

STIPULATING TO OVERTURN *KLAXON*

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INTRODUCTION

Contractual choice-of-law provisions allow parties to specify which jurisdiction's legal principles should govern a future dispute.¹ But even once a lawsuit has been filed, litigants have an opportunity to tell the court what law applies. For example, the parties might stipulate to the use of a state's law.² Or they might implicitly agree on the governing law simply by citing to cases from a particular jurisdiction in their respective briefs.³

But what about the Supreme Court's pronouncement in *Klaxon Co. v. Stentor Electric Manufacturing Co.*⁴ that federal courts exercising diversity jurisdiction must apply the choice-of-law rules of the state in which they sit? Might litigants skirt that important precedent by stipulating to the applicable

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¹ See 15 TIMOTHY MURRAY, CORBIN ON CONTRACTS § 79.7 (“Often parties specify in their contracts which jurisdiction’s law applies.”). A 2018 study found that seventy-five percent of contracts entered into by Securities and Exchange Commission-registered companies contained a governing law clause. Julian Nyarko, *We’ll See You in . . . Court! The Lack of Arbitration Clauses in International Commercial Contracts*, 58 INT’L REV. L. & ECON. 6, 11 (2019).

² See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982). For further discussion of these stipulations, see Tyler Brown, Note, *Choice of Law Stipulations by Litigants*, 43 WASH. & LEE L. REV. 141 (1986).

³ See, e.g., *Tehran-Berkeley Civ. & Env’t Eng’rs v. Tippetts-Abbott-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989) (applying New York law because, through their mutual citation to that law in their briefs, the parties implicitly consented to its application).

⁴ 313 U.S. 487, 496 (1941) (“The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware’s state courts.”).

law?⁵

More often than not, federal courts analyze the validity of these agreements, which I refer to as intra-litigation choice-of-law agreements, without any consideration of forum state law. This Article argues that courts exercising diversity jurisdiction violate *Klaxon* when they rule on the validity of these agreements without due consideration of state law. There can be no “independent determinations by the federal courts” in conflicts of law.⁶ When federal courts fashion a rule that parties can or cannot displace forum state choice-of-law principles by agreement, they make such an independent determination. Whether intra-litigation choice-of-law agreements are valid is a question to be answered by state law. A contrary rule harms the interests of states, which must be free “to pursue local policies diverging from those of [their] neighbors.”⁷

This Article proceeds in four parts. Part I traces relevant Supreme Court case law. It starts with the seminal decision of *Erie Railroad Co. v. Tompkins*⁸—where the Court first rejected “independent determinations” of the law by the federal judiciary⁹—before arriving at *Klaxon*.

Part II examines federal judicial treatment of intra-litigation choice-of-law agreements. The Article groups decisions on the validity of such agreements, which may be explicit or implicit, into one of three categories. Category A represents those that enforce intra-litigation choice-of-law agreements without regard for state law. Category B represents those that decline to enforce them, again without regard for state law. Category C represents those that apply the choice-of-law rules of the forum state.

Part III argues that federal courts sitting in diversity must apply state law in assessing whether intra-litigation choice-of-law agreements are valid. First, *Klaxon* prohibits federal courts from applying their own body of law in the area of conflicts of law; it is state law that must apply. Second, the Rules of Decision Act, 28 U.S.C. § 1652, requires the application of state law. Third, agreements to the governing law made during litigation should be treated identically to those made during contract formation (which are analyzed under state law¹⁰), despite a distinction drawn between them by Judge Richard Posner.¹¹

Part IV argues that courts have an independent obligation to analyze

⁵ Parties might ignore *Klaxon* intentionally or unintentionally. See Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 495 (2009) (“The system breaks down, however, when the parties have either intentionally or accidentally overlooked a legal argument relevant to the dispute, forcing judges to choose between resolving the dispute on the parties’ terms or issuing an inaccurate statement of law.”).

⁶ *Klaxon*, 313 U.S. at 496.

⁷ *Id.*

⁸ 304 U.S. 64 (1938).

⁹ *Klaxon*, 313 U.S. at 496 (citing *Erie*, 304 U.S. 64).

¹⁰ See *infra* note 85.

¹¹ See *infra* notes 86–89 and accompanying text.

choice of law and cannot simply defer to the parties' agreement. First, glossing over the issue because the parties agree risks creating new judicial precedent that is inconsistent with *Klaxon*—a process this Article suggests is already underway—and allows parties to avoid *Klaxon*'s application. Second, neglecting the role of state law violates the U.S. Constitution—at least as interpreted by *Erie*. Lastly, if judges do not look past the parties' agreement, they might end up applying the law of a jurisdiction with no connection to the dispute.

I.

ERIE AND KLAXON

This Part examines Supreme Court precedent instructive to analyzing the validity of intra-litigation choice-of-law agreements. While *Klaxon* provides the most guidance, any discussion of that case must begin with the Supreme Court's decision three years earlier in *Erie*.¹² The issue in *Erie* was the source of the duty owed by a railroad to a trespasser.¹³ Did the duty come from the decisional law of Pennsylvania courts, which would apparently deny recovery unless the railroad's negligence was "wanton or willful"?¹⁴ Or was "the railroad's duty . . . to be determined in federal courts as a matter of general law"?¹⁵

The Supreme Court held that, for federal courts exercising diversity jurisdiction, "the law to be applied in any case is the law of the State."¹⁶ Earlier case law, following *Swift v. Tyson*,¹⁷ relied on a "fallacy" that "federal courts have the power to use their judgment as to what the rules of common law are."¹⁸ Put differently, "[t]here is no federal general common law."¹⁹

The week after *Erie*, the Supreme Court decided *Ruhlin v. New York Life Insurance Co.*²⁰ In a footnote, the Court highlighted but declined to resolve a potential conflict between general commercial law, which required that insurance contracts be construed in accordance with the law of the state where the policy is delivered, and Pennsylvania law, which might "follow a

¹² See, e.g., Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, 169 U. PA. L. REV. 2193, 2199 (2021) ("It always starts with *Erie*."); Kermit Roosevelt III, *Choice of Law in Federal Courts: From Erie and Klaxon to CAFA and Shady Grove*, 106 NW. U. L. REV. 1, 15 (2012) (referring to *Klaxon* as *Erie*'s "most direct descendant in the realm of choice of law").

¹³ *Erie*, 304 U.S. at 69–71 ("Because of the importance of the question whether the federal court was free to disregard the alleged rule of the Pennsylvania common law, we granted certiorari.").

¹⁴ *Id.* at 70.

¹⁵ *Id.*

¹⁶ *Id.* at 78.

¹⁷ 41 U.S. (16 Pet.) 1 (1842).

¹⁸ *Erie*, 304 U.S. at 79 (citing *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

¹⁹ *Id.* at 78.

²⁰ 304 U.S. 202 (1938).

different conflict of laws rule.”²¹ In other words, the Court left open the question of whether *Erie*’s command that federal courts sitting in diversity apply state law also meant they must apply state choice-of-law rules.

Klaxon provided the answer. After a dissolved New York corporation received a \$100,000 jury verdict in Delaware district court, it moved to amend the judgment to add interest under a New York statute.²² The circuit court applied the New York law, a decision which “apparently followed from the court’s independent determination of the ‘better view’ without regard to Delaware law, for no Delaware decision or statute was cited or discussed.”²³ The Supreme Court held that “the prohibition declared in *Erie* . . . against such independent determinations by the federal courts, extends to the field of conflict of laws.”²⁴ Federal courts exercising diversity jurisdiction must apply the forum state’s conflict-of-law rules.²⁵ A contrary rule would lead to forum shopping with two sets of choice-of-law rules available in a single state: one in use by federal courts, and one in use by state courts.²⁶

The Court acknowledged its decision might lead to a “lack of uniformity . . . between federal courts in different states,” given that federal courts across states would now follow separate choice-of-law rules.²⁷ But those disparities are “attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.”²⁸ Federal courts are not free “to thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.”²⁹

II.

ENFORCE, REJECT, OR APPLY *KLAXON*: THREE APPROACHES TO INTRA-LITIGATION CHOICE-OF-LAW AGREEMENTS

This Part surveys the approaches taken by federal courts in scrutinizing intra-litigation choice-of-law agreements. These decisions fall against the backdrop of the different ways state and international courts have grappled with the effect of explicit and implicit choice-of-law stipulations.³⁰

²¹ *Id.* at 208 n.2.

²² *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494–95 (1941).

²³ *Id.* at 496.

²⁴ *Id.* (citation omitted).

²⁵ *Id.*

²⁶ *See id.* (“Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.”) (citing *Erie*, 304 U.S. at 74–77).

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See* *Textile Biocides Inc. v. Avecia Inc.*, 52 Pa. D. & C.4th 244, 260 n.10 (Pa. Ct. Com. Pl. 2001) (describing the enforcement of choice-of-law stipulations in several jurisdictions); Geert Van

Additional state decisions on the validity of intra-litigation choice-of-law agreements will assist federal courts wishing to follow state law on the issue, as this Article argues they must. In the absence of state case law, federal courts are to attempt to ascertain how a state court would rule.³¹

Federal decisions can be grouped into three categories. Category A are those that enforce intra-litigation choice-of-law agreements without consideration of their validity under state law. Category B are those that reject these agreements, again ignoring their validity under state law. Finally, Category C are those that apply the law of the forum state to assess the agreement's validity.

A. Category A: Enforce Intra-Litigation Choice-of-Law Agreements Without Regard for Their Validity Under State Law

The Seventh Circuit confronted an intra-litigation choice-of-law agreement in *Lloyd v. Loeffler*.³² There, a father brought suit in Wisconsin federal district court against the mother of his child, her husband, and the mother's parents for tortious interference with the custody of a child.³³ The parties apparently stipulated to the trial court that Wisconsin law applied.³⁴ The *Lloyd* court noted that "reasonable stipulations of choice of law are honored in contract cases."³⁵ The court saw no reason "why the same principle should not apply in tort cases" and thus analyzed whether the

Calster, *The Hungarian Supreme Court on Conduct in Litigation Resulting in Implied Choice of Law*, GAVC LAW (July 21, 2020), <https://gavclaw.com/2020/07/21/the-hungarian-supreme-court-on-conduct-in-litigation-resulting-in-implied-choice-of-law/> [https://perma.cc/THY8-VSMG] (summarizing a Hungarian Supreme Court decision finding that the party had implicitly agreed to the application of Hungarian law by engaging with that law during litigation). California's approach to intra-litigation choice-of-law agreements is to accept them only if there is a reasonable basis for the chosen jurisdiction and that jurisdiction's law does not conflict with a fundamental policy of California. See *Dailey v. Dallas Carriers Corp.*, 51 Cal. Rptr. 2d 48, 51 (Cal. Ct. App. 1996). Rhode Island honors intra-litigation choice-of-law agreements. *Vincent Co. v. First Nat'l Supermarkets, Inc.*, 683 A.2d 361, 362 (R.I. 1996) ("Since the parties agree that Massachusetts law applies, this court will interpret the contract under the laws of that commonwealth.").

³¹ See, e.g., *Maska U.S., Inc. v. Kansa Gen. Ins. Co.*, 198 F.3d 74, 78 (2d Cir. 1999) ("To the extent that state law is uncertain or ambiguous, this Court must 'carefully . . . predict' how the state's highest court would resolve the uncertainty or ambiguity." (alteration in original) (quoting *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994)); *Imperial Enters., Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 290 (5th Cir. 1976) (finding "there is no Georgia law on the narrow issue presented in this case" and that therefore the court must "make an intelligent vicarious determination of this question"); *Auto Owners (Mut.) Ins. Co. v. Stanley*, 262 F. Supp. 1, 4 (N.D. Ind. 1967) ("Indiana has no law on the precise question . . . Thus we must decide it as we believe the highest court of the State would rule, were it presented with this factual situation.").

³² 694 F.2d 489 (7th Cir. 1982).

³³ *Id.* at 490.

³⁴ The Seventh Circuit noted that the record revealed only a reference to such a stipulation and not the stipulation itself. *Id.* at 495. The court concluded that it "cannot see what difference it makes whether [the stipulation was] written or oral." *Id.*

³⁵ *Id.* (citing RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355–56 (2d ed. 1980)).

stipulation was reasonable.³⁶ The Seventh Circuit concluded the intra-litigation choice-of-law agreement was reasonable (and therefore enforceable) because, had the parties not raised the choice-of-law issue, Wisconsin would have defaulted to the application of its own law.³⁷ Though the court looked to Wisconsin law to determine if the stipulation was enforceable, this was not a pure application of state law because the test being applied was whether the stipulation was reasonable.³⁸ The court simply relied on Wisconsin law in concluding it was.³⁹

The Seventh Circuit again confronted an intra-litigation choice-of-law agreement in *Auto-Owners Insurance Co. v. Websolv Computing, Inc.*⁴⁰ In *Auto-Owners*, an insurer and the insured agreed before the district court that Iowa law applied.⁴¹ The district court disregarded the parties' agreement and applied the law of Illinois, the forum state.⁴² The Seventh Circuit reversed, finding that Iowa law applied.⁴³ "First, and most importantly, the parties agreed that Iowa law should control their dispute," began the panel.⁴⁴ The Court then reiterated its holding from *Lloyd*: "We honor reasonable choice-of-law stipulations in contract cases regardless of whether such stipulations were made formally or informally, in writing or orally."⁴⁵ The Seventh Circuit found that the parties' "choice of Iowa law is entirely reasonable" and thus applied it.⁴⁶

Some federal courts uphold even tacit agreements regarding the applicable law.⁴⁷ One example is *Tehran-Berkeley Civil & Environmental*

³⁶ *Id.*

³⁷ *Id.* (citing *Central Soya Co. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 941 (7th Cir. 1982)). The *Central Soya* court did not cite any authority for the proposition that a "Wisconsin (or any) state court" would default to the application of its own law where "the parties did not explicitly indicate which law they thought governed." 676 F.2d at 939. The Court said only that a Wisconsin court resorting to the application of Wisconsin law was "an implicit rule of Wisconsin conflicts law." *Id.*

³⁸ *See supra* note 37 and accompanying text.

³⁹ *Id.*

⁴⁰ 580 F.3d 543 (7th Cir. 2009).

⁴¹ *Id.* at 546.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 546–47.

⁴⁵ *Id.* at 547 (citing *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982)).

⁴⁶ *Id.* The *Auto-Owners* court also concluded that the application of the forum state's choice-of-law principles would lead to the application of Iowa law. *Id.* This was apparently dicta because the court had already determined that the parties' stipulation that Iowa law applied yielded the application of Iowa law.

⁴⁷ *See, e.g.*, *Bennett v. Sterling Planet, Inc.*, 546 F. App'x 30, 33 (2d Cir. 2013) ("In a diversity case, where the parties have agreed to the application of the forum law—as evidenced by reliance on that law in the parties' briefing, as in this case—their agreement ends the choice-of-law inquiry."); *Whole Enchilada, Inc. v. Travelers Prop. Cas. Co. of Am.*, 581 F. Supp. 2d 677, 689 (W.D. Pa. 2008) ("Furthermore, as the policies at issue are silent as to governing law, and both parties appear to implicitly agree that Pennsylvania law applies, the Court need not engage further in a choice of law analysis."); *see also infra* notes 48–52 and accompanying text.

Engineers v. Tippetts-Abbett-McCarthy-Stratton.⁴⁸ There, a firm agreed to conduct environmental investigations on the site of a planned international airport in Tehran, Iran, but the contract failed to specify the governing law.⁴⁹ Though the parties' briefs relied upon New York law, the Second Circuit noted that "Iranian law could apply, since the contract was executed and performed in that country."⁵⁰ Nevertheless, the Court applied New York law "[u]nder the principle that implied consent to use a forum's law is sufficient to establish choice of law"⁵¹ By citing New York cases in their briefs, the parties had consented, perhaps unwittingly, to the court's application of that state's legal principles in deciding the case.⁵²

B. Category B: Decline to Enforce Intra-Litigation Choice-of-Law Agreements Without Regard for Their Validity Under State Law

The Third Circuit cast a more skeptical eye on an intra-litigation choice-of-law agreement in *Consolidated Water Power & Paper Co. v. Spartan Aircraft Co.*⁵³ In that case, the court noted that the parties had "endeavored to provide choice-of-law rules by the novel expedient of stipulating that breach of warranty matters are to be governed by the laws of Wisconsin and that liability for misrepresentation in the nature of fraud is to be governed by the law of Oklahoma."⁵⁴ The Third Circuit refused to be bound by the agreement, reasoning that "no stipulation made after litigation has begun as to the law which is to determine it has ever been upheld so far as we know. Nor do we think it likely to be."⁵⁵

In *Ezell v. Hayes Oilfield Construction Co.*,⁵⁶ the Fifth Circuit also rejected an intra-litigation choice-of-law stipulation, one that sought to have Mississippi law applied.⁵⁷ The court recited *Klaxon's* holding: that a federal court sitting in diversity must apply the choice-of-law rules of the forum state, which in *Ezell* was Louisiana.⁵⁸ Turning to the stipulation, the Fifth Circuit distinguished the parties' agreement from a contractual choice-of-law provision, which the court noted Louisiana would honor.⁵⁹ But the panel noted that the "pretrial stipulation . . . is not a contractual provision and is no

⁴⁸ 888 F.2d 239 (2d Cir. 1989).

⁴⁹ *Id.* at 240, 242.

⁵⁰ *Id.* at 242.

⁵¹ *Id.* (citing *Larsen v. A.C. Carpenter, Inc.*, 620 F. Supp. 1084, 1103 (E.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986) (mem.)).

⁵² *Id.*

⁵³ 185 F.2d 947 (3d Cir. 1950).

⁵⁴ *Id.* at 949.

⁵⁵ *Id.* Lawyers for the parties "backed away from" the stipulation at oral argument, according to the court. *Id.*

⁵⁶ 693 F.2d 489 (5th Cir. 1982).

⁵⁷ *Id.* at 492.

⁵⁸ *Id.*

⁵⁹ *Id.* at n.2.

more binding on us than any pretrial stipulation as to the content of Louisiana law.”⁶⁰ The court did not cite Louisiana law in rejecting the intra-litigation choice-of-law agreement; thus, it is not entirely clear whether the Fifth Circuit believed itself to be applying Louisiana choice-of-law rules to disregard the parties’ stipulation, or whether it invalidated the stipulation on some other grounds.

Because of the ambiguity as to why the *Ezell* court invalidated the stipulation, that case provides a nice transition to the third approach taken by federal courts toward intra-litigation choice-of-law agreements, and the one this Article ultimately argues should be followed: enforcing these agreements if and only if the forum state would recognize them.

C. Category C: Apply the Law of the Forum State

The majority of federal court decisions discussing the validity of intra-litigation choice-of-law agreements do so without reference to the law of the forum state. However, two courts have considered how courts of the forum state would look upon such agreements.

The Seventh Circuit returned to the effectiveness of intra-litigation choice-of-law agreements in *Twohy v. First National Bank of Chicago*,⁶¹ focusing on how the courts of the forum state, Illinois, would treat the stipulation.⁶² The parties had stipulated that Spanish law applied.⁶³ But the court encountered a problem: Illinois law was “silent on the issue of the effectiveness of choice of law stipulations by litigants.”⁶⁴ The Seventh Circuit concluded that the stipulation would be valid under Illinois law both because that state “recognizes the enforceability of choice of law clauses in contracts”⁶⁵ and because Illinois conflict-of-law doctrine would call for the

⁶⁰ *Id.* Having invalidated the parties’ pretrial stipulation that Mississippi law applied, the court found that no conflict existed between Louisiana and Mississippi law on the issues and that no choice-of-law determination was required. *Id.* at 492.

⁶¹ 758 F.2d 1185 (7th Cir. 1985).

⁶² *Id.* at 1190 (“Our task is to determine whether the Illinois courts are likely to adopt the *Lloyd* rule in the future.”) (first citing *Huff v. White Motor Corp.*, 565 F.2d 104, 106 (7th Cir. 1977); and then citing 19 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4507, at 103 (1982)). In *Twohy*, the Seventh Circuit suggested it was taking the issue from *Lloyd*—whether parties can stipulate to the applicable law—and simply applying the choice-of-law rules of a different forum state: Illinois, instead of Wisconsin as in *Lloyd*. *See id.* (“The reasoning of *Lloyd* applies equally well to the present case despite the fact that Illinois conflict of law principles govern this case, as opposed to those of Wisconsin in *Lloyd*.”). But the *Lloyd* court did not rely entirely on state law to find the stipulation in that case valid; it asked whether the choice-of-law stipulation was reasonable—a question with no apparent basis in Wisconsin law—and simply looked to state law in deciding that it was. *See supra* notes 35–39 and accompanying text. *Twohy* is a more straightforward application of state law than *Lloyd*, thus its grouping in Category C.

⁶³ *Twohy*, 758 F.2d at 1189.

⁶⁴ *Id.* at 1190.

⁶⁵ *Id.* (first citing *Keller v. Brunswick*, 369 N.E.2d 327, 329 (Ill. App. Ct. 1977); and then citing *Carter v. Catamore Co.*, 571 F. Supp. 94, 95 (N.D. Ill. 1983)).

application of Spanish law.⁶⁶

In the absence of an explicit choice-of-law stipulation, a district court in the Second Circuit applied state law rather than simply enforce an implicit agreement.⁶⁷ The parties in *Sportsinsurance.com v. Hanover Insurance Co.* mutually relied upon New York law in their briefs.⁶⁸ In a footnote, the court pointed out the inherent tension between *Tehran-Berkeley*, which held that litigants' joint citation to a jurisdiction's law ends the choice-of-law analysis,⁶⁹ and *Klaxon*, which requires federal courts sitting in diversity to apply the forum state's choice-of-law rules.⁷⁰ Noting that, under *Klaxon*, it must apply New York choice-of-law principles, the court engaged in a conflict-of-law analysis and found that New York law applied because it was the "principal location of the insured risk."⁷¹

The Category C cases demonstrate courts' attempts to apply the law of the forum state when faced with either an explicit or implicit choice-of-law agreement. Though *Twohy* analyzed whether the law of the forum state would recognize the agreement and *Sportsinsurance.com* did not, both courts applied forum state law.

III.

DON'T FORGET THE FORUM STATE: REASONS TO APPLY STATE LAW

This Part argues that the validity of intra-litigation choice-of-law agreements is a matter of state, not federal, law.⁷² At least three reasons support this conclusion. First, *Klaxon* instructs federal courts sitting in diversity to apply state conflict-of-law law, and a determination of whether litigants can bind the court as to the governing law is inherently one of conflicts of law. Second, the Rules of Decision Act, 28 U.S.C. § 1652, requires the application of state law on this issue. Finally, the question of whether contractual choice-of-law provisions are valid is one of state law, and intra-litigation choice-of-law agreements should be treated similarly; distinctions should not be drawn between the two on the basis of substance and procedure.

⁶⁶ See *id.* at 1191 & n.2 (first citing *P.S. & E., Inc. v. Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1972); and then citing *Ingersoll v. Klein*, 262 N.E.2d 593 (Ill. 1970)) (finding that the Illinois courts would adopt the *Lloyd* rule, which here would recognize Spanish law as the reasonable choice).

⁶⁷ *Sportsinsurance.com v. Hanover Ins. Co.*, No. 20-CV-403, 2021 WL 781286 (N.D.N.Y. Mar. 1, 2021).

⁶⁸ See *id.*

⁶⁹ See *supra* notes 51–52 and accompanying text.

⁷⁰ *Sportsinsurance.com*, 2021 WL 781286, at *4 n.1.

⁷¹ *Id.* (quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1069 (N.Y. 1994)).

⁷² For an argument that choice of law is not a matter of state law and *Klaxon* should be overturned, see generally Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017 (2015).

I begin by returning to *Klaxon*, which, as discussed above, held that there can be no independent determinations by federal courts in “the field of conflict of laws.”⁷³ Put differently, the law of the forum state, not that of the United States, must determine which jurisdiction’s law applies.⁷⁴ When the courts in categories A and B above decided to enforce or reject intra-litigation choice-of-law agreements without considering state law, they violated this principle. The litigants in those cases attempted to wrest the question of whose law applies from judicial control; a decision condoning or condemning the practice that is unmoored from state law is in essence an independent conflict-of-law determination by the federal courts. Law, after all, must come from some identifiable source.⁷⁵

Next, state law must govern the validity of intra-litigation choice-of-law agreements because federal statute requires it. According to the Rules of Decision Act, “[t]he 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.”⁷⁶ One of *Erie*’s premises is that the “laws of the several states” includes state court decisions⁷⁷ and is not limited to “positive statutes of the state.”⁷⁸

The Rules of Decision Act applies to situations where “a federal common-law rule, which is not the subject of a congressional statute or a rule of procedure adopted by the Supreme Court under the aegis of the Rules

⁷³ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

⁷⁴ This result might be constitutionally compelled. See Bradford R. Clark, *Erie’s Constitutional Source*, 95 CALIF. L. REV. 1289, 1302 (2007) (“Thus, in the absence of an applicable rule of decision supplied by the ‘Constitution,’ ‘Laws,’ or ‘Treaties’ of the United States, federal courts simply lack constitutional authority to disregard state law.” (quoting U.S. CONST. art. VI)).

⁷⁵ See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified . . .”); see also Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11–12 (1975) (“[*Erie*] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”). Federal law, for its part, must be promulgated under the “finely wrought and exhaustively considered” process set forth in the Constitution. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

⁷⁶ 28 U.S.C. § 1652.

⁷⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938) (holding that federal diversity courts should apply “the law of the State, unwritten as well as written”). The *Erie* Court relied upon legislative history research by Charles Warren to conclude that state law includes state case law. See *id.* at 73 n.5 (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 51–52, 81–88, 108 (1923)).

⁷⁸ *Id.* at 71 (quoting *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842)). The interpretation of the Rules of Decision Act alone, however, was not enough; the unconstitutionality of *Swift*, in addition to the Rules of Decision Act, compelled *Erie*’s holding. *Id.* at 77–78 (“If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century.”).

Enabling Act, conflicts with state law.”⁷⁹ Federal courts assessing the validity of intra-litigation choice-of-law agreements without consideration of state law—the approaches of the courts in categories A and B *supra*—apply federal common law. For instance, in *Lloyd*, the Seventh Circuit applied a rule of reasonability to find the stipulation valid, citing a treatise as the origin for that test.⁸⁰ Divining such a rule not only violates *Erie*’s rule against independent determinations of the law by federal courts;⁸¹ it also displaces conflicting state law. State courts are likely to have either directly addressed the enforceability of intra-litigation choice-of-law agreements or provided clues as to how they might treat such an agreement.⁸² Under the Rules of Decision Act, state law prevails in conflicts with judge-made federal law except where no substantive reason supports the state rule.⁸³ Because a state’s application of its own choice-of-law principle is an “important expression[] of its domestic policy,”⁸⁴ state law must determine the validity of intra-litigation choice-of-law agreements.

A final reason why state law must govern the validity of intra-litigation choice-of-law agreements is that they should be treated identically to contractual choice-of-law clauses, which are enforced or rejected on the basis of state law.⁸⁵ Judge Richard Posner argued against identical treatment and suggested in *Wood v. Mid-Valley Inc.* that intra-litigation choice-of-law agreements should be afforded different treatment from contractual choice-

⁷⁹ *In re Air Crash Disaster near Chi., Ill.*, on May 25, 1979, 803 F.2d 304, 314 (7th Cir. 1986) (first citing *Hanna v. Plumer*, 380 U.S. 460, 465–68, 468 n.9 (1965); and then citing *Roberts v. Sears, Roebuck & Co.*, 573 F.2d 976, 984 (7th Cir.), *cert. denied*, 439 U.S. 860 (1978)); *see also Hanna*, 380 U.S. at 471–72 (“We are reminded by [*Erie*] that neither Congress nor the federal courts can . . . fashion rules [of decision for federal courts] which are not supported by . . . Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.”).

⁸⁰ *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) (citing RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 355–56 (2d ed. 1980)); *see also supra* notes 35–36 and accompanying text.

⁸¹ *See Erie*, 304 U.S. at 79 (declaring unconstitutional the *Swift v. Tyson* doctrine that federal courts have the ability to give independent judgments of state law).

⁸² *See supra* note 30. Even if a federal court were unsure as to whether a court of the state in which it sits would honor the parties’ agreement, it would stay truer to the Rules of Decision Act and *Klaxon* by ignoring the agreement and applying whatever conflict-of-law tests the forum state has adopted. This is the approach taken by the *Sportsinsurance.com* court. *See supra* note 71 and accompanying text.

⁸³ *See In re Air Crash Disaster*, 803 F.2d at 314–16; *see also Huff v. Shumate*, 360 F. Supp. 2d 1197, 1201 (D. Wyo. 2004) (“The Rules of Decision Act applies when the federal rule of decision competing with a state law is wholly judge-made. . . . Choices between state law and federal judge-made law are governed by the Rules of Decision Act and cases construing it.”).

⁸⁴ *See, e.g., Russell J. Weintraub, The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L. J. 228, 242 (1964) (“[T]he choice-of-law rules of a state are important expressions of its domestic policy.”).

⁸⁵ *See, e.g., Collins v. Mary Kay, Inc.*, 874 F.3d 176, 183–84 (3d Cir. 2017) (analyzing validity of contractual choice-of-law provision by citing New Jersey law).

of-law agreements.⁸⁶ The validity of a contractual choice-of-law provision is a matter of state law, he wrote, citing *Klaxon*.⁸⁷ But where “the parties’ agreement to the application of a particular state’s substantive law is not found in a contract but is either stipulated by the lawyers or inferred from their failure to make an issue of it,” the question is not to be resolved by reference to state law.⁸⁸ Instead, in the intra-litigation context, “[t]he question whether to honor a choice of law stipulation . . . is not a question of choice of law; it is a pure question of procedure”⁸⁹

The substance-procedure dichotomy, which originated in *Erie*, “restricted the power of the federal diversity courts over substantive law, confining them to the task of providing an alternative forum for enforcing legal rights that are created and defined by the states.”⁹⁰ It maintains its role in the resolution of choice-of-law problems.⁹¹ But it does not change the mandatory application of state choice-of-law rules to assessments of the validity of intra-litigation choice-of-law agreements.

Though “[c]lassification of a law as ‘substantive’ or ‘procedural’ for *Erie* purposes is sometimes a challenging endeavor,”⁹² rules regarding the validity of intra-litigation choice-of-law agreements are substantive. Rules of substance affect “rights themselves, the available remedies, *or the rules of decision by which the court adjudicated either*,” according to the Supreme Court.⁹³ If an intra-litigation choice-of-law agreement is held to be valid, it does more than simply “alter[]” the “rules of decision”;⁹⁴ it sets them by telling the court which jurisdiction’s law provides them. The determination of whether the agreements are enforceable, then, is substantive.

One counter-argument to substantive classification is that intra-litigation choice-of-law agreements can be viewed as waivers, whereby the parties surrender the opportunity to contest that the chosen state’s law applies. And, at least in the context of the right to a jury trial, the validity of a waiver is a matter of federal procedural law.⁹⁵ Thus, perhaps federal courts

⁸⁶ 942 F.2d 425, 426 (7th Cir. 1991).

⁸⁷ *Id.* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 110–11 (2011).

⁹¹ *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010) (“We have held since *Sibbach*, and reaffirmed repeatedly, that the validity of a Federal Rule [of Civil Procedure] depends entirely upon whether it regulates procedure.” (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941))).

⁹² *Gasparini v. Ctr. for Humans, Inc.*, 518 U.S. 415, 427 (1996).

⁹³ *Shady Grove*, 559 U.S. at 407–08 (emphasis added).

⁹⁴ *Id.* at 407.

⁹⁵ *See In re County of Orange*, 784 F.3d 520, 530 (9th Cir. 2015) (holding that in federal courts, federal procedural law is what governs the validity of a pre-dispute jury trial waiver). Nevertheless, because state law was more protective than federal law of the jury trial right, the Ninth Circuit applied state law. *Id.* at 531.

simply apply federal procedural law when they enforce these “waivers” of the opportunity to contest choice of law.

But this situation involves a federal common-law procedural rule: courts’ ability to accept “waivers” of the choice-of-law issue. And in such situations, “the Court usually uses a policy-focused outcome-determinative approach: a federal court must use a state rule of procedure when using a federal rule would frustrate the ‘twin aims of *Erie*’ (discouraging forum shopping and avoiding inequities in outcome between state and federal courts).”⁹⁶ The analysis therefore should lead a court to apply state law. With regard to forum shopping, a party wanting the application of New York law but realizing a New York state court would apply Connecticut law might instead file in New York federal court and hope its adversary “waives” the issue.⁹⁷ The desire to avoid inequitable outcomes between judicial systems would also favor application of state law; the party in the previous hypothetical might win the case if the New York federal court enforced the “waiver” under federal law to apply New York law but lose it in New York state court (where Connecticut law would have applied).⁹⁸ Therefore, even characterizing intra-litigation choice-of-law agreements as waivers does not avoid the *Erie* problem.⁹⁹

And, as discussed above, the Rules of Decision Act is implicated by federal judges’ failure to apply state law in these situations because they present conflicts “between state law and federal judge-made law.”¹⁰⁰ But,

Rules of Decision Act analysis does not resort to notions of substance and procedure at all. . . . [B]ecause the purposes of the Rules of Decision Act, as interpreted by the Supreme Court, are not only to prevent the frustration of state substantive policy, but also to ensure the outcome of litigation in the forum will not materially differ when it takes place in federal rather than state court.¹⁰¹

⁹⁶ Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 VAND. L. REV. 877, 898 (2019).

⁹⁷ The party agreeing to the waiver might do so because it is not skilled enough to see the strategic advantage to the other side in receiving the application of New York law. *See Frost, supra* note 5, at 499 (noting that a “persistent criticism of adversarial procedure” is “that it fails when the parties’ skills and resources are not evenly matched”); *see also id.* at 501 (“By raising overlooked issues and legal authority, a judge can ameliorate the imbalances that undermine the adversarial system.”).

⁹⁸ This is the type of “violence to the principle of uniformity within a state” with which the *Erie* and *Klaxon* Courts were concerned. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

⁹⁹ Finding that the parties have waived the issue in the first place is also inconsistent with our common law system, where judicial decisions have application to the resolution of future disputes. *See Frost, supra* note 5, at 493 (“[L]itigant-specific rationales . . . cannot justify issuing incorrect statements of law that will bind, or at least affect, all those similarly situated to the parties before the court.”); *see also infra* Part IV.

¹⁰⁰ *Huff v. Shumate*, 360 F. Supp. 2d 1197, 1201 (D. Wyo. 2004).

¹⁰¹ *Id.* (first citing *Hanna v. Plumer*, 380 U.S. 460, 465–66 (1965); and then citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 108–09 (1945)).

Thus, because of the Rules of Decision Act, the substance-procedure divide is inapplicable to this precise problem.

In sum, federal courts exercising diversity jurisdiction must look to state law in analyzing whether they may or must honor parties' intra-litigation choice-of-law agreements. *Klaxon* and the Rules of Decision Act both require it. State law governs the validity of contractual choice-of-law provisions; there is no reason another rule should apply to intra-litigation choice-of-law agreements. It is incongruent with our judicial system to allow federal common law to displace state law in this area.

IV.

SUA SPONTE REVIEW OF INTRA-LITIGATION CHOICE-OF-LAW AGREEMENTS

This Part argues that federal courts are obligated¹⁰² to apply the forum state's choice-of-law principles and must raise the issue *sua sponte* even where the parties agree upon the governing law.¹⁰³

There is a norm against judicial issue creation,¹⁰⁴ despite the long-

¹⁰² Few would question a court's *ability* to engage in a *sua sponte* choice-of-law analysis. *See* *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *But see* *Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. . . . [W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.")

¹⁰³ One possible critique of judicial issue creation is that judges risk transforming themselves into advocates. *See* STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 1 (1984) (citing Lon L. Fuller, *The Adversary System*, in *TALKS ON AMERICAN LAW* 34, 34–35 (Harold J. Berman ed., 1961)). That risk seems minimal if judges scrutinize every intra-litigation choice-of-law agreement to determine if it comports with forum state law. *See* Frost, *supra* note 5, at 501 ("If a judge realizes that there is an important legal argument that has been overlooked, or valuable precedent that has gone uncited, the judge does not act as advocate if she points out the missing information and provides *both* parties with an opportunity to address the issues she has identified."); *see also id.* at 502 ("[T]here is no reason to think that a judge who notes an overlooked issue and asks the parties to investigate and brief it will review that issue any differently than a question raised by the parties themselves."). Professor Frost suggested that, to preserve litigant autonomy when judges raise issues *sua sponte*, those judges could order supplemental briefing. *See id.* at 505; *see also id.* at 508 ("[I]f judges do see an argument missed by the parties, they should be free to raise it on the condition that it is closely related to the legal question before them, and the parties are given a chance to voice their views on the issue."). Supplemental briefing could easily be utilized in situations where neither party addresses which state's law the forum state would choose, or whether the forum state would uphold an intra-litigation choice-of-law agreement.

¹⁰⁴ *See* Frost, *supra* note 5, at 455 (describing "the conventional view that the parties to litigation, and not the judge, are responsible for raising the legal questions that will ultimately be resolved by the court"); *see also* Lee Epstein, Jeffrey A. Segal & Timothy Johnson, *The Claim of Issue Creation on the U.S. Supreme Court*, 90 AM. POL. SCI. REV. 845 (1996) (noting a norm against the "creation of issues not raised in the record before the Court"). As Professor Frost points out, though, even *Erie* was decided on grounds not raised by the parties. Frost, *supra* note 5, at 450 (noting that "neither the [*Erie*] petitioner nor the respondent took issue with *Swift v. Tyson*'s holding

established “duty of the judicial department to say what the law is.”¹⁰⁵ More specific to this issue, Judge Posner observed that “[c]ourts do not worry about conflict of laws unless the parties disagree on which state’s law applies.”¹⁰⁶ To do so “would be a foolish expenditure of judicial resources,” according to another Seventh Circuit panel.¹⁰⁷ The Sixth Circuit noted that courts “regularly rely on the litigants’ agreement about the governing law . . . to avoid deciding what could be knotty choice-of-law questions.”¹⁰⁸ Though judicial economy is not on the side of disturbing (or analyzing) the parties’ agreement (or their silence, in the circumstance of an implied agreement), there still remains good reason for doing so.

First, as one scholar has observed, relying on the parties’ presentation offends precedent in two ways: by leading to the development of new case law that is inconsistent with existing law (such as *Klaxon*), and by lessening the power of *stare decisis* as parties and judges become free to ignore it.¹⁰⁹ Second, because the decision of which jurisdiction’s law applies implicates federalism concerns, which in turn implicate the Constitution,¹¹⁰ federal courts must not simply defer to the parties’ agreement.¹¹¹ Finally, deferring to the parties’ agreement as to the applicable law could lead to absurd results.¹¹²

To start, relying solely on the parties’ presentation of the choice-of-law issue is “incompatible with the power of precedent in a common law system.”¹¹³ The Supreme Court has held that federal courts exercising

that federal courts sitting in diversity jurisdiction could create federal common law, and yet the Court overruled *Swift* and required federal courts to abide by state common law rules”) (footnote omitted).

¹⁰⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁰⁶ *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991). Professor Frost observed that “Judge Posner seems to view his role entirely as a dispute resolver in the adversarial tradition, rather than also as a law pronouncer in the common law tradition.” Frost, *supra* note 5, at 508. This is problematic, according to Professor Frost, because American appellate decisions have consequences for “more than just the party before the court.” *Id.*

¹⁰⁷ *Mass. Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1120 (7th Cir. 1998).

¹⁰⁸ *Masco Corp. v. Wojcik*, 795 F. App’x 424, 427 (6th Cir. 2019).

¹⁰⁹ Frost, *supra* note 5, at 492.

¹¹⁰ The doctrine of *Swift v. Tyson*, 41 U.S. (1 Pet.) 1 (1842), had given courts permission “to disregard state court decisions and exercise independent judgment[.]” Clark, *supra* note 74, at 1291; *see also id.* at 1309 (noting *Swift* “eventually degenerated into an excuse for federal courts to make their own body of law in diversity cases”). The Supreme Court held in *Erie* that this was “an unconstitutional assumption of powers by courts of the United States” *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938).

¹¹¹ *See Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (“We granted the petition, and although normally we do not consider questions raised neither below nor in the petition, the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them sua sponte.” (citations and footnote omitted)); *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990) (“And delicate questions of comity can be raised on the court’s own initiative”).

¹¹² *See infra* notes 133–34 and accompanying text.

¹¹³ Frost, *supra* note 5, at 491.

diversity jurisdiction must apply the choice-of-law rules of the state in which they sit.¹¹⁴ Professor Amanda Frost has observed two ways precedent can be undermined by affording litigants complete control; both injuries to precedent are implicated by intra-litigation choice-of-law agreements.¹¹⁵ The first injury is that litigants ignoring certain legal principles—here, *Klaxon*—risk creating circuit precedent that also ignores those principles.¹¹⁶ That risk seems particularly concrete in the context of intra-litigation choice-of-law agreements, given that two circuits have adopted relevant rules that are arguably at odds with *Klaxon*.¹¹⁷ The second injury is that “litigants fail[ing] to cite and discuss binding precedent . . . may evade its application unless the court raises the precedent sua sponte.”¹¹⁸ Ignoring stare decisis removes a powerful constraint on judicial decision-making.¹¹⁹ “Just as it is important for courts to respect stare decisis, it is essential that litigants not be allowed to slip its bonds simply by refusing to cite established precedent.”¹²⁰ Thus, courts should not interpret the parties’ agreement on the governing law as an invitation to ignore the issue entirely.¹²¹

Precedent is not the only reason why judges should scrutinize intra-litigation choice-of-law agreements; federalism also supports that outcome. When Judge Posner wrote that federal courts “ordinarily do not create issues where the parties agree,”¹²² he noted an exception to that principle “for sensitive questions touching the relations between the federal government and those tattered quasi-sovereigns, the states.”¹²³ Judge Posner did not view the federalism exception to the rule against judicial issue creation as being

¹¹⁴ *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941).

¹¹⁵ Frost, *supra* note 5, at 492.

¹¹⁶ *Id.* at 509 (“Courts should raise new issues when failing to do so would result in erroneous statements of precedent-setting law.”).

¹¹⁷ *See* *Wood v. Mid-Valley Inc.*, 942 F.2d 425, 426 (7th Cir. 1991) (applying the law of the forum state not because that state’s choice-of-law rules dictated that outcome but because neither party disputed the issue); *Tehran-Berkeley Civ. & Env’t Eng’rs v. Tippetts-Abbott-McCarthy-Stratton*, 888 F.2d 239, 242 (2d Cir. 1989) (applying the law of the forum state not due to an application of that state’s choice-of-law rules but because the parties both cited to that state’s law in their briefs).

¹¹⁸ Frost, *supra* note 5, at 492.

¹¹⁹ *See id.* at 493 (“The United States inherited an English legal tradition in which judges were guided by prior decisions and canons of construction, and at least theoretically were not free to make unconstrained pronouncements on the meaning of the law.”).

¹²⁰ *Id.*

¹²¹ And, to analogize again to the contractual choice-of-law context, *see supra* note 85 and accompanying text, courts do not necessarily defer to parties’ mistaken assumptions about the scope of choice-of-law clauses. For example, in *Ochoa v. Indus. Ventilation, Inc.*, a court noted the parties’ erroneous assumption that a contractual choice-of-law clause extended to tort claims and engaged in a sua sponte choice-of-law analysis. No. 18-CV-393, 2021 WL 5405203 (E.D. Wash. Nov. 18, 2021).

¹²² *Wood*, 942 F.2d at 427.

¹²³ *Id.*

met in the context of intra-litigation choice-of-law agreements.¹²⁴ But the Supreme Court recognized in *Klaxon* that “our federal system . . . leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.”¹²⁵ Federal courts “thwart such local policies by enforcing an independent ‘general law’ of conflict of laws.”¹²⁶ Because choice-of-law questions are inextricably intertwined with federalism concerns, federal courts have an obligation to independently analyze which jurisdiction’s law applies.

Federal courts arguably exceed the power given to them by the U.S. Constitution when they defer to the parties’ agreement about the applicable law without engaging in a choice-of-law analysis.¹²⁷ Again, *Erie* held that federal courts sitting in diversity “should apply the substantive law of the states in which they sit,” and *Klaxon* “just takes the modest additional step of deciding that choice-of-law rules are substantive for *Erie* purposes”¹²⁸ By deciding implicitly or explicitly that the parties’ intra-litigation choice-of-law agreement has force, courts are in essence fashioning a substantive rule that says litigants may bind the court by agreement.¹²⁹ But federal courts do not have the constitutional power to create substantive common-law rules.¹³⁰ Deference to intra-litigation choice-of-law agreements without an examination of state law amounts to a violation of state sovereignty.¹³¹ By not applying state law, then, federal courts might violate the Constitution.¹³²

¹²⁴ *Id.* (“Courts do not worry about conflicts of laws unless the parties disagree on which state’s laws apply.” (citation omitted)).

¹²⁵ *Klaxon Co. v. Stentor Elec. Mfg. Co.* 313 U.S. 487, 496 (1941).

¹²⁶ *Id.*

¹²⁷ Article III, which defines the federal judicial power, “has very little to say about how federal courts should go about deciding cases.” Frost, *supra* note 5, at 470; *see also* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1364 (1973) (noting Article III “is itself spare and unhelpful” on the meaning of judicial power); Clark, *supra* note 74, at 1289–90 (noting that “scholars continue to debate the precise contours—and even the existence—of the constitutional basis for the Supreme Court’s decision in *Erie*”).

¹²⁸ Roosevelt, *supra* note 12, at 18.

¹²⁹ *See supra* notes 73–75 and accompanying text.

¹³⁰ *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general.’ . . . [N]o clause in the Constitution purports to confer such a power upon the federal courts.”).

¹³¹ *See id.* at 79 (“Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State . . .”).

¹³² *See* Henry P. Monaghan, *Hart and Wechsler’s The Federal Courts and Federal System*, 87 HARV. L. REV. 889, 892 (1974) (book review) (“*Erie* is, fundamentally, a limitation on the federal court’s power to displace state law absent some relevant constitutional or statutory mandate which neither the general language of article III nor the jurisdictional statute provides.”). The nature of *Erie*’s constitutional basis has been subject to considerable debate. *See* Clark, *supra* note 74, at 1290. For an argument that the source is the Supremacy Clause, *see generally id.*

As a final reason why federal courts have an independent obligation to scrutinize intra-litigation choice-of-law agreements, multiple courts have pointed out that failing to scrutinize intra-litigation choice-of-law agreements could have absurd results—namely, the application of the law of a jurisdiction with no connection to the particular dispute.¹³³ For example, while the *Lloyd* court enforced the parties' agreement that Wisconsin law applied, it hinted it would refuse to enforce a stipulation calling for application of Hammurabi's Code because such a decision would lack precedential value.¹³⁴ There must be a judicial role in the choice-of-law process to prevent the possible application of the law of uninterested jurisdictions.

CONCLUSION

Confronted with a stipulation that the law of a particular state governs a dispute, federal courts sitting in diversity tend to ignore state law and decide on their own whether the stipulation is enforceable. These intra-litigation choice-of-law agreements present a “who decides?” question regarding their validity. Supreme Court precedent, the Rules of Decision Act, and the Constitution all suggest that the laws of the forum state should dictate whether or not the agreements are valid. After all, state choice-of-law rules are expressions of local policies,¹³⁵ which litigants should not be free to evade. Looking to state law to determine whether these agreements are enforceable comports with the approach taken with regard to contractual choice-of-law provisions. It is misguided to distinguish between contractual choice-of-law provisions and intra-litigation choice-of-law agreements on the grounds that the former involves substance and the latter involves procedure.

The fact that the parties do not dispute which jurisdiction's law applies in these cases does nothing to change the required application of forum state law to those stipulations; judges must engage in the analysis *sua sponte*. If forum state law is not applied, federal courts create precedent that is at odds

¹³³ See *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) (noting the parties could have stipulated to the application of Hammurabi's Code); *Sportsinsurance.com v. Hanover Ins. Co.*, No. 20-CV-403, 2021 WL 781286, at * 9 n.1 (N.D.N.Y. Mar. 1, 2021) (pointing out that the “parties could agree to apply the law of, say, Vatican City in their briefs, and a court would apparently be bound by their agreement—even in a case with no international connection”).

¹³⁴ *Lloyd*, 694 F.2d at 495. The *Lloyd* court seemed to suggest that applying Hammurabi's Code at the parties' election would somehow impede its jurisdiction. See *id.* (“We hesitate to say that a conflicts question never can affect jurisdiction. If the parties had stipulated [to apply] . . . the Code of Hammurabi, we think the district court should . . . not have the power to render a decision on that basis.”). While the Hammurabi example is an extreme one, federal courts sitting in diversity frequently apply foreign law without divesting themselves of jurisdiction—when that law is chosen by forum state choice-of-law principles. See Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1534 n.19 (2011) (collecting cases).

¹³⁵ See Weintraub, *supra* note 84, at 242.

with the Supreme Court's *Klaxon* decision and allow parties to avoid that case's holding. Principles of federalism also counsel in favor of judicial issue creation in this context, outweighing the efficiencies that would be gained in a regime where the parties' agreement to the applicable law ends the choice-of-law analysis. Parties must not be free to override state substantive policies by agreement, and federal courts should ensure those policies are effectuated.