

Winter 1964

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Recommended Citation

Weintraub, Russell J. (1964) "The Erie Doctrine and State Conflict of Laws Rules," *Indiana Law Journal*: Vol. 39 : Iss. 2 , Article 2.
Available at: <http://www.repository.law.indiana.edu/ilj/vol39/iss2/2>

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THE ERIE DOCTRINE AND STATE CONFLICT OF LAWS RULES

RUSSELL J. WEINTRAUB†

The focus here is upon that aspect of the *Erie R.R. v. Tompkins*¹ doctrine which compels a federal district court, on issues not governed by federal law, to apply the conflict of laws rules of the state in which it sits. The purpose is to appraise some of the good and, it is submitted, some of the bad effects of this aspect of the doctrine, and then to suggest how realistically, in the light of recent developments, without heroic measures, the good can be reinforced and the bad eliminated. First, however, it is necessary to tell enough of the *Erie* story to provide a background for what is to follow.

I. DEVELOPMENT OF THE OUTCOME-DETERMINATIVE TEST

Section 34 of the Judiciary Act of 1789 acted as catalyst for the controversy which followed: "The laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."² In 1948 the words "trials at common law" were changed to "civil actions,"³ thus rendering moot any further debate as to whether the section or the doctrine it embodied was applicable to equity cases⁴ and eliminating one possible basis for distinguishing between the mandate of the statute and the commands of the United States Constitution.⁵ In its present form, the section reads: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."⁶

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1. 304 U.S. 64 (1938).

2. Act of September 24, 1789, ch. 20, § 34, 1 Stat. 92.

3. H.R. 3214, 80th Cong., 2d Sess. (1948).

4. See, e.g., *Russell v. Todd*, 309 U.S. 280, 287 (1940) ("The Rules of Decision Act does not apply to suits in equity."); *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 205 (1938) ("The doctrine [*Erie*] applies though the question of construction arises not in an action at law, but in a suit in equity."); *Mason v. United States*, 260 U.S. 545, 559 (1923) (statute merely declarative of the rule which would exist in the absence of statute; state laws as rules of decision in equity suits not excluded from the statute by implication).

5. See Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 *YALE L.J.* 187, 193 (1957).

6. 28 U.S.C. § 1652 (1958).

In *Swift v. Tyson*,⁷ an opinion written by Mr. Justice Story, it was held that "laws," in the introductory phrase of the section, did not include the decisions of state courts upon matters of general common law which the federal courts were as competent as the state courts to decide:

It never has been supposed by us, that the section did apply, or was designed to apply to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.⁸

The case involved an interstate transaction, being a suit on a bill of exchange dated in Maine, taken in payment for Maine land, and drawn on and accepted by the defendant in New York. In holding that a federal court sitting in New York need not follow the New York rule concerning the adequacy of a pre-existing debt as consideration to make a taker of a note one in due course, the rational purpose may have been to foster uniformity in an area where uniformity then, as now, was very important to the young nation—interstate commercial transactions. Quite often, following *Swift v. Tyson*, this theme of national uniformity was sounded by the Court. For example, in *Baltimore & O.R.R. v. Baugh*, holding that a federal court sitting in Ohio need not follow the Ohio fellow-servant rule as it applied to an action against a railroad for injuries suffered by an employee in a collision in Ohio, the court asked, "As it [the railroad] passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every state line?"⁹ Even Mr. Justice Holmes who, in a series of dissents, opposed extensions of *Tyson* was willing to acquiesce in its application to "those principles which it is desirable to make uniform throughout the United States."¹⁰

In fact, however, no such uniformity resulted. The Court stopped short of requiring the state courts to follow the "general law" as articu-

7. 41 U.S. 1 (1842).

8. *Id.* at 18-19.

9. 149 U.S. 368, 378 (1893).

10. *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 371 (1910) (Holmes, J., dissenting).

lated by the federal courts, and the state courts continued to go their own way. More significantly, the *Tyson* concept of general law was applied to essentially intrastate transactions. Horrible examples began to accumulate in which a state rule, applicable to an intrastate transaction, could be avoided by stepping across the courthouse square into the federal court under the aegis of diversity jurisdiction. In *Kuhn v. Fairmont Coal Co.*,¹¹ involving the duty of a coal company to provide support for surface land during mining operations in West Virginia, the Court refused to direct a federal court sitting in West Virginia to follow a decision of West Virginia's highest court, directly in point, which had become final after suit had been filed in the federal court, but before the decision by the court of appeals.¹² Probably the best known of the "horrible examples" is *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*¹³ In this case, a Kentucky corporation, by the device of dissolving and re-incorporating in Tennessee, was permitted to manufacture diversity of citizenship jurisdiction and to enforce in a federal court, sitting in Kentucky, a contract made and to be performed in Kentucky which no Kentucky state court would have enforced.

The situation was intolerable, as many recognized.¹⁴ The forum-shopping involved was bad, but much worse, at the core of the problem was the fact that individuals, in their everyday activities and dealings, were subjected to two inconsistent bodies of law. At the nadir of *Black & White Taxicab*, *Tyson* entered its last decade. It was slain by the sledge hammer blows of *Erie R.R. v. Tompkins*.¹⁵

Mr. Tompkins, a citizen of Pennsylvania, was walking alongside defendant's railroad tracks in Pennsylvania when he was struck by some projection from a passing train. On the basis of diversity of citizenship, plaintiff sued the railroad in a federal court in New York. The defendant urged that under Pennsylvania law the plaintiff, being a trespasser, could not recover. This point of Pennsylvania law was disputed, but in deciding to affirm a verdict for the plaintiff, the court of appeals held that it was unnecessary to consider whether the Pennsylvania law was as defendant had contended, because the question was one of general law

11. 215 U.S. 349 (1910).

12. For a post-*Erie* case to the contrary on the duty of a federal court to conform to state decisions pendente lite see *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941).

13. 276 U.S. 518 (1928).

14. See, e.g., Mills, *Should Federal Courts Ignore State Laws?*, 34 AM. L. REV. 51, 68-69 (1900) (urging amendment of the Judiciary Act to compel federal courts to use as rules of decision both "statutes and decisions of the courts of last resort of such States").

15. 304 U.S. 64 (1938).

upon which the federal courts were free to exercise their independent judgment. Upon certiorari being granted, the parties focused their arguments on the extent of the *Tyson* doctrine. Mr. Justice Brandeis, however, seized the opportunity to overrule *Tyson*.

Charles Warren had demonstrated that, in the original draft of Section 34 of the Judiciary Act of 1789, the words "statute law" and "unwritten or common law" had been stricken and the single word "laws" inserted in their place.¹⁶ But Mr. Justice Brandeis was not content to overturn *Tyson* simply on a matter of statutory construction. In his much-debated dictum he said:

If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so. . . . Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. 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 part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.¹⁷

The case was remanded to the court of appeals with directions to determine the issue of state law it had thought irrelevant.¹⁸

Ironically, less than five months after the *Erie* opinion, the new Federal Rules of Civil Procedure took effect. The stage was thus set for exploring in depth the "substance"—"procedure" dichotomy in the context of *Erie* and the Judiciary Act. To what extent would federal courts now be free to apply the new Federal Rules of Civil Procedure and other rules and procedures formerly common in those courts and to what extent would these rules and procedures have to be displaced by state law? What was to be "procedural" and what "substantive?"

The first battle was a victory for the new rules. *Sibbach v. Wilson*

16. C. Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 86 (1923).

17. 304 U.S. at 77-78.

18. *Id.* at 80.

& Co.¹⁹ held that a federal district court could, pursuant to rule 35,²⁰ order the plaintiff in a personal injury suit to submit to a physical examination by a court-appointed physician, despite the fact that such an order could not be made in a state court in the state in which the case was tried. The Court found that the rule was within the mandate of the statute authorizing the Supreme Court to prescribe uniform rules of civil procedure for the federal district courts: "Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."²¹ The plaintiff was wrong in translating "substantive" into "important" or "substantial."²²

It was apparent, however, that deeper analysis would soon be required. "Substance" and "procedure" are chameleon-like words, changing their meaning dramatically with changed context. The Court had yet to indicate what meaning they were to bear in this new context.

*Klaxon Co. v. Stentor Elec. Mfg. Co.*²³ pointed the direction in which the Court was to move. Pursuant to an agreement executed in New York, a New York corporation transferred its business to a Delaware corporation. The Delaware corporation was to use its best efforts to further the manufacture and sale of certain patented devices and the New York corporation was to have a share of the profits. The assets were transferred in New York and performance was commenced there. Subsequently, the New York corporation sued the Delaware corporation in a Delaware federal court for violating the agreement. Upon recovering judgment, plaintiff moved for addition of interest under the New York Civil Practice Act. Without inquiry into what a Delaware court would have done, the federal court granted the motion. The Supreme Court reversed. Delaware was not constitutionally compelled to apply the New York rule on interest and therefore, under the *Erie* doctrine, the federal court was bound to determine and to follow the Delaware conflicts rule.²⁴ "Otherwise, the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side."²⁵

In the same vein, stressing the avoidance of a different result being

19. 312 U.S. 1 (1941).

20. FED. R. CIV. P. 35.

21. Act of June 19, 1934, ch. 651, § 1, 48 Stat. 1064.

22. 312 U.S. at 11.

23. 313 U.S. 487 (1941).

24. On remand, the court below reached the same result, finding "from all the available data" that a Delaware court would probably apply the New York rule on interest as "substantive." *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820 (3d Cir.), cert. denied, 316 U.S. 685 (1942).

25. 313 U.S. at 496.

reached in a federal court than would have been reached in a state court in the state where the federal court was sitting, the Court decided a series of cases resulting in what has come to be called the "outcome-determinative" test for application of the *Erie* doctrine. It was held that in a suit by a stakeholder under the Federal Interpleader Act,²⁶ despite the nation-wide service of process provided in the act, the federal district court would have to reach the same result as would be reached in the state courts of the state in which it sat.²⁷ Similarly, the burden of proving contributory negligence was governed by local state law even though, under Rule 8(c) of the Federal Rules of Civil Procedure,²⁸ contributory negligence had to be pleaded as an affirmative defense.²⁹ *Guaranty Trust Co. v. York*,³⁰ in holding that in a diversity case the federal court cannot try a case barred by the state statute of limitations, stated the outcome-determinative test in classic fashion. "In essence, the intent of that decision [*Erie*] was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."³¹ In further applications of this doctrine, the Court held that in diversity cases a federal court must obey a state forum-closing rule;³² that although Rule 3 of the Federal Rules of Civil Procedure states that "filing a complaint with the court" commences an action,³³ such filing does not toll the local statute of limitations if the state rule is that service of the summons is required for tolling;³⁴ that if the state court is closed to a plaintiff who has not qualified to do business within the state, the federal court is likewise closed;³⁵ that a state statute requiring a plaintiff in a derivative stockholder's action to give security for costs at the demand of the corporation must be

26. 28 U.S.C. §§ 1335, 1397, 2361 (1958).

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

28. Fed. R. Civ. P. 8(c).

29. *Palmer v. Hoffman*, 318 U.S. 109 (1943). See also *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446 (1959) ("presumptions (and their effects) and burden of proof are 'substantive'"); *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (burden of proof in equity action to remove cloud on title).

30. 326 U.S. 99 (1945).

31. *Id.* at 109.

32. *Angel v. Bullington*, 330 U.S. 183 (1947).

33. Fed. R. Civ. P. 3.

34. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949). See also *Netermyer v. Henley*, 205 F. Supp. 734 (N.D. Ind. 1962), reluctantly following *Ragan* although the court questions the justice of the result.

35. *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949).

followed, although no such requirement is contained in rule 23;³⁶ and in what may be the high water mark of the outcome-determinative test in the Supreme Court, that if the state court would not stay a suit pending arbitration, pursuant to an arbitration clause in the contract being litigated, the federal court should not do so.³⁷

There are many questions concerning application of this outcome-determinative test which are still open, causing debate and often disagreement in the lower courts. *Dick v. New York Life Ins. Co.*³⁸ left open the question of whether, in a diversity case, a state or a federal standard should determine the sufficiency of the evidence to support a jury verdict.³⁹ Other problems which have raised the question of whether a federal or state standard is applicable include the permissibility of a verdict in excess of the ad damnum clause,⁴⁰ judicial notice of the law of a sister state,⁴¹ indispensability of parties,⁴² election of remedies,⁴³ and admissibility of evidence.⁴⁴ There is almost no extreme to which the outcome-determinative argument has not been pushed. It has been held that, in a diversity case, a federal court should look to local state law in determining whether to afford relief under the federal Declaratory Judgment Act.⁴⁵ It has even been urged, unsuccessfully, that despite rule

36. FED. R. CIV. P. 23; *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

37. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956).

38. 359 U.S. 437, 444-45 (1959).

39. See, e.g., *Johnson v. Buckley*, 317 F.2d 644 (5th Cir. 1963) (quantity and quality of proof necessary to make out a case for submission to a jury—federal standard); *Safeway Stores v. Fannan*, 308 F.2d 94 (9th Cir. 1962) (quantum of proof necessary to sustain a cause of action—federal standard); 5 MOORE, FEDERAL PRACTICE ¶ 38.10 (2d ed. 1951) (discussing split of authority in courts of appeal and advocating a federal standard).

40. *Riggs, Ferris & Geer v. Lillibridge*, 316 F.2d 60 (2d Cir. 1963) (dictum) (federal).

41. See, e.g., *Schultz v. Tecumseh Prods.*, 310 F.2d 426 (6th Cir. 1962) (federal); *Reeves v. Schulmeier*, 303 F.2d 802 (5th Cir. 1962) (federal); 1A MOORE, FEDERAL PRACTICE ¶ 0.316[4], at 3523 (2d ed. 1961) (consensus for federal standard).

42. *Resnick v. La Paz Guest Ranch*, 289 F.2d 814 (9th Cir. 1961) (federal).

43. *Berger v. State Farm Mut. Auto Ins. Co.*, 291 F.2d 666 (10th Cir. 1961) (state).

44. See, e.g., *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961) (whether others associated plaintiff with alleged libel—federal); *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961) (hearsay—federal); *Monarch Ins. Co. of Ohio v. Spach*, 281 F.2d 401 (5th Cir. 1960) (pre-trial examination—federal); *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463 (2d Cir. 1962) (physician-patient privilege—state); *Car & Gen. Ins. Corp. v. Goldstein*, 179 F. Supp. 888 (S.D.N.Y. 1959), *aff'd mem.*, 277 F.2d 162 (2d Cir. 1960) (lawyer-client privilege—state); *Ladd, Uniform Evidence Rules in the Federal Courts*, 49 VA. L. REV. 692 (1963); *cf. FED. R. CIV. P. 43(a)*.

45. *Allstate Ins. Co. v. Charneski*, 286 F.2d 238 (7th Cir. 1960). *But see Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 360 (1961) (dissent): "Whether or not such relief should be granted does not depend upon whether the state courts would exercise their discretion to grant a declaratory judgment in the same situation."

41(b),⁴⁶ state law determines whether a federal court may dismiss on the merits for failure of the plaintiff to prosecute.⁴⁷

From such decisions the question naturally arises whether there is any logical stopping point for the outcome-determinative test. Any difference in method of administering justice might be outcome-determinative. Would the bubble be blown until it burst or would it continue to grow until, at least in diversity cases, it strangled the last vestige of independent responsibility of federal courts for the integrity and economy of judicial administration in those courts? Moreover, the implications of the answer to this question extend even beyond diversity cases. Although it is largely in diversity cases that the gloss upon *Erie* has been written, the Judiciary Act does not so limit its "rules of decision" section and it would seem that the *Erie* doctrine, whatever it may come to be, or, perhaps more correctly, a close analogue of it, is applicable in all situations where federal courts turn to state law to supply the rule for decision because "the Constitution or treaties of the United States or Acts of Congress" do not "otherwise require or provide,"⁴⁸ whatever the basis for federal jurisdiction.⁴⁹

II. BYRD: NEW LIGHT OR FALSE TRAIL?

*Byrd v. Blue Ridge Rural Elec. Coop., Inc.*⁵⁰ is the case which, at least on the surface, seemed to provide the pin to prick the bubble. The plaintiff, employed by an electric contractor, was injured while doing a job contracted for by the defendant. Under the South Carolina workmen's compensation act, the plaintiff recovered benefits from the electric contractor. Then the plaintiff, on the jurisdictional basis of diversity of

46. FED. R. CIV. P. 41(b).

47. Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962).

48. 28 U.S.C. § 1652 (1958).

49. See Meredith v. Winter Haven, 320 U.S. 228, 237 (1943): "*Erie R. Co. v. Tompkins* . . . did not free the federal courts from the duty of deciding questions of state law in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern;" Austrian v. Williams, 198 F.2d 697, 700 (2d Cir.), cert. denied, 344 U.S. 909 (1952); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 281 (1946); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 697 (1953); Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 257 (1963); cf. Kelly v. Kosuga, 358 U.S. 516 (1959) (effect of illegality under a federal statute a matter of federal law, even in diversity actions); Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956) (in action for alleged conversion of bonds of federal agency, burden of proof and good faith issues governed by state law, but not whether bonds overdue). But see Rothenberg v. H. Rothstein & Sons, 183 F.2d 524 (3d Cir. 1950) (since not a diversity case, remedy not barred in federal court although barred in state court); GOODRICH, CONFLICT OF LAWS 44-45 (3d ed. 1949).

50. 356 U.S. 525 (1958).

citizenship, sued the defendant in a federal court in South Carolina for common-law negligence. The defense was that plaintiff's exclusive remedy against defendant was under the South Carolina workmen's compensation act, a remedy which plaintiff had already exhausted. Under the South Carolina statute, the question of whether the defendant was entitled to the limited and definite liability of an employer depended upon whether in fact the defendant had in the past performed work for itself similar to the work it had here contracted to the company for which plaintiff worked.⁵¹ The court of appeals decided this fact question adversely to the plaintiff and rendered judgment for the defendant. The Supreme Court reversed, holding that in a federal court the fact issue should have been submitted to a jury, even though under South Carolina practice such issues in workmen's compensation cases were decided by the court. In the course of his opinion for the majority, Mr. Justice Brennan uttered words which were manna for those who thought that the outcome-determinative test had been carried to undesirable extremes:

Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow the state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.⁵²

It might appear, then, that the way was open for viewing the outcome-determinative gloss upon *Erie* as a policy against forum-shopping between a state court and a federal court in the same state, which, as a policy, might, in appropriate circumstances, yield to sufficient "countervailing considerations."

Even in the *Byrd* opinion, however, this hope of mitigating the outcome-determinative test was dimmed by indications that the "countervailing considerations" language was very limited in scope and not a broad mandate for change. The result was reached "under the influence—if not the command—of the Seventh Amendment." If there ever was doubt, it now seems clear, in light of subsequent Supreme Court de-

51. S.C. CODE ANN. § 72-11 (1962).

52. 356 U.S. at 537.

cisions, that the seventh amendment to the United States Constitution⁵³ required the *Byrd* result.⁵⁴ Moreover, *Byrd's* reliance on "countervailing considerations" was hedged by a statement that the South Carolina practice of deciding such fact questions by judge rather than jury "appears to be merely a form and mode of enforcing the immunity . . . and not a rule intended to be bound up with the definition of rights and obligations of the parties."⁵⁵ Further, Mr. Justice Brennan did not think the right to trial by jury rather than judge was very likely to affect the outcome, in view of the extensive powers of a federal judge to comment on the evidence and witnesses and to grant a new trial if the verdict seemed to him contrary to the weight of the evidence.⁵⁶

Despite these built-in limitations on *Byrd* as a possible change in the outcome-determinative doctrine, a few circuit court decisions have seized upon the "countervailing considerations" language as an aid in rejecting arguments made under the *Erie* gloss,⁵⁷ and some commentators see in *Byrd* hope for basic shifts in attitude.⁵⁸ Even if the "countervailing considerations" concept of *Byrd* is a viable basis for relief from an over-rigid outcome-determinative rule, however, it is likely to be largely limited to preserving those aspects of federal trial court procedures and practices essential to the integrity and economy of judicial administration in the federal courts as a separate system. Further encroachment of *Erie* on the Federal Rules of Civil Procedure may be prevented, but much beyond this, concerning rules traditionally deemed "substantive," the reform value of *Byrd* is, at best, doubtful.⁵⁹

53. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

54. See *Simler v. Conner*, 372 U.S. 221 (1963) (in federal courts, in diversity as well as other actions, right to a jury trial determined as a matter of federal law under the seventh amendment); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962) (suit by longshoreman on law side of federal court by reason of diversity carried with it a right to trial by jury under the seventh amendment); A. E. Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 451 (1962); Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEXAS L. REV. 549, 560-61 (1959).

55. 356 U.S. at 536. See also *Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273 (1959).

56. 356 U.S. at 539-40 (1958).

57. See *Brown v. Pyle*, 310 F.2d 95, 97 (5th Cir. 1962) (rejecting argument that, despite improper venue, federal court must hear case if state court would); *Monarch Ins. Co. of Ohio v. Spach*, 281 F.2d 401, 406-07 (5th Cir. 1960) (may admit pre-trial examination in evidence even though state court would not).

58. Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082, 1098-99 (1963); Storke, *Conflicts Erie Cases*, 32 ROCKY MOUNT. L. REV. 20, 36 (1959); Vestal, *supra* note 49.

59. *But see* Vestal, *supra* note 49, at 269.

III. "COUNTERVAILING CONSIDERATIONS": THE KEY TO USE OF STATE CONFLICT OF LAWS RULES IN FEDERAL COURTS

Conceding the weakness of *Byrd* as a reed upon which to rest an argument for general and pervasive change in the outcome-determinative rule, it is nevertheless the basic thesis of this article that *Byrd's* "countervailing considerations" concept is useful, indeed essential, for achieving wise and desirable answers to the question of when, in choosing applicable state law, a federal court should utilize the conflict of laws rules of the state in which it sits. The *Byrd* rationale has very special strengths here which it may not have elsewhere.

Neither of the two basic reasons given by Mr. Justice Brandeis in *Erie* for overruling *Swift v. Tyson*, the constitutional dictum or the interpretation of "laws" to include decisional law, is applicable to use of state conflicts rules. There has been much debate concerning the soundness of the dictum concerning the "unconstitutionality of the course pursued"⁶⁰ under *Tyson*. Mr. Justice Brandeis' reasoning here seems to have been that Congress could not constitutionally make laws applicable to essentially intrastate transactions, when unauthorized by any provision of the Constitution of the United States. If Congress could not do this, neither could the federal courts: "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 part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."⁶¹ This argument, which might conveniently be labelled a "tenth amendment"⁶² argument,⁶³ also appeared in several of the pre-*Erie* dissents to applications of *Tyson*.⁶⁴ A possible reply to this constitutional argument is that, although Congress cannot legislate except within the bounds of its constitutional authority, the "necessary and proper" clause⁶⁵ combined with the judiciary article⁶⁶ may in fact be sufficient constitutional authority for Congress to make substan-

60. 304 U.S. at 77-78.

61. *Id.* at 78.

62. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

63. See *Iovino v. Waterson*, 274 F.2d 41, 48 (2d Cir. 1959), *cert. denied sub nom., Carlin v. Iovino*, 362 U.S. 949 (1960); *Silving, Analogies Extending and Restricting Federal Jurisdiction; Erie R. Co. v. Tompkins and the Law of Conflict*, 31 IOWA L. REV. 330, 345 (1946).

64. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 532-33 (1928) (Holmes, J., dissenting); *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368, 399 (1893) (Field, J., dissenting).

65. U.S. CONST. art. I, § 8, cl. 18.

66. U.S. CONST. art. III.

tive law for diversity cases.⁶⁷ Even conceding the validity of this constitutional argument, however,⁶⁸ it is not applicable to conflict of laws rules involving by definition, interstate rather than intrastate transactions, and subject to congressional control under the commerce⁶⁹ and full faith and credit⁷⁰ clauses. Mr. Justice Brandeis was addressing himself solely to application of an alien rule to an essentially intrastate transaction which, under the Constitution, was solely of state concern. It was surely only in this limited context that he meant "there is no federal general common law."⁷¹ In a case decided the same day as *Erie*, Mr. Justice Brandeis himself applied what he called "federal common law" in deciding another case involving the apportionment of an interstate stream.⁷² Moreover, *Erie* itself involved a choice-of-law problem. The impact had been in Pennsylvania while the federal forum was in New York. Without paying the New York choice-of-law rule even the respect of mention, the case was remanded to permit the circuit court to determine and apply the Pennsylvania tort law.⁷³ This is especially striking in view of the fact that the question of the applicability of *Erie* to choice-of-law rules was specifically reserved in a case decided less than a month after *Erie* and *sub judice* at the time *Erie* was decided.⁷⁴

Another, possibly stronger, argument in support of a constitutional basis for *Erie* is that, although Congress has constitutional power to make substantive law for diversity cases, the federal courts, on their own, do

67. *Erie R.R. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring). *But see* Quigley, *Congressional Repair of the Erie Derailment*, 60 MICH. L. REV. 1031, 1059 (1962); Whicher, *supra* note 54, at 553.

68. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 202 (1956) (construing United States Arbitration Act as not applicable, to avoid constitutional question presented by *Erie*).

69. U.S. CONST. art. I, § 8, cl. 3. See *Silving*, *supra* note 63, at 351.

70. U.S. CONST. art. IV, § 1. See *Cook*, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421 (1919); *Freund*, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1229-30 (1946).

71. 304 U.S. at 78.

72. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). See, e.g., *United States v. Standard Oil Co. of Calif.*, 332 U.S. 301 (1947) (government's right to recover for injury to soldier governed by federal law even though Congress has not acted on the question); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945) (even in absence of statute, rights and liabilities on commercial paper issued by the federal government determined by federal law); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943) (same); *Fulton Nat'l Bank v. United States*, 197 F.2d 763 (5th Cir. 1952) (same).

73. 304 U.S. at 80. For similar pre-*Klaxon* statements see *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10-11 (1941); *Hudson v. Moonier*, 304 U.S. 397 (1938). That, because of echoes of *Tyson* in New York opinions, reference to New York law might have produced a different result, see *Hill*, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. REV. 427, 541, 598 (1958).

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

not,⁷⁵ save in those few areas where the necessity for a uniform national result achieved by adherence to a federal rule requires the shaping of "federal common law."⁷⁶ Again, even assuming that conflict rules do not present such a need for national uniformity, this reason is not applicable to such rules. That a forum uses its own conflicts rules is a doctrine too firmly established to provide any room for such a constitutional argument.

Finally, and best of all, a constitutional argument for *Erie* can be made by analogy to those cases establishing due process limitations on a state's choice of law.⁷⁷ A forum may not apply its own law to a case so as to affect the result on the merits, unless some policy of the forum would be advanced in so doing and its application would not outrageously surprise one of the parties.⁷⁸ Once again, such a constitutional argument is not applicable to choice-of-law rules if those rules point to a domestic law, the application of which meets the requirements of due process.

As for *Erie's* interpretation of "laws" as including court-made law—this does not foreclose the argument, especially in view of Mr. Justice Brandeis' failure to advert to the conflicts element in *Erie*, that such court-made laws include only the ordinary domestic laws of the appropriate state, not the conflicts rules of the state in which the district court is sitting. This contention is buttressed by the last phrase in the Judiciary Act section under scrutiny—"in cases where they apply." The federal court, the argument might run, is free to decide for itself to which controversies, having contacts with more than one state, the domestic law of any particular state is applicable.

Having said all this, however, is still not to say that a federal district court should never apply the conflicts rules of the state in which it is sitting. The outcome-determinative gloss written upon *Erie* in subsequent Supreme Court cases had no real relation to *Erie* itself,⁷⁹ but that gloss nevertheless represents a policy which, if unopposed by "countervailing considerations," should prevail—the policy against making the result depend upon the fortuitous selection of forum.⁸⁰ Different conflicts rules are likely to lead to different results in litigation as surely as different substantive domestic laws. The following sections, then, will be devoted

75. See Quigley, *supra* note 67; Whicher, *supra* note 54, at 551; Note, 52 HARV. L. REV. 1002, 1003 (1939).

76. See cases cited note 72 *supra*.

77. See, e.g., Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

78. See Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 490 (1959).

79. See HART & WECHSLER, *op. cit. supra* note 49, at 633-34.

80. "If the decree would have been right in a court of the State of Texas it was right in a District Court of the United States sitting in the same State." Union Trust Co. v. Grosman, 245 U.S. 412, 418 (1918) (Holmes, J.)

to examining various circumstances in which a federal district court, in a diversity case, might be asked to apply the conflicts rules of the state in which it is sitting. The purpose will be to determine in what situations the non-constitutional, non-statutory policy against forum-shopping between state and federal court is outweighed by other, conflicting policies, pointing to the federal court's applying its own conflicts rules.

IV. THE ARGUMENT AGAINST THE APPLICATION OF ERIE TO ANY CONFLICTS PROBLEM

A. *The Danger of Interstate Forum-Shopping*

It might be argued that the policy against intrastate forum-shopping is always outweighed by the danger of interstate forum-shopping if a federal district court is required to conform to local state conflicts law. Application of the local conflicts rule will reflect the parochial views of the forum state and provide a convenient forum, additional to the state court, where, by application of inappropriate and outcome-determinative forum rules, the result is made dependent upon the selection of the forum. Classic examples of this undesirable practice are *Sampson v. Channell*⁸¹ and the landmark Supreme Court case extending *Erie* to conflicts rules, *Klaxon Co. v. Stentor Elec. Mfg. Co.*⁸² In each of these cases, the federal court was required to apply an outcome-determinative rule of the state in which it was sitting if that state would classify the rule as "procedural." This was true even though the forum state would agree that all "substantive" issues should be decided under the law of another jurisdiction whose contacts with facts and parties made use of its law more appropriate. In *Sampson* this resulted in applying the Massachusetts rule on burden of proof as to contributory negligence when, for resolution of all "substantive" issues, a Massachusetts court would have looked to Maine law. In *Klaxon*, such a view required remand to determine whether a Delaware court would insist on applying the Delaware rule on judgment interest to a contract made and performed in New York, the only contact with Delaware being that Delaware was the place of the defendant's incorporation.⁸³

There are several possible answers to such an argument. First of all, as Professor Freund has pointed out,⁸⁴ the "additional convenient

81. 110 F.2d 754 (1st Cir.), *cert. denied*, 310 U.S. 650 (1940).

82. 313 U.S. 487 (1941).

83. *Stentor Elec. Mfg. Co. v. Klaxon Co.*, 125 F.2d 820 (3d Cir.), *cert. denied*, 316 U.S. 685 (1942) (deciding Delaware would regard the New York rule as "substantive" and apply it).

84. Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1212 (1959).

forum" argument may be based on an assumption as to the plaintiff's freedom of choice of forum which is unrealistic in view of the fact that in most diversity cases the action may be brought "only in the judicial district where all plaintiffs or all defendants reside."⁸⁵ But passing this hurdle, the fact remains that the choice-of-law rules of a state are important expressions of its domestic policy.⁸⁶ It is as important for the state to decide to what interstate transactions its domestic laws are applicable as it is for it to decide what intrastate transactions invoke those laws.⁸⁷ Displacement of a state conflict rule by the federal court's own view as to appropriate choice of law, although it may be proper under certain circumstances, should not be made cavalierly or as a matter of course. Moreover, although labelling as "procedural" a rule with high potential for affecting the outcome may seem a wild and irrational aberration of the local state's conflicts doctrine, it may mask a poorly articulated but quite reasonable policy decision that in fact the local domestic rule is the one most appropriate for application to the interstate transaction in dispute. A notorious example of this is the dictum in *Kilberg v. Northeast Airlines, Inc.*⁸⁸ that the \$15,000 limit on recovery contained in the Massachusetts wrongful death act was not applicable to a suit in New York by the administrator of a deceased New York domiciliary who had boarded the fatal airplane flight in New York, because the measure of damages was "procedural."

At bottom, the argument that federal courts should always apply their own conflict rules assumes that federal courts, being by nature less parochial than the courts of the state in which they are sitting, will be far more likely to evolve better choice-of-law rules, selecting domestic rules more appropriate than those that would be selected by a local state court.⁸⁹ This assumption may have been rendered obsolete by the many recent indications that state courts are turning from rigid, territorially-

85. 28 U.S.C. § 1391(a) (1958). This choice is now enlarged in a number of cases by the 1963 amendment to the venue provision providing that "A Civil action on a tort claim arising out of the manufacture, assembly, repair, ownership, maintenance, use, or operation of an automobile may be brought in the judicial district wherein the act or omission complained of occurred." 77 Stat. 473 (1963).

86. See Cavers, *Change in Choice-of-Law Thinking and Its Bearing on the Klaxon Problem*, in ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 154, 166 (Tent. Draft No. 1, 1963) [hereinafter cited as ALI STUDY]; Currie, *Change of Venue and the Conflict of Laws: A Retraction*, 27 U. CHI. L. REV. 341, 344 (1960).

87. See Freund, *supra* note 70, at 1217-19.

88. 9 N.Y.2d 34, 42, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137 (1961).

89. See Wolkin, *Conflict of Laws in the Federal Courts: The Erie Era*, 94 U. PA. L. REV. 293, 295 (1946). But see Cavers, *supra* note 86, at 182-91 (reasons why unlikely federal courts could develop a unitary system of choice-of-law rules better than states have done).

oriented choice-of-law rules to choice of law based upon analysis of the policies underlying putatively conflicting domestic rules.⁹⁰

In extreme cases where, in any view, the state conflicts rule results in an irrational selection of inappropriate law, a remedy may lie in cautious extension of established constitutional limitations on a state's choice of law. One area where such extension might occur is that mentioned above. It should be a violation of due process for a forum, by the device of affixing a "procedural" label, to avoid the application of another state's rule, if the policies underlying the other state's rule would be advanced by applying that rule to the case at bar, the rule is of a kind which has high potential for affecting the outcome on the merits, the foreign rule is not inordinately difficult for the forum to find and apply and application of the forum's different rule will not advance any rationally applicable policy of the forum. Ironically, one of the first candidates for overruling under such a view of due process would be *Klaxon* itself.⁹¹ A similar due process argument might be made if the forum state would apply its own "substantive" law to a controversy as indicated by a traditional, territorially-oriented choice-of-law rule, such as the place of impact for torts, but analysis reveals that no policy of the forum's rule is applicable to the case at bar and that a different and rationally applicable rule exists elsewhere.

Again, if the forum would refuse to apply its own rule because the forum's traditional choice-of-law rule points to some other geographical location as having the decisive "contact," such a refusal may be based upon an unreasonable classification if in fact the policies underlying the forum rule would be advanced by applying it and if application would not interfere with the legitimate interests of any other state or unfairly surprise any party. Such unreasonableness should be precluded by the "equal protection" clause of the fourteenth amendment of the United States Constitution.⁹²

90. See, e.g., *Bernkrant v. Fowler*, 55 Cal. 2d 588, 360 P.2d 906, 8 Cal. Rptr. 386 (1961); *Schmidt v. Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Thompson v. Thompson*, 193 A.2d 439 (N.H. 1963); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Haumschild v. Continental Cas. Co.*, 7 Wis. 2d 130, 95 N.W.2d 814 (1959).

91. See *Cavers*, *supra* note 86, at 210; *Weintraub*, *supra* note 78, at 467-68.

92. See *Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1, 11 (1960); *Kramer, Interests and Policy Clashes in Conflict of Law*, 13 RUTGERS L. REV. 523, 536 (1959); *Weintraub, A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 224-25 (1963); cf. *Canadian No. Ry. v. Eggen*, 252 U.S. 553, 559 (1920) (borrowing statute's exclusion of local citizen not "arbitrary or vexatious discrimination against non-residents"); *Tussman & TenBroek, The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949).

B. *The Danger of Intrastate Forum-Shopping*

Paradoxically, requiring the federal district court to apply the conflicts law of the state in which it is sitting may result in the very intrastate forum-shopping which such a requirement is designed to prevent. This is because the conflicts area is in a state of flux approaching revolution. Choice-of-law rules formerly accepted without question are being rapidly displaced and long lines of cases based on such rules overturned.⁹³ In such an atmosphere, a party who would benefit from application of a standard, territorially-oriented choice-of-law rule reflected in the most recent pronouncement of the highest court of the state would do well to choose the federal district court as forum. Conversely, a party will have far greater chance of success in the state supreme court, if he wishes to argue that the conflicts rule formerly accepted in the state would produce an irrational and unjust result in the case and should be changed in accord with current trends elsewhere.⁹⁴ It is sobering to reflect that only five years before *Kilberg v. Northeast Airlines, Inc.*⁹⁵ and seven years before *Babcock v. Jackson*⁹⁶ so able a federal judge as Jerome Frank felt compelled, despite his sympathy with arguments that the result was unjust, to sanction the dismissal of a complaint brought by an American plaintiff against an American defendant in an American court if the plaintiff could not prove the tort law of Saudi Arabia, the place of injury. New York had consistently applied the law of the place of wrong to tort conflicts problems and Judge Frank could "see no signs that the New York decisions pertinent here are obsolescent."⁹⁷

The reason for this unhappy state of affairs is that federal courts have been given too little freedom to adapt to current trends in state law. In the words of Mr. Justice Black:

But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. And in the absence of a change by the Missis-

93. See cases cited note 90 *supra*.

94. See 1A MOORE, FEDERAL PRACTICE 3324 (2d ed. 1961); Quigley, *supra* note 67, at 1036.

95. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

96. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

97. *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541, 543 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). Although Judge Frank wrote the opinion which affirmed the dismissal of the complaint, he voted to remand in order to give the plaintiff another opportunity to prove Saudi-Arabian law.

issippi legislature, the court below could reconsider and depart from the ruling of the highest court of Mississippi on Mississippi's statute of limitations only to the extent, if any, that examination of the later opinions of the Mississippi Supreme Court showed that it had changed its earlier interpretation of the effect of the Mississippi statute.⁹⁸

Unless "convinced by other persuasive data that the highest court of the state would otherwise decide," the federal court is required to follow the opinions, not only of the state supreme court, but the lower state courts of record.⁹⁹ In what may be the crowning indignity, even on questions in which it is clear that the state court would apply the law of another state, the federal court must ascertain the law of that other state, not independently, but as the alter ego of the supreme court of the state in which it is sitting.¹⁰⁰ As Judge Friendly has 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."¹⁰¹ To aggravate the situation, in diversity cases the Supreme Court has, except in exceptional circumstances like avoidance of a constitutional issue, disapproved a federal court's staying proceedings until a doubtful question of state law could be determined by the parties in a declaratory proceeding in a state court.¹⁰² It is not surprising, then, to find federal judges saying such things as: "Nor can we apply, in diversity cases, a rule of stare decisis which permits us to weight the degree of authority belonging to a precedent by its agreement with the spirit of the times. The Georgia courts can overrule their prior decisions. The Federal Courts cannot do so."¹⁰³

If the question is how to avoid this weird form of intrastate forum-shopping, the answer does not lie in giving federal courts complete freedom to disregard the law of the state in which they are sitting. The answer does lie in removal of artificial limitations which have impeded their efforts to reflect viable current trends and changes in conflicts law not discernible in state opinions which are ripe for overruling. Professor

98. *Moore v. Illinois C. R.R.*, 312 U.S. 630, 633 (1941).

99. *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). See also *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *cf. King v. Order of United Commercial Travelers of America*, 333 U.S. 153 (1948) (need not follow decision of court not of record and not constituting precedent in any state court).

100. *Nolan v. Transocean Air Lines*, 365 U.S. 293 (1961).

101. *Cooke v. E. F. Drew & Co.*, 319 F.2d 498, 503 (2d Cir. 1963) (dissent).

102. *Sutton v. Lieb*, 342 U.S. 402 (1952); *Meredith v. Winter Haven*, 320 U.S. 228 (1943); *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101 (1944) (avoidance of constitutional question—suit to enjoin enforcement of state tax).

103. *Polk County, Ga. v. Lincoln Nat'l Life Ins. Co.*, 262 F.2d 486, 490 (5th Cir. 1959). See also *Schultz v. Tecumseh Prods.*, 310 F.2d 426, 432 (6th Cir. 1962); *Hausman v. Buckley*, 299 F.2d 696, 704 (2d Cir.), *cert. denied*, 369 U.S. 885 (1962).

Moore has put it well: "Although there must be faithful adherence to state substantive law in non-federal matters, it should be a wise and discerning loyalty, something in the nature of a 'prophetic judgment' as to what the highest court would now do."¹⁰⁴ In an area which is changing as rapidly as is the conflict of laws, there should be a reversal of the current attitude which prevents federal courts from obtaining direct information on the state view of the matter in controversy by staying, for declaratory proceedings in a state court, or, where state statute permits,¹⁰⁵ certifying the question directly to the state court.

C. *The Loss of Federal Judicial Talent in Developing Conflict Rules*

It might be urged that requiring federal courts in diversity cases to follow the law of the state in which they are sitting destroys the creativity of federal courts in a major fraction of their business and squanders the talents of federal judges, whose ranks include many of our most able jurists.¹⁰⁶ This is an especially serious waste of intellectual resources in an area, such as conflicts, where the complexity of the problems and the rapidity of current growth and change require as much talent as can be recruited.

Much of the answer to such an argument lies in what has been said just above concerning the desirability of giving federal judges in diversity cases reasonable freedom to take account of developing trends so that they do not march several leagues behind the very state courts whose pace they are attempting to match. But there is another vast area where full advantage may be taken of the creative talents of federal judges in solving conflicts problems. This is the area in which, in the interstitial augmenting of federal common or statutory law, the federal court turns to state law as the rule for decision.¹⁰⁷ The federal court should be free here to determine for itself which state will supply the rule most appropriate

104. MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE 338 (1949). See also *Cooke v. E. F. Drew & Co.*, 319 F.2d 498, 505 (2d Cir. 1963) (Friendly, J., dissenting); *Cavers*, *supra* note 86, at 211; *Quigley*, *supra* note 67, at 1067.

105. See FLA. STATS. ANN., §§ 25.031-.032 (1961), utilized in *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960) to avoid decision of constitutional question; *cf.* *Kurland, Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 214 (1957) (federal certification statute would be possible).

106. See *Hart, The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 510 (1954); *Corbin, The Judicial Process Revisited: Introduction*, 71 YALE L.J. 195, 200 (1961); *Note*, 71 YALE L.J. 344, 353 (1961).

107. See, *e.g.*, *Commissioner v. Stern*, 357 U.S. 39 (1958) (indicating commissioner's recover of estate's tax deficiencies from beneficiary of life insurance policy held by decedent depends upon law of decedent's domicile); *Helvering v. Fuller*, 310 U.S. 69 (1940) (whether husband taxable on income from alimony trust depends on whether, under appropriate state law, the husband can be compelled to make additional payments in the future).

for the case at bar.¹⁰⁸ In cases involving injury to passengers on the high seas, but on the law side of the federal court solely by reason of diversity jurisdiction,¹⁰⁹ federal courts have employed their own conflicts rules in determining which nation's law should govern the validity of contractual shortening of periods of limitations.¹¹⁰ The Supreme Court has left open the question of whether *Klaxon* is applicable to cases in which federal jurisdiction is not based on diversity of citizenship.¹¹¹ This doubt should be resolved in favor of freedom for federal judges to lend their talents to the new efforts to solve conflicts problems in a more rational and just manner. Intrastate forum-shopping between state and federal court would not result, because once the federal choice-of-law rule had been established, the state court, having concurrent jurisdiction of the issue arising under federal law, would be compelled to follow suit.¹¹²

There might, of course, be a period of time, perhaps a substantial period, which would pass before the federal conflicts rules were authoritatively established and in which intrastate forum-shopping might occur. For this reason, the ideal situation in which to develop federal choice-of-law rules is that in which federal law looks to state law for the final rule of decision, but jurisdiction is exclusively in the federal courts. Suits against the federal government under the Federal Tort Claims Act¹¹³ fit this description exactly. Unfortunately, this chance for creative federal contributions to the common law of conflicts has thus far been wasted because the statute expresses a woodenly rigid choice-of-law rule referring to "the law of the place where the act or omission occurred."¹¹⁴ In order to restore at least a chance for flexibility and rationality to the statutory rule, the Supreme Court of the United States has interpreted it as referring to the whole law of the state where the "act or omission occurred" including that state's choice-of-law rule.¹¹⁵ It would be better to amend the statute so as to leave federal courts free to fashion their own

108. See Freund, *supra* note 70, at 1236 n.62; 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, 807-08 (1957).

109. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (no jurisdiction over maritime claims on law side of federal court unless there is diversity of citizenship).

110. *Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Piscane v. Italia Societa Per Azioni Di Navigazione*, 219 F. Supp. 424 (S.D.N.Y. 1963).

111. *D'oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 456 (1942). See also *Fahs v. Martin*, 224 F.2d 387, 398-99 (5th Cir. 1955) (indicating federal and state choice-of-law rule would be the same in an action by trustee in bankruptcy for federal tax refund).

112. *Cf. Siegelman v. Cunard White Star, Ltd.*, 221 F.2d 189 (2d Cir. 1955).

113. 28 U.S.C. §§ 1346(b), 2671-80 (1958).

114. 28 U.S.C. § 1346(b) (1958).

115. *Richards v. United States*, 369 U.S. 1 (1962).

conflicts rules in tort claim cases. This might be done, for example, by having the quoted provision read simply "the appropriate law."

A possible rebuttal to this position is that, once it is determined that state law should be looked to for the rule of decision, the whole law of the state should be applied, including its conflicts rules.¹¹⁶ Conflicts rules express the policies of the state as surely as the purely domestic rules of the state and often provide a vital clue to the policies underlying the domestic rules. This is true. Saying that federal courts, in federal question cases where reference to state law is required, should be free to fashion their own conflicts rules is, however, not saying that they should deliberately disregard state conflicts rules. They should examine the state conflicts rules for any clue those state rules afford as to the policies underlying the putatively conflicting state domestic rules. Any rational choice-of-law decision must begin with a consideration of those underlying policies. Also, any proper choice-of-law rule will avoid unfair surprise to the parties. If a federal court decides to fashion a conflicts rule different from that of the state in which it is sitting, it will be because the court's rule is thought to be more "appropriate"—more concerned with the policies underlying the conflicting domestic rules of the states having relevant contacts with the controversy and less likely to upset the reasonable expectations of the parties.

D. *Across-the-Board Refusal to Apply State Conflicts Rules Unjustified*

For the reasons stated above, a blunderbuss attack on federal courts ever applying state conflicts rules should be repulsed. It cannot be said that there is any one policy or any combination of policies which, in all circumstances, will outweigh the policy against intrastate forum-shopping which urges a federal court to use the conflicts rules of the state in which it is sitting. What is required is separate scrutiny of various diversity jurisdiction cases to determine in which circumstances the policy against intrastate forum-shopping is overcome by countervailing considerations. Now to turn to this task.

V. STATE FORUM-CLOSING CONFLICTS RULES

A. *General Diversity Jurisdiction*

Out of the rather complex circumstances in *Angel v. Bullington*¹¹⁷ arose the rule that, in a diversity case, a federal court must follow the conflicts rule of the state in which it is sitting, even if that state rule merely closes the state forum to suit and does not produce a result on the

116. See 1A MOORE, FEDERAL PRACTICE 3056, 3769-70 (2d ed. 1961).

117. 330 U.S. 183 (1947).

merits. In *Angel*, the plaintiff, a citizen of Virginia, had sold land in Virginia to the defendant, a North Carolina citizen. The defendant made a down payment and then defaulted on one of a series of notes given for the balance of the purchase price. The land was sold under a power of sale contained in a deed of trust securing the notes. Because the proceeds of sale were less than the amount owed on the notes, the plaintiff brought suit in a state court in North Carolina for the deficiency. The defendant demurred, relying on a North Carolina statute which provided that "In all sales of real property by . . . trustees under powers of sale contained in any . . . deed of trust . . . the . . . holder of the notes secured by such . . . deed of trust shall not be entitled to a deficiency judgment. . . ." ¹¹⁸ The trial court overruled the demurrer, but on appeal the North Carolina Supreme Court held that the statute denied the state courts jurisdiction to grant the relief sought and dismissed the suit. The North Carolina high court, stating that it was merely denying a forum and not passing on any question of substantive law that affected the merits, rejected the plaintiff's claim under the United States Constitution that North Carolina was precluded from closing the doors of its courts to him. Without appealing this decision to the Supreme Court of the United States, the plaintiff, utilizing diversity jurisdiction, brought a new suit for the deficiency judgment in a federal district court sitting in North Carolina. Judgment for the plaintiff was affirmed by the court of appeals but reversed by the Supreme Court. The Court held that the issue of whether North Carolina could constitutionally close its courts to plaintiff was *res judicata*, having been decided adversely to the plaintiff in the North Carolina high court opinion which plaintiff had allowed to become final. If North Carolina state courts were not open to the plaintiff, then, to avoid a difference in result, a federal district court sitting in North Carolina was similarly closed to him.

In opposing *Angel* and urging that a federal court in a diversity case should not be bound by any forum-closing state rule, several arguments might be based upon the current wording of section thirty-four of the Judiciary Act of 1789.¹¹⁹ State forum-closing rules are not "rules of decision" because they do not produce a judgment on the merits. Moreover, the Judicial Code, in stating that "district courts shall have original jurisdiction"¹²⁰ of diversity cases, does "otherwise require or provide."

The real issues, however, run deeper than such surface arguments suggest. Very important state policies designed for the protection of

118. N.C. GEN. STAT. § 45-21.38 (1950).

119. 28 U.S.C. § 1652 (1958).

120. 28 U.S.C. § 1332(a) (1) (1958).

citizens of the state may be expressed in terms of forum-closing rules. If a state has an applicable rule insulating its citizen from liability flowing from a transaction having some contacts abroad, it might be more desirable for the state to resolve any conflict between the policies underlying its rule and the policies underlying the applicable liability-producing rule of another state and come to a decision on the merits, applying one rule or the other. By abandoning the ostrich-like solution of simply closing its courts to the problem, the chances are increased that conflicts involving commercial agreements will be resolved in favor of validity, especially if the difference in domestic rules producing the conflict reflects a difference in detail rather than basic policy.¹²¹ The fact remains, however, that states do utilize the forum-closing device to express their strongly held policies. Moreover, although theoretically not a decision on the merits, closing of the local forum may effectively insulate the local citizen from liability, for the plaintiff may not be able to find a court elsewhere which has jurisdiction to render a judgment against the defendant or to affect his rights in property.

In the typical diversity case, a federal district court should respect the policies underlying the forum-closing rules of the state in which it is sitting unless these policies are those of the state only qua possible forum and do not rationally flow from some contact which the state has with the parties or with the transaction. Typical of rationally applicable rules which should be respected is that of protecting a local citizen from contractual liability entered into abroad, when the interest of his domicile in protecting him was at all times apparent.¹²² Another such rule is that of insulating a citizen of the state from tort liability to another local citizen when, although the injury fortuitously happened abroad, the policies underlying the rule denying liability remain fully applicable.¹²³ State forum-closing rules which are rationally applicable only when trial is held in the state, should not be followed when the forum is shifted to a federal court sitting in the state. Forum non conveniens is one such solely forum-centered policy.¹²⁴ Perhaps another would be a rule designed to keep of-

121. See Weintraub, *The Contracts Proposals of the Second Restatement of Conflict of Laws—A Critique*, 46 IOWA L. REV. 713, 714-18 (1961).

122. See *Union Trust Co. v. Grosman*, 245 U.S. 412 (1918).

123. See, e.g., *Kircher v. Kircher*, 288 Mich. 669, 286 N.W. 120 (1939); *Koplik v. C. P. Trucking Corp.*, 27 N.J. 1, 141 A.2d 34 (1958); *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E.2d 597 (1936); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23, cert. denied, 293 U.S. 597 (1934).

124. See Hill, *supra* note 73, at 570-71; cf. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (question of application of *Erie* left open). *Contra*, *Weiss v. Routh*, 149 F.2d 193 (2d Cir. 1945) (L. Hand, J.) (*Erie* applicable).

fensive testimony from being heard in state courts.¹²⁵

In short, the argument that a state forum-closing rule is, in view of the policies it advances, applicable only in the state courts qua possible forums and is inapplicable in another forum, even a federal court sitting in the state, deserves serious consideration when made. *Angel v. Bullington* rejected the argument that the North Carolina statute, as construed by the North Carolina Supreme Court, was intended only to close the courts of that state and not federal courts sitting there. *Angel* characterized as "obsolete"¹²⁶ *David Lupton's Sons Co. v. Automobile Club of America*,¹²⁷ which had accepted such an argument and had held that a corporation, which could not sue in New York state courts because it was not authorized to do business in New York, could maintain a suit in a federal court in that state. In view of North Carolina's strong interest in protecting its citizens from a deficiency judgment, this argument may have been properly rejected in *Angel*. Its rejection is more debatable in *Woods v. Interstate Realty Co.*¹²⁸ which reached a result opposite that of *David Lupton's Sons* under a similar state statute. It should not be assumed that there is never any merit to the argument that a state's forum-closing rule is rationally applicable only in courts of that state.

The argument based on the Judiciary Act provision "except where the Constitution, treaties or statutes of the United States shall otherwise require or provide" is weakest when it claims that the general provision for diversity jurisdiction is license to override a strong and rationally applicable state policy when that policy is expressed in a forum-closing conflicts rule, rather than one which points to the law of the state for a judgment on the merits. Such an argument gains strength, however, in cases like *Allstate Ins. Co. v. Charneski*,¹²⁹ where relief under the federal Declaratory Judgments Act¹³⁰ was denied because a Wisconsin court would not let an insurance company, subject to direct suit in Wisconsin, obtain a preliminary declaration of its policy's coverage.¹³¹ The argument becomes compelling in situations where a state attempts to restrict certain proceedings to the state courts of general jurisdiction, withdraw-

125. Cf. *Gordon v Parker*, 83 F. Supp. 40, 43 (D. Mass.), *aff'd*, 178 F.2d 888 (1st Cir. 1949).

126. 330 U.S. at 192.

127. 225 U.S. 489 (1912).

128. 337 U.S. 535 (1949).

129. 286 F.2d 238 (7th Cir. 1960).

130. 28 U.S.C. §§ 2201-02 (1958).

131. *But see Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 360 (1961) (dictum).

ing jurisdiction from all other courts, including federal courts within the state.¹³²

B. *Constitutional Limitations on Forum-Closing*

A state's forum-closing rule should withstand constitutional attack under the due process clause if the policy underlying the rule would be advanced by applying it to the case at bar, and if its application will not outrageously surprise the plaintiff.¹³³ Such a test is usually satisfied if the state seeks to protect its citizens from liability on agreements made in other states, which would be unenforceable if entered into within the state. Unless the defendant's domicile has changed since the transaction in issue, an outrageous surprise argument would be difficult for the plaintiff to maintain.

A state's forum-closing rule should be immune from attack under the full faith and credit clause unless the state's interest in the application of that rule is outweighed by the national need for a uniform result under the public act, record or judicial proceeding of another state.¹³⁴ In the area of judgments, where the national full faith and credit policy is especially strong, local forum-closing rules will generally have to bow to permit enforcement of the judgment of a sister state.¹³⁵ It is only in exceptional circumstances, if any, however, in which a state's rationally applicable forum-closing rule should have to yield to permit suit on a statutory or non-statutory cause of action arising under the law of another state and not reduced to judgment. *Hughes v. Fetter*¹³⁶ did hold that Wisconsin could not close its courts to a suit under the Illinois wrongful death act.¹³⁷ This holding, however, was based on a finding that Wisconsin had no interest whatever to weigh in the balance against the need to give full faith and credit to the Illinois statute by providing a forum for the action. Wisconsin had no policy against wrongful death actions generally because suit could be brought there for a death caused in Wisconsin. Wisconsin had no valid forum non conveniens policy here applicable because all the parties were Wisconsin residents. Even in *Hughes v. Fetter*, however, this conclusion is debatable. A rational forum non conveniens policy may be based not only upon foreign parties, but upon

132. See *Markham v. City of Newport News*, 292 F.2d 711 (4th Cir. 1961); cf. *Zeidner v. Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961).

133. See Weintraub, *Due Process and Full Faith and Credit Limitations on a State's Choice of Law*, 44 IOWA L. REV. 449, 490 (1959).

134. *Id.* at 490-91.

135. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908). *But see* *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1903).

136. 341 U.S. 609 (1951).

137. *Accord*, *First Nat'l Bank v. United Air Lines*, 342 U.S. 396 (1952).

foreign facts, the need for calling foreign witnesses and the problems involved in applying foreign law. The rationale of *Hughes v. Fetter* should not be applicable to situations in which a state's forum-closing rule advances a policy of the state, and surely not if a state has such an interest in the matter that a judgment on the merits for the defendant would withstand constitutional attack, but the state elects instead to close its courts to the plaintiff.

C. State Forum-Closing Rules in Federal Interpleader Actions

*Griffin v. McCoach*¹³⁸ was the landmark case discussing the interplay between the Federal Interpleader Act¹³⁹ and the outcome-determinative *Erie* gloss. Colonel Robert D. Gordon, a citizen of Texas, interested several persons in Texas oil developments and a syndicate was formed for this purpose. Money was advanced to Gordon by the syndicate and premiums paid on an insurance policy on his life. Gordon promised to repay the syndicate, but in fact, no repayment was ever made. Because of financial reverses, the syndicate was dissolved and a new association formed for the sole purpose of paying premiums on the life insurance policy and receiving and distributing the proceeds among the members, one-eighth to Gordon's widow and seven-eighths to members of the syndicate or their assignees. The application for the insurance policy was signed by Gordon in New York and accepted in New Jersey at the home office of the insurer; the policy was delivered in New York. The final change of beneficiaries incorporating the agreement to divide the proceeds eight ways was effected by forms signed in Texas by Gordon and in New York by other beneficiaries, the insurer's endorsement on the policy in New Jersey, and return of the policy to the New York beneficiaries. Upon Gordon's death, his personal representatives sued the insurer on the policy in a federal district court in Texas. The insurer, moving under the Federal Interpleader Act, impleaded the other beneficiaries who claimed a seven-eighths share in the proceeds. The Federal Interpleader Act permits a stakeholder, such as the insurer here, if there are two or more adverse claimants of diverse citizenship, to bring a bill of interpleader in any judicial district in which a claimant resides. Service of process under the act is nation-wide. The district court distributed the proceeds of the policy, one-eighth to Gordon's widow and the remainder to the other beneficiaries, as indicated in the policy. The estate's representatives appealed, contending that under Texas law the claimants adverse to the widow did not have an insurable interest in Gordon's life.

138. 313 U.S. 498 (1941).

139. 28 U.S.C. §§ 1335, 1397, 2361 (1958).

The court of appeals affirmed, holding that the policy and subsequent changes were governed by New York law, under which the policy's terms concerning distribution were enforceable. The Supreme Court reversed and remanded to the court of appeals for determination of Texas law. The implication was that the federal court should do whatever a Texas court would do under the same circumstances.

In fact, however, a Texas court would never have a case under the same circumstances. Because of the diverse citizenship of the claimants, the insurer could not file an effective bill of interpleader in a Texas state court. The case that might occur in a Texas state court would be a suit by the New York beneficiaries against Gordon's estate to recover seven-eighths of the policy proceeds. Even this is very unlikely, however, as the wisest course for the New York beneficiaries to follow would be to stay out of Texas and sue the insurer in New York.

Assuming, however, a suit in a Texas court involving the New York beneficiaries against the estate, there are two possible courses of action for a Texas court to take in enforcing the Texas rule on insurable interest: to close the Texas forum to the suit and dismiss but not on the merits, or to render judgment on merits for the estate. The federal court in the interpleader action would have no difficulty mirroring the Texas judgment on the merits for the estate, although such a result would raise grave questions which are discussed in the next section of this article.

What, though, is the federal court to do in its interpleader action if the Texas courts would simply close their doors and not render a decision on the merits? One possibility is to deliver the proceeds to the representative of the estate, leaving the adverse claimants theoretically free to pursue the proceeds in the hands of the representative, but cutting off any claim that the New York beneficiaries might have had against the insurer. Though nominally not a decision on the merits, such a decision would, for all practical purposes, end the New York beneficiaries' chances of obtaining the proceeds, since a Texas state forum would be closed to them and their rights against the insurer would be terminated. This raises questions substantially identical with the propriety of the federal court, in an interpleader action, mirroring a Texas judgment on the merits. This is discussed in the next section. In fact, on remand, the circuit court awarded the proceeds to Gordon's administrator, but it is not clear whether the New York beneficiaries would be free to pursue the proceeds in his hands, if they could find some way to do so.¹⁴⁰

140. *Griffin v. McCoach*, 123 F.2d 550 (5th Cir. 1941), *cert. denied*, 316 U.S. 683 (1942).

Another possibility, if the Texas rule is a forum-closing one, is to dismiss the bill of interpleader and return the funds to the stakeholder. This should not be the result. Federal interpleader is one circumstance under which the federal forum should not be closed in deference to a state forum-closing rule. Because of the nation-wide service of process available under the Federal Interpleader Act, upon dismissal, the stakeholder could simply bring suit again in another judicial district where a claimant resided, obtain in personam jurisdiction over all claimants, and enjoin pending¹⁴¹ or future action against it in a state court. It should not be necessary to act out such a ridiculous charade. In view of the futility of attempting to follow a state forum-closing rule by dismissing a bill of interpleader, the argument that the Federal Interpleader Act does "otherwise require or provide" is particularly strong.

VI. APPLICATION OF STATE LAW ON THE MERITS WHEN THE FEDERAL COURT HAS NATION-WIDE JURISDICTION

A. *Interpleader Actions*

Griffin v. McCoach also raises the question of whether a federal court, in an interpleader case, having nation-wide service of process, should invariably apply the choice-of-law rules of the state in which it is sitting, thus selecting the law to govern the merits. It has been urged that the federal court should not do so because this would make federal interpleader a device for interstate forum-shopping. The first claimant to sue could fix the forum and pick the law.¹⁴²

This is not quite true. Only the stakeholder may bring a bill in federal interpleader.¹⁴³ The bill may be brought in any judicial district where a claimant resides.¹⁴⁴ The federal court within which the bill is brought has jurisdiction to enjoin claimants anywhere in the nation¹⁴⁵ from instituting or continuing¹⁴⁶ actions in state courts against the stakeholder. The stakeholder, being required to deposit in court the funds or

141. See *Holcomb v. Aetna Life Ins. Co.*, 255 F.2d 577 (10th Cir.), *cert. denied sub nom.*, *Fleming v. Aetna Life Ins. Co.*, 358 U.S. 879 (1958) (prior state court suit enjoinable).

142. See, e.g., Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 287 (1946); Harper, *Policy Bases of the Conflict of Laws: Reflections on Re-reading Professor Lorenzen's Essays*, 56 YALE L.J. 1155, 1175 n.63 (1947).

143. 28 U.S.C. § 1335 (1958).

144. 28 U.S.C. § 1397 (1958).

145. 28 U.S.C. § 2361 (1958).

146. See *Holcomb v. Aetna Life Ins. Co.*, 255 F.2d 577 (10th Cir.), *cert. denied sub nom.*, *Fleming v. Aetna Life Ins. Co.*, 358 U.S. 879 (1958) (prior state court suit enjoinable).

property it is holding¹⁴⁷ to be divided among the claimants, will usually have no incentive for interstate forum-shopping, except, perhaps, on matters unrelated to the merits, such as whether the stakeholder may recover its attorneys' fees.¹⁴⁸

Nevertheless, there remains compelling force to the argument that, in federal interpleader, the federal court should not be required to apply the choice-of-law rules of the state in which it is sitting. Although, theoretically, the stakeholder may sue anywhere a claimant resides, it is likely that the bill of interpleader will be filed as a reflex action in the judicial district in which the first claimant sues the stakeholder. This is what happened in *Griffin v. McCoach*. Moreover, the power of nation-wide service of process obligates the federal court to act as a neutral forum, not as the vassal of the state in which it is sitting.¹⁴⁹ Otherwise the policies of that state might prevail over claimants who, but for the nation-wide service, could never have been subjected to those policies. A similar action could not be brought in a state court. Indeed, this is the reason we have federal interpleader. Therefore, it is false and misleading, in this context, to talk of the danger of intrastate forum-shopping if the federal court refuses to apply the conflicts rules of the state in which it is sitting.

It is not suggested that in federal interpleader the federal court deliberately ignore the conflicts rules of the state in which it is sitting, but merely that the court be free to depart from those rules if it sees fit to do so. Under such a standard, the federal court would reject the law of the state in which it is sitting should it decide that the law of another state is more appropriately applicable. In making this determination, the federal court should consider the policies underlying the relevant conflicting domestic laws, including clues to such policies as may be provided by the conflicts rules of the states involved. Any true conflict between the domestic law of the state in which the federal court is sitting and the domestic law of another state should be resolved against the law of the local state if, as in *Griffin v. McCoach*, it is an odd, anachronistic lag in the development of local law, unknown in other states.¹⁵⁰

147. 28 U.S.C. § 1335(a)(2) (1958).

148. See *Aetna Life Ins. Co. v. Johnson*, 206 F. Supp. 63 (N.D. Ill. 1962) (whether stakeholder entitled to attorneys' fees out of fund depends on local state law). *Contra*, *Palomas Land & Cattle Co. v. Baldwin*, 189 F.2d 939 (9th Cir. 1951).

149. See ALI STUDY 35 (recommending that 28 U.S.C. § 2361 be amended so that when state law supplies the rule of decision, the district court may make its own determination as to which state rule is applicable); Freund, *Federal-State Relations in the Opinions of Judge Magruder*, 72 HARV. L. REV. 1204, 1211 (1959).

150. See Clark, *supra* note 142, at 287 (Texas rule was "unique").

B. Other Proceedings

If, when the action is brought by a usually neutral stakeholder, a federal court, whose process runs beyond the state in which it sits, should not be required to apply the conflicts rules of the state in which it is sitting, this is true a fortiori when such extra-state process is available to parties contending on the merits and the danger of interstate forum-shopping is dramatically increased.¹⁵¹

At the present time, this kind of danger of interstate forum-shopping has been created to a limited extent by the amendment to Rule 4(f) of the Federal Rules of Civil Procedure which became effective on July 1, 1963. It reads, in part, as follows:

In addition, persons who are brought in as parties pursuant to Rule 13(h) [parties other than those to the original action whose presence is required for the granting of complete relief in the determination of a counterclaim or cross-claim] or Rule 14 [brought in by defendant as third-party defendants], or as additional parties to a pending action pursuant to Rule 19 [persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties], may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial. . . .¹⁵²

Although there is a limit of 100 miles on the out-of-state service under this rule, Professor Vestal has pointed out that in many of our multi-state metropolitan areas "the federal court will be able to reach vast population centers outside the state in which the court is sitting."¹⁵³ When so doing, the federal court should be free to apply its own criteria for choice of governing state law.

Even greater opportunities to use federal courts as devices for interstate forum-shopping would be created by enactment of an amendment to the Judicial Code recommended in a *Study of the Division of Jurisdiction Between State and Federal Courts*, sponsored by the American Law Institute.¹⁵⁴ The study suggests giving federal district courts "original

151. See Freund, *supra* note 149, at 1211-12; Vestal, *Erie RR. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 269 (1963).

152. FED. R. CIV. P. 4(f).

153. Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U.L. REV. 1053, 1065 (1963).

154. ALI STUDY.

jurisdiction of 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 in any one territorial jurisdiction and one of any two adverse parties is a citizen of a State and the other a citizen or subject of another territorial jurisdiction."¹⁵⁵ In order to make such jurisdiction effective, nation-wide service of process is provided.¹⁵⁶ Whatever the merits or demerits of this proposal on other grounds, it is commendable that, as a correlate of this expansion of judicial jurisdiction, the study provides that "the district court may make its own determination as to which State rule of decision is applicable."¹⁵⁷

A somewhat similar danger of subjecting a party to the law of a state he might not otherwise have been subjected to is presented by Section 1404(a) of the Judicial Code: "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."¹⁵⁸ But what conflicts rules are to be applied—those of the state from which the action is transferred, those of the state to which it is transferred or those fashioned by the federal courts?

The few federal cases in point have decided in favor of the law of the state from which transfer is made, at least so far as the applicable statute of limitations is concerned.¹⁵⁹ *H. L. Green Co. v. MacMahon* reaches this same result for the law applicable generally to claims that could have been brought by the plaintiff in the transferor state.¹⁶⁰ The study referred to above recommends codifying this result in the Judicial Code on the ground that, "so long as *Klaxon* stands (and the Reporters remain of the opinion that it should), an independent federal choice-of-law rule applicable in transfer cases only seems logically impossible to justify."¹⁶¹ Furthermore, "the effect is to give the plaintiff the benefit which traditionally he has had in the selection of a forum with favorable choice-of-law rules."¹⁶²

There are several answers that might be made to this argument. First of all, the plaintiff is not "traditionally" entitled to select an in-

155. *Id.* at 22.

156. *Id.* at 27

157. *Id.* at 28.

158. 28 U.S.C. § 1404(a) (1958).

159. *H. L. Green Co. v. MacMahon*, 312 F.2d 650 (2d Cir. 1962), *cert. denied*, 83 S. Ct. 876 (1963); *Headrick v. Atchison, T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950); *Gomez v. The S.S. Dorothy*, 183 F. Supp. 499 (D. P.R. 1959); *Hargrove v. Louisville & Nashville R.R.*, 153 F. Supp. 681 (W.D. Ky. 1957).

160. *Supra* note 159. *But cf.* *Goranson v. Kloeb*, 308 F.2d 655, 656-57 (6th Cir. 1962) (dictum) (law of transferee state).

161. ALI STUDY 66-67.

162. *Id.* at 66.

convenient forum. But for the flexibility that 1404(a) provides when the plaintiff has selected an inconvenient forum, the sanction might be dismissal of the complaint and with it the plaintiff's advantage in being able to select his law with his forum. Because transfer under section 1404(a) is made for "the convenience of parties and witnesses, in the interest of justice," the state to which transfer is made is likely to have far closer connections with the parties and the transaction in controversy and the probabilities are that its law will be more appropriate for application. From this standpoint, it would seem preferable to apply the law of the state to which transfer is made, including its conflicts rules.¹⁶³ Such a result, however, might turn defendant's motion for transfer under 1404(a) into a device for interstate forum-shopping of the kind condemned above. In view of all this, it may be that the best solution in transferred cases is to permit the federal courts to make their own determination of which state law is most appropriately applicable to the case at bar, and this result is not "logically impossible to justify."

VII. CONCLUSION

What is needed now is not major surgery, not an overruling of *Erie* or even of *Klaxon*, if, in regard to *Klaxon*, one puts aside the suggestion that application of Delaware law to affect the result on the merits, although under a "procedural" label, should be a violation of due process. It is desirable that advantage be taken of the "countervailing considerations" concept articulated in *Byrd* to avoid blind adherence to the outcome-determinative test in situations where the harm caused thereby far exceeds any ill effects stemming from different results being reached by state and federal courts sitting in the same state. Though there are many situations in which it is debatable whether this is so, the following stand out as the situations in which it is most strongly arguable that a federal district court should not be required to follow the conflicts rules of the state in which it is sitting: cases under the Federal Interpleader Act; cases in which a party utilizes federal process beyond the boundaries of the forum state, such as is now possible under Rule 4(f) of the Federal Rules of Civil Procedure; actions transferred under Section 1404(a) of the Judicial Code.

If, in these few extreme situations, one is still disturbed by the fact that a different result may be obtained across the courthouse square, the solution is in terms of making the state courts conform to the federal conflicts rule. There are several devices available for this.

163. See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908, 937 (1947); Freund, *supra* note 149, at 1211.

First, there might be an expansion of due process and full faith and credit limitations on a state's choice of law. It would be undesirable, however, in the present state of development of conflict rules, to limit a state's application of its own law to advance its own legitimate interests, except in circumstances where this would result in outrageous surprise to one of the litigants, or in those few instances where the state's legitimate interests are overshadowed by the need for a nationally uniform result under the public act, record or judicial proceeding of a sister state. An example of this latter proposition is compelling a forum state to enforce a judgment of a sister state although a contrary judgment might constitutionally have been obtained at the forum. There is room, though, for making it clearer that a state which does not have sufficient contact with the parties or with the transaction to have a legitimate interest in effecting the result on the merits may not do so under the guise of applying its "procedure." Ironically, *Klaxon* itself might be the first to fall under such a modest expansion of due process standards. Further, the time is ripe for cautious use of the "equal protection" clause of the fourteenth amendment to eliminate some of the irrational classifications which still pervade conflicts dogma.

Beyond this, state conformity to federal conflicts rules must await the day, should it ever come, when objective, informed and intelligent appraisal of the situation leads to the conclusion that an overwhelming need for a nationally uniform conflicts doctrine requires that choice of law in interstate transactions be made a federal question. Even now, as good a case can be made for federal standards for choice of law as for a shipowner's liability to one not a member of the crew who, while calling on a seaman friend, trips on a boat docked in New York harbor.¹⁶⁴ Perhaps competition from "common markets" abroad will cause this day to arrive or will hasten its arrival.¹⁶⁵ But if and when such a day should come, it would be well to arrange the relevant statutory and decisional framework so that this "federal question" does not provide an independent basis for federal jurisdiction,¹⁶⁶ just as today a claim that a state's conflict rule

164. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); cf. *Stolz, Pleasure Boating and Admiralty: Erie at Sea*, 51 CALIF. L. REV. 661, 663, 665 (1963) (no federal interest apparent in personal injury cases arising from pleasure boating).

165. Cf. *Hancher, The Commerce Clause and A Common Market*, 8 S.D. L. REV. 1, 2, 22 (1963).

166. Cf. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) (admiralty not an independent basis for jurisdiction on the law side of a federal court); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), cert. granted, 362 U.S. 909, writ of cert. dismissed, 364 U.S. 801 (1960) (suits involving application of the federal Arbitration Act do not furnish an independent basis for federal jurisdiction); *Boner, Erie v. Tompkins: A Study in Judicial Prece-*

violates due process or denies full faith and credit does not provide such a basis. Any good that may come from the studies devoted to reducing the flood of diversity cases would be swept away by such a "federal question" cloudburst.

dent, 40 TEXAS L. REV. 509, 520 (1962) ("laws of the United States" include only statutes).