A Resurgence of the Klaxon Controversy - Contemporary Legal Trends Revitalize an Old Principle

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A RESURGENCE OF THE KLAXON CONTROVERSY — CONTEMPORARY LEGAL TRENDS REVITALIZE AN OLD PRINCIPLE

I. Introduction

In the 1941 landmark decision of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, the United States Supreme Court concluded that the principle of *Erie R.R. v. Tompkins* extended to the field of conflict of laws. Under *Klaxon*, a federal court must apply the conflict or choice of law rule prevailing in the forum state to the extent that *Erie* dictates that state law should supply the rule of decision applicable to a case. The *Klaxon* decision has evoked extensive debate among legal theorists, and recent developments in the choice of law area have caused the debate to intensify. A resurgence of the controversy has also been engendered by the American Law Institute's proposals to extend federal diversity jurisdiction to encompass what are termed multi-party, multi-state diversity cases. These proposals recommend amendment of the Judicial Code to empower district courts to entertain suits which cannot be maintained at the state level because of the inability of any state forum to acquire personal jurisdiction over all parties whose joinder is deemed "necessary" for a just adjudication of the controversy. The subject matter jurisdiction of the district courts in these cases is to be perfected by "minimal" diversity of citizenship, a diversity between any plaintiff and any defendant. Since the inability of the state courts to adjudicate these cases is due to territorial limitations upon the effective service of state process, the district courts are to be accorded "worldwide" service of process in order to summon all "necessary"

1. 313 U.S. 487 (1941).
2. 304 U.S. 64 (1938).
4. A party is deemed "necessary" as a defendant if complete relief cannot be accorded the plaintiff in his absence, or if dismissal would be necessitated under federal or state rules without his joinder. ALI STUDY § 2341(b), at 33. A party is deemed "necessary" as a plaintiff if he claims an interest in the subject matter of the action and is so situated that disposition of the action in his absence may leave the defendant subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations. ALI STUDY § 2343(b), at 36.
5. ALI STUDY § 2341(a), at 33. In general diversity litigation, the rule of *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), necessitating "complete" diversity of citizenship between every plaintiff and every defendant, has been followed. According to the ALI, however, the *Strawbridge* rule is not compelled by article III of the Constitution, so that "minimal" diversity is a permissible basis for federal subject matter jurisdiction. ALI STUDY 180–90. See Haynes v. Felder, 239 F.2d 868, 875–76 (5th Cir. 1957). Approval of this view is not, however, unanimous. See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 Mich. L. Rev. 483, 526–27 (1957).
The immediate importance of the ALI’s proposals to the \textit{Klaxon} controversy is found in the recommendation that a district court should be free, in these multi-party, multi-state diversity cases, to make its own determination upon the issue of which state’s substantive law is applicable, without being compelled to follow the choice of law rule of the state in which it is sitting.\footnote{8} The recommendation of so revered a body as the ALI that \textit{Klaxon} be abrogated in a specific type of diversity case has prompted an acute re-appraisal of \textit{Klaxon}’s role in the framework of general diversity jurisdiction.\footnote{9} In continuation of this trend, this comment will present and attempt to evaluate current opinion regarding the propriety of the \textit{Klaxon} principle as it operates in the area of general diversity jurisdiction. Brief attention will also be directed to the suggested abandonment of \textit{Klaxon} in the type of multi-party, multi-state diversity cases envisioned by the ALI’s proposals.

\section{Traditional Attacks upon \textit{Klaxon}}

Criticism of the \textit{Klaxon} rule as it operates in the area of general diversity jurisdiction is neither new nor undisputed. One line of attack has centered around \textit{Klaxon}’s alleged tendency to encourage interstate forum-shopping whenever a defendant is amenable to service of process in more than one state.\footnote{10} The compulsion on the part of the district court in each state to follow the local choice of law rule is said to afford a diversity plaintiff considerable leeway in the selection of an opportune forum, since it is likely that at least one state will have a rule favorable to his cause. It is also asserted that the \textit{Klaxon} rule thwarts an essential aim in conflict of laws theory by precluding the attainment of a uniformity in choice of law rules, which will result in the same substantive law being applied to a given factual situation, regardless of the federal forum chosen.\footnote{11}

In answer to these critics, defenders of \textit{Klaxon} assert that there is little or no convincing evidence that the \textit{Klaxon} rule appreciably encourages

\begin{thebibliography}{9}
\bibitem{7} ALI Study § 2342(a), at 34.
\bibitem{8} ALI Study § 2344(c), at 39.
\end{thebibliography}
interstate forum-shopping, and that, in any event, abolition of *Klaxon* would signal the return of intrastate forum-shopping by non-resident plaintiffs against resident defendants unable to seek removal.12 The *Erie* Court implicitly condemned intrastate forum-shopping by establishing a policy favoring uniformity of outcome with respect to decisions of federal and state courts sitting within the same state. In so doing, the Court necessarily recognized that interstate forum-shopping is a lesser evil which must be tolerated as the inevitable safety valve for opportunists. The *Klaxon* decision appears to rest squarely upon the uniformity of outcome principle of *Erie*.13 Since the policy fostered by both decisions is the same, it would appear that any criticism of *Klaxon*’s alleged tendency to encourage interstate forum-shopping is, in reality, an attack upon the recently reaffirmed policy14 of the *Erie* decision itself. Furthermore, *Klaxon* defenders insist that the quest for uniformity in the choice of law principles governing diversity cases through the implementation of independent federal rules is of questionable validity when the sacrifice to legitimate state interests in the choice of law field which would result from this uniformity is considered.15 Even if it be conceded that such uniformity is a desirable goal, the hope that federal courts released from *Klaxon* will bring about the sought after consonance is largely chimerical when the unimpressive record of the federal judiciary under *Swift v. Tyson*16 is also considered.17

### III. A NEW APPROACH TO STATE CHOICE OF LAW THINKING

The most compelling arguments for and against the abrogation of *Klaxon* are to be derived from the fact that, in legal commentary and in the penumbra of more recent state court decisions, a new concept of the proper role of the state judiciary in the choice of law process has been emerging. A generalized summary of this development is a prerequisite to further informed discussion of the *Klaxon* problem.

The mechanical choice of law rules of the original *Restatement of Conflicts*,18 and the Bealean “vested rights” theory underlying them, have been largely discredited.19 Recognized authorities are in the process of

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13. See Goodrich, *Conflict of Laws* 25 (Seoles ed. 1964); Abraham, supra note 6, at 526.
15. See notes 64–68 infra and accompanying text.
19. See Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROB. 754 (1963), in which it is stated: Today the *Restatement* stands renounced by the American Law Institute itself; no responsible scholar offers to defend it; court after court throws off the shackles without waiting for full development of a new rationale, increasingly without the obedience to the old system that was ritually observed by pioneering rebels. For additional criticism see Reese, *Conflict of Laws and the Restatement Second*, 28
formulating sensible substitutes,\textsuperscript{20} and their theories are finding increasing judicial acceptance. Most authoritative expositions of the new approach to choice of law thinking emphasize what may be called a governmental policy analysis.\textsuperscript{21} The basic function of a state court confronted with a choice of law problem is no longer seen as determining the "proper" law of a case through the mechanical application of a set of a priori, single-jurisdiction selecting rules which produce a result consistent with the assumed goal of national uniformity but inconsistent with any realistic allocation of the spheres of legislative control among the states. Rather, under the new approach to choice of law thinking, the court performs a genuine allocation of spheres of legislative control by analyzing the policies or governmental purposes underlying the apparently conflicting laws of each state whose contacts with the transaction or event sued upon are sufficiently substantial to raise a choice of law problem. The law ultimately employed is the law of the state having the paramount governmental interest in the application of its internal law to the particular issue presented.\textsuperscript{22}

\textbf{Law & Contemp.} Prob. 679, 679–81 (1963); R. Traylor, \textit{Is This Conflict Really Necessary?}, 37 Texas L. Rev. 657, 667 (1959). For judicial censure of the original Restatement's \textit{lex loci delicti} rule see, e.g., Clark v. Clark, 222 A.2d 205, 207 (N.H. 1966), in which it is stated that "no American court which has felt free to re-examine the matter thoroughly in the last decade has chosen to retain the old rule."


21. At this point, brief attention must be directed to the Restatement of Conflicts (Second) which has adopted the general criterion that the proper law in both tort and in contract cases is that of the state having the "most significant relationship" with the event sued upon. See Restatement (Second), Conflict of Laws §§ 332, 332(b), 379 (Tent. Draft No. 6, 1960). The Restatement's "most significant relationship" test has been criticized by those who fear that it will degenerate in practice to a mere contact-counting choice of law theory, without incorporation of policy analysis. See Leflar, \textit{Comments on Babcock v. Jackson, A Recent Development In Conflict of Laws}, 63 Colum. L. Rev. 1212, 1247, 1248 (1963); Weintraub, \textit{A Method for Solving Conflict Problems — Torts}, 48 Cornell L.Q. 215, 244 (1963); Comment, \textit{The Second Conflicts Restatement of Torts: A Caveat}, 51 Calif. L. Rev. 762 (1963). See also criticisms of Restatement (Second) in Ehrenzweig, \textit{Conflict of Laws} 351–52 (1962); Ehrenzweig, \textit{The "Most Significant Relationship" in the Conflicts Law of Torts}, 28 Law & Contemp. Prob. 700 (1963); Leflar, \textit{Choice-Influencing Considerations in Conflicts Law}, 41 N.Y.U.L. Rev. 267, 268–69 (1966). It has been suggested, however, that the most significant relationship test was intended to incorporate governmental interest or policy analysis. See Reese, \textit{Conflict of Laws and the Restatement Second}, 28 Law & Contemp. Prob. 679 (1963). It has also been urged that the inescapable effect of the new Restatement, where adopted, will be to require courts to examine choice of law questions in terms of the state policies involved. Cavers, \textit{The Klaxon Memorandum} 169–70, 178.

When presented with a case involving foreign elements, a court should immediately look to the governmental policies underlying the local law relevant to each particular issue presented; it should then determine whether local contacts with the case are sufficient to give the forum state any interest in applying the local law embodying the policies discovered. An identical analysis in terms of policies, contacts and interests should then be performed with regard to the pertinent law of any other state involved in the litigation. If each state considered has sufficiently substantial contacts with the facts sued upon, but the foregoing policy analysis clearly reveals that the policies embodied in one state's internal law can be significantly furthered without frustrating the corresponding governmental interests of the other states involved, the case is regarded as presenting a "false" conflict which requires the application of the interested state's law. Where policy analysis discovers a "true" conflict in which the strong, legitimate interest of the forum state in the application of its law clashes with a correspondingly strong and legitimate interest of another state, Professor Currie would have applied the law of the forum state as a matter of course, while other authorities would call for further refinements in policy analysis to arrive at the state most intimately concerned with the application of its internal law to the issue at hand. All authorities agree, however, that the new approach to choice of law thinking should afford the lex fori a respect unknown under the "vested rights" theory. Under the new approach, the forum state's choice of law rule is but a delimitation of the policies underlying the appropriate local law, and a determination of the extent to which those policies are to be given extra-territorial effect by application of local law to a case having foreign elements. There is no reason why this delimitation and determination should not be afforded the utmost respect if it is within constitutionally permissible limits.

23. It should be noted that whenever the term "forum state" is employed in the article, the reference is to an interested forum state, that is, a forum state which has sufficient contacts with the facts sued upon to raise a genuine issue, solvable by policy analysis, as to whether the local law or that of another state should be applied to the case. Where the forum state is disinterested — without any substantial contacts with the facts sued upon — no such genuine issue arises and it is apparent without policy analysis that the local law is not applicable.


28. See notes 51-56 infra and accompanying text.
Exemplary of the new approach to choice of law thinking in *Griffith v. United Air Lines, Inc.*, a case involving an action brought in Pennsylvania for the wrongful death of a Pennsylvania resident in the crash of an airliner enroute from Philadelphia to Phoenix, Arizona. The mishap occurred in Colorado which severely limited recovery in wrongful death actions; the Pennsylvania statute, on the other hand, imposed no limitations on the amount recoverable. Rejecting the traditional *lex loci delicti* principle "in favor of a more flexible rule which permits analysis of the policies and interests underlying the particular issue before the court," the Pennsylvania Supreme Court proceeded to delimit and balance the policies behind the competing statutes in light of the relative contacts of each state with the occurrence sued upon. The policy underlying the Pennsylvania statute, which was directed at assuring an adequate recovery to local dependents of Pennsylvania decedents, was held clearly to outweigh the policy behind the Colorado damage limitation, which was found to be either the protection of Colorado defendants from excessive verdicts or the prevention of speculative damage computations in Colorado courts. A "false" conflict was therefore revealed, and the statute of Pennsylvania, as the state possessing the paramount governmental interest in the outcome of the litigation, was applied.

Policy analysis has similarly played an increasingly important role in many of the more recent state court decisions expressing dissatisfaction with the mechanical choice of law rules of the original Restatement, although with varying degrees of emphasis. The United States Supreme Court has also voiced approval of this trend by judicial notice. Indeed, the Court has for some time employed a policy analysis approach in resolving full faith and credit and due process cases in dealing with a forum state's duty to recognize the law of a sister state. It was against this very background

30. Id. at 21, 203 A.2d at 805.
32. See Richards v. United States, 369 U.S. 1, 12 (1962), in which the Court commented upon the recent "tendency on the part of some States to depart from the general conflicts rule in order to take into account the interests of the State having significant contact with the parties to the litigation" and adopted an interpretation of the Federal Tort Claims Act consistent with the free development of this tendency.
that Professor Currie adopted his groundbreaking formulation of the policy analysis approach, which he termed the "governmental interests" theory.  

IV. A NEWLY DISCOVERED CONSTITUTIONAL BASIS FOR KLAXON?

With this schematic analysis of the new approach to state choice of law thinking in mind, we proceed to the central question of this study: Is the abolition of Klaxon in general diversity jurisdiction, or in any specific class of diversity cases, permissible or desirable? A negative answer would be apparent if it could be categorically stated that the Klaxon rule is compelled by the Constitution. Most commentators, however, prefer to think that it is not. Indeed, considerable doubt has been expressed as to whether the Erie decision is itself constitutionally compelled,  

in spite of Justice Brandeis' cryptic references to the "unconstitutionality of the course pursued" under Swift v. Tyson. In Hanna v. Plumer,  

however, the Supreme Court again implied that the Erie decision is supported by the tenth amendment's proscription against federal encroachment of law-making powers not delegated to the central government. Of utmost significance is the fact that the Hanna decision reiterates the principle, adumbrated in Erie, that where failure to apply the law of the forum state in a diversity suit would cause a sufficient variation in the outcome of the litigation as between a federal court and a state court sitting within the same state, considerations of equal protection necessitate compliance with the Erie command. In view of these recent pronouncements, it would appear that the Erie decision has definite constitutional dimensions.


37. 380 U.S. 460 (1965). The Court stated that:

We are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law.

Id. at 471-72.

38. 304 U.S. at 74-75.

39. 380 U.S. at 468, 469. Compare Abraham, supra note 6, at 529-30, wherein the opinion is expressed that the uniformity of outcome principle of Erie finds a constitutional basis in the fact that the classic view which regards the purpose of diversity jurisdiction as limited to providing an impartial forum for the out of state litigant has been traditionally enunciated as a constitutional doctrine. Therefore, "if the purpose of diversity is thus constitutionally limited and the principle of uniformity of outcome were not faithfully carried out, the federal courts would be performing a function in diversity cases beyond that authorized by Article III." Id. at 530.
Nevertheless, it is argued that even if the 

Erie decision is of constitutional dimensions, the Klaxon principle is compelled neither by the Constitution nor by the Rules of Decision Act reconstrued in Erie. Quite to the contrary, it is felt that the concept of judicial power includes the inherent power to prescribe choice of law rules to govern cases falling within its scope, and that the constitutionally based grant of power to the federal courts in diversity cases necessarily includes the power to fashion independent choice of law rules to govern those cases. In addition, it is urged that the full faith and credit clause is, and was historically intended to be, an affirmative grant of power to Congress, and inferentially to the federal courts, to create a uniform body of conflicts principles binding not only upon the federal courts but upon state courts as well. Yet neither Congress nor the Supreme Court has chosen to interpret the full faith and credit clause in the preemptive manner urged. Furthermore, the developing shift in the concept of the state judiciary's role in the choice of law process tends to make far less supportable the view that, although the Erie decision may be of constitutional dimension, the Klaxon principle is not. As previously indicated, under the policy analysis approach, a forum state's choice of law rule is but a delimitation of the policy underlying the pertinent local law and a determination of the extent to which that policy is to be given extraterritorial application. So considered, the choice of law rule tends to function not as some abstraction independent of substantive law, but as an essential part of the local law in question. This is so because it is that portion of the local law which defines the geographical range of its applicability to particular factual situations. Once a choice of law rule is considered as part and parcel of a substantive law, the assumed gap between the Erie principle and the Klaxon rule appears to vanish, and the latter tends to become as constitutionally compelled as the former.


41. 28 U.S.C. § 1652 (1964). It is urged that the last phrase of the act, "in cases where they apply," leaves open the question of which state's law is to apply in a diversity case and, hence, is capable of being fairly interpreted in a way that would permit the application of independent federal choice of law rules in diversity cases. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 199 (1942); WRIGHT, FEDERAL COURTS 199 (1963); BAXTER, CHOICE OF LAW AND THE FEDERAL SYSTEM, 16 STAN. L. REV. 1, 41-42 (1963); RANDALL, THE ERIE DOCTRINE AND STATE CONFLICT OF LAWS, 17 S.C.L.Q. 494, 495 (1965).


45. See notes 51-56 infra and accompanying text.

46. See note 27 supra and accompanying text.

it is arguable that where a district court's failure to apply the controlling substantive law of the forum state in a diversity case would amount to a denial of equal protection under the *Erie* doctrine, the same result should obtain where the failure is to apply that portion of the forum state's substantive law which is termed its choice of law rule. If the uniformity of outcome policy of the *Erie* decision has equal protection ramifications, the *Klaxon* rule, which is founded upon the same policy, could possess the same constitutional consequences.

The foregoing argument would, of course, be tenable only so long as the forum state's choice of law rule remains within constitutionally permissible limits. Under present Supreme Court standards, the choice of local law by a forum state is regarded as violative of full faith and credit or due process only if blatantly unreasonable. The Court presently embraces a "states' rights" approach to conflict of laws, which affords the states substantial freedom in the choice of governing law. The present test is negative rather than positive in content; an outer limit of permissible state choice of law has been delineated which provides that the forum may not apply the substantive law of its own or another state to a litigated set of facts having no discoverable connection with the state. Generally, however, if the state whose law is chosen has some minimally substantial connection with the occurrence sued upon, some reasonable governmental interest in the application of its law, the forum state's choice will be upheld. The Court is reluctant to "weigh" the interests of the chosen state against the corresponding interests of another state once the requisite minimum connection is found, even if it appears that such a balancing process would

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*A Retraction*, in *Selected Essays on the Conflict of Laws* 431, 434-35 (1963), where it is stated:

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. 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 of the law in its application to marginal domestic situations...

But cf. ALI Study 198-99 n.6.

48. See note 39 *supra* and accompanying text.
50. See note 13 *supra*.
52. Leflar, *ibid.*
reveal that the latter state's governmental interests are paramount. This suggests that more than one state may have a connection with an occurrence that is sufficient to bring the application of its law within constitutionally permissible limits.\textsuperscript{56}

The point to be gleaned from the foregoing discussion may be summarized as follows: Abolition of \textit{Klaxon} in general diversity jurisdiction would result in giving federal courts freedom to override the choice of law rule of a forum state that favors local law, a choice of law rule that is permissible under present constitutional standards if application of the local law would serve any reasonable state interest, and a rule which, when considered as an exercise in policy analysis, merges into the state's substantive law by virtue of its definition of that law's extraterritorial effect. This grant of freedom might, therefore, present constitutional objections comparable to those that attend the failure to comply with the \textit{Erie} principle. Such an argument is, of course, open to considerable attack. It will suffice, however, to indicate that the nearly unanimous opinion that the \textit{Klaxon} principle fails to be of constitutional dimensions is not beyond criticism.

V. The Desirability of \textit{Klaxon}'s Retention in General Diversity Jurisdiction

Assuming for present purposes that \textit{Klaxon} is not constitutionally compelled, the question arises as to whether that decision should be preserved as embodying a principle conducive to harmonious federal-state relations. It must be remembered that whatever desirability there may be in the concept of state autonomy in the choice of law field must be balanced against the recognized federal interest in maintaining harmonious relations between the states, a harmony which is potentially capable of disruption every time one state is given the opportunity to decide the law applicable to issues touching several states.\textsuperscript{57} The fear continues to exist that a given state's choice of law rules may essentially be the product of a provincialism which is revealed in a reluctance to give operative effect to any but the local law in factual situations which might, upon a fairer reading, be deemed governable by the law of some other state.\textsuperscript{58} Moreover, if allocation of consistent spheres of legislative control among the states is a goal of con-

\textsuperscript{56} In Richards v. United States, 369 U.S. 1, 15 (1962), the Court stated: Where more than one state has sufficiently substantial contact with the activity in question, the forum State, by analysis of the interests possessed by the states involved, could constitutionally apply to the decision of the case the law of one or another state having such an interest in the multistate activity.


flicts doctrine, autonomy in choice of law matters should not remain with the states, where the choice of the law applicable to a given case may depend upon the fortuitous circumstance of which state happens to acquire judicial jurisdiction. Rather, autonomy in diversity cases should be lodged with federal courts which, as entities disinterested in questions of conflict of laws, are in a uniquely favorable position to perform the allocation function properly. For these and other reasons, it is asserted that, although policy analysis may be the correct approach to choice of law problems, the proper analyst in a diversity case is a federal court freed from Klaxon.

It would appear, however, that the case for abolition of Klaxon in general diversity jurisdiction remains unestablished after pro-Klaxon factors are considered. To begin with, the importance of provincialism in state choice of law decisions appears to be overemphasized by the Klaxon critics. Under the policy analysis approach, there is considerable leeway for the permissible application of local law by the forum state. The result is that, in many cases, what the critics characterize as forum state provincialism "may be no less than the assertion of a genuine state interest in the teeth of a mechanical choice-of-law rule which would frustrate state policy." The thrust of the pro-Klaxon argument has been incisively presented by Professor Cavers, who has asserted that, if policy analysis is to be fostered as the proper approach to choice of law, there are at least two compelling reasons requiring the retention of Klaxon in diversity cases. First, if the basic task of the court under the policy analysis approach is "to identify state policies and to determine the significance for those policies of their application or non-application in interstate situations, then the most appropriate forum for the performance of this task is a court of a state whose policies are in issue." It stands to reason that the forum state's delimitation of the policies underlying its local law, and its determination of the extent to which these policies are to be given extraterritorial effect, are entitled to greater respect than those of a federal court less familiar with and, indeed, less interested in, effectuating legitimate local policies. The reasoning is the same as that which, as a matter of

62. To quote Justice Traynor: "It is answer enough to the misanthropes that the forces against provincialism are strong today and that a judge trained to look through the partisan wrappings of a conflict will be inclined to look through provincial wrappings as well." R. Traynor, Is This Conflict Really Necessary?, 37 Texas L. Rev. 657, 675 (1959).
63. Cavers, The Klaxon Memorandum 165.
64. Ibid.
logic, compels the conclusion that a federal court should follow the forum state's interpretations of its own statutes in a diversity case. Broadly stated, it is the principle that one sovereign's pronouncements regarding the meaning and incidents of its own laws are the product of expertise and familiarity with local needs and conditions, and, for that reason, are entitled to the utmost respect in the eyes of a different sovereign faced with applying those laws. If Klaxon were abolished in general diversity jurisdiction, a federal court would be free to override the policy-oriented choice of law rule of a forum state. Retention of Klaxon, however, affords maximum respect to the forum state's choice of law rule, a respect consistent with the "states' rights" approach currently embraced by the Supreme Court, and also possesses the distinct advantage of avoiding the danger that federal courts might be compelled to apply overly provincialistic choice of law rules. It is clear that the moment the forum state's choice of law rule overreaches constitutionally permissible limits, a federal court will no longer be bound by Klaxon to apply it.

Professor Cavers' second point is that the abolition of Klaxon is desirable only if it can be certain that federal courts freed from Klaxon will adopt the policy analysis approach. He asserts, however, that since a major factor motivating the abolition of Klaxon would be the quest for certainty and uniformity in choice of law rules, federal courts released from Klaxon would tend to fulfill such expectations in the only way possible, by adopting familiar, mechanical choice of law rules which are analogous to those exemplified in the original Restatement and defended as productive of uniformity and certainty. Abolition of Klaxon, therefore, might well smoother the policy analysis approach before it has had a chance to develop.

In view of the arguments presented, it appears that, at least for the present, the balance is in favor of continued adherence to Klaxon in general diversity litigation.


66. It is believed that the views thus far expressed regarding the desirability of Klaxon's retention in general diversity jurisdiction are in substantial accord with those presented in Hill, The Erie Doctrine and the Constitution, 53 Nw. U.L. Rev. 541, 546-68 (1958). Professor Hill is of the opinion that Klaxon is not constitutionally compelled, but nevertheless feels that where the forum state has substantial contacts with the controversy, its choice of law rule should be adhered to by a federal court in a diversity suit, "not for lack of a constitutional power to devise choice of law rules, but because in such cases the power should be exercised in such a way as to effectuate rather than frustrate the policies of the forum state." Id. at 546.

67. See note 52 supra and accompanying text.

68. It is generally felt that Klaxon ceases to compel a federal court to apply the forum state's choice of law rule whenever the rule is violative of the full faith and credit or due process clause. 1A Moore, Federal Practice ¶ 0.311[2], at 3414 (2d ed. 1953).

VI. THE PROPRIETY OF KLAXON'S ABROGATION IN MULTI-PARTY, MULTI-RANK STATE DIVERSITY CASES

Assuming that *Klaxon* is best retained in the area of general diversity jurisdiction, the question remains as to whether there is any merit in the ALI's proposal to release federal courts from continued adherence to *Klaxon* in multi-party, multi-state diversity cases. Since it is apparent from the very nature of the proposal that the *Klaxon* principle is not as secure as it is in the area of general diversity jurisdiction, where the federal court functions as "only another court of the State," the proposal is admittedly defensible. Chief among the arguments offered to justify the recommendation is that:

Choice-of-law rules may reflect the desires of a state as to the extra-territorial reach of its substantive policies. There is no good reason why a state should be able to effectuate its desires in this regard against an individual who could not be reached by state process and appears in a forum within the state only by force of federal power.

The argument that a federal court, when it summons litigants through nationwide service of process, should not be bound to apply the choice of law rule of a forum state which could not have obtained jurisdiction over the parties is hardly a new weapon in the anti-*Klaxon* arsenal. Critics of *Griffin v. McCoach*, which extended the *Klaxon* principle to federal statutory interpleader suits, have for years urged the same objection, and, at least in the interpleader context, it is a weighty one indeed. The argument clearly escapes at least one objection based upon the *Erie* doctrine, since it can hardly be argued that the application of an independent federal choice of law rule in this situation encourages intrastate forum-shopping. Moreover, the policy of *Erie* favoring uniformity of outcome between federal and state courts sitting within the same state would not seem to compel adherence to *Klaxon* where the state in which the federal courthouse is located could not have obtained jurisdiction to adjudicate the case. Disparity of outcome is hardly possible where one

70. See notes 3-8 *supra* and accompanying text.
72. ALI Study 149-50.
76. See notes 38 and 39 *supra* and accompanying text.
of the two potentially disparate forums is powerless to entertain the suit. Similarly, the tenth amendment limitations buttressing the *Erie* doctrine would appear to be satisfied by the requirement that the district courts apply some state's substantive law in a multi-party, multi-state diversity case, and would not seem to necessitate application of any particular state's choice of law rule. Thus, the *Erie* doctrine cannot be said to vitiate against independent federal choice of law rules in such cases.

However, it does not follow from the fact that the *Erie* doctrine fails to compel adherence to *Klaxon* in multi-party, multi-state diversity jurisdiction, that abrogation of the *Klaxon* principle is desirable in all such cases. The ALI's argument appears to assume that the only claim the forum state could have to application of its choice of law rule is a multi-party, multi-state diversity case is the fortuitous presence of the federal courthouse within its borders. In many cases, however, it is probable that the forum state will have a much greater claim. Since in the vast majority of multi-party, multi-state diversity cases, venue will lie where "a substantial part of the events or omissions giving rise to the claim occurred . . .", the forum state will often have important factual connections with the transaction sued upon. If these connections would be significant enough to give the forum state, if it were seized of the case, governmental interests in the application of the *lex fori* which are equal, if not superior, to those of any other state, then departure from the forum state's choice of law rule favoring the local law would not seem defensible. To the extent that the ALI's proposals authorize such a departure, they would appear to exceed the purpose of releasing the district courts from compulsion to apply the local choice of law rule when the forum state can make no greater claim thereto than the presence of the federal courthouse within its borders. It is to be noted that the ALI is not totally unmindful of the fact that independent federal choice of law rules are not necessarily warranted in all multi-party, multi-state diversity cases. Nevertheless, this recognition is

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77. See note 37 *supra* and accompanying text.

78. Even if *Erie* were a bar, it has been urged that the doctrine of "affirmative countervailing circumstances," expressed in Byrd v. Blue Ridge Elec. Co-op., Inc., 356 U.S. 525 (1958), be invoked to free federal courts from any compulsion to apply *Klaxon* in cases of this type. Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 Iowa L. Rev. 248, 269-70 (1963).

79. See note 72 *supra* and accompanying text.

80. ALI Study § 2342(a), at 34.

81. ALI Study 150-51:
The reasons which underlie this release [from *Klaxon*] do not compel a wholly independent choice-of-law rule as to each issue in every case within this chapter. Thus, if all parties involved in an issue were in fact served in a single state, or if they would all have been amenable to the ordinary process of the district court . . . it would normally be appropriate for the district court to follow the choice-of-law rule of the indicated state. Or, even if the parties to an issue were not all served . . . within a single state, but the choice-of-law rules of all states having significant contacts with a given issue point to the application of the same state's substantive rule of decision on that issue, there is no reason why the federal courts should not then apply the rule of decision of that state — even though a fully independent federal choice might have produced a different result.
not effectively embodied in the black letter terminology of proposed section 2344(c). It is submitted, therefore, that the proposed section should incorporate a proviso sufficient to insure that when the district court sits in a forum state of the type described above, the local choice of law rule will be applied.

VII. CONCLUSION

The Klaxon controversy will continue to rage for as long as the American system of government fosters healthy debate between federalists and states' rightists. The propriety of the Klaxon principle must always be judged, however, not by what one wishes contemporary legal standards to be, but in light of what they actually are. If current legal thinking as to the proper role of the court in the choice of law process placed primary emphasis upon the importance of national uniformity in conflict of laws, and if present standards regarding the application of full faith and credit and due process to the choice of law field were considerably more stringent than they are, it is questionable whether Klaxon could continue to be rationally defended. Since both of these areas have shown a susceptibility to change in the past, it is possible that future developments will call for Klaxon's downfall. For the present, however, the developing trend in choice of law thinking sacrifices the quest for national uniformity in the choice of law field to the desirability of affording the states considerable leeway in the effectuation of legitimate governmental policies, and present full faith and credit and due process standards present no obstacle. The abolition of Klaxon in general diversity jurisdiction, resulting in potential federal court freedom to override the forum state's policy-oriented choice of law rule, would therefore seem incompatible with contemporary legal standards. Approval of the ALI's recommendation that Klaxon be abrogated in the proposed multi-party, multi-state diversity jurisdiction must be qualified by the proviso that, whenever the forum state has such a substantial connection with the transaction or event sued upon that application of its law would be a proper result of policy analysis, the district court should apply the local choice of law rule if it favors the lex fori.

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82. ALI Study § 2344(c), at 39, provides that: "whenever State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable."