Stone, *Legal Design for the "Good Man,"* 102 VA. L. REV. 1767, 1796–800 (2016)). For descriptions of Legal Realism and its link to "the law in action," see BRIAN H. BIX, JURISPRUDENCE: THEORY AND CONTEXT 198–99 (8th ed. 2019) (suggesting Legal Realists sought "a proper understanding of judicial decision-making," provided a critique of deductive legal reasoning from indeterminate legal concepts, and urged "a larger role" for "public policy and social sciences"), and Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1975 (2015) ("[I]t was central to Legal Realism to reform the law to make the actual doctrine cited by courts and treatise writers correspond to the actual normative standards upon which judges rely." (emphasis omitted)). *See also* John Henry Schlegel, *Legal Realism*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 772, 772–73 (James D. Wright ed., 2d ed. 2015) (admitting the definition of Legal Realism is contested and that, to some degree, "Realism is what Realists did," but also stating that "some portion of the activities of individuals commonly called Realists was directed at critique of the doctrinal results of what these scholars pejoratively labeled legal formalism, at understanding judicial decision-making, at empirical research in law, [and] at reform of legal education").

11. Coyle, *"Contractually Valid," supra* note 6, at 129.

12. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 62 n.5 (2013).

13. *See id.* at 54 n.1 (explaining the existence of proper venue in the original forum).

14. For a clause that identifies a state court or foreign country court, the Court stated that the *forum non conveniens* doctrine provides the "appropriate" analysis. *Atl. Marine Constr. Co.*, 571 U.S. at 60.

and the clause is presumptively enforceable.[15] Significantly, the Court made clear that these conclusions rested on a critical assumption: "Our analysis presupposes a contractually valid forum-selection clause."[16] Professor Coyle's Article takes up this important threshold question of how a court should assess whether a forum selection clause is "contractually valid."

This Response to Coyle's Article has three goals. The first, and easiest, is to provide a brief summary of what Coyle's Article accomplishes. Second, I will home in on one of the issues that Coyle addresses—the frequent failure of federal courts to give effect to state statutes that prohibit or limit the enforcement of forum selection clauses. Third, I will argue that Coyle's analysis supports the conclusion that federal court enforcement of forum selection clauses is an example of "below-the-radar" litigation that produces little-noticed but significant substantive effects. Indeed, the cases that Coyle highlights provide an illuminating example of the harm that results from doctrines that operate with near invisibility. I will also speculate, somewhat freely, about the reasons for the divergence between state and federal courts. Here, my claim is that below-the-radar enforcement of forum selection clauses is a deliberate policy choice that undermines federalism values and the purposes of the *Erie-Hanna* doctrines and that also disadvantages consumers in favor of corporate interests.

I. WHAT IS A "CONTRACTUALLY VALID" FORUM SELECTION CLAUSE?

Coyle's Article provides a convincing argument for the proper analysis that federal courts should use to determine whether a forum selection clause is "contractually valid." He divides this question into three parts: (1) validity; (2) interpretation; (3) and enforceability.

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15. *See Atl. Marine Constr. Co.*, 571 U.S. at 59–61. More specifically, the Court stated that when venue is proper under 28 U.S.C. § 1391, and the district court is considering whether to enforce "a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. Only under extraordinary circumstances unrelated to the convenience of the parties should a § 1404(a) motion be denied." *Id.* at 62 (footnote omitted). Further, although "[i]n the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion (or a *forum non conveniens* motion) must evaluate both the convenience of the parties and various public-interest considerations." *Id.* (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981)). "[A] valid forum selection clause . . . 'represents the parties' agreement as to the most proper forum,'" and therefore "requires district courts to adjust their usual § 1404(a) analysis in three ways." *Atl. Marine Constr. Co.*, 571 U.S. at 63 (quoting Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988)). "First, the plaintiff's choice of forum merits no weight." *Id.* Second, the court should not consider the *Piper* private interest factors, because the forum selection clause "waive[s]" any arguments about convenience. *Atl. Marine Constr. Co.*, 571 U.S. at 64. "Third, when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules—a factor that in some circumstances may affect public-interest considerations." *Atl. Marine Constr. Co.*, 571 U.S. at 64 (citing *Piper Aircraft Co.*, 454 U.S. at 241 n.6 (1981)).

16. *Atl. Marine Constr. Co.*, 571 U.S. at 62 n.5. The Court repeated the phrase "valid forum-selection clause" several times. *See supra* note 15.

A clause is not valid as a matter of contract law if the plaintiff never signed the agreement or if the plaintiff was fraudulently induced to sign it.[17] In the specific context of forum selection clauses, courts have also considered whether a valid use of the clause includes allowing a non-party to the agreement to invoke the clause, on the theory that they are "closely related" to a signatory and their invocation of the clause is foreseeable.[18] Surprisingly, many courts have allowed non-parties to invoke forum selection clauses even if they would not qualify as third-party beneficiaries.[19] Courts have also addressed the argument that choice-of-forum clauses remain valid even after a contract has terminated or been cancelled and its other terms no longer operate. Here again, doctrine has developed to allow enforcement unless the parties have specifically rejected the choice-of-forum clause itself.[20]

If a clause is valid in the limited sense discussed above, courts still must interpret it to determine what it means.[21] In the choice of forum context, two issues dominate. First, courts must decide if the choice-of-forum clause is exclusive or mandatory (designating one and only one forum for litigation), or whether it is non-exclusive or permissive (providing consent to one forum but not excluding others).[22] Second, courts may have to decide whether the choice-of-forum clause applies to noncontractual claims or disputes that arise out of or relate to the contract. Federal courts tend to interpret the scope of these clauses broadly to include claims that "'arise out of the same operative

17. *See* Coyle, *"Contractually Valid," supra* note 6, at 134–35. Coyle convincingly explains why the validity of a forum selection clause must be an issue of state law, which in turn requires interpreting the contract's choice-of-law clause (if it has one) or conducting a choice-of-law analysis (if it does not). *See id.*

18. *See id.* at 136–37.

19. *See id.*; *see also* Peters v. C21 Invs., Inc., 520 P.3d 920, 925 (Or. Ct. App. 2022) ("We note that courts of other jurisdictions have held that, *in limited circumstances*, forum-selection provisions may be enforced by or against nonsignatories. Assuming that we were to adopt the view that certain circumstances might justify enforcement of a forum-selection clause by a nonsignatory to the agreement containing the clause, the record here is not sufficiently developed to determine whether the limited circumstances described in those cases exist here.") (citations omitted).

20. *See* Coyle, *"Contractually Valid," supra* note 6, at 137–38.

21. Here again, Coyle convincingly explains why state law must apply to the question of what a contract's choice-of-forum clause means, subject of course to a choice of law analysis. *See id.* at 139; *see also* Symeonides, *supra* note 9, at 1152 ("[N]ot many people would question that the interpretation of FS clauses—like the interpretation of a contract—is a 'quintessentially substantive' question. Consequently, like any other substantive question . . . . [it] should be subject to the choice-of-law inquiry, which may or may not lead to the law of the forum.") (footnote omitted) (quoting Martinez v. Bloomberg L.P., 740 F.3d 211, 221 (2d Cir. 2014)). Strangely, the Ninth Circuit has held that federal law governs this issue, analogizing it to the separate and subsequent question of enforceability. *See* Coyle, *"Contractually Valid," supra* note 6, at 139 (citing Manetti-Farrow, Inc. v. Gucci Am., Inc., 858 F.2d 509, 513 (9th Cir. 1988), Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009)).

22. *See* Coyle, *supra* note 5, at 140 (citing Coyle, *Interpreting Forum Selection Clauses*, *supra* note 7, at 1799–803). The choice of forum clauses cited in *supra* note 1 are both exclusive.

facts as a parallel' claim for breach of contract" or that will require a court to refer to the contract to resolve the claim.[23]

The final issue is whether a forum selection clause that is valid and applies to the dispute is also enforceable. And here, the issues become even more complicated. In contrast to validity and interpretation—which raise substantive issues of contract law properly governed by state law[24]—enforcement raises a tricker choice of law question. Professors Clermont and Symeonides have argued convincingly that the law of the forum—as opposed to the law selected in a choice-of-law clause—should determine whether a choice-of-forum clause is enforceable.[25] They both note the traditional view that "[q]uestions of venue and the enforcement of forum selection clauses are essentially procedural, rather than substantive, in nature,"[26] but they also provide sound policy reasons to support this position, particularly protection of the weaker party to the contract.

But Coyle is writing more specifically about the issue raised by *Atlantic Marine*: when should a *federal* court enforce a forum selection clause. In federal court, the law of the forum arguably could mean the law of the state in which the federal court sits (similar to the *Klaxon* rule that requires federal courts to apply the choice-of-law rules of the state in which they sit,)[27] or it could mean federal law because the forum is federal court. Most federal judges take the second view, for reasons that Clermont ably articulates: "[t]he federal forum has strong interests in discretionarily controlling its own jurisdiction, venue, and procedure, which should prevail over comparable state interests on such matters."[28] It's hard to disagree with this claim in the

23. Coyle, *supra* note 5 at 141–42 (quoting Coyle, *Interpreting Forum Selection Clauses*, *supra* note 7, at 1809–12). Not all state courts take such a broad approach. *See, e.g.*, *Peters*, 520 P.3d at 927 (interpreting a forum selection clause that referred to disputes "in respect of the subject matter of" the agreements and reasoning that although the relevant "agreements are tangential to and certainly provide background for plaintiffs' current tort claims against defendants, the claims themselves do not have as their bases the contractual obligations of the parties to those agreements; nor are the claims as to the contractual subject matter of the agreements . . . . Rather, the claims concern defendants' alleged tortious *interference* with those agreements. Thus, we conclude that the claims themselves are not 'in respect of the subject matter' of the agreements.").

24. *See supra* notes 17 & 21 and accompanying text.

25. *See* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 9, at 654–55; Symeonides, *supra* note 9, at 1152–60.

26. Symeonides, *supra* note 9, at 1152 (quoting Jones v. Weibrecht, 901 F.2d 17, 19 (2d Cir. 1990)); *see also* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 9, at 655 ("For good reasons, courts do not normally interpret choice-of-law clauses to cover procedural matters; the enforceability of the separable forum-selection clause, sensibly and practically considered, appears procedural for this purpose." (footnote omitted)).

27. *See* Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487, 496 (1941). For defenses of the *Klaxon* rule, see Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2193, 2200–03, 2212–41 (2021), and John T. Parry, *Some Realism About Choice-of-Law Statutes and the Common Law: The Oregon Example*, 27 LEWIS & CLARK L. REV. 197, 205–12 (2023).

28. Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 9, at 665–66; *see also* Coyle, "*Contractually Valid*," *supra* note 6, at 144–45 (describing the federal approach). Clermont takes a more nuanced approach when the relevant state has a "specifically substantive public

context of federal question cases, or where special federal venue rules or significant federal interests exist.[29]

But what about diversity jurisdiction? Here too, as a general matter, federal courts will nearly always apply federal rules.[30] And in *Stewart Organization, Inc. v. Ricoh*—a diversity case—the Supreme Court held that 28 U.S.C. § 1404(a) displaced Alabama law that disfavored forum selection clauses:

> The forum-selection clause, which represents the parties' agreement as to the most proper forum, should receive neither dispositive consideration (as respondent might have it) nor no consideration (as Alabama law might have it), but rather the consideration for which Congress provided in § 1404(a). This is thus not a case in which state and federal rules "can exist side by side . . . each controlling its own intended sphere of coverage without conflict."
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> . . . .
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> We hold that federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause and transfer this case to a court in Manhattan.[31]

Coyle documents the way that federal courts have followed *Stewart* and applied federal law as a framework for considering the relevance of state law to the decision whether to enforce a forum selection clause. He explains that some federal courts give dispositive effect to the "more than 200 state statutes that specifically limit the enforceability of such clauses[,]"[32] but that other federal courts treat state law "as merely one factor to consider in determining whether a forum selection clause should be enforced as a matter of federal law."[33] He also points out the apparent forum shopping problem with the multi-factor approach:

> If a state has enacted a statute invalidating forum selection clauses, the state courts sitting in that jurisdiction will enforce the statute as written. If the federal courts in that jurisdiction apply a balancing test that routinely leads to the clause being enforced, defendants will

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policy, such as that embodied in a state statute protecting franchisees from having to litigate claims in an out-of-state court." Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 9, at 666–67 (stating that such a statute "will supplement that federal law in federal court" and that "specifically substantive state interests can occasionally be strong enough to shift the balance and so call for state law to apply under *Erie*").

29. *See* Coyle, *"Contractually Valid," supra* note 6, at 146–50 (discussing these issues).

30. *See, e.g.*, Hanna v. Plumer, 380 U.S. 460, 465–66 (1965).

31. Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31–32 (1988) (citation omitted).

32. Coyle & Richardson, *Enforcing Outbound Forum Selection Clauses*, *supra* note 3, at 1093.

33. Coyle, *"Contractually Valid," supra* note 6, at 153; *see also* Coyle & Richardson, *Enforcing Outbound Forum Selection Clauses*, *supra* note 3, at 1104–23 (discussing state court consideration of public policy).

> have a strong incentive to remove the suit to federal court so as to take advantage of a more favorable federal rule.[34]

Coyle also examines the wide variety of circumstances in which federal courts must decide whether a choice-of-forum clause is unreasonable.[35] He concludes the section on enforceability with an empirical study of 658 cases in which federal courts "considered the argument that a clause was unreasonable or contrary to public policy," and he finds that federal courts rejected those arguments and enforced the clause in eighty-eight percent of the cases.[36]

After unearthing and explaining the issues raised by validity, interpretation, and enforcement, Coyle makes six well-earned and important proposals for improving the doctrine in this area. Federal courts should enforce state statutes that forbid or limit enforcement of forum selection clauses; they "should take a broader view of when a clause is unenforceable because it is unreasonable;" they should consistently construe special federal statutory venue provisions to override forum selection clauses; they should narrow the circumstances in which non-signatories can enforce these clauses; they should construe ambiguous clauses against the drafting party; and they should refuse to enforce "'non-mutual' forum selection clauses that require one contracting party to sue in the chosen forum but allow the other party to sue wherever they want."[37] Faced with Coyle's analysis, fair minded federal judges ought to easily recognize the contrast between the collective negative weight of their current doctrines and the clarity and fairness of Professor Coyle's proposals.

II. FORUM SELECTION AND THE PRIORITY OF STATE LAW IN DIVERSITY CASES

In this Section, I want to look more closely at the specific legal question of how federal courts, sitting in diversity, ought to deal with the interaction between (1) a forum selection clause that appears in the contract that forms the basis for the litigation; and (2) a statute of the state in which the federal court sits that prevents or limits enforcement of forum selection clauses. My analysis here draws from *"Contractually Valid" Forum Selection Clauses* and also looks ahead to Professor Coyle's forthcoming co-authored Article, Erie *and Forum Selection Clauses*.[38]

Federal courts confront this issue in motions to transfer venue pursuant to 28 U.S.C. § 1404, or in motions to dismiss under the *forum non conveniens*

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34. Coyle, *"Contractually Valid," supra* note 6, at 155.

35. *Id.* at 156–60; *see also* Coyle & Richardson, *Enforcing Outbound Forum Selection Clauses*, *supra* note 3, at 1123–44 (discussing state court assessment of reasonableness objections).

36. Coyle, *"Contractually Valid," supra* note 6, at 160–61.

37. *Id.* at 169–70.

38. *See generally* Coyle & Hessick, Erie *and Forum Selection Clauses*, *supra* note 8 (manuscript at 5) ("the enforceability of forum selection clauses is a substantive matter that should be govern ed by state law in federal court"). *See also* Steinman, *supra* note 9, at 817–18 (asserting "a forum-selection clause is contractually valid if and only if it would be deemed valid and enforceable by the state court where the federal district court is located").

doctrine (depending on the forum identified in the clause).[39] Either way, federal courts feel free to reject state law and to enforce forum selection clauses, based on the general view that venue issues are procedural, as well as the more specific assertion in *Stewart v. Ricoh* that § 1404 cannot coexist with state law in this context and that, of necessity, § 1404(a) "governs" the enforcement of forum selection clauses.[40] Notably, however—as Coyle points out—*Stewart* did not address *forum non conveniens*, which is a federal common law doctrine not governed by statute or federal rule.[41] Thus, the claim that federal law should control the enforcement of a forum selection clause for purposes of *forum non conveniens* is not governed by *Stewart* itself and instead rests either on a naked assertion that a federal interest controls, or on the outcome of a "twin aims" analysis.[42]

Stewart's analysis, by contrast, rests on § 1404(a)'s admittedly preemptive force in federal court. Yet *Stewart* advances an aggressive interpretation of a statute which provides only that, "[f]or 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."[43] That language neither endorses nor condemns forum selection clauses. Indeed, as Justice Scalia suggested in his *Stewart* dissent, the text of § 1404(a) looks forward towards the trial, whereas the majority's analysis included a backward

39. Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex., 571 U.S. 49, 59–60 (2013) ("Section 1404(a) . . . provides a mechanism for enforcement of forum-selection clauses that point to a particular federal district," and "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*.").

40. *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 29–31 (1988).

41. *See* Coyle, *"Contractually Valid," supra* note 5, at 153 n.154; *see also* Coyle & Hessick, Erie *and Forum Selection Clauses*, *supra* note 8 (manuscript at 38) ("The courts cannot rely on the federal doctrine of *forum non conveniens* to justify the creation of a federal common law because that doctrine is itself a type of judge-made law."); *Atl. Marine Constr. Co.*, 571 U.S. at 60–61 (describing *forum non conveniens* as a "residual" common law doctrine). For an excellent excavation of the *forum non conveniens* doctrine and its history, see generally William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163 (2023).

42. *See* Hanna v. Plumer, 380 U.S. 460, 380 U.S. 448, 468 (1965) (identifying "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws"); *see also Stewart*, 487 U.S. at 39 (Scalia, J., dissenting) ("In deciding what is substantive and what is procedural for these purposes, we have adhered to a functional test based on the 'twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.'") (quoting *Hanna*, 380 U.S. at 468). Perhaps the federal interest bootstraps on *Stewart*, to the effect that it makes no sense to have federal law control the enforcement of a forum selection clause under § 1404(a) but to give state law controlling effect for purposes of *forum non conveniens*. (The fact that the two doctrines have very different effects dilutes at least some of the force of that argument.) *See infra* note 51 (discussing the lack of a strong federal policy to support a broad reading of *Stewart*).

43. *See* 28 U.S.C. § 1404(a) (2018); *Stewart*, 487 U.S. at 37 (Scalia, J., dissenting) ("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. . . . It seems to me the generality of its language—'[f]or the convenience of parties and witnesses, in the interest of justice'—is plainly insufficient to work the great change in law asserted here.").

look at the contract itself without considering "what law governs whether the forum-selection clause is a valid or invalid allocation of any inconvenience between the parties."[44] Further, he argued, "§ 1404(a) was enacted against the background that issues of contract, including a contract's validity, are nearly always governed by state law."[45] Keeping in mind the *Erie* concern about forum shopping, Justice Scalia argued that state law must apply and, if under state law the clause "is invalid, *i.e.*, should be voided, between the parties, it cannot be entitled to any weight in the § 1404(a) determination."[46]

Justice Scalia's analysis simplifies to a single sentence: § 1404(a) will take a forum selection clause into account only if the clause is "contractually valid" under state law. And that is exactly the assumption that the *Atlantic Marine* court made twenty-five years later.[47] Seen in this way, *Stewart* and *Atlantic Marine* are in tension. Even more, *Atlantic Marine* can be read as resolving that tension by modifying and narrowing *Stewart* so that it controls the procedural questions associated with transferring venue but not the substantive contract law question of whether a forum selection clause is valid.[48]

Now consider this issue from the perspective of state law. Numerous states have enacted statutes that limit or prohibit the enforcement of forum selection clauses.[49] These statutes articulate state public policy, which suggests the potential for conflict between these policies and *Stewart*'s overly broad reading of § 1404(a).[50] And no significant federal policy—other than efficiency and the desirability of a uniform federal common law rule—exists to justify displacement of substantive state public policy.[51] Hence the *Erie* problem that

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44. *Stewart*, 487 U.S. at 35 (Scalia, J., dissenting) (emphasis omitted).

45. *Id.* at 36.

46. *Id.* at 35; *see also id.* at 37–40 (explaining the *Erie* analysis). *Cf.* Steinman, *supra* note 9, at 805–06 ("[T]he *Stewart* majority's attitude toward the preemptive scope of § 1404(a) is hard to square with more recent Supreme Court opinions on the *Erie* doctrine."); *id.* at 811–13 (providing further explanation).

47. As I've noted already, Coyle's analysis makes abundantly clear that at least some of the inquiry into contractual validity must be a question of state law. *See supra* notes 17 & 21. The only issue here is whether *Stewart* carves out a special enclave of federal law at the end of the "contractually valid" analysis.

48. Indeed, by equating the § 1404(a) and *forum non conveniens* analyses, *Atlantic Marine* heightened the need to pull back from a broad reading of *Stewart*. *See* Steinman, *supra* note 9, at 813–14.

49. *See* Coyle, *"Contractually Valid," supra* note 6, at 150; Reichard, *supra* note 5, app. at 909–21 (collecting numerous state statutes that limit enforcement of forum selection clauses).

50. *See* text accompanying *supra* notes 43–46.

51. Freer asserts it is "rather clear that federal law should govern" "the question of whether a forum selection clause is enforceable." 14D RICHARD D. FREER, FEDERAL PRACTICE & PROCEDURE § 3803.1 (4th ed. 2023). He relies on *Stewart* and does not provide an independent rationale, other than the assertion that "[m]ost states . . . appear to have adopted the federal approach, so often courts are able to elide the basic issue because the result would be the same under federal and state law." *Id.* Coyle's research, of course, demonstrates that this assertion is outdated. *See also* Steinman, *supra* note 9, at 809–10 (discussing the general lack of a strong federal interest); *cf.* United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–30 (1979) (discussing the limits of uniformity arguments in whether to craft a new federal common law rule or adopt state law).

Justice Scalia identified and that Coyle also explores. I share that concern, but two issues give me pause.

First, I wonder whether the nature of the state's public policy should also matter. In many situations, these statutes evidence a substantive effort to protect vulnerable consumers. But the state's interest may not always be as clearly substantive. In *Stewart*, for example, the Eleventh Circuit observed that "the Alabama policy is for the protection of the jurisdiction of the state courts rather than the protection of the state's citizens. . . . Since this case will be tried in federal court, the protection of state court jurisdiction is not involved."[52] Instead of moving from a blanket rule that federal law controls, to a blanket rule that state law controls, should federal courts instead condition the application of state law on the specific public policy that it pursues?[53] The Supreme Court has taken disparate views on the extent to which district courts should accommodate potentially idiosyncratic state policies, but methods exist to accommodate legitimate, and competing, state and federal interests.[54]

Second, Coyle's empirical research presents a slightly more complex picture than first appears. On the one hand, one of his forthcoming Articles demonstrates that "federal courts enforce forum clauses at a higher rate than state courts in virtually every federal circuit" and that "[i]n states where state law is dissimilar to federal law, the gap is large."[55] This disparity indicates that federal courts are rejecting arguments that have merit under state law, which of course creates a strong incentive for defendants sued in state court to forum shop through removal to federal court.

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52. Stewart Org., Inc. v. Ricoh Corp., 810 F.2d 1066, 1069–70 (11th Cir. 1987) (en banc).

53. *Cf.* Clermont, *Governing Law on Forum-Selection Agreements*, *supra* note 9, at 666–67 (suggesting that when a state has "specifically substantive public policy," that policy "will supplement that federal law in federal court" and "can occasionally be strong enough to shift the balance and so call for state law to apply under *Erie*").

54. *Compare* Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 437–38 (1996) (accommodating state and federal interests by assigning the district court the task of reviewing jury verdicts pursuant to New York law, despite the fact that the appellate court would undertake that review in state court), *with* Shady Grove Orthopedic Assocs, P.A. v. Allstate Ins., 559 U.S. 393, 407 (2010) (plurality) (rejecting accommodation of state interests and asserting federal rules of civil procedure apply, despite their substantive impact, if they regulate procedure). *See also* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508–09 (2001) ("Since state, rather than federal, substantive law is at issue there is no need for a uniform federal rule. . . . This is, it seems to us, a classic case for adopting, as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which the federal diversity court sits. . . . This federal reference to state law will not obtain, of course, in situations in which the state law is incompatible with federal interests.").

55. Coyle & Hessick, Erie *and Forum Selection Clauses*, *supra* note 8 (manuscript at 7). To the extent that state courts enforce statutory public policy against forum selection clauses, I wonder whether the disparity could be greater than the cases suggest. A defendant might not file a motion to enforce a forum selection clause in state court if they know they are going to lose. By contrast, the same defendant is probably more likely to file the same motion in federal court, knowing that they are likely to prevail. Put differently, state statutes may limit the number of state court efforts to enforce a forum selection clause but have little impact on the number of federal court challenges.

On the other hand, a different Article reveals that state courts do not always enforce their own statutes in this area.[56] Where that is true, why should federal courts enforce those statutes? In such situations, there is little or no disparity between the law-in-action in state court, and the law-in-action in federal court. Well-informed defendants who remove to federal court may not be forum shopping for clause enforcement and instead may be seeking other permissible advantages.[57]

Indeed, the advantages of federal court may be so clear to defendants that they will remove regardless of whether the federal court will enforce a forum selection clause that a state court might not enforce. If that is true, the risk of forum shopping does not provide a sufficient reason for enforcement of state laws against forum selection clauses.[58]

The best answer to my concern about forum shopping is constitutional and jurisprudential. The *Erie* doctrine is about more than forum shopping; it reflects significant federalism values and constrains the law-making role of federal courts.[59] When federal courts depart from *Erie* values in the wholesale way that they have with forum selection clauses, they undermine the rule of law.

III. WHAT HAPPENS BELOW-THE-RADAR

Coyle's proposals for reform are so reasonable, and the *Erie* issues raised by current doctrine are so obvious, that one must wonder how federal courts have managed to disregard state law, undermine special federal statutory venue preferences, and construe forum selection clauses broadly, in ways that embrace unreasonable positions and strain against contract doctrine.

Part of the answer is that, before Professor Coyle embarked on his multi-article project, very few people had a clear idea of exactly what was going on with forum selection clauses and their enforcement.[60] The decisions that have produced a doctrine of almost automatic federal court enforcement of forum

56. *See* Coyle & Richardson, *supra* note 3, at 1106–08.

57. *See generally* Scott Dodson, *The Culture of Forum Shopping in the United States*, COMPENDIUM ON COMPAR. PROCEDURAL L. & JUST. (forthcoming 2025) (manuscript at 11–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332658 [https://perma.cc/V9ZD-FVQH] (noting the goal of "protect[ing] the out-of-state party from the appearance of the risk of bias of state court" as well as the "less noble" desire for "choice of procedure").

58. Adam Steinman points out that enforcement of a forum selection clause through § 1404(a) may also lead to a change in the substantive state law that will govern the dispute, because *Atlantic Marine* also held "that *Van Dusen* does not apply when a § 1404(a) transfer is based on a valid forum-selection clause." Steinman, *supra* note 9, at 806; *see also supra* notes 15–15 and accompanying text (discussing the reasoning in *Atlantic Marine*). A change in forum and a change in governing law (if in fact the law of the transferee jurisdiction is meaningfully different) could well provide a reason to forum shop.

59. For a nice summary of the *Erie* doctrine and its values, see Coyle & Hessick, *supra* note 8 (manuscript at 8–13). *See also id.* (manuscript at 39) (discussing federalism issues); Steinman, *supra* note 9, at 808 ("For a federal court to displace state contract law is arguably a classic interference with state law substantive rights in violation of *Erie*.").

60. *See* Coyle & Richardson, *supra* note 3, at 1091–93.

selection clauses were deciding motions to transfer venue or to dismiss based on *forum non conveniens*.[61] The decisions were coded as procedural rulings and they flew below-the-radar.

A "below-the-radar" decision is not simply a decision that people don't notice—although it is certainly the case that venue rulings rarely receive attention. Rather, below-the-radar rulings combine obscurity with significant impact. Put differently, they are "low-visibility technical rulings on judicial doctrines and principles that end up having significant effects."[62] Even more, decisions of this kind may evidence a deliberate strategy to avoid notice and prevent opposition.[63] Rulings on procedural issues can fit into this description;[64] indeed, that's one basis for the claim that the person who writes procedure will prevail over the person who writes only substance.

Federal court procedural rulings that enforce forum selection clauses operate under-the-radar in two substantive ways. First, they largely escape notice but manage to produce the results that Coyle details: decisions that not only decide venue questions but also undermine state law and federal policy. Second, these decisions quietly produce a body of non-preemptive federal common law that strongly favors enforcing forum selection clauses in situations in which state courts would not enforce them. Federal courts are not required to create this doctrine, and it is not based in any clearly articulated and general federal policy in favor of enforcing forum selection clauses regardless of state law. That is to say, federal courts are engaged in low visibility but apparently deliberate policymaking that explicitly rejects relevant state law and works against above-the-radar statements of federal doctrine.

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61. *See, e.g.*, Atl. Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex., 571 U.S. 49, 52–53 (2013) (adjudicating a 28 U.S.C. § 1404(a) motion); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 31 (1988) (same); Lakeside Surfaces, Inc. v. Cambria Co., 16 F.4th 209, 214–16 (6th Cir. 2021) (surveying federal court approaches to the intersection of forum selection clauses with *forum non conveniens* doctrine).

62. Amanda Hollis-Brusky & Celia Parry, *"In the Mold of Justice Scalia": The Contours & Consequences of the Trump Judiciary*, 19 FORUM: J. OF APPLIED RSCH. CONTEMP. POL. 117, 123 (2021); *see also id.* at 134 (stating below-the-radar decisions "avoid public backlash and scrutiny by ruling on technical, difficult to understand, low-visibility issues that nonetheless have a significant and serious impact on the direction and future of law and politics").

63. *See* ALISON L. GASH, BELOW THE RADAR: HOW SILENCE CAN SAVE CIVIL RIGHTS, 12–18 (2015). Gash discusses the use of low-visibility advocacy as a progressive strategy to avoid notice and resulting backlash. Hollis-Brusky and Parry adapt the book's argument to warn of below-the-radar rulings that go in a different political direction and could restrict the powers of Congress and individual rights. Hollis-Brusky & Parry, *"In the Mold of Justice Scalia": The Contours & Consequences of the Trump Judiciary*, *supra* note 62, at123–24. Although I am using the same basic idea, and there is a constitutional flavor to my argument, nonetheless using this idea to assess rulings on forum selection clauses further stretches the point.

64. The above and below-the-radar categories also map onto the separation between the Supreme Court's merits and "shadow" dockets. *See generally* STEPHEN VLADECK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC (2023) (explaining the Court's usage of the shadow docket does not garner as much attention as its normal decisions).

The forum selection decisions sit alongside other areas of "procedure" in which federal courts also brush off state law or state interests with little warrant.[65] To be sure, federal law overrides state law per the Supremacy Clause, and federal courts have a legitimate interest in controlling their procedure, but the doctrines associated with *Erie* and *Hanna* balance that rule with the recognition that where Congress has not spoken, federal courts must respect and often apply state law. Collectively, forum selection and other below-the-radar procedure decisions by federal courts depart from this balanced approach, significantly undermine state policies, and harm plaintiffs who are often consumers or employees and who already litigate at a disadvantage.[66]

At the risk of pushing the speculation too far, I also want to suggest that, by ignoring the *Erie-Hanna* balance and undermining state law, these below-the-radar procedural decisions pursue a vision of federalism that arguably conflicts with more familiar above-the-radar decisions that purport to realign federalism towards greater solicitude for state sovereignty.[67] Here, again,

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65. Recognizing that many readers will disagree with how I characterize one or more of the following examples, I will stress that my goal here is simply to sketch the outline of a collective disregard by federal courts of state law and policy. *See also* Reichard, *supra* note 5, at 873–78 (arguing that "[o]ver the last several decades, the civil justice system has experienced a severe constriction of access to the courts," highlighting limits on class actions and increased use of mandatory arbitration, and noting that litigation over choice of forum clauses raises the same access issues); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1107–08 (2006) (arguing the Rehnquist Court's jurisprudence can be explained by reference to an underlying hostility toward litigation as a mechanism for administering justice).

The first example is the broad interpretation of the Federal Arbitration Act to control state court proceedings. *Compare* Kindred Nursing Centers Ltd. P'ship v. Clark, 581 U.S. 246, 250–52 (2017), *with id.* at 257 (Thomas, J., dissenting). Second is the restriction of general personal jurisdiction, initially combined with restrictions on specific personal jurisdiction. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 137–42 (2014) (restricting general jurisdiction); Bristol-Myers Squibb Co. v. Superior Ct. of Cal., S.F. Cnty., 582 U.S. 255, 264–68 (2107) (restricting specific jurisdiction in context of class action litigation). *But cf.* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1034–42 (2021) (rejecting a restrictive approach to claims that relate to the defendant's activities in the forum); Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 125–26 (2023) (rejecting an argument that corporate registration statutes cannot require consent to general personal jurisdiction). The third is the tendency of federal courts to ignore or mischaracterize state choice of law doctrine even when purportedly applying state law. *See* Maggie Gardner, *Dangerous Citations*, 95 N.Y.U. L. Rev. 1619, 1646–47 (2020); Parry, *supra* note 27, at 205–06, 228–30. My fourth example is the doctrine that federal contractors can take advantage of the Federal Officer Removal statute to remove tort cases to federal court, based on the existence of a federal defense. *See, e.g.*, Latiolais v. Huntington Ingalls, Inc., 951 F.3d 286, 296–98 (5th Cir. 2020) (en banc).

66. I did not include *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398 (2010) (holding Federal Rule of Civil Procedure 23 displaced New York law that precluded class actions to recover penalties), in the list that appears in *supra* note 65, because the result in *Shady Grove* benefitted plaintiffs. For discussion, see generally Linda S. Mullenix, *Federal Class Actions: A Near-Death Experience in a* Shady Grove, 79 GEO. WASH. L. REV. 448 (2011), and Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 50–53 (2012).

67. *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 544 (2013) (stating that "[n]ot only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of *equal*

doctrine requires a difficult balance among competing values. But my argument is less about the terms of that balance, and more about the fact that litigation below-the-radar achieves outcomes that articulate a very different normative landscape from the more widely known cases and doctrines.[68] One might even draw the inference that these efforts reveal a deliberate attempt to calibrate regulatory power and create categories of winners and losers: in the above-the-radar cases, the federal government loses power in favor of states (including power to regulate the activities of corporations and other businesses), while in the below-the-radar cases, states and ordinary people lose power in favor of corporations.

CONCLUSION

John Coyle's work on forum selection clauses has enormous benefits for civil procedure scholars and—hopefully—for litigators and federal judges. With the full contours of forum selection clause doctrine increasingly coming into focus, scholars can better assess the state of the law, litigators can frame

sovereignty' among the States," and concluding that "[t]he Voting Rights Act sharply departs from these basic principles"); NFIB v. Sebelius, 567 U.S. 519, 658 (2012) (opinion of Scalia, J., joined by Kennedy, Thomas, and Alito, JJ.) (stating the individual mandate in the Affordable Care Act is unconstitutional "because it gives such an expansive meaning to the Commerce Clause that *all* private conduct (including failure to act) becomes subject to federal control, effectively destroying the Constitution's division of governmental powers"); Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."); New York v. United States, 505 U.S. 144, 161 (1992) (holding Congress cannot "commandeer" state legislatures "by directly compelling them to enact and enforce a federal regulatory program" (quoting *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)). Of course, states do not win every case, and many decisions uphold federal power.

68. Although the analogy is a bit strained, the distinction between below-the-radar and above-the-radar doctrine has at least surface similarity to the distinction between decision rules and conduct rules in criminal law. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626–30 (1984) (discussing and critiquing the differences between decision and conduct rules). Recognizing the frequent need to reconcile conflicting values, Dan-Cohen observes that "the law may attempt to segregate its messages by employing special measures to increase the probability that a certain normative message will reach only the constituency for which it is intended," *id.* at 635, and he notes "the possibility that some decision rules may best serve the purposes of the law by remaining concealed from public view," *id.* at 669. Of course, these quotations (admittedly out of context) raise the questions of who, exactly, is the constituency intended to understand the availability and power of below-the-radar litigation, and they require consideration of exactly what "purposes of law" are best served by concealment. Dan-Cohen's analysis is sophisticated and complex, and his defense of acoustic separation and selective transmission is far from unqualified (not to mention that his focus is criminal law, not civil procedure or federalism). Among other things, Dan-Cohen acknowledges the serious questions of legitimacy that arise from acoustic separation, and he comments with some resignation that in the real world, "law, like politics, is a power game with high stakes indeed. In such a game, strategic behavior, including bluffing and other forms of deceit, must always be expected." *Id.* at 677. Dan-Cohen understandably does not seek to identify all of the circumstances in which this strategic behavior should also be tolerated or condoned.

arguments in more compelling ways, and federal judges can be confronted with the significant doctrinal tension that their decisions are creating. Hopefully the law will begin to change. Perhaps, too, we will increasingly be able to move beyond speculation and fit the information and analysis that Professor Coyle has provided into the broader study of state contract law, federal civil procedure, and federalism.