

1964

The Erie Doctrine and State Conflict of Laws

Charles H. Randall Jr.

University of South Carolina School of Law

Follow this and additional works at: <https://scholarcommons.sc.edu/sclr>



Part of the [Law Commons](#)

Recommended Citation

Randall, Charles H. Jr. (1964) "The Erie Doctrine and State Conflict of Laws," *South Carolina Law Review*. Vol. 17 : Iss. 4 , Article 5.

Available at: <https://scholarcommons.sc.edu/sclr/vol17/iss4/5>

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE ERIE DOCTRINE AND STATE CONFLICT OF LAWS

CHARLES H. RANDALL, JR.*

Some of you have heard Professor Thomas Reed Powell's definition of the legal mind. As I recall it, he said that the legal mind is the mind that can think of something that is inextricably intertwined with something else, without thinking of the thing with which it is intertwined. Our panel found that dividing the *Erie Railroad* topic into manageable assignments challenged the legal mind to the utmost. It's hard to talk about any aspect of the problem without slipping into another aspect. And it's harder to discuss the topic at all than it would be to reorganize the railroad.

My assignment is to discuss choice of law, where it concerns not choice between federal law and the law of some state, as in Mr. Knowlton's subject or in *Clearfield Trust Co. v. United States*,¹ but choice between competing rules of two or more states. This problem, of course, arose and was settled sub silentio in the *Erie Railroad* case itself, where Mr. Justice Brandeis stated the problem to be² "whether the federal court was free to disregard the alleged rule of the Pennsylvania common law." You will recall that the action arose in southern New York, based on an injury suffered by Tompkins while he was walking along the railroad's longitudinal pathway. The defense contended that the Pennsylvania rule treated users of longitudinal pathways as trespassers, and that this rule should govern. The plaintiff, of course, not knowing that the judicial universe was about to be inverted, argued *Swift v. Tyson*,³ that the federal

* Professor of Law, University of South Carolina.

1. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). For a penetrating analysis of the potentialities of this decision, see Friendly, *In Praise of Erie—and of the New Federal Common Law*, 19 RECORD OF THE N.Y.C.B.A. 64 (1964), 39 N.Y.U.L. Rev. 383 (1964).

2. *Erie R.R. v. Tompkins*, 304 U.S. 64, 71 (1938). For discussions of the general subject matter of this paper, see WRIGHT, FEDERAL COURTS 187-218 (1963); Cheatham, *Federal Control of Conflict of Laws*, 6 VAND. L. REV. 581 (1953); Hart, *The Relations Between State and Federal Law*, 50 COLUM. L. REV. 489, 509-15 (1964); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427 (1958); Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797 (1957); Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962); Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228 (1964).

3. 41 U.S. (16 Pet.) 1 (1842).

court should follow its own rule, since there was no state statute on the matter. The Supreme Court held that Pennsylvania law must govern, and sent the case back for the district court to determine Pennsylvania law. Not a word in the opinion suggested that the federal court should consult the "whole law" of New York to find whether a New York court would apply its own law or that of Pennsylvania.

Indeed, the question of what state law a federal court should follow when deciding a case governed by state law is very different from the question whether a federal court should be able to fashion its own rule, disregarding state rulings entirely. Regarding the choice-of-law question, presumably Congress, under the full faith and credit clause of the Constitution,⁴ does have power in the premises, so that Mr. Justice Brandeis' blanket condemnation of the "unconstitutionality of the Course pursued"⁵ by federal courts for over a hundred years would not here apply. Furthermore, the Rules of Decision Act⁶ states only that the laws of the several states shall be regarded as rules of decision "in cases where they apply." This at least leaves open the question as to which state's laws apply to a particular case. So neither by the Constitution nor by act of Congress would it appear a decision was compelled that a federal court must follow the conflicts rules of the state in which it sat. The decision when made could be based on discriminating choice, in the light of the needs of the federal system and the operating therein of the diversity jurisdiction.

Although the question was earlier intimated,⁷ it was not until 1941, in the case of *Klaxon Co. v. Stentor Elec. Mfg. Co.*,⁸ that Mr. Justice Reed for a unanimous Court laid down what has come to be known as the *Klaxon* doctrine. I remember a story, I hope apocryphal, that Air Force pilots enjoyed telling during the Second World War. The aircraft had a warning device, called a klaxon,⁹ which emitted a horrible scream when the aircraft approached stalling speed without its wheels being down. The purpose of the device, of course, was to prevent the pilot from inadvertently stalling the plane, or landing without lower-

4. U.S. CONST. art. IV, § 1.

5. *Erie R.R. v. Tompkins*, 304 U.S. 64, 77-78 (1933).

6. 28 U.S.C.A. § 1652; see WRIGHT, FEDERAL COURTS § 54 (1963).

7. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 208 n.2 (1938).

8. 313 U.S. 487 (1941).

9. WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1936), defines klaxon as "make a sharp, piercing sound; scream, roar; a trade-mark applied to a kind of horn used especially on autos."

ing the wheels. One day a pilot in training school made a beautiful landing on the runway, but unfortunately without having put his wheels down, and the plane skidded to a grinding halt. His instructor ran over, and asked why he had not put his wheels down. The pilot explained, "I just couldn't think. That damned klaxon was making too much noise."

In conflicts questions in diversity cases, federal judges today are not supposed to think; they are supposed to listen to the *Klaxon*.

You will recall that in that case the plaintiff recovered on a breach of contract claim brought in the Delaware federal court, on a contract in which almost all the "place of contracting" or "place of performance" elements were in New York. The question was whether Delaware or New York law should govern recovery of interest on the judgment from the date of suit. Speaking for the Court, Mr. Justice Reed laid down a rule embracing not only this case but all diversity conflicts cases:

The principal question in this case is whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit. . . . We are of opinion that the prohibition declared in *Erie* . . . against such independent determinations by the federal courts extends to the field of conflicts of laws. . . . Otherwise the accident of diversity of citizenship would constantly disturb equal administration of justice in co-ordinate state and federal courts sitting side by side. . . . Any other ruling would do violence to the principle of uniformity within a state upon which the *Tompkins* decision is based. . . . It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.¹⁰

Thus Justice Reed in certain terms stated what might be termed the "full-blown *Klaxon* rule," that the question as to which state law governed an issue in a particular diversity litigation was to be handled exactly as any question of substantive law in the case, by looking to the law of the forum state. As Judge Friendly later said, "the question is not what we think, but what we think the New York Court of Appeals would think the Supreme Court of Ohio would think."¹¹ In hornbook terms this full-blown *Klaxon* rule is the governing rule today.

10. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 494, 496 (1941).

11. *Cooke v. E.F. Drew & Co.*, 319 F.2d 498, 503 (2d Cir. 1963) (dissenting opinion).

This rule is subject to one major exception, an exception some thought might swallow the whole rule: to the extent that the federal constitution, especially the full faith and credit clause or the due process clause, inhibits a state from applying its own conflicts or other rule, the federal court is, of course, equally bound by the supreme law of the land. For a while, writers asked whether the conflicts of law was about to become another branch of federal constitutional law.¹² Any fear of this is now not well founded.

Consider the case of *Wells v. Simonds Abrasive Co.*,¹³ decided in 1953. In this case, the *Klawon* rule is the unstated major premise: argument is entirely in terms of the full faith and credit clause. Plaintiff sued in a Pennsylvania federal court, for the wrongful death of her husband, who was killed in Alabama. His death resulted from the bursting of an emery wheel that had allegedly been defectively made by defendant Pennsylvania corporation. Alabama's wrongful death statute has a two-year limitation period: Pennsylvania's—one year. To provide intellectual delight to law professors and judges, the plaintiff brought her diversity action after the one-year Pennsylvania period had run, but before expiration of the two-year Alabama period. Defense counsel was armed with a precedent that boded ill for unalert widows, the case of *Rosenzweig v. Heller*,¹⁴ decided by the Supreme Court of Pennsylvania in 1951. This case, involving Pennsylvania and New Jersey wrongful death acts and their limitations periods, was what a lawyer friend of mine would call "on all eights" with the case at bar. Hence, in *Simonds Abrasive*, *Klawon* applied with a vengeance: there was a tough Pennsylvania decision, much criticized, directly on point. *Klawon* was applied, and the Supreme Court held that the full faith and credit clause was no bar.

Mr. Justice Jackson, joined by Justices Black and Minton, dissented in terms that embrace but do not expressly state distaste for the *Klawon* decision itself:

Klawon . . . contains language that would seem to make all conflict questions depend on the law of the forum. But that was an action of contract in which conflict considerations prevail that are not present in tort cases. It is but *dictum* so

12. EHRENZWEIG, CONFLICT OF LAWS § 9 (1962); ROSS, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161 (1931).

13. 345 U.S. 514 (1953).

14. 302 Pa. 297, 153 Atl. 346 (1931).

far as it touches this statutory tort case. . . . The Court's decision, in contrast with our position, would enable shopping for favorable forums. Suppose this plaintiff might have obtained service of process in several different states—an assumption not extravagant in the case of many national corporations. Under the Court's holding, she could choose from as many varieties of law as of forums. Under our theory, wherever she elected to sue (if she had a choice), she would take Alabama law with her. Suppose even now she can get service in a state with no statute of limitations or a long one: can she thereby revive a cause of action that has expired under Alabama law? . . . This case is in United States Court, not by grace of Pennsylvania, but by authority of Congress. . . .¹⁵

Those cases involving what have been called state "door-closing" policies have given particular concern.¹⁶ Consider *Angel v. Bullington*,¹⁷ where a North Carolinian bought Virginia land in Virginia, and defaulted on the purchase price. The seller foreclosed on the land and had the proceeds applied to the price. Then he sued in a North Carolina federal court to recover the deficiency. Virginia law permitted actions for deficiency judgments, but a North Carolina statute precluded such actions. If we ignore as we may¹⁸ the complication introduced into the decision by prior litigation in a North Carolina state court, the Supreme Court held that North Carolina's law of conflicts must govern, and if that state says that its statute forbade collection of deficiency judgments where all significant contacts were in Virginia, the federal court must follow that rule. The plaintiff was foreclosed by the prior litigation from arguing that this violated full faith and credit. Mr. Justice Frankfurter said on the *Klaxon* issue of the case:

The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has

15. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 520-22 (1953).

16. An interesting and potentially important recent decision is *Szantay v. Beech Aircraft Corp.*, 237 F. Supp. 393 (E.D.S.C. 1965), aff'd, 349 F.2d 60 (4th Cir. 1965). See comments on the *Szantay* case before the Fourth Circuit at pp. 631-34 *infra*.

17. 330 U.S. 183 (1947).

18. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 668 n.1 (1953), argues convincingly that both *res judicata* and *Erie R.R.* issues are, in this case, "not alternative grounds of decision but separately necessary and complimentary ones."

authoritatively announced that deficiency judgements cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suit in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.¹⁹

To the same effect is *Cohen v. Beneficial Indus. Loan Corp.*,²⁰ in 1949, in which Mr. Justice Rutledge voiced some objections to *Klawon*:

Erie . . . made no ruling that in so deciding diversity cases a federal court is 'merely another court of the state in which it sits,' and hence that in every situation in which the doors of state courts are closed to a suitor, so must be also those of the federal courts. Not only is this not true when the state bar is raised by a purely procedural obstacle. There is sound historical reason for believing that one of the purposes of the diversity clause was to afford a federal court remedy when, for at least some reasons of state policy, none would be available in state courts.²¹

One more decision needs comment, to round out the present *Klawon* doctrine. This is the sister case to *Klawon*, decided the same day, the case of *Griffin v. McCoach*.²² To simplify the facts perhaps to distortion, one Colonel Gordon took out insurance policies on his life with Prudential, naming as beneficiaries certain New Yorkers who had advanced funds to him for business transactions in which all were involved. Admittedly, those New Yorkers had insurable interests in the Colonel's life. Texas has a criticized and minority view that the assignees of a policy must have an insurable interest. Some of the New York beneficiaries assigned their interests to other New Yorkers, unrelated to the

19. *Angel v. Bullington*, 330 U.S. 183, 191-92 (1947).

20. 337 U.S. 535 (1949).

21. *Id.* at 558.

22. 313 U.S. 498 (1941).

dealings with Colonel Gordon. On the Colonel's death, his estate sued Prudential in a Texas federal court, to recover the proceeds of the policies insofar as they had been transferred to persons without insurable interests. Prudential answered by interpleading the New York claimants, serving them with process in New York under the nationwide service provision of Title 28.²³ Prudential then received a stakeholder discharge, and left the claimants to fight it out. The Supreme Court, again speaking through Mr. Justice Reed, held that this district court must follow the law of Texas, including its conflicts rulings, and that Texas could, consistent with full faith and credit, apply its public policy to foreclose suit by the assignees in its courts.

These decisions state the present law. To criticize them, it is appropriate to ask, first, whether the broad *Erie Railroad* doctrine is sound: and second, if it is, where do the conflicts fit into it. I believe that Judge Friendly's view, stated so eloquently in his Cardozo lectures,²⁴ is correct in his finding wisdom in and a broad measure of satisfaction with the basic *Erie* doctrine. Whether constitutionally compelled, as he says it is, or not, *Erie* is the conventional wisdom²⁵ of the day. *Erie* recognizes a meaningful area for the operation of state sovereign power. The Rules of Decision Act plainly recognizes state legislative power in the premises: it is fully appropriate that state judicial power also be accorded due respect. The non-Euclidean constitution offered by Professor Crosskey²⁶ some years ago has found few if any adherents, and it is probable that the high-water mark of outright attack on *Erie* has passed.

If *Erie* is sound, where do doctrines of the conflict of laws fit the pattern? The starting point for present intelligent consideration of this question should be the illuminating treatment given the subject by Professor Cavers in his report to Professor Field's committee.²⁷ To me, the most important point Professor Cavers makes in his directing attention to the current ferment, amount-

23. 28 U.S.C. § 1335 (1948); 28 U.S.C. § 2361 (1948), as amended (1949).

24. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

25. The phrase, of course used in a different context, is that of Professor Galbraith, in *THE AFFLUENT SOCIETY* (1958).

26. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953).

27. Cavers, *Special Memorandum on Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154-214 (Tent. Draft No. 1, 1963); Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719 (1961); Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

ing to revolution in doctrine, in the field of conflicts itself.²⁸ Analytical tools are here being shaped that may alter the entire focus of the *Klaxon* problem, and that promise to make a major contribution to intelligent federalism.

One aspect of this is the recognition that state rulings on conflicts are not and never have been intellectual exercises to ascertain by application of logic what state's rules should govern. The conflicts rulings themselves embody determinations of the policy reach of the statutes and judicial decisions of the forum state.²⁹

For instance, in torts conflicts cases, the rule that the law of the place of wrong governs questions of liability is under attack. Only the latest blow is the New York state court decision, *Babcock v. Jackson*,³⁰ in 1963. A New Yorker drove his car, accompanied by a New York guest, into Canada, and the guest was injured there when the driver negligently ran into a stone wall. New York permits recovery by a guest from his host on proof of ordinary negligence. Ontario, where the accident occurred, has a very restrictive guest statute, which would have barred recovery. The court of appeals applied the New York rule to permit recovery, reversing lower courts which applied the place-of-wrong rule. The theory of the court was that New York had the "dominant contacts" with the particular issue involved, that is, whether recovery should be permitted by a guest against his host. Judge Fuld said:

Comparison of the relative 'contacts' and 'interest' of New York and Ontario in this litigation, vis-a-vis the issue here presented, makes it clear that the concern of New York is unquestionably the greater and more direct and that the interest of Ontario is at best minimal.³¹

Decisions not dissimilar have arisen in California, Wisconsin, New Hampshire, and Pennsylvania;³² and the same "new look"

28. *Id.* at 159-66.

29. For a convincing presentation of this thesis, see EHRENZWEIG, *CONFLICT OF LAWS* 307-359 (1959).

30. 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963). See Cavers, *supra* note 27, at 173-180; Cavers, Cheatham, Currie, Ehrenzweig, Leflar, Reese, *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963); O'Rourke, *Analysis of the Contacts Test: A Numerical Evaluation of Babcock v. Jackson*, 11 PRAC. LAW. 87 (1965); *Weintraub, Revolution in the Choice of Law for Torts*, 51 A.B.A.J. 441 (1965).

31. *Babcock v. Jackson*, 240 N.Y.S.2d 243, 750, 191 N.E.2d 279, 284 (1963).

32. *Griffith v. United Air Lines*, 416 Pa. 3, 203 A.2d 796 (1964); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Haumschild v. Continental Cas. Co.*, 7 Wis.2d 130, 95 N.W.2d 814 (1959); *Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953).

is appearing in contracts and other divisions of the law as well.³³

The point is that if a state's rulings on conflicts questions embody to some extent its feelings as to the policy and reach of its own substantive law, there is a kernel of *Erie Railroad* truth in the *Klawon* doctrine. At the same time, there is a federal interest in these cases, where by hypothesis they have important contacts with more than one state. The new conflicts doctrine contributes to giving due weight to each of these factors.³⁴ First, it considers not what law governs the "case," but what rule should govern a particular "issue." Second, it asks Mr. Justice Traynor's conflict-allaying question, "Is this conflict really necessary?" Is there a true conflict, considering the policy foundations of the purportedly conflicting rules of the two states? Third, Justice Traynor would have the court weigh the competing policies of the two states, where a "true" conflict exists, to determine which policy is the more weighty. Now, this approach is exactly what a federal court might well do in a conflicts case if it were free of *Klawon*.

With that inadequate setting of the stage, let me briefly discuss suggestions which have been made as to modification of the *Klawon* rule. I take it that many of the cases I have mentioned in the *Klawon* line are agreed candidates for oblivion. What rule should be substituted for that which I have called the "full-blown *Klawon* rule," the rule that a federal court in a diversity case should decide conflicts questions as though it were "only another court of the state."?

The most modest suggestion might be called "the well-tempered *Klawon*." This rule would follow state law, but not with the same rigidity as in following the strictly substantive rules of the state.³⁵ Here, the full panoply of Mr. Gibb's suggestions in his earlier remarks can be advocated. His comments apply with peculiar cogency to the conflicts area. The federal courts should have at least as much freedom as a state court below the court of last resort, and perhaps more. Thus far, I am sure all would go.

A second approach might be termed "muted *Klawon*." If the forum state has little or no contact with the operative facts of a controversy, then let the federal court in that forum operate free of the *Klawon* rule. If the forum state has significant con-

33. Cavers, *supra* note 27, at 166-73, 180-82.

34. See articles cited, *supra* note 27, especially that of Mr. Justice Traynor in 37 TEXAS L. REV. 657 (1959).

35. Cavers, *supra* note 27, at 211-12.

tacts, then apply the conflicts rule of the forum state.³⁶ Especially is this approach useful in a case such as *Klaxon* itself, where the danger is that the forum might characterize the issue as "procedural" and apply its own laws where such application would be egregious.³⁷ A companion approach is the suggestion that the Supreme Court should more vigorously invoke the full faith and credit clause as a limitation on the extent to which states may apply their own rules of conflicts to transactions essentially extra-state.³⁸

A third suggestion might be termed "*Klaxon* with selective amputation." Pushed far enough, this could swallow most of the rule. In some areas, such as multi-state defamation, or airline accidents, Congress might enact substantive rules governing liability, thus removing the problem from *Klaxon*. Alternatively, the Congress might invoke the full faith and credit clause to selectively carve out areas of exception.³⁹ An example of the latter is the proposal in Professor Field's amendments to the Judicial Code,⁴⁰ which would overrule *Griffin v. McCoach*,⁴¹ and provide that where federal diversity jurisdiction is invoked in multi-state, multi-party litigation, where nationwide process is permitted, the federal court should be free to "make its own determination as to which state rule of decision is applicable." Professor Field has looked longer and harder at this problem than I have. I am not sure that this proposal is not a quotient verdict: a splitting of the difference among the critics, and that every policy argument against *Griffin* does not equally lie against *Klaxon*. The argument is that the claimants in federal statutory interpleader are engaged in litigation that could not have been brought in any state court anyway, since federal national service is necessary to get them in. Some claimants are in a foreign forum against their will, when they were beyond

36. *Id.* at 209-10.

37. On remand in the *Klaxon* case, the Delaware federal court ruled that a state court in Delaware would apply the New York rule, characterizing that rule as "substantive." *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820 (3d Cir. 1942), *cert. denied*, 316 U.S. 685 (1942).

38. Cavers, *supra* note 27, at 202-10.

39. These proposals are discussed in Cavers, *supra* note 27, at 207-09.

40. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, § 2344(c), (Proposed Final Draft No. 1, 1965) (relating to multi-party, multi-state diversity); § 2361(c) (relating to multi-state interpleader); Commentary to § 2344(c) at 148; Commentary to § 2361(c) at 159; and Supporting Memorandum C at 193 (relating to constitutionality of the proposed rules).

41. *Griffin v. McCoach*, 313 U.S. 498 (1941).

reach of its normal process. But the plaintiffs in *Cohen*,⁴² *Angel v. Bullington*,⁴³ and *Simonds Abrasive*⁴⁴ all probably had the alternative of sue here or nowhere. In the federal interpleader statute, if the *Guaranty Trust*⁴⁵ view of diversity jurisdiction is correct, the federal interest ends when the stakeholder wins his protection against double liability. Then the conflict is over state law of insurance, and between claimants. If there is a federal interest in which state's law is chosen here, there is a federal interest in every true conflicts choice.

It is interesting that all these proposals are looked on without alarm by Professor Cavers, who wishes to preserve the *Klawon* rule.⁴⁶ It seems that twenty-five years of arguing the case have narrowed the area of disagreement considerably. Many critics of *Klawon* would be satisfied to have the felon branded, without insisting on a hanging. Arguably, the modest proposals so far suggested, while preserving *Klawon*, would overrule every Supreme Court case involving direct attack on *Klawon*.

There have been other proposals for modification of *Klawon*, such as more vigorous rules of forum non conveniens; some I have not time to mention, others no doubt I have not even heard of. One I would like to mention. We could call the rule "*Presumptively Klawon*." It could rise from the possibility that the *Byrd*⁴⁷ case and *Hanna v. Plumer*⁴⁸ might foreshadow some change in the distant *Klawon* area. Would it make federal sense to have a rule that *Klawon* would apply unless there were judge-discovered "affirmative countervailing considerations at work," to use Mr. Justice Brennan's felicitous phrase.⁴⁹ Admittedly, this suggestion is getting near the borderline of *Swift v. Tyson* territory, especially were we to say the appropriate "other considerations" could be the greater weight of another state's contacts with the events in litigation, or its deeper policy interest in the outcome on the issue. These new conflicts insights, espoused so ably by many courts and by Professors Currie, Cavers and Ehrenzweig, among others, promise to accord new weight to the very interests of federalism that the

42. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

43. 330 U.S. 183 (1947).

44. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

45. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1955).

46. Cavers, *supra* note 27, at 202-14.

47. *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958).

48. 85 S.Ct. 1136 (1965), discussed at length in the remarks of Mr. Knowlton at this conference.

49. *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 537 (1958).

opponents of *Klawon* wish to promote.⁵⁰ Loosening of the *Klawon* rule would permit federal judges and the federal bar to contribute to the development of these ideas.

I have little developed the importance of forum-shopping considerations, intra-state or extra-state. Time does not permit developing this line of argument, but with Professor Hart⁵¹ and Mr. Justice Harlan,⁵² I feel that the primary interest of federalism in these questions is on certain and just choice-of-law rules bearing on the level of primary private activity, not on the litigation stage. Admittedly, the two ideas merge.

Today's world moves faster than does the mind of man. Already Professor Field's sweeping proposals to amend diversity jurisdiction, if adopted, will alter the underlying premises of our discussion, in ways that are not completely known. A short time ago, Professor Sutherland spoke at proceedings in celebration of the anniversary of the great speech by Dean Pound, then a Nebraska attorney, before the American Bar Association at St. Paul in 1906. I quote a remark of Professor Sutherland, which, while given in a slightly different content, bears on our efforts at this Conference. He said this:

I suggest, then, one problem, relevant to Dean Pound's observations made here in 1906, a problem capable of no complete solution, susceptible to no impatient improvement, a problem so evident that much of the time we take it for granted, we accept its malfunctionings as inevitable payments on the price of our constitutional system. I refer to those troubles in the American administration of justice which arise from our Federal structure-troubles which, like most of man's ills, can never be completely cured, but troubles to whose alleviation we, in this place, on this occasion, should particularly dedicate ourselves. We shall find enough to keep us busy.⁵³

The problems that were launched in 1938 with the decision of the *Erie Railroad* case are indeed capable of no complete solution, and susceptible to no impatient improvement. The bench and bar shall, indeed, find enough to keep us busy, in working to preserve and broaden this great insight into the smooth and just functioning of our federal system.

50. An early and still valid analysis is found in HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 633-636 (1953).

51. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, (1953).

52. 85 Sup. Ct. 1136, 1146 (1965) (concurring opinion).

53. 35 F.R.D. 241, 269 (1964).