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PLURALISTIC LEGISLATIVE JURISDICTION: 
PLAINTIFF'S CHOICE UNDER THE KLAXON RULE

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The growing acceptance of pluralistic legislative jurisdiction is continuously evidenced by the flow of decisions from the courts. The purpose of this article is to examine the latest phases of this development and to consider its influence on the plaintiff's choice of forum—and consequently on his choice of law—under the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.* The *Klaxon* rule, of course, is that by which the Supreme Court extended the *Erie R.R. v. Tompkins* doctrine to compel a federal court in a diversity case to apply the same choice of law rule as would a state court of the forum state. While the *Erie* rule is hailed for its contribution to the cause of uniformity of law within a single state and to the elimination of any substantive advantage in hopping from the state to the federal forum, the *Klaxon* decision paradoxically seems to assure maximum advantage to a plaintiff from his discerning choice between two or more available state forums. The problem has become more acute because of erosion of traditional principles once established by *Pennoyer v. Neff* and increasing enactment of state long-arm statutes.

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2. 313 U.S. 487 (1941). The case involved a diversity suit in a federal court sitting in Delaware for royalties payable under a contract made and to be performed in New York. After entry of judgment for the plaintiff the plaintiff moved for amendment of the judgment to include interest from the date of the suit to the date of the judgment as required by New York law. The Supreme Court held that the choice of law governing the inclusion of interest must be subject to the law of the state in which the federal court was sitting, viz., Delaware. The federal court could not make its own independent choice of law between conflicting rules of two or more states but must abide by the law of conflicts of the forum state.

3. 304 U.S. 64 (1938). This was a diversity negligence action brought in a New York district court for damages suffered by the plaintiff while walking on the defendant's right of way in Pennsylvania. The lower courts allowed the plaintiff to recover by applying a rule of federal common law. The Supreme Court reversed, explicitly overruling the century-old doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and the more recent case of *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928).

4. 95 U.S. 714 (1877).
for out-of-state service of process in personal civil actions. These factors have resulted in the expansion of choices available to the plaintiff.

The developing concept of pluralistic legislative jurisdiction has been illustrated most recently in the field of torts by a series of airline cases from New York while in contracts it is exemplified by *Clay v. Sun Ins. Office, Ltd.* These decisions will be examined in some detail.

I. The Airline Cases

In August 1958 a Northeast Airlines plane departed from LaGuardia Airport in New York on a flight to Nantucket Island in Massachusetts. Approaching its destination it crashed and burned at Nantucket, killing all on board. Among the many who died in the catastrophe were the following passengers: Kilberg, Pearson, and Dean—all residents of the state of New York. All had purchased their flight tickets at LaGuardia Airport before boarding the ill-fated plane. Within the appropriate time period after the accident, the respective personal representatives of the individual deceased passengers brought suit in the New York court against Northeast Airlines, a Massachusetts corporation. The cases presented some interesting conflict of laws questions. The Massachusetts death statute, which governed the legal consequences of the disaster so far as Massachusetts was concerned, limited the recovery for the death of each victim to a maximum of $15,000; contrariwise the New York constitution explicitly prohibited any statutory limitation on damages for injuries resulting in death. Secondarily, a New York statute prescribed that pre-judgment interest from the date of filing suit to the date of entry of judgment should be included in the amount of judgment, while Massachusetts made no such provision in its law and its practice was contrary.

A. The Kilberg Case

In addition to a count under the Massachusetts death statute the Kilberg complaint included a count in contract on the theory that the airline had breached its contract for safe carriage of the passenger to his destination. The contract count seemingly provided an excellent opportunity on traditional terms for the court to avoid the Massachusetts limitation of damages, since the ticket had been purchased and the contract made in New York and a large part of the performance was in that

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New York reasonably could have been regarded as the “center of gravity” of the contract by virtue of its having the most significant contacts. The New York trial court, indeed, upheld the contract count by denying a motion to dismiss as a matter of law. The appellate division, however, reversed and ordered the granting of the motion for dismissal of the contract count, choosing to follow earlier New York precedents which had rejected the contract theory for recovery of damages from carriers in similar situations. The New York Court of Appeals affirmed the appellate division on this point and unanimously rejected the contract theory as a basis for suit.

Judge Desmond, writing for the majority of four out of seven judges, went on to observe in well-deliberated dicta that the court’s decision did not mean that the plaintiff would be limited to a $15,000 recovery for the wrongful death. Although the suit was under the Massachusetts death statute the New York court did not regard itself as bound by the built-in limitation of that statute in view of the strong public policy against any statutory limitation on the amount of damages for injuries resulting in death. Judge Desmond thought the court had found a way of attaining this result “without doing violence to the accepted pattern of conflict of law rules.” The way was to characterize the question of damages as one of “procedure” rather than “substance” and, consequently, as subject to the law of the forum rather than of the place of injury by tradition. Two judges dissented from this part of the majority opinion, including Judge Froessel of whom we shall speak later, while a third, Judge Fuld, merely disassociated himself on the ground it was dictum not required for decision of the narrow issue presented by the appeal—the propriety of the dismissal of the contract count.

Shortly after the court of appeal’s decision in Kilberg, the New York court was presented with a somewhat analogous conflict of laws question in the case of Davenport v. Webb. This was a New York action for damages resulting from a wrongful death occurring in Maryland. The issue was whether the New York court should include in the amount of recoverable damages an item for pre-judgment interest for the period between the filing of suit and the entry of judgment. As was noted earlier, such interest was prescribed by New York statute but was not allowable by the law of Maryland. The New York trial court included such pre-judgment interest on the authority of the New York Court of Ap-

10. Id. at 39-42, 172 N.E.2d at 527-29.
peals' dicta in its Kilberg opinion. On appeal the appellate division reversed the trial court on this point and struck out the item of pre-judgment interest. It distinguished the Kilberg case in two respects. It held first that the New York legislature had not indicated an intention to apply the pre-judgment interest statute to out-of-state injuries and second that in any case the New York statutory rule as to interest did not indicate so strong a state public policy as did the constitutional prohibition involved in the Kilberg case. In any event a contrary decision by the New York court might have posed a serious question of due process—at least under the better view that the right to interest goes to the substance of a plaintiff's claim and is not merely procedural. The official reports of the case reveal no contacts which might have supported any assertion by New York of legislative jurisdiction to impose extra liability on the non-resident defendant for the Maryland tort. If the defendant had been an interstate carrier transporting passenger victims whom he had picked up in New York, the minimal contract requirement would very likely have been satisfied. As it was, the New York Court of Appeals affirmed the appellate division.

The court of appeal's rationale in the Davenport decision disclosed sharp discrepancies with Judge Desmond's reasoning in his Kilberg opinion. Desmond had sought to justify the Kilberg rule with the simple dichotomy between "substance" and "procedure," holding that the measure of damages is procedural and hence governed by the law of the forum. Judge Dye, writing for the court in the later case, said:

The overwhelming weight of authority, recognizing that "the question of the proper measure of damages is inseparably connected with the right of action," has long held that the measure of damages for a tort is to be treated as a matter of substance, governed by the law of the place where the wrong occurred. This has been particularly true in the area of wrongful death actions. Such actions did not exist at common law; they are creatures of statute. Therefore, as we said on another occasion, "Right and remedy coalesced" and are "united."12

The Court nevertheless continued to adhere to the result indicated by the Kilberg dicta, justifying it merely as an enforcement of New York's strong public policy which did not extend to the question of pre-judgment interest.13

12. Id. at 393, 183 N.E.2d at 903.
13. Id. at 395, 183 N.E.2d at 904.
Judge Desmond, author of the Kilberg opinion, concurred in the Davenport decision with curious ambivalence:

I concur in the result only, since much of the discussion in the majority opinion is inconsistent with our stated grounds for decision in Kilberg v. Northeast Airlines . . . The result here is correct, however, since there is no New York public policy or other bar to our following Maryland’s law as to interest on a recovery for a wrongful death in Maryland.14

If the measure of damages could properly be characterized as a procedural matter, which was the expressed basis for the Kilberg rule, then tradition would appear to dictate that the law of the forum should control. Judge Desmond, while refusing to abandon his “procedure” rationale, nevertheless went along with the seemingly inconsistent “policy” theory in order to concur with the majority in the Davenport decision which applied the law of the place of injury. Also, oddly enough, Judge Froessel, who had dissented from the Kilberg dicta, nevertheless relied upon it to support his dissent from the Davenport decision, possibly in deference to the principle of stare decisis. Certainly his point appears well taken. The Davenport decision seems logically incompatible with the Kilberg rationale. On the other hand the two decisions together make clear that the New York Court of Appeals has rejected the rationale of its Kilberg rule but has reaffirmed its conclusion on the alternative basis of strong public policy.15

14. Id. at 395, 183 N.E.2d at 905.
15. The groping rationalization of the Kilberg rule by the New York court is reminiscent of the false starts of the California Supreme Court in its rationale of the revolutionary decision in Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944, 949 (1953). Here, it will be recalled, the California court permitted a plaintiff to recover for personal injuries against an estate by applying the law of the forum rather than that of the place of injury to the question of whether such a claim survives the death of the tort-feasor. In his original opinion Judge Traynor, like Judge Desmond in the Kilberg case, characterized the question as one of procedure and hence applied the law of California, the forum. After his opinion had been widely commended for its result but criticized for its rationale, Judge Traynor six years later offered the following candid critique of his own opinion: “Although the opinion in the case is my own, I do not regard it as ideally articulated, developed as it had to be against the brooding background of a petrified forest. Yet I would make no more apology for it than that in reaching a rational result it was less deft than it might have been to quit itself of the familiar speech of choice of law.” Traynor, Is This Conflict Really Necessary? 37 Texas L. Rev. 655, 670, n.35 (1959).

At the same time Traynor rationalized his decision anew, this time weighing policies and the respective claims and interests of the parties and jurisdictions involved. As a matter of fact the New York court has gone much further in its Kilberg decision than did the California court in Grant v. McAuliffe. In that case Arizona’s sole contact with the event was the fortuity that the accident happened to occur within its territory. In Kilberg Massachusetts had an additional contact in that the defendant was a Massachusetts corporation regularly doing a large part of its business there. Moreover, Grant in-
B. The Pearson Case

Following the Kilberg decision the United States District Court for the Southern District of New York tried the Pearson case under its diversity jurisdiction. Deeming itself bound by the Kilberg dictum the trial court entered judgment under the Massachusetts statute without regard for the $15,000 limitation on damages prescribed by that statute. Upon appeal a panel of the Court of Appeals of the Second Circuit reversed and remanded on the constitutional ground that enforcement of the remedy under the Massachusetts death statute without regard for the limitation built into the statute, constituted violation of full faith and credit. Judge Kaufman dissented. Upon motion by the plaintiff-appellee a rehearing was ordered before the whole court en banc in view of the great significance of the issue—namely, the constitutional power of the states to develop conflict of law doctrine.

On the rehearing the whole court overruled the panel decision by a six to three vote, and affirmed the trial court. Judge Kaufman now wrote the majority opinion. Referring to the panel decision he said:

. . . the inference seemed inescapable that, in effect, the panel majority had exalted the lex loci delictus to constitutional status with the consequence that New York was barred from applying the whole or any part of its wrongful death policy to the events occurring in Nantucket. If this is indeed the rationale of the panel’s opinion, then it is the first decision to “freeze” into constitutional mandate a choice-of-law rule derived from what may be described as the Ice Age of conflict of laws jurisprudence—at a time when that jurisprudence is in an advanced stage of thaw. A majority of the Court rejects this rationale.

Judge Friendly’s dissent is practically required reading for a complete understanding of the problem involved in the Pearson dispute. Friendly is clearly prepared to recognize that more than one state may often have concurrent—or pluralistic—legislative jurisdiction over the

volved a common-law type of action where the courts have traditionally played a creative, law-making role, whereas Kilberg involved a death action unknown at common law, for which statutory prescription has ordinarily been deemed essential.

17. The trial court also included in damages an item for pre-judgment interest, in accordance with New York law. Subsequently the New York court in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902 (1962), ruled that New York had no overriding public policy, with respect to pre-judgment interest. This, as a matter of course, eliminated the issue from consideration by the United States court of appeals upon the appeal.
18. 307 F.2d 131 (2d Cir. 1962).
19. 309 F.2d 553 (2d Cir. 1962).
20. Id. at 557.
same set of operative facts. Thus under the Kilberg-Pearson facts he would presumably concede that New York had sufficient contacts to justify its extension of its death statute to the Massachusetts disaster. The point was that neither the New York legislature nor the New York court made any pretense of invoking the New York statute. The court explicitly purported to be enforcing the Massachusetts statute but in its own free-wheeling fashion, without regard to the built-in limitation which was an integral part of that statute. Judge Friendly dissented:

[I]t does not follow that when New York looks to a statute of a sister state as the source of a claim enforceable in its courts, the Constitution allows it to decline, in the Supreme Court's words, "to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action or which name conditions on which the right to sue depends."21

Judge Friendly's argument may seem to have some merit in a wrongful death action since traditionally such actions were outside the purview of common law and have been regarded as based only on statutory enactments. It is suggested however that this rests on too rigid a concept of common law. The genius of common law has rested in its creative vitality and ability to grow and develop as courts acquire new knowledge and insights and are faced with new circumstances and needs. Thus, under the Kilberg-Pearson facts a New York court was called upon to adjudicate a claim for damages arising from a death occurring in Massachusetts. In point of fact it applied the ready-made law neither of Massachusetts, which would have limited recovery to $15,000, nor of New York, which simply did not apply to the situation. Instead, by its own common-law vitality it created its own remedy by interweaving elements of the Massachusetts statute which granted a cause of action and of the New York constitution which prohibited any statutory limitation on the amount of recovery.22 The New York court's approach is rather similar to that taken in some recent dram shop cases where the sale of liquor and the subsequent tort injury occurred in different states. In such instances a few courts have resorted to common-law theory to permit recovery where such recovery would not lie under the statutory provisions, taken alone, of either of the individual states involved.23

21. Id. at 565.
22. Id. at 560, 561.
C. The Dean Case (Gore v. Northeast Airlines, Inc.\textsuperscript{24})

Gore, a resident of the District of Columbia but the executor of Dean's New York estate, brought an action for Dean's death in the New York state court from which it was removed to the United States District Court for the Southern District of New York. There, on authority of the Kilberg rule, the plaintiff moved to strike the affirmative defense based on the Massachusetts statutory limitation on damages. In this instance, surprisingly, the district court denied the motion and allowed the affirmative defense to stand. It distinguished the case from the Kilberg-Pearson situation on the sole ground that none of the deceased's next of kin (who were beneficiaries of the suit) were residents of New York at the time the suit was brought although three out of five had been residents at the time of the accident. In fact two were continuously residents of California and the other three moved from New York to Maryland some time after the accident but before suit was filed. One wonders how the court would have handled the problem had the three continued to reside in New York until entry of judgment. Would it have applied the limitation with respect to two-fifths of the recovery and applied New York policy of full compensation with respect to the three-fifths attributable to the New York kin? Would it have enjoined the executor in making distribution of proceeds to give only $6,000 (two-fifths of the limited maximum) to the two California children and to distribute the full remainder (three-fifths of full compensation which the complaint alleged to be $1,750,000) among the widow and two children who continued to reside in New York? Such procedure would hardly commend itself to our common sense but it would seem the logical outcome of the court's principle of discrimination on the basis of residence of the next of kin.

\footnote{The common law courts have given little recognition to statutes as starting points for judicial lawmaking comparable to judicial decisions. They have long recognized the supremacy of statutes over judge-made law, but it has been the supremacy of a command to be obeyed according to its letter, to be treated as otherwise of little consequence. The fact that the command involves recognition of a policy by the supreme law making body has seldom been regarded by the courts as significant, either as social datum or as a point of departure for the process of judicial reasoning by which the common law has been expanded ... I can find in the history and principles of the common law no adequate reason for our failure to treat a statute much more as we treat a judicial precedent, as both a declaration and a source of law, and as a premise for legal reasoning. Stone, \textit{The Common Law in the United States}, in \textit{The Future of the Common Law} 120, 131-32 (1937).}

\footnote{24. 222 F. Supp. 50 (S.D.N.Y. 1963). [Throughout the remainder of this article Gore v. Northeast Airlines, Inc. will be referred to as the Dean case.]}

adequacy of statutory remedies may indicate a tendency away from the judicial attitude deplored by Justice Stone when he wrote:
The federal district court purported to apply the same rule which it believed the New York court would have chosen had it been deciding the case, but it found little support for its belief in the reported opinions of the New York courts on which it relied. The original *Kilberg* rationale, as we have seen, went on the theory that the question of damages was procedural and hence subject to forum law, which would scarcely suggest any discrimination based on the residence or non-residence of the plaintiffs or beneficiaries. Furthermore, in discussing the *Kilberg* decision in a later opinion the New York Court of Appeals said it had been based on the “interest of New York in providing its residents or users of transportation facilities there originating with full compensation for wrongful death” (emphasis added). Still, the court in the *Dean* case based its argument largely on the improbable conjecture that New York’s principal interest was to secure full compensation for its own domiciliaries so they would not become public charges. Possibly this may have figured in the state’s public policy but its emphasis seems almost frivolous in the case of a decedent such as Dean, who was apparently a man of means. So also may victims *Kilberg* and *Pearson* have been men of means. The policy favoring full compensation was not contingent on the need of the next of kin but on the amount of their loss. Even if we assumed that New York’s concern was limited to its own domiciliaries this would seem to embrace its domiciliaries who died in the accident. Although technically the proceeds of the suit would not be included in the deceased’s estate for tax and administrative purposes, any passenger boarding a plane in New York would certainly regard himself as benefitted materially and in peace of mind if he knew that New York’s liberal policy of full compensation would protect his family in case of accident. Dean, a New Yorker himself, might well have objected to his state’s arbitrary and unjust discrimination against his family on the ground of their non-residence. It would constitute discrimination against himself as well as against his next of kin.

In any event such discrimination against the surviving next of kin on the sole ground of their non-residence seems to raise a substantial constitutional question under the equal protection clause of the fourteenth amendment. The clause of the California Workmen’s Compensation statute involved in *Alaska Packers Ass’n v. Industrial Acc. Comm’n* was by its terms restricted to residents of the state who entered contracts of

27. 294 U.S. 532 (1935).
hire within the state and suffered injuries in the course of employment outside the state. Nevertheless the United States Supreme Court applied the law to a non-resident alien migrant on the authority of California decisions. California courts had extended the statute to non-residents as well as residents on the ground that otherwise the entire statute would be invalid because it violated the privileges and immunities clause of article four of the United States Constitution. Today, perhaps, the privileges and immunities clause would be a weak reed on which to rely but the same argument of unjust discrimination could be made under the currently more viable equal protection clause of the fourteenth amendment. It is true that some state courts have departed from the California approach and upheld a state's privilege to discriminate against non-residents in dispensing benefits under its workmen's compensation laws. Such discrimination can be defended more easily in the case of workmen's compensation than in the case of civil remedies for tort. In the former case the state is dispensing insurance funds set up by state mandate and subject to its control and regulation. In such funds the state has an interest very nearly proprietary in nature. The Kilberg and Dean cases, on the other hand, are in the nature of civil tort actions between private individuals and the airline company, in the outcome of which New York can in no sense be said to have a proprietary interest. In both cases the operative facts were identical except for the domicile of the deceased's next of kin. Even this distinction did not exist until after the cause of action had arisen. It seems out of character for a federal court to make such an invidious distinction between residents of New York and those of a sister state when the New York court itself has given no indication that it would do so. Unfortunately the district court's dismissal of the motion in the Dean case seems to have ended the matter. No appeal or re-argument has been reported.

It is interesting to speculate what the New York Court of Appeals might have done had a Pennsylvanian and a Massachusetts resident also been on board the ill-fated plane with Kilberg and died in Nantucket. Let us assume both had purchased their tickets and enplaned at LaGuardia along with Kilberg, Pearson, and Dean. Pennsylvania has a wrongful death statute providing for compensatory damages without arbitrary limit although as yet Pennsylvania has not indicated that it would follow

31. 147 A.L.R. 925 (1943); 12 A.L.R. 1207 (1921).
Kilberg in superimposing its full compensation policy on a claim arising in Massachusetts. The Massachusetts law, of course, we have already discussed. Would the New York court try to distinguish between the claims based on the death of a New York resident in Massachusetts and the deaths of the Pennsylvanian and the Massachusetts man, respectively, where all other factors save residence of the victim were identical? Unlike ancient Rome the Anglo-Saxon and common-law traditions do not recognize one law for the Romans and another for the Jews. Does it not seem repugnant to our sense of equal protection of the law to discriminate against a wrongful death claim solely because of the residence of the deceased? New York residence, taken alone, would not likely be upheld as sufficient minimal contact to justify New York's claim to legislative jurisdiction. For example, if Kilberg had purchased his ticket and enplaned at Boston instead of LaGuardia and thereafter crashed to his death in Nantucket, any attempt of the New York court to increase the airline's liability by applying the Kilberg rule would seem to violate our historical concept of due process of law. By the same reasoning, since the New York court has established the Kilberg rule in the case of a New York resident where it has sufficient other minimal contacts to support its assertion of legislative jurisdiction, can it exclude from the benefits of the rule an identical claim founded on the death of a non-resident? If it did limit the Kilberg rule to New York residents, would it then look to the domicile of the non-resident to determine the rule of damages to be applied? Suppose the Pennsylvania court or legislature had itself established a policy or rule of law identical with New York's policy invoked in Kilberg, would the New York court take this into consideration and allow full compensation on the Pennsylvanian's claim? Murky as have become the rules and principles to guide courts in their choice of law the difficulties would be multiplied many times if we began to regard the domicile of each victim or claimant as the ultimate determinant of the right to recover or the measure of damages.

II. CLAY V. SUN INS. OFFICE, LTD.34

This litigation extended from 1957 to May 1964. It involved a claim under a so-called personal property floater policy providing for world-wide coverage against all risks of loss or damage to the property

34. 377 U.S. 179 (1964).
covered. The insured was a resident of Illinois and took out the policy in that state with a British insurance company licensed to do business in Illinois, Florida, and elsewhere. The insured paid a single premium for the three-year term of the policy. So far as appears in the case report all of the insured's property covered by the policy at the time of issuance was located in Illinois. The policy contained a so-called "suit-clause" which forbade any suit thereon unless it was instituted within twelve months after discovery of the loss. This clause was valid under Illinois law but conflicted with a Florida statute which declared all such contract stipulations for time limitation to be illegal and void. Three months after taking the policy the insured moved to Florida where he established his residence. There his estranged wife deliberately took or damaged some of his clothes and household effects. He promptly notified the insurance company which denied liability on the ground that the policy did not cover malicious damage by his wife. More than two years later the insured initiated suit on his claim in a federal district court in Florida and recovered judgment for $6,800. The trial court rejected the insurance company's defense based on the "suit-clause" of the policy. The court of appeals, voting two to one, reversed and remanded for entry of judgment in favor of the insurance company. While expressing uncertainty as to whether the Florida court would apply the Florida statute to an Illinois contract under the circumstances of the case, the court of appeals held that in any event any attempt by Florida to do so would be a denial of due process under the fourteenth amendment.

On certiorari the United States Supreme Court vacated the judgment on the ground that the court of appeals was premature in deciding the constitutional question without first determining the threshold question of whether Florida purported to apply its statute to the Illinois contract. Two justices, Black and Douglas, dissented, contending first that the literal language of the Florida statute purporting to embrace "all contracts" was clearly intended to cover the Illinois contract and second that such application did not violate full faith and credit or due process.

Upon remand the Fifth Circuit Court of Appeals certified the threshold question of Florida law to the Florida Supreme Court in accordance with Florida practice. The Florida court gave the following curious answer:

Obviously . . . the Legislature of this state could not conceivably have any interest in a contract executed in another state by

35. 265 F.2d 522 (5th Cir. 1959).
residents of other states, involving property in another state; and we agree with appellant that "Imputing any such intention to the Florida legislature would be an absurdity." But a statute must, of course, be read in its entirety; and we think it is equally clear, from the last sentence thereof, . . . that the Legislature intended the Act to apply to "any contract whatever"—foreign or domestic—when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon.37

Upon return of the case to it, the Fifth Circuit Court of Appeals commented on the "novel doctrine" that "the ability to serve the insurance company with process is the Florida test for determining whether the law of the forum will be applied in ascertaining the enforceability of policy clauses which are valid where the contract is made." The court then continued kindly:

Rather than attribute to the Florida court a literal meaning to the language it used, we think it intended to do no more than to declare that if the State of Florida had such significant contacts with the factual phases of the litigation as to give it a paramount interest in the control of the governing legal rules, then its invalidating statute would be applied. If the surmise which we have made, and we must make one, as to the meaning of the Florida court's statement of Florida law is a correct one, then it must be apparent that the court was persuaded of the existence of the required significant contacts in this case.38

The court of appeals nevertheless remained unconvinced that Florida had sufficient contacts to deprive the insurer of its defenses under the "suit-clause." It reaffirmed the conclusion it had reached in its earlier decision of the case, reversed the judgment of the trial court, and remanded to the district court for entry of judgment for the insurance company. None of the three judges participating in this decision had been among those who had participated in the earlier decision which they reaffirmed.

Again on certiorari to the Supreme Court that Court unanimously reversed the court of appeals,39 holding in the language of Justice Douglas that "Florida has ample contacts with the present transaction and the parties to satisfy any conceivable requirement of full faith and credit or

38. 319 F.2d 505, 510 (1963).
of due process." The Supreme Court thus upheld the initial judgment entered by the trial court in favor of the insured claimant. We are left wondering whether the Supreme Court decision in effect approves the Florida court's opinion extending application of the Florida act "to any contract whatever—foreign or domestic—when Florida's contact therewith, existing at the time of its execution or occurring thereafter, is sufficient to give a court of this state jurisdiction of a suit thereon."\(^4\)

If this interpretation is correct the *Clay* decision represents the extreme to which the Supreme Court has thus far gone under the *Klaxon* rule in recognizing and establishing the doctrine of pluralistic legislative jurisdiction based on the barest minimal contact. *Watson v. Employers Liability Assur. Corp.*,\(^4\) cited in the *Clay* opinion, dealt with a product liability insurance policy and in particular a clause, binding in the state where made, which prohibited direct action against the insurer until final determination of the obligation of the insured. The Supreme Court permitted Louisiana to nullify the direct action clause, but there it was a tort victim who sued and not a party to the contract, and the clause nullified was one in effect devised by the insurer and the insured to hinder and obstruct the tort victim's remedy. Thus Louisiana's action seems clearly less cavalier than Florida's intervention for the plaintiff in the *Clay* case to nullify the effect of the plaintiff’s own free and voluntary contract, legal and binding when and where made.

III. THE IMPACT OF PLURALISTIC LEGISLATIVE JURISDICTION ON KLAXON

A. Legal Background of Klaxon Rule

At the outset of this article attention was directed to the paradox between the *Erie* rule and its *Klaxon* offspring—the former designed to promote uniformity of law within a single state and the latter so conducive to diversity among the fifty states. Justice Brandeis based the *Erie* decision on the currently quaint theory that the Federal government is strictly limited on the grant of powers under the Constitution. Thus he stated:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of

\(^{40}\) Sun Ins. Office, Ltd. v. Clay, 133 So.2d 735, 738 (Fla. 1961).
\(^{41}\) 348 U.S. 66 (1954).
torts. And no clause in the Constitution purports to confer such a power upon the federal courts.\textsuperscript{42} It is curious that the Supreme Court thus based its \textit{Erie} decision on a theory of limited powers at the very time the same Court was enormously expanding the recognized powers of Congress by enlarging the constitutional concept of interstate commerce.\textsuperscript{43} Nevertheless Justice Brandeis' argument has residual validity even today. The power of the federal courts to make law can scarcely be deemed to be co-extensive with the legislative power of Congress. The commerce power was specifically granted under article one of the Constitution to the legislative branch of the government and not to the courts. The failure of Congress to enact laws providing uniform regulation of commercial paper\textsuperscript{44} or tort liability of interstate railways\textsuperscript{45} or franchise monopolies serving stations of interstate railways\textsuperscript{46} may be regarded as deliberate choices by Congress to abstain; and the federal courts cannot properly defeat this choice by substituting their own rules of common law. Traditionally the dormancy of the powers of Congress in these areas would not enlarge the powers of the federal courts but rather would confirm the power of the states to occupy the field within their respective domains.\textsuperscript{47} These arguments are particularly cogent when a federal court seeks to make law under an assertion of jurisdiction based solely on the diversity of citizenship of the parties before it without any claim that it is deciding a federal issue uniquely within its own province where its decision will be paramount to state law and binding upon state courts. The \textit{Erie} rule was directed at these diversity cases and its dominant policy was to eliminate variances in the substantive law applied to a given set of facts by the state courts on one side of courthouse square and by the federal courts on the other side. Something seemed amiss under the former rule of \textit{Swift v. Tyson}\textsuperscript{48} when the outcome of a law suit was made to depend simply on whether it was triable only in a state court or could also be tried in a federal court be-

\begin{footnotes}
\textsuperscript{42} 304 U.S. 64, 78 (1938). Brandeis refused to base his overruling of \textit{Swift v. Tyson} on the ground that \textit{Swift} depended upon an improper construction of the Rules and Decisions Act of Congress. The original misconstruction of the act, if such it was, could certainly be deemed ratified after lapse of nearly a century during which Congress abided by the interpretation without amending or clarifying the act.
\textsuperscript{43} \textit{E.g.}, Wickard v. Filburn, 317 U.S. 111 (1942).
\textsuperscript{44} An interstate bill of exchange was the subject of the suit in \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1 (1842).
\textsuperscript{45} Such tort liability was involved in the \textit{Erie} case. See note 3 supra.
\textsuperscript{46} Such a monopoly was the subject of the suit in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).
\textsuperscript{48} 41 U.S. (16 Pet.) 1 (1842).
\end{footnotes}
cause it met technical diversity requirements which had no substantive relevance to the cause of action.

On the other hand when the conflict in substantive rules of law is between two or more interested states rather than between the state and federal jurisdictions, we might reasonably regard the issue as a matter of unique federal concern. Here the federal courts would seem natural arbiters of the competing claims of the states involved. We do concede, nevertheless, that the federal courts have been loath to assume the role of such an arbiter. Even twenty years before *Erie* the Supreme Court in *Union Trust Co. v. Grosman* hold that a federal court sitting in Texas must enforce Texas local policy in dismissing an action on a Texas married woman's contract even though the woman had made the contract in and for performance in Illinois under whose law the contract was perfectly good. Three years after *Erie* the Supreme Court handed down its *Klaxon* decision and its even more controversial ruling in *Griffin v. McCooch*.

The *Griffin* case involved some New Yorkers who organized an oil syndicate which depended largely on the know-how of a Texas oil promoter. To protect their investment and ultimately to recoup their losses the New Yorkers caused the promoter while in New York to take out a life insurance policy with a New Jersey insurance company naming the New Yorkers as beneficiaries. The New Yorkers paid or advanced the money for the payment of all premiums on the policy. Nevertheless on the insured's death his Texas widow filed claim against the insurance company in Texas for the whole proceeds of the policy on the ground that by Texas law the New Yorkers would have no insurable interest in the promoter's life. The insurance company interpled the New Yorkers. In this interpleader action the federal court stood in a position distinct from any Texas court for at that time no Texas state court could have obtained personal jurisdiction over the New Yorkers. By its long-arm interpleader jurisdiction the federal court in effect shanghaied the New Yorkers into Texas jurisdiction and stripped them of their rights gained under the New York law on the theory that it had no other alternative but to apply Texas law. Here both New York and Texas may be regarded as having independent or pluralistic jurisdiction to impose on the insurance transaction certain legal consequences without, in either case, violating constitutional due process or full faith and credit. Texas construed its law as controlling even though its only connection

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49. 245 U.S. 412 (1918).
50. 313 U.S. 487 (1941).
51. 313 U.S. 498 (1941).
(apart from being the forum) was a single contact: the insured’s residence. New York, of course, with far more reason would have construed its law as governing the consequences of the transaction.

B. Effect of Expanding Jurisdiction in Personam

The problem has been aggravated, as already indicated, by the current retreat from the old formalism of Pennoyer v. Neff and its narrow restrictions on in personam jurisdiction exercisable by state courts. This retreat can be traced through the state non-resident motorist acts which today generally authorize constructive service of process on non-resident defendants in causes of action arising from motor accidents within the state, and in the so-called “long-arm” statutes being enacted by more and more states, which assert personal jurisdiction over non-residents on the basis of single acts or other minimal contacts within the state. The United States Supreme Court has gone far to support these innovations by its decisions in Hess v. Pawloski and McGee v. International Ins. Co. Also, in 1963, it liberalized rule four of the Federal Rules of Civil Procedure to extend such innovations of any state to the manner and place for service of process in any action brought in a federal court sitting in such state. Again, early in 1964 the Supreme Court put its stamp of approval on contractual contrivances whereby an interstate seller can subject his farflung customers to the court jurisdiction of some pre-selected state. The clear consequence, of course, is to offer a plaintiff in many cases involving multiple state contacts a far wider choice among forums available for filing suit. Under facts similar to the Klaxon case itself the plaintiff today could avoid the results of that decision by bringing his suit in New York where the Delaware defendant had originally entered into the contract sued upon. For practical purposes a basic key to the choice of law has become the choice of forum which more and more has become a matter within the plaintiff’s power of election.

C. Prospects for Modification of the Klaxon Rule

Any foreseeable modification of the Supreme Court’s extremism in applying the Klaxon rule would probably have to come, if at all, at the instance of Congress. Congress seemed to open the way to greater flexibility under the Klaxon rule when in 1948 it enacted section 1404(a) of the Judicial Act which provides:

52. 95 U.S. 714 (1877).
53. See note 5 supra for examples of these statutes.
54. 274 U.S. 352 (1927).
57. See note 2 supra.
For the convenience of parties and witnesses, *in the interest of justice*, a district court may transfer any civil action to any other district or division where it might have been brought (emphasis added).

This provision suggested the possibility that a federal court faced with a difficult choice of law in a diversity case might escape the *Klaxon* straitjacket “in the interest of justice” by transferring the case to a suitable forum with a more acceptable rule of law. Thus in the airline cases a federal court sitting in New York might avoid, if it saw fit, the unorthodox New York *Kilberg* rule by transferring the case to a federal court sitting in Massachusetts. The Supreme Court destroyed any hope of this solution by its decision in *Van Dusen v. Barrack* which held that upon any transfer under section 1404(a) the transferee court would be compelled to apply the choice of law of the transferor forum and not of the transferee. Thus such transfer can effect no change in the choice of law or in the substantive law applicable in the case. The plaintiff will continue to enjoy any advantage which he may have gained by his original choice of forum.

In the spring of 1964 the American Law Institute issued a report in draft form of a Study for the Division of Jurisdiction between State and Federal Courts. It recommends various changes in the United States Judicial Code which would affect the operation of the *Klaxon* rule in a number of ways. In the first place the recommendations would substantially curtail diversity jurisdiction in the following respects: 1) by precluding any person from invoking federal jurisdiction, either originally or on removal, in any district in a state of which he is a citizen, 2) by restricting a corporation's access to federal courts, and 3) by virtually eliminating a commuter's recourse to the federal courts in matters arising in a state where he works. These changes, of course, will in no way deter the proliferating pluralism of our jurisdictions. The study continues to favor the *Klaxon* choice of law rule and recommends legislation which would codify the rule of *Van Dusen v. Barrack* whenever the transfer of venue under section 1404(a) is made upon motion of the defendant. The study, however, recommends an interesting exception to the *Van Dusen* rule when the transfer of venue is made upon motion of the plaintiff. In such case the study recommends legislation which would

60. 2 ALI § 1302, comment at 67-77.
62. 2 ALI § 1306(c), comment at 96-97.
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require the transferee forum to apply the choice of law rule of the state in which it sits. The reporters believe that upon obtaining such a transfer of venue the plaintiff should not be permitted to preserve any advantage which he might have obtained by his original choice of forum.63

The reporters also, in effect, manifest their disenchantment with the results reached in *Griffin v. McCoach*64 by recommending legislation which would permit the federal court to make its own independent choice of law in cases where it exercises jurisdiction by reason of long-arm federal process beyond the reach of the process of the state in which it sits. Thus, in federal interpleader cases the district court would be permitted to make its own determination as to which state rule of decision would be applied.65 The same exception would apply under a recommended new chapter of the Judicial Code entitled "Multi-Party Multi-State Diversity" which would provide original jurisdiction and long-arm federal process in any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a state and the other is a citizen or subject of another territorial jurisdiction.66 In basing these two exceptions on the absence of personal jurisdiction of the state courts over the parties to the suit the study uses an approach curiously similar to that of the Florida court in its declaratory opinion in the *Clay* case. That court, it will be remembered, purported to invoke Florida law whenever Florida's contact "is abundantly sufficient to give a court of [Florida] jurisdiction of a suit thereon."67

In a memorandum published in an earlier draft of the American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts, Professor Cavers enumerates alternatives to the abolition of *Klaxon*,68 including a relatively modest and attractive proposition that the federal courts exercise greater freedom in choice of law decisions in diversity cases. Professor Cavers says:

[W]here, as in choice of law, conformity is not dictated by constitutional compulsion, the federal courts should be allowed to exercise greater freedom. It would certainly be compatible with

63. *Id.* § 1307(b), comment at 99.
64. 313 U.S. 498 (1941).
65. 2 ALI § 2361(c), comment at 158.
66. *Id.* § 2344(c), comment at 147.
retention in the states of the power to delimit their own policies if a federal court on an issue of choice of law were to enjoy at least as much freedom as a state's intermediate appellate court. Indeed I believe the federal court should also be free to re-examine doctrines which, though still unchallenged, no longer seemed likely to be accepted by the state's supreme court. 69

The court of appeals in its initial decision of *Clay v. Sun Ins. Office, Ltd.*, 70 chose to apply Illinois law on a constitutional basis without determining whether Florida would have applied its own local law. If the court had decided the same way but, absent Florida authority, purported to interpret Florida law as not reasonably intended to apply to the transaction at bar, conceivably the Supreme Court might have affirmed in the same spirit as that of Professor Cavers. The Supreme Court's language, however, discourages us from believing that this would have been the result. Three justices, Black, Warren, and Douglas, seemed to proceed on the inarticulate premise that absent an authoritative state ruling to the contrary, a state may be presumed to intend to apply its local law to interstate transactions to outermost constitutional limits. 71 Justice Frankfurter, writing for the majority, advocated as he has in other similar situations that the federal court should suspend decision until it can secure a state court's determination of any unresolved question of its local law. 72 So here again, the Supreme Court has made reasonably clear by its *Clay* decisions that it is not of a mind to modify the *Klaxon* rule even so modestly as Professor Cavers has suggested.

Nevertheless, we know how Congress and the Supreme Court have, from time to time in piecemeal fashion, limited and made ad hoc exceptions to the *Erie* doctrine itself. Most of these modifications have applied to situations where the United States government or one of its agencies was party to the action or where the jurisdiction of the federal courts is not based solely on diversity of citizenship of the parties. Thus the Court has held that the availability of equitable defenses on a note which has been pledged with the Federal Deposit Insurance Company must be determined by federal common law and not by the local law of either of the two states involved. 73 It also has held that federal law merchant developed under the *Swift v. Tyson* regime must govern the rights and duties of the United States government on a treasury check which

69. Id. at 211.
70. 265 F.2d 522 (5th Cir. 1959).
72. Id. at 212.
had been negotiated on a forged endorsement and that federal common law fashioned in accord with the policy of our national labor laws must govern all suits for violation of labor contracts under section 301(a) of the Labor Management Relations Act. Congress in turn has provided that the tort liability of the United States government for the negligent or wrongful acts or omissions of its employees shall be governed by the law of the place where any such act or omission occurred and that the tort liability of railroads for injuries or death of their employees while employed in interstate commerce shall be governed by the Federal Employers Liability Act. Even in diversity cases the Supreme Court has held that the Erie doctrine does not extend to the federal right to trial by jury and in prescribing the Federal Rules of Civil Procedure the Court presumably exempted from Erie all matters covered by the rules.

In like manner we may possibly see future ad hoc modifications in the application of the Klaxon and Erie rules in areas of great federal concern or where the need for uniformity looms particularly large. Thus Judge Friendly has commented on the slowness with which states are adopting the Uniform Commercial Code and has suggested the feasibility of a Federal Commercial Code modeled after the Uniform Code. However, in this particular area things are now moving so rapidly that perhaps Congressional action will be unnecessary. During the last two years eighteen additional states have adopted the Uniform Commercial Code bringing the total number of states which have done so to twenty-nine. Knowledgeable men think it likely that within five years practically all the fifty states will have adopted the Code. Even absent a federal statute the Court of Claims and the Armed Services Board of Contract Appeals, respectively, have recently ruled that the Uniform Commercial Code governs the interpretation of federal contracts because it reflects "the best in modern decision and discussion." If this trend continues the problem of Erie and Klaxon with respect to commercial paper may eventually in the ordinary course of events be resolved in favor of uniformity. In this connection it should also be noted that the Uniform

Commercial Code itself contains provisions for determination of the choice of law in any transaction which bears "a reasonable relation" to two or more states.\(^\text{82}\)

Similarly Professor Prosser has made a strong case in favor of a federal statute to govern multiple state libels.\(^\text{83}\) Attention might also be directed to a recent United States Supreme Court decision holding that the judge-made act of state doctrine is a federal and not a state question of law in a diversity case.\(^\text{84}\) The complexity of questions raised by the New York airline cases discussed earlier in this paper point to the desirability of a federal law to regulate and standardize the liability of airlines, manufacturers, suppliers, and operators for injuries or deaths suffered on interstate airlines.\(^\text{85}\) It is important to note that such modifications are more apt to take the form of establishing federal rules of law extending beyond diversity cases rather than guidelines to assist in the choice of one state rule of law rather than another. In other words, any changes are apt to affect the scope of the \textit{Erie} rule as well as \textit{Klaxon}. As Judge Friendly has remarked, "state courts must conform to federal decisions where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end."\(^\text{86}\) Even in areas where Congress and the Supreme Court may not see fit to impose federal law binding upon state courts much can be said in favor of abrogating the \textit{Klaxon} rule. Such abrogation would mean that in diversity cases presenting questions of choice of law, a Federal court could exercise its own independent judgment in choosing and applying one of conflicting pluralistic rules of law asserted by two or more interested states. The Federal court would no longer be compelled blindly to apply the law of the state in which it happened to be sitting.

D. \textit{Klaxon’s Relation to Pluralism and Standards in the Choice of Law}

Today's pluralism is a far cry from the cherished ideal of uniformity of decision which once animated American law in theory if not always in practice. This was the ideal that all forums, regardless of variances in their domestic laws and regardless of multiple state contacts, would at-

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82. \textit{Uniform Commercial Code}, § 1-105.
84. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-424 (1964). The Supreme Court here applied the act of state doctrine to enforce a discretionary Cuban expropriation without compensation which the State Department itself had denounced as a violation of international law. The court declared that federal and not state law governed because "the problems involved are uniquely federal in nature." The same might be said of choice of law questions involving the competing interests and conflicting policies of two or more states.
85. Friendly, \textit{supra} note 80, at 88, 89.
86. \textit{Id.} at 82.
tach the same legal consequences to a given set of operative facts. Traditional American theory sought to prescribe unique contacts in each case which would give one territory rather than another the exclusive jurisdiction to define authoritatively the ultimate legal consequences of the respective operative facts. The rights thus defined by a state found to have exclusive jurisdiction were said to be "vested" and entitled to recognition and usually to enforcement by all other states. If no rights were granted by such state with jurisdiction, then no rights could be granted or enforced by any other state. Justice Brandeis presents a good example of this view in his majority opinion in *Bradford v. Clapper.* 87 There he held that the full faith and credit clause of the constitution compelled a court to give effect to the compensation law of the state of principal employment and to deny the common-law tort remedy under the law of the state of injury, which also happened to be the forum state. The first state, according to Brandeis, had exclusive legislative jurisdiction to define the jural relations between employer and employee. Remembering that Brandeis a few years later authored the opinion in *Erie v. Tompkins* 88 which bound federal courts in diversity cases to apply the substantive law of the states in which they sat, it is interesting to find him in *Bradford* invoking constitutional compulsion to impose a federal choice of state law upon all states.

Justice Stone's approach in *Bradford v. Clapper,* 89 on the other hand, offers a sharp contrast. He concurred in the result of the pre-*Erie* case but on the basis of judicial discretion and not of constitutional compulsion. Subsequently Stone wrote court opinions developing the theory that in workmen's compensation cases with multiple state contacts, each interested state could properly apply its own remedy in the matter without compulsion to defer to the interest or law of any other state or states. 90 For example, in the *Alaska Packers* case he said:

In the case of statutes, the extra-state effect of which Congress has not prescribed, where the policy of one state statute comes into conflict with that of another, the necessity of some accommodation of the conflicting interests of the two states is still more apparent. A rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict

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87. 286 U.S. 145 (1932).
88. 304 U.S. 64 (1938).
89. 286 U.S. 145 (1932).
arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own. Unless by force of that clause a greater effect is thus to be given to a state statute abroad than the clause permits it to have at home, it is unavoidable that this Court determine for itself the extent to which the statute of one state may qualify or deny rights asserted under the statute of another. 81

Justice Stone delivered the foregoing opinion before the _Erie_ and _Klaxon_ decisions. Hence he reserved to the federal courts and to the United States Supreme Court the function of determining the extent to which the law of one state may qualify or override the law of another. Any rescission of the _Klaxon_ rule would merely revest this function in the federal courts sitting in any diversity cases. In fulfilling this function we see no compelling reason why the federal courts would be at any greater disadvantage than the state courts in working out rational and coherent principles to guide their actions.

Nevertheless, in defense of the _Klaxon_ rule Professor Cavers has argued:

Are we to conclude that the disinterested federal forum, if freed from _Klaxon_, would be more likely to reach the right solution (which, moreover, it could impose on both states)? If conflict persists under a choice-of-law process that encouraged courts to examine the policy implications of their decisions, I believe a more probable explanation would be that most of the chronic differences would reflect genuine differences in values. Moreover, I doubt that there is any supra-state hierarchy of values which would justify the federal courts exercising diversity jurisdiction in overriding one state's strongly-held values in favor of another's as long as constitutional limits on state power were respected. Yet the attack on _Klaxon_ implies the proposition that the states should, in diversity cases, be ousted of their authority to identify and delimit their own policies even though these policies are kept within the bounds set by the Supreme Court under the Full Faith and Credit and Due Process Clauses. 82

In similar vein Professor Currie asserts that opposition to the _Klaxon_ rule "assumes that it is possible to develop a rational system of conflict of laws in the abstract, independently of the construction and interpreta-

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81. 294 U.S. 532, 547.
tion placed by the courts of a state upon its laws.\(^{93}\) Elaborating his position, he continues:

Many familiar conflict-of-laws problems can and should be resolved by reference to the governmental policies of the states concerned, and to the interests of the respective states in the application of such policies. Another way of saying this is that many conflict-of-laws problems can and should be resolved through construction or interpretation of the laws in question. The applicability of a statute or common-law rule to a case having foreign aspects presents a question of construction or interpretation of the same kind as does the applicability of the same statute or rule to a marginal domestic situation, or a situation existing prior to the enactment of the statute. If this is true, it is clear that a federal court should be bound as firmly to apply the state court's construction of the law in its application to cases having foreign aspects as it is bound to apply the state court's construction to the law in its application to marginal domestic situations and pre-existing conditions.\(^{94}\)

The foregoing views are puzzling. The abrogation of the *Klaxon* rule need not strip the state courts of their function of construing and interpreting and even formulating the laws and policies of their respective states. Absent the *Klaxon* rule, a federal court would be called upon merely to choose between the laws and policies of two or more states with legitimate contacts or interests in a given transaction. The individual states would still determine the intended scope of their own laws and policies and their intended application to transactions having foreign aspects. If a federal court in a diversity case is called upon to make a choice of law decision at a time when the courts and legislatures of the states involved have left uncertain the precise scope of their respective laws and policies, the federal court would perhaps be called upon at the threshold of its decision, to define the limits to which it believes the states would assert their respective laws and policies. But the federal courts do this much already in operating under both the *Erie* and the *Klaxon* rules.

To illustrate let us go back to the airline cases. If the federal court had decided the *Pearson* case before the New York court had decided *Kilberg*, it is hardly likely it would have reached the novel and unprece-


\(^{94}\) Id. at 434.
dented result of those two cases. Under the Klaxon rule the federal court would have no choice but to follow the New York choice of law and there was no pre-Kilberg authority to show that the New York court would apply the New York rule of damages to a Massachusetts tort. Similarly, if the Klaxon rule were put aside the federal court would still be restricted to a choice between the end result prescribed by the law and policy of New York (including its choice of law) and that prescribed by the law and policy of Massachusetts. It is reasonably certain that Massachusetts would have limited the damages in the airline cases, and prior to Kilberg there was no precedent to indicate that New York would not deem itself traditionally bound by the Massachusetts limitation of damages. Under such circumstances the laws and policies of the two states, taken as a whole, would not have appeared to conflict and therefore the federal court would have had no choice to make. It is not proposed that repeal of the Klaxon rule would empower a federal court to extend the New York rule of damages to a Massachusetts tort when New York itself would not do as much.

Of course situations arise where the full intended scope of the laws and policies of the respective states are uncertain. Here the federal courts are required to do their own construction and interpretation of state laws, but this is equally true with or without the Klaxon rule. For example in Waynick v. Chicago's Last Dep't Store, a dram shop case in which the defendant sold liquor in Illinois and his customer injured the plaintiff in Michigan, the Seventh Circuit Court of Appeals found itself bound by Illinois and Michigan decisions to the effect that the Illinois Dram Shop Act did not apply to out of state torts and the Michigan statute did not apply to out of state liquor dealers. Under the circumstances the Court showed Houdini-like dexterity in escaping both the Erie and the Klaxon straitjackets by permitting recovery under the alleged common law of Michigan in the belief that this would not violate the policy of Illinois, the forum state, since Illinois also imposed criminal penalties for sale of liquor to intoxicated persons. Here the federal court took the lead in an enlightened interpretation of Illinois law and policies—a lead which the Illinois courts were not loathe to follow. In the Colligan case four years later, the Illinois Appellate Court reached a similar result under presumed Indiana common law where the defendant had sold liquor in Illinois and his customer had injured the plaintiff in Indiana. Here in its apparent eagerness to reach the "right result" the court entered judgment without proof of Indiana common law but on the presumption that In-

95. 269 F.2d 322 (7th Cir. 1959), cert. denied 362 U.S. 903 (1960).
diana common law was the same as Illinois common law prior to the Illinois Dram Shop Act.

The abrogation of the Klaxon rule would not of itself oust states of their authority to identify and delimit their own policies, as Professors Cavers and Currie seem to fear. It would merely deprive them of the final say as to whether their particular policies should prevail over conflicting policies of sister states with equal or better claims to legislative jurisdiction over the respective matters involved. More than a single state must be involved to make a conflict of laws and policies. The question is simply: which state should be the appropriate power to identify and to select between those laws and policies. Should the answer be within the exclusive power of a state, which may have relatively minor contacts, simply because by chance or plaintiff's adroit choice it happens to be the forum? An independent nation can, if it be so minded, employ all its effective power to enforce its particular rules and policies in a given transaction without regard for the interest or legislative jurisdiction of another nation with different rules and policies. But is it appropriate that this same bleak principle of effective power should control the choice of law among our fraternity (or sorority) of federated states even where there be diversity of citizenship and a federal court is in a position to resolve the issue?

There seems little basis for fearing that abolition of the Klaxon rule would result in a reversion by the federal courts to the mechanistic choice of law rules prescribed by the original Restatement of 1934 or even to the more flexible norm of the tentative draft of the Restatement which seeks to apply the law and policies of the particular state which has the most significant relationship with a given transaction. After all, it was before the Klaxon case that Justice Stone and the United States Supreme Court developed the pluralistic doctrine in workmen's compensation cases that an injured employee could elect his remedy under the laws of either the state of employment or the state where the injury occurred. In electing an administrative remedy under the workmen's compensation laws, the claimant is of course required to proceed in the forum which has the machinery to process the remedies he invokes. But in a migratory civil action a plaintiff should be able to sue in any convenient forum under alternative counts based on the law and policy of any state having sufficiently significant contacts with the transaction involved. Thus in the airlines cases both New York and Massachusetts gave alternative remedies to the families of the deceased passengers. Prescinding from the Klaxon rule there seems no reason to suppose a judge sitting in a federal court could not fairly consider New York's jurisdictional claim to pro-
vide more liberal remedies for the claimants. Philosophy, intelligence, predilections, and temperament differ from judge to judge according to the qualities of the individuals involved without regard to whether they sit on federal or state courts. A federal judge as such can be expected to differ from a state judge as such principally in his greater detachment from the parochial self-interests of his local state. This would be a considerable virtue in any judge called upon to choose between the conflicting policies and interests of two or more states.

Quite apart from the Klaxon rule the federal court might well have reached the same result in the Pearson case as it did. New York certainly had substantial and significant contacts with the occurrence—more than adequate to justify its assertion of legislative jurisdiction in the matter. New York did no more than to provide remedial damages for a loss actually suffered. Massachusetts did not deny the real loss suffered by the claimants and it likewise imposed sanctions against the airline for its alleged negligence. It differed only in its arbitrary limitation of the damages it would allow. But suppose New York law also permitted the recovery of punitive damages under the circumstances of the case. Such punitive damages might be within the rubbery confines of the Constitution but a federal court free of the Klaxon rule would certainly have good ground on which to refuse to recognize New York's assertion of penal jurisdiction while at the same time upholding its jurisdiction to grant remedial damages for a loss actually suffered.

Suppose further that the airflight had been between Boston and a point in western Massachusetts and at the end of the flight the plane had been blown off course and crashed in New York a few feet from the Massachusetts state line. Under these circumstances the great weight of the traditional locus delicti rule would presumably assure the constitutionality of applying New York's more liberal measure of damages. Under the existing state of the law a plaintiff would certainly be well advised to bring his suit in New York. Nevertheless under new approaches to choice of law questions which seek a transaction's "center of gravity," a grouping of contacts, and a weighing and evaluation of the significance of contacts some judges might be expected to find that New York's contact to the transaction was one of inconsequential chance with insufficient significance to justify the application of New York's more liberal measure of damages. If the defendant were a Massachusetts airline which customarily restricted its flights to Massachusetts territory this argument would be particularly strong. Apart from the Klaxon rule we might find a federal judge sitting in a diversity case even within a New York district, applying Massachusetts' limited measure of dam-
ages. Of course, if it were clear that even in such a case a Massachusetts court would apply the law of the place of injury and so also would a New York court, the federal court could be expected to go along. No question of choice of law would be presented. This decision to apply the law of the place of injury would result not from any conservatism on the part of the federal court or refusal to adopt a functional approach based on consideration of the legitimate interests and policies of the states involved but rather from such postures on the part of the state courts involved.

Let us turn now to some contract cases. It was the United States Supreme Court in pre-<em>Erie</em> and pre-<em>Klaxon</em> days which contributed mightily to the sound (but not absolute) choice of law principle which favored the validating law of one state over the invalidating law of another. This is illustrated by two early Supreme Court decisions. One in 1875 involved a bill of exchange drawn and orally accepted in Illinois and payable in Missouri, and the other in 1891 involved a bill of exchange drawn and orally accepted in Missouri and payable in Illinois. The oral acceptance was valid under Illinois law but invalid under the Missouri statute of frauds. In each instance the Court upheld the validity of the acceptance and enforced payment of the bill. In the earlier case the Court invoked the mechanical rule that matters bearing upon the execution, interpretation, and validity of the contract are determined by the law of the place where the contract was made. In the latter case the Court took a more functional approach, reciting that the contract was to be entirely performed in Illinois where the defendants resided and carried on their business, concluding therefore that these facts indicated the parties had contracted "with a view to the law of Illinois." Despite the varying rationales of the two cases they are readily reconciled on the validating principle favoring the law of any involved state which would uphold contractual obligations freely assumed in good faith. The same principle was observed by the Supreme Court in pre-<em>Erie</em> usury cases. It is also propounded in the tentative draft of the <em>Restatement of the Law of Conflicts</em>:

A prime objective of contract law is to protect the justified expectations of the parties who naturally expect and intend that all the contract's provisions should be valid and effective. For this reason, the courts will be inclined to apply a law which would uphold the entire contract or a provision thereof in pref-

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ence to one under which the contract, or the particular provision, would be invalid.100

Against the foregoing, contrast the decision in Clay v. Sun Ins. Office, Ltd., where the Supreme Court applied the strict Klaxon rule to reverse the Fifth Circuit Court of Appeals.101 It invalidated the explicit "suit-clause" of the contract, freely entered into by the contracting parties, by the process of applying the local law of the forum state with minimal contacts which had not come into existence until after the contract had been in force for some time. The decision illustrates how Klaxon's doctrinaire absolutism can defeat any intelligent choice of law approach by the federal courts in the face of local parochialism.

Perceptive students of the judicial process realize that courts (including some of the best judges) are prone to fashion their judgments to attain what they believe to be practical or just results under the highly particularized circumstances of each case.102 They may disguise the process by juggling alternative rules or principles each of which seems couched in sufficiently broad language to cover all cases. The two pre-Erie Supreme Court cases which we have just discussed provide one example of this.103 Let us see further how this judicial practice might affect a case similar in facts to Union Trust Co. v. Grosman.104 In this pre-Klaxon case Justice Holmes, speaking for the Supreme Court, took a Klaxon-like approach to invalidate a good Illinois contract made by a Texas married woman. Under similar facts today a plaintiff could avoid the sad consequences of that case by bringing his suit in Illinois rather than in Texas and obtaining jurisdiction of the Texas woman under the Illinois long-arm statute. The Illinois court would almost certainly uphold and enforce the contract under the law of Illinois where the money-lending bank was doing its business and where the contract was signed and was to be performed. The Texas policy was designed to protect married women from uxorial pressure to pledge their fortunes in the interest of their respective husbands. Such a law represents a minority

100. Restatement, Conflict of Laws 33, 34 (Tentative Draft No. 6, April 1960). The sentence immediately following the passage quoted is as follows: "A law which will uphold the contract will not be applied in preference to the local law of a state where a considerable majority of the important contacts are grouped."


102. This "just-result" test, of course, involves value judgments which scandalize many legal theoreticians because they elude rigid standards for judicial certainty which such theoreticians perenially hope can reduce decision-making to a computer-like processing of all factors involved. See Carpenter, Value Judgments as Norms of Law, 7 J. Legal Ed. 163, 176-77 (1954). Perhaps this is one of the reasons for the continued appeal of the Klaxon rule with its relative certainty and built-in bias in favor of the forum.

103. See cases cited notes 96 and 97 supra.

104. 245 U.S. 412 (1918).
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archaic rule stemming from common law but inconsistent with the independent role and status of modern women. Despite the publicized image of dominating Texan males, courts outside Texas are not apt to assume that the proportion of submissive wives requiring protection is any greater in Texas than in any other state. Consequently one would normally expect a non-Texas court (including a federal court sitting in Texas if only it were free of Klaxon shackles) to apply Illinois law to enforce the contact against the Texas wife. Suppose, however, the evidence in a particular case showed that the wife was unskilled in commerce and dominated by her wheeler-dealer spouse, and that the latter had deliberately brought her to Chicago away from the protective sanctuary of her home state in order to get the advantage of her personal fortune in some risky venture of his own. Suppose also that the Chicago money-lender could be charged with notice of these circumstances. Equitable elements now enter the scene and a federal court sitting in Illinois, acting independently of the Klaxon rule, might be expected to give greater weight than otherwise to the protective domiciliary law of Texas. Texas law and policy might be justified here but not in a situation where a knowledgeable wife has acted in cooperation with her husband to mislead unwary non-Texas creditors.

CONCLUSION

We suspect that many “progressive” state courts which depart from traditional mechanical choice of law rules in favor of more flexible principles and standards are actually moved by mixed impulses including partiality for the law of their own respective states or solicitude for the plaintiff or both. For example, the courts of California, Wisconsin, New Jersey, and New Hampshire have in recent years refused to look to the traditional lex locus injuriae to determine the question of intra-family tort liability where the parties were residents of the forum state but the injuries occurred in other states whose laws precluded intra-family liability. They followed a new approach of characterizing the intra-family issue as one of family law subject to the state of domicile rather than as one of tort subject to the state where the injury occurred, which has no governmental interest in the intra-family liability of non-residents. Such approach in every case decided thus far has enabled the courts to apply the law of their own states and to permit recovery by the plaintiffs. It remains to be seen what these same courts may do when family mem-

bers from a common-law state which denies intra-family liability come into the respective forum states and sue to recover damages for injuries suffered within such forum states. Of course, behind the scenes in such cases there usually lurks an insurance company. It is questionable whether the courts will be so ready to invoke domiciliary law when that law is contrary to the law of the forum state where the tort occurred and would result in denying the plaintiff recovery for real injuries suffered. Under such circumstances we suspect that some or all of these courts might see fit to recast their rationale, finding the common-law rule of the domiciles to be backward and obsolete by modern sociological standards of the forum states and thus contrary to strong public policy. This would bring these cases into line with the “local public policy” theory underlying the New York rule in the airline cases and the Florida rule in the Clay decision. This theory in turn depends on the unabashed acceptance of pluralistic legislative jurisdiction which plays down the principle of uniformity.

We do not believe, however, that pluralism should lead to the complete abandonment of all efforts toward some degree of uniformity in the standards and principles acceptable as guidelines in choice of law decisions. In this respect, at least, we seem to be in agreement with most legal authorities writing on the subject. However, we go further and surmise that the federal courts could contribute considerably more to the achievement of some relative uniformity if they abandon the Klaxon rule when called upon to weigh the conflicting claims and interests of two or more states. True, the federal courts are divided into eleven circuits which often disagree, but at least they form a single judicial system. Uniformity and not pluralism is their avowed goal and they are subject to the occasional direction and control of the Supreme Court when it takes cases on appeal or certiorari. But by adopting and clinging to the Klaxon rule the federal courts have abdicated their role in the choice of law area. In such matters it must now be the state courts of the respective state forums which weigh the diverse interests of the states involved or prescribe their weighing in the balance. Uniformity becomes a relatively remote objective when we cope with the stark reality of pluralistic tolerance, exemplified by the Supreme Court’s Clay decision and by the relegation of the choosing function to the untrammeled discretion of the courts of our respective fifty states—each possibly with its own ax to grind.106

106. The United States Supreme Court recently discarded its tolerance for pluralism among the states in the choice of law to determine the state entitled to escheats and imposed its own standard on the adversary states. In his opinion Justice Black said:

The ‘contacts’ test as applied in this field is not really any workable test at all—it is simply a phrase suggesting that this Court should examine the circumstances
Mere abrogation of the *Klaxon* rule would obviously not bring about complete uniformity nor destroy pluralism in the choice of laws applied by state courts in non-diversity cases. But it would enable federal courts to assume a tutorial role to which at least they would seem entitled by their eminence and their unique position as natural arbiters among the individual states making up our federation. It may sometimes result in variances in decisions reached by federal courts in diversity cases and those reached in non-diversity cases by state courts on the other side of courthouse square. But for every such variance it will also help to resolve the variances in choice of law decisions made by federal courts in one state and decisions under similar facts which federal courts must today accept in another state.

The men sitting on the federal bench today include many of the better qualified and more forward looking jurists in our country. It seems about time they should be brought back into the mainstream of discussion and rule-making in this area of choice of laws. Their talents should be used to formulate less partial standards to evaluate the conflicting jurisdictional claims of individual states. If the federal courts did exercise this responsibility the structure of their organization into eleven circuits under the suzerainty of the Supreme Court would give them a great advantage over the fifty pluralistic states in the effort to achieve reasonable uniformity. If the federal courts did succeed in establishing a relatively high degree of uniformity in this area the force of their example could be expected to exert a strong influence on the state courts in their non-diversity decisions. It may be a virtue that this influence would be one of persuasion and not compulsion. The state courts would still retain freedom in the area of non-diversity cases. Within this area they could continue to define their own interests and develop their own policies, to differ and dissent in matters where they may feel most strongly concerned, and to continue to make their own contribution to the federal-state and inter-state dialogue. The fact remains, however, that this promising solution can be attempted only in the event of the demise of the *Klaxon* rule, for only then can the federal courts contribute their efforts to this problem from their unique point of vantage as national and relatively impartial courts. It is this demise of the *Klaxon* rule, improbable though it may be in present prospect, which should be accomplished.

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surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim . . . seems stronger than another's. *Under such a doctrine any State likely would easily convince itself . . . that its claim shall be given priority.* (Emphasis added.)

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