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## Corporate Amenability to Process in the Federal Courts: State or Federal Jurisdictional Standards?

*A recent Second Circuit opinion, Arrowsmith v. United Press Int'l, continues a lively debate over the applicability of the Erie doctrine to the in personam jurisdiction of federal courts sitting in diversity cases. The author of this Note considers the effect of the Federal Rules of Civil Procedure and then examines, in the light of the Supreme Court's decisions in York and Byrd, the federal and state policies reflected in the choice of the jurisdictional standards. He concludes that jurisdiction may, in many circumstances, be an inappropriate area for the application of state law.*

Before a federal court in a diversity action can determine whether it has in personam jurisdiction over a foreign corporate defendant, it often must first decide whether the standard that governs its assertion of jurisdiction is a uniform federal standard or the standard followed by the courts of the state in which the federal court sits.<sup>1</sup> This choice between standards has recently received consideration in *Jennings v. McCall Corp.*<sup>2</sup> and *Smartt v. Coca-Cola Bottling Corp.*<sup>3</sup>; and it was given nearly exhaustive exposition in *Arrowsmith v. United Press Int'l*,<sup>4</sup> in which the Second Circuit, sitting en banc, overruled the alternate ground of its earlier opinion in *Jaftex Corp. v. Randolph Mills, Inc.*<sup>5</sup> These recent decisions, like the great majority that preceded them,<sup>6</sup> all

1. In theory, of course, the federal courts will always apply a federal jurisdictional standard. The question is whether the federal standard requires reference to state law. See *Kenny v. Alaska Airlines, Inc.*, 132 F. Supp. 838, 847 n.10 (S.D. Cal. 1955). In the discussion that follows this intermediate step will be disregarded.

2. 320 F.2d 64 (8th Cir. 1963).

3. 318 F.2d 447 (6th Cir. 1963).

4. 320 F.2d 219 (2d Cir. 1963).

5. 282 F.2d 508 (2d Cir. 1960).

6. First Circuit: *Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1962); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1948); Third Circuit: *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (1953); Fourth Circuit: *Moore-McCormack Lines, Inc. v. Bunge Corp.*, 307 F.2d 910 (1962); *Iliff v. American Fire Apparatus Co.*, 277 F.2d 360 (1960); *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853 (1959); Fifth Circuit: *Connor v. New York Times Co.*, 310 F.2d 133 (1962); *Stanga v. McCormick Shipping Corp.*,

chose the state standard, although the courts often failed to consider the implications of their choice. Notwithstanding the consensus on this subject, there remain compelling reasons for continuing discussion of the problems involved: The Supreme Court has never spoken clearly on the issue; views strongly in favor of a federal standard have been expressed by numerous commentators;<sup>7</sup> and the prodigious reputation of the late Judge Clark, author of *Jaftex* and a dissenter in *Arrowsmith*, in matters of federal jurisdiction and procedure demands that his arguments be given respectful consideration. This Note discusses the development of the choice between federal and state jurisdictional standards in diversity cases and the policies and considerations that should play a part in making the choice.<sup>8</sup>

*Erie R.R. v. Tompkins*<sup>9</sup> held that the Rules of Decision Act<sup>10</sup> requires a federal court in diversity actions<sup>11</sup> to apply the substantive law of the state in which it sits as that law is declared in the decisional, as well as the statutory, law of the state. *Guaranty Trust Co. v. York*<sup>12</sup> declared that state procedural rules must also be followed if they are "outcome-determinative" because "the outcome of the litigation in the federal court should be substan-

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268 F.2d 544 (1959); *Smith v. Ford Gum & Mach. Co.*, 212 F.2d 581 (1954); Seventh Circuit: *Edwin Raphael Co. v. Maharam Fabrics Corp.*, 283 F.2d 310 (1960); *Roberts v. Evans Case Co.*, 218 F.2d 893 (1955); *Canvas Fabricators, Inc. v. William E. Hooper & Sons Co.*, 199 F.2d 485 (1952); Eighth Circuit: *Ark-La Feed & Fertilizer Co. v. Marco Chem. Co.*, 292 F.2d 197 (1961); Ninth Circuit: *L. D. Reeder Contractors v. Higgins Indus., Inc.*, 265 F.2d 768 (1959) (*semble*); Tenth Circuit: *Walker v. General Features Corp.*, 319 F.2d 583 (1963); *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (1949); District of Columbia Circuit: *Mutual Int'l Export Co. v. Napco Indus., Inc.*, 316 F.2d 393 (1963).

7. 1A MOORE, FEDERAL PRACTICE ¶ 0.317[5]; 2 *id.* ¶ 4.25; Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427 (1958); Mendor, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963); Note, 56 COLUM. L. REV. 394 (1956); Note, 5 DUKE B.J. 129 (1956); Note, 69 HARV. L. REV. 508 (1956); 47 CORNELL L.Q. 286 (1962); 77 HARV. L. REV. 559 (1964); 74 HARV. L. REV. 1662 (1961). *Contra*, ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 24, 67-69 (tentative draft No. 2, 1963); 6 VILL. L. REV. 408 (1961).

8. See also Note, *Federal Jurisdiction Over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964).

9. 304 U.S. 64 (1938).

10. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 92 (now 28 U.S.C. § 1652 (1958)).

11. *Erie*, of course, is not limited to diversity actions.

12. 326 U.S. 99 (1945).

tially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.”<sup>13</sup> The well-known result has been a host of cases in which federal courts have had to choose between federal and state laws.

The problem of ascertaining the standard for determining in personam jurisdiction over foreign corporations, long a perplexing one within our federal structure,<sup>14</sup> soon arose in the context of the *Erie* case.<sup>15</sup> In the years between *Erie* and *York* the lower federal courts tended to make the hasty assumption that because jurisdiction was traditionally procedural, federal standards applied.<sup>16</sup> After *York*, however, more thoughtful consideration led to a contrary result. Judge Goodrich, sitting with the First Circuit, stated in *Pulson v. American Rolling Mill Co.*<sup>17</sup> that determination of a federal court’s jurisdiction over a foreign corporation in diversity cases involved two steps: “The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented?”<sup>18</sup> If not, the diversity action will be dismissed for want of jurisdiction. If the answer is yes, the court must determine whether such assertion of jurisdiction by the state court would violate federal due process. If the fourteenth amendment prohibits the assertion of jurisdiction by the state, the federal court will not hear the case.

Although the *Pulson* test gained a wide following,<sup>19</sup> it is not entirely clear whether the decision was based on *Erie* and *York*, neither of which were cited by Judge Goodrich, or whether the court thought that the manner of service of process under Rule 4(d)(7) of the Federal Rules of Civil Procedure determined which jurisdictional standard was to be applied. State methods of serv-

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13. *Id.* at 109.

14. For an excellent brief history of federal jurisdiction over corporations, see Note, 69 HARV. L. REV. 508, 509-14 (1956).

15. *Hedrick v. Canadian Pac. Ry.*, 28 F. Supp. 257 (S.D. Ohio 1939).

16. *Ibid.*; cf. *Roark v. American Distilling Co.*, 97 F.2d 297 (8th Cir. 1938).

17. 170 F.2d 193 (1st Cir. 1948).

18. *Id.* at 194.

19. *E.g.*, *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963); *Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1st Cir. 1962); *Iliff v. American Fire Apparatus Co.*, 277 F.2d 360 (4th Cir. 1960); *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953); *Rosenthal v. Frankfort Distillers Corp.*, 193 F.2d 137 (5th Cir. 1951) (removed action).

ice, as authorized by Rule 4(d)(7),<sup>20</sup> and as used in *Pulson*, are used frequently by litigants in the federal courts. Their typical provisions for service upon designated state officials and the increased incidence of "long arm" statutes for service upon non-resident defendants provide a more extensive and flexible reach than the authorized federal methods. In the great majority of appellate decisions that have chosen between federal and state jurisdictional standards, service had been made pursuant to Rule 4(d)(7),<sup>21</sup> and in those cases the choice was overwhelmingly in favor of the state standard, although the cases are unclear as to whether state standards were used because of Rule 4(d)(7) or because of *Erie*.<sup>22</sup>

Some who otherwise favor the choice of a federal standard, notably Judge Clark,<sup>23</sup> have argued that Rule 4(d)(7) itself requires the use of state jurisdictional standards completely independent of *Erie* grounds and that the cases following *Pulson*, therefore, are not relevant when service is made in a federal manner.<sup>24</sup> Others have taken the contrary view,<sup>25</sup> arguing that Rule

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20. And, since the 1963 amendments, also under Rule 4(e). Rule 4(d)(7) provides that service may be made on a foreign corporation "in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

21. *Walker v. General Features Corp.*, 319 F.2d 583 (10th Cir. 1963); *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447 (6th Cir. 1963); *Connor v. New York Times Co.*, 310 F.2d 133 (5th Cir. 1962); *Moore-McCormack Lines, Inc. v. Bunge Corp.*, 307 F.2d 910 (4th Cir. 1962); *Waltham Precision Instrument Co. v. McDonnell Aircraft Corp.*, 310 F.2d 20 (1st Cir. 1962); *Iliff v. American Fire Apparatus Co.*, 277 F.2d 360 (4th Cir. 1960); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544 (5th Cir. 1959); *Smith v. Ford Gum & Mach. Co.*, 212 F.2d 581 (5th Cir. 1954); *Steinway v. Majestic Amusement Co.*, 179 F.2d 681 (10th Cir. 1949); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948).

22. See *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541, 545 (3d Cir. 1953) (concurring opinion).

23. See, e.g., *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 242 (2d Cir. 1963); *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508 (2d Cir. 1960).

24. Thus Judge Clark in *Arrowsmith* whittles a considerable body of precedent down to the only two appellate-level cases that clearly and consciously apply state jurisdictional standards where service was federally adequate: *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541 (3d Cir. 1953) and *Canvas Fabricators, Inc. v. William E. Hooper & Sons Co.*, 199 F.2d 485 (7th Cir. 1952). *Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963), which also looked to state standards in spite of service in a federal manner, was decided after *Arrowsmith*. See *Mutual Int'l Export Co. v. Napco Indus., Inc.*, 316 F.2d 393, 395 n.7, 397 n.13 (D.C. Cir. 1963) (concurring opinion).

25. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (2d Cir. 1963); Note, 56 COLUM. L. REV. 394, 400 n.38 (1956); Note, 5 DUKE B.J. 129, 131 (1956).

4(d)(7) relates only to the mechanics of service and that if state jurisdictional standards apply, they apply for reasons independent of the rule. In support they point to the word "manner" in the rule itself and to Rule 82,<sup>26</sup> which states that the federal rules do not extend or limit the jurisdiction of the district courts.<sup>27</sup>

The word "manner" in Rule 4(d)(7) is somewhat ambiguous. Nevertheless, it seems fairly certain that the rule requires the federal courts to observe more than the mere mechanics of state service. For example, a litigant in a federal court could not use the manner of service prescribed by a typical nonresident motorist statute (service on a state official plus registered letter to the nonresident defendant) in an action completely unrelated to the use of a motor vehicle. Whether "manner" goes so far as to require in personam jurisdiction to be determined by state standards when state service is otherwise appropriately used remains unclear.

Rule 4(e), which was broadened by the 1963 amendments to the federal rules to include service pursuant to a state statute and which now generally governs service outside the state, may be helpful in determining the meaning of "manner." This rule provides that service may "be made *under the circumstances* and in the manner prescribed in the statute. . . ."<sup>28</sup> This language makes explicit what was probably clear before the amendment when out of state service pursuant to a state statute could only be made under Rule 4(d)(7): that use of state modes of service of process in obviously inappropriate situations is improper. It now also seems clear that "under the circumstances" is meant to include all those circumstances that by state standards will make the individual or corporation amenable to service. But the absence of such language in Rule 4(d)(7) may indicate that when service is made within the state in a state-prescribed manner, the federal courts need not imply a state standard for in personam jurisdiction from "manner" or be concerned with the appropriateness of the situation for use of the state service, but only the mechanics of state service.<sup>29</sup> Thus, it remains unclear whether *Pulson* and the other 4(d)(7) cases stand for the proposition that *Erie* and *York* de-

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26. See Note, 67 YALE L.J. 1094, 1105 (1958).

27. *But see* Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 445 (1946): "the Advisory Committee . . . has treated Rule 82 as referring to venue and jurisdiction of the subject matter of the district courts. . . ."

28. Emphasis added.

29. Neither the Advisory Committee's notes nor recent comment by the Committee's reporter, Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963(I)*, 77 HARV. L. REV. 601 (1964), throw any light on the matter. The phrase "under the circumstances" appeared in the original Rule

mand the choice of a state standard or whether the choice follows from the rule.

The problem of choosing between state and federal jurisdictional standards is most clearly presented when service is made on a foreign corporation in the independent federal manner prescribed by Rule 4(d)(3). Here, if courts look to state standards for a determination of amenability to process, it must be because in some way the choice is dictated by *Erie* and its progeny. Since the Supreme Court has never decided this issue,<sup>30</sup> the lower federal courts have had to act without its specific direction; those courts that have chosen the state standard have looked most often not to *Erie* itself, which was concerned with the states' sphere of substantive law, but to *York*,<sup>31</sup> which was concerned more with assuring uniformity of outcome between state courts and federal courts sitting in diversity actions. The *York* policy found expression in the jurisdictional area subsequent to *York* in *Angel v. Bullington*<sup>32</sup> and *Woods v. Interstate Realty Co.*<sup>33</sup> In *Angel* the Supreme Court held that a North Carolina statute that precluded recovery of certain deficiency judgments must be applied by the

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4(e), which spoke only of service made out of the state "whenever a statute of the United States or an order of court" provided; therefore, the inclusion of the phrase in the amended rule and its omission in Rule 4(d)(7) may be without significance.

30. In *Riverbank Labs. v. Hardwood Prods. Corp.*, 350 U.S. 1003 (1956) the Court, per curiam, reversed a Seventh Circuit decision that had dismissed a suit in the federal district court for lack of jurisdiction under Illinois law. The Court said only that it was "of the opinion that the District Court correctly found there was proper service upon the defendant in this case." The opinion is too brief to be of any value. See *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 513 (1960); Note, 67 YALE L.J. 1094, 1097-98 (1958). But see *K. Shapiro, Inc., v. New York Cent. R.R.*, 152 F. Supp. 722 (E.D. Mich. 1957).

The recent decision in *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311 (1964), is of interest here. In that case eight out of nine members of the Court indicated that they felt federal standards defined who is an "agent authorized by appointment" under Rule 4(d)(1). This could be read to mean that federal standards are to define who is amenable to service under the federal rules; but it is more likely that the Court meant only that federal standards will define what constitutes a sufficient principal-agent relationship to insure proper notice to the principal when the purported agent is served with process according to the federal rules.

31. It has been suggested that the *Erie* doctrine might better be known as the *York* doctrine; for while *Erie* destroyed the structure of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *York* "forms the cornerstone of the new doctrine which has replaced *Tyson*." Kurland, Book Review, 67 HARV. L. REV. 900, 907 (1954).

32. 330 U.S. 183 (1947).

33. 337 U.S. 535 (1949).

federal courts in North Carolina, even though the North Carolina Supreme Court had interpreted the statute as "procedural" and the specific cause of action in *Angel* arose out of an out-of-state transaction. In *Woods* a Mississippi statute that closed the door of the state courts to non-qualifying foreign corporate plaintiffs was applied in the federal courts in Mississippi. At least impliedly these two cases overruled<sup>34</sup> a pre-*Erie* line of cases, beginning with *Barrow S.S. Co. v. Kane*,<sup>35</sup> which had declared that the jurisdiction of the federal courts could not be affected by state statutes. Although *Angel* and *Woods* are not directly in point — they are not concerned with amenability<sup>36</sup> — they are relevant because, like *York*, they are an extension of the *Erie* doctrine that *Erie* itself perhaps did not require. Before *Erie*, the federal courts determined their jurisdiction without reference to state law, and this application of federal standards was made independently of the mandate of *Swift v. Tyson* because the federal courts considered jurisdiction to be procedural.<sup>37</sup> Thus, by overruling *Swift*, *Erie* did not require the federal courts to change their jurisdictional standards. Indeed, the repeal of the Conformity Act, which had required adherence to state modes of practice,<sup>38</sup> and the establishment of an independent procedural system for the federal courts at almost the same time that *Erie* was decided should have reinforced the courts' adherence to their own standards. But *Angel* and *Woods* indicated otherwise. Nevertheless, although the statutes in these cases purported to deal with jurisdiction, both clearly reflected substantive policies of the state: in *Angel* a policy in favor of a certain class of debtors; in *Woods* a policy penalizing non-qualifying foreign corporations. Thus neither *Angel* nor *Woods* requires the federal courts to look to state in personam

34. See *Angel v. Bullington*, 330 U.S. 183, 192 (1947).

35. 170 U.S. 100 (1898); accord, *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912); see *Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910).

36. Citation of U.S. CONST. art. III, § 2 and 28 U.S.C. § 1332 (1958) (the basic diversity provisions) by advocates of a separate federal standard likewise seems inappropriate. Compare *Partin v. Michaels Art Bronze Co.*, 202 F.2d 541, 545 (3d Cir. 1953) (concurring opinion), with *Kenny v. Alaska Airlines, Inc.*, 132 F. Supp. 838, 843 (S.D. Cal. 1955).

37. Although the Conformity Act, 17 Stat. 197 (1872) required adherence to the local modes of practice "as near as may be," the federal courts generally held that this provision did not require them to give effect to state rules that would affect federal jurisdiction. *E.g.*, *Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910); *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898); see 69 HARV. L. REV. 508, 521 (1956).

38. See note 37, *supra*.



or subject matter jurisdictional standards unless the state standards embody a substantive policy.

*Byrd v. Blue Ridge Elec. Co-op.*<sup>39</sup> lends some support to adoption of a federal jurisdictional standard. In *Byrd* the Supreme Court held that the question of an employee's status, for purposes of determining whether the South Carolina Industrial Commission had jurisdiction over a negligence action, was one of fact to be determined in the federal court by a jury, even though a state rule permitted the question to be determined by the trial judge.

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. . . . The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule—not bound up with rights and obligations—which disrupts the federal system of allocating functions between judge and jury.<sup>40</sup>

*Byrd* was the first explicit expression by the Court of possible limitations on the outcome-determinative test.<sup>41</sup> But *Byrd* is a subtle case; the Court's retreat from *York* is carefully measured.<sup>42</sup> The Court began with an examination of the South Carolina rule and found that it arose almost accidentally—that it was not “an integral part of the special relationship created by [the Workmen's Compensation Act]”<sup>43</sup> and that it was not “bound up with the definition of the rights and obligations of the parties.”<sup>44</sup> Thus South Carolina's denial of a jury trial on this issue represented no clearly articulated substantive policy; the rule was truly procedural, “merely a form and mode of enforcing” a right.<sup>45</sup> Finding the rule “procedural” did not quite end the matter, however, for the outcome-determinative principle remained. The Court decided that whether the outcome test should be applied depended

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39. 356 U.S. 525 (1958); accord, *Simler v. Conner*, 372 U.S. 221 (1963).

40. 356 U.S. at 537-38.

41. But cf. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946).

42. The analysis of *Byrd* that follows is based on that in Hill, *The Erie Doctrine and the Constitution* (pt. 2), 53 Nw. U.L. Rev. 541, 601-07 (1958).

43. 356 U.S. at 536. The issue of the jurisdiction of the Industrial Commission had previously only arisen when appeal was made from the Commission to the state courts, and the issue had then been settled by the court. In *Adam v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E.2d 566 (1957), the South Carolina court simply extended this policy when the jurisdiction of the Industrial Commission was asserted as a defense in an action begun in a state trial court.

44. 356 U.S. at 536.

45. *Ibid.*

upon a balancing of that test against federal policies, in this case represented by *Herron v. Southern Pac. Co.*<sup>46</sup> and the seventh amendment.<sup>47</sup>

In spite of these careful limitations on its retreat from *York*, the *Byrd* Court appears to have deliberately asserted that identity of outcome is not the only consideration. Although the action was one of common-law negligence, the defense raised — that the suit was properly under the jurisdiction of the state Industrial Commission — was statutory; and it is doubtful that there is anything in the seventh amendment that compels the federal courts to submit this issue to the jury when state practice is to the contrary. Thus, *Byrd* does seem to intimate that in diversity cases federal courts are more than just another court of the state in which they sit.

Several interesting circuit court decisions have interpreted *Byrd* as having a wider application than judge-jury relationships. In *Iovino v. Waterson*<sup>48</sup> the Second Circuit held that Federal Rule 25(a) permitted substitution of a nonresident administrator in a diversity action although New York, the forum state, would not have done so. *York* was considered inapplicable because it had involved a clear statutory state policy and because, unlike the instant case where the court could rely on Rule 25(a), in *York* there was no clearly relevant federal legislation. In *Monarch Ins. Co. v. Spach*<sup>49</sup> the Fifth Circuit held that a prior inconsistent statement by an officer of the plaintiff corporation was admissible under Rule 43(a) although a statute of Florida, the forum state, would have excluded it. Again the court pointed to *Byrd*: the existence of a federal rule justified deviation from state practice.

Before *Byrd* could be applied to justify the choice of a federal jurisdictional standard, the federal courts had to ascertain the existence of such a standard. Judge Friendly, dissenter to the alternate ground of decision in *Jafte* and author of the over-

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46. 283 U.S. 91 (1931), a pre-*Erie* case in which the Supreme Court held that neither the Conformity Act nor the Rules of Decision Act required a federal trial court to follow a state constitutional rule that contributory negligence in all cases should be left to the jury.

47. 356 U.S. at 536-39. The Court noted that in the circumstances of *Byrd* the choice of jury over trial judge might not have any significant effect upon the outcome (and this may well be true in most cases in which the rule dealt with is not "bound up with . . . rights and obligations"), but the analysis was based on the assumption that the outcome might have been substantially affected.

48. 274 F.2d 41 (2d Cir. 1959), cert. denied, 362 U.S. 949 (1960).

49. 281 F.2d 401 (5th Cir. 1960); cf. *Hope v. Hearst Consol. Publications, Inc.*, 294 F.2d 681 (2d Cir. 1961), cert. denied, 368 U.S. 956 (1962).

ruling opinion in *Arrowsmith*, argued that there was not and never had been a federal jurisdictional standard. He conceded that nothing in the Constitution prevented "Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not."<sup>50</sup> Judge Friendly is most certainly correct; if the *Erie* result is required by the Constitution, it is because Congress and the federal courts cannot promulgate substantive rules of law for those courts in diversity actions.<sup>51</sup> Jurisdiction, on the other hand, if not clearly procedural, is at least in the "twilight zone between [substance and procedure] . . . where a rational classification could be made either way. . . ."<sup>52</sup> Until Congress does clearly establish a federal jurisdictional standard, argued Judge Friendly, the federal courts must apply the standards of the states in which they sit.

Judge Clark, in both *Jaftex* and *Arrowsmith*, argued that a federal jurisdictional standard did exist.<sup>53</sup> Although the parts of his opinion dealing with the source of the standard are difficult and obscure, it appears that he purported to derive the standard from sections 1391 (dealing with venue)<sup>54</sup> and 1693 (dealing with process)<sup>55</sup> of title 28, although admitting that neither by itself provides for a standard. These provisions both originated in section 11 of the Judiciary Act of 1789,<sup>56</sup> and Judge Clark found some significance in their conjunction. It has been suggested that he was reading the "doing business" test of section 1391(c) into

50. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226 (1963).

51. See *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956); Hill, *The Erie Doctrine and the Constitution* (pt. 1), 53 Nw. U.L. Rev. 427 (1958).

52. *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940).

53. His argument is set out generally in *Arrowsmith*, 320 F.2d at 238-39, and *Jaftex*, 282 F.2d at 512.

54. 28 U.S.C. § 1391(c) (1958), the relevant subsection, provides: "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

55. By its terms the provision refers to *capias*. It provides: "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court." It is largely superseded by Rule 4 of the Federal Rules of Civil Procedure.

56. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78-79, which provided that "no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. . . ."

section 1693.<sup>57</sup> He may, in fact, have been doing the reverse, looking to section 1391(c) as relating to process as well as venue by virtue of the fact that the provisions were once joined.<sup>58</sup>

Whatever significance there may be in the original conjunction of the process and venue statutes, it is difficult to ascertain how these provisions, if they have relevance to amenability at all, provide any more than a ceiling upon the exercise of jurisdiction; the terms of both sections restrict the federal courts. They indicate when jurisdiction is not to be asserted and are silent as to when it is to be asserted. The problem remains one of finding an affirmative mandate, because the traditional base of jurisdiction, physical power,<sup>59</sup> is inapplicable to the abstract corporate entity. Perhaps Judge Clark is saying that absent statutory restrictions the jurisdiction of the federal district courts is nationwide, but since there have been restrictions from the inception of the district courts, a federal standard has been evolved with reference to these restrictions. If it were not for the restrictions, the federal courts could take jurisdiction in any case and there would be no need to define a federal standard.<sup>60</sup>

The venue provision, section 1391(c), which provides that a corporation may be sued in any district in which it is "doing business," may itself provide a standard. Section 1391(c) has led to remarkable confusion among courts that refuse to distinguish clearly between venue and jurisdiction,<sup>61</sup> although arguably there

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57. 77 HARV. L. REV. 559, 560 (1964).

58. See his comment in *Arrowsmith* on the "error" of the majority opinion in "saying that § 11 [of the Judiciary Act of 1789] has always been a venue provision and nothing more." 320 F.2d at 238. In either case, the citation of § 1391(c) is curiously unhistorical, for that provision was added in 1948, as Judge Clark surely knew.

59. See *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

60. In support of this, see Judge Clark's frequent comments in both *Arrowsmith* and *Jaftex* on the "well-known" requirement of service within the district, and other similar language emphasizing restrictions. 320 F.2d at 238-39; 282 F.2d at 512. It is, of course, commonplace that judicial development of jurisdictional standards, in whatever context, comes most particularly where the outermost limits of jurisdiction are tested.

For a view similar to Judge Clark's, finding a quasi-statutory basis for federal jurisdiction, see *Mutual Int'l Export Co. v. Napco Indus., Inc.*, 316 F.2d 393, 395-96 n.8 (D.C. Cir. 1963) (Wright, J., concurring): "[F]ederal law has devised its own scheme of venue, convenience, and notice. Resort to local law, therefore, except perhaps for implementation under Rule 4(d)(7), is unnecessary and inappropriate."

61. *E.g.*, *Riverbank Labs. v. Hardwood Prods. Corp.*, 220 F.2d 465 (7th Cir. 1955), *rev'd*, 350 U.S. 1003 (1956); *cf.* *Satterfield v. Lehigh Valley R.R.*, 128 F. Supp. 669 (S.D. N.Y. 1955).

is no need to distinguish if the statute was meant to incorporate a jurisdictional standard.<sup>62</sup> Judge Clark, while admitting that section 1391 is a venue statute, agrees that "doing business" for venue purposes is also applicable to define the requirements of service of process.<sup>63</sup> In any case, the test of doing business for section 1391(c) purposes must be a federal test and resort to state jurisdictional standards means "a developing confusion resulting from a uniform federal interpretation of 'doing business' for purposes of venue existing alongside fifty varying interpretations of what is sufficient doing business to permit service of process."<sup>64</sup>

Another possible source of a federal standard lies in Rule 4 of the Federal Rules of Civil Procedure. The decisions in both *Iovino* and *Spach* were based on federal rules; the propriety of looking to the federal rules for federal standards and policies was tacitly noted by the Supreme Court in *Byrd* when it cited<sup>65</sup> with approval *Sibbach v. Wilson*,<sup>66</sup> which upheld Federal Rule 35 over a contrary state rule, although the federal policy in *Byrd* itself was constitutionally derived. But the difficulty in looking for a federal jurisdictional standard in Rule 4 is the same as trying to find it in the venue and process statutes; the rule is not concerned with amenability. All of these federal provisions — Rule 4, the venue statute, and the process statute — are relevant only because they express a legislative purpose to regulate and define the procedure of the federal courts in areas very closely related to the problem of amenability. The provisions lend support to Judge Clark's assertion that the in personam jurisdiction of the courts "is to be considered so much a part of the make-up of a federal court that it is not lightly to be superseded,"<sup>67</sup> but they do not by themselves define a federal standard.

Even if a federal standard cannot be found in existing statutes,

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62. Note, 56 COLUM. L. REV. 394, 397-98 (1956); see *Satterfield v. Lehigh Valley R.R.*, 128 F. Supp. 669 (S.D. N.Y. 1955).

This may be true when there has been continuous activity by a corporation, see Note, 69 HARV. L. REV. 508, 519 (1956), but it is doubtful if federal venue is proper where a single act is involved, cf. *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953), even though jurisdiction is clearly acquired thereby, *Hess v. Pawloski*, 274 U.S. 352 (1927). Under a recent amendment, venue is now proper for tort actions relating to automobiles in the district where the tort occurred. 77 Stat. 473 (1963).

63. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 512 n.2 (2d Cir. 1960).

64. Barrett, *Venue and Service of Process in the Federal Courts — Suggestions for Reform*, 7 VAND. L. REV. 608, 618 (1954).

65. 356 U.S. at 538 n.12.

66. 312 U.S. 1 (1940).

67. *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 512 (2d Cir. 1960).

it seems fairly certain that, before *Erie* the federal courts had developed their own jurisdictional test.<sup>68</sup> If this test has survived *Erie* and *York* and is applicable in diversity cases, the problem of its present definition remains. Although Judge Clark denied that the fourteenth amendment was his standard<sup>69</sup> and although the Supreme Court has suggested that there are no constitutional limits on federal in personam jurisdiction,<sup>70</sup> because of the nature of the federal judicial system — historically territorially limited — the standard promulgated in *International Shoe Co. v. Washington* may be helpful.<sup>71</sup>

The traditional restrictions upon the federal courts have always been in keeping with the territorial nature of the courts. Prior to *Erie* and *International Shoe* the federal courts required corporate "presence" within the judicial district.<sup>72</sup> Although *Hutchinson v. Chase & Gilbert, Inc.*<sup>73</sup> and *International Shoe* broke down the "presence" test to one of "reasonable contacts," the emphasis

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68. *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119 (1927); *Bank of America v. Whitney Cent. Nat'l Bank*, 261 U.S. 171 (1923); *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 260 U.S. 516 (1923); *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917); *Mechanical Appliance Co. v. Castleman*, 215 U.S. 437 (1910). But see *Arrowsmith v. United Press Int'l*, 320 U.S. 219, 228 (1963).

69. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 238 (2d Cir. 1963).

70. See *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (dictum) ("Congress could provide for service of process anywhere in the United States"). So, for that matter, can any state. See, e.g., ILL. REV. STAT. ch. 110, § 16 (1963). The statement speaks only to service. It says nothing about amenability.

71. 326 U.S. 310 (1945). Those who favor use of the state standard would, of course, agree that *International Shoe* is the test in federal courts sitting in states that have extended jurisdiction to the maximum permissible extent. What is referred to here, however, are courts which have looked to *International Shoe* because they feel it defines a federal standard, not because they are applying a state standard.

On its facts, *International Shoe* has, of course, no relevance for the federal courts, for the case involved due process limitations of the fourteenth amendment on the reach of state jurisdiction. A number of federal courts, however, believe that the jurisdictional standard for federal courts is the one set out in *International Shoe*. E.g., *Mutual Int'l Export Co. v. Napco Indus., Inc.*, 316 F.2d 393, 395 (D.C. Cir. 1963) (concurring opinion); *Lone Star Package Car Co. v. Baltimore & O. R.R.*, 212 F.2d 147, 155 (5th Cir. 1954); *Southern New England Distrib. Corp. v. Berkeley Fin. Corp.*, 30 F.R.D. 43 (D. Conn. 1962); *K. Shapiro, Inc. v. New York Cent. R.R.*, 152 F. Supp. 722 (E.D. Mich. 1957); see *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 666 (1953) (dictum); *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 672 (9th Cir. 1951); *French v. Gibbs Corp.*, 189 F.2d 787 (2d Cir. 1951).

72. *Philadelphia & Reading Ry. v. McKibbin*, 243 U.S. 264 (1917).

73. 45 F.2d 139 (2d Cir. 1930) (L. Hand, J.).

remained on reasonable contacts with the forum. And until the adoption of the 100-mile "bulge" in the 1963 amendments to the federal rules,<sup>74</sup> the process of district courts remained limited by state lines, unless state procedures under Rule 4(d)(7) were used or one of several special federal statutes, such as interpleader,<sup>75</sup> was involved. Thus in a sense the federal courts have remained local courts, and a jurisdictional standard such as *International Shoe* evolved for the territorially limited jurisdiction of the states, is not without relevance for the federal courts.<sup>76</sup> The *International Shoe* tests for determining the "presence" of an abstract entity, the corporation, within a locality have applicability to any court, including federal, with a territorially limited jurisdiction,<sup>77</sup> although the test would not literally be a constitutional limit on the federal courts.<sup>78</sup>

Thus, although it is difficult to agree with Judge Clark when he states that it is "quite clear and subject to dogmatic assertion that there is a federal law of statutory authority,"<sup>79</sup> it should be apparent that there is available precedent from which an independent federal jurisdictional standard may be defined. As a pragmatic matter, a satisfactory definition would have to take

74. FED. R. CIV. P. 4(f), which provides that "persons who are brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, 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. . . ." The question then arises as to what standard shall govern amenability to service within the 100-mile area. The Advisory Committee's reporter suggests what appears to be a fourteenth amendment test: "the party should be amenable to the federal process if, considering its activities within the forum state plus the 100-mile area, it would be amenable to that state's process, had the state embraced this area and exerted judicial jurisdiction over the party to the degree constitutionally allowable." Kaplan, *supra* note 29, at 633 (1964). He adds a caveat to this, however: "This formula of amenability to federal process served within the 100-mile area may need correction in the degree that the constitutional standard for determining the state's judicial jurisdiction is thought to reflect 'territorial' considerations as distinguished from considerations of fairness to the defendant." *Id.* at 633 n.136.

75. 28 U.S.C. § 2361 (1958).

76. Thus it seems unnecessary to question, as does Kaplan, see note 74 *supra*, application of fourteenth amendment standards to the federal courts—at least in diversity cases—insofar as those standards reflect "territorial considerations." See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

77. See Note, 69 HARV. L. REV. 508, 516-17 (1956).

78. *But cf.* *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 331 (1964) (dissenting opinion).

79. *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 239 (1963).

account of the territorial nature of the federal courts and would probably be similar to the standard of *International Shoe*.

The mere existence of a federal jurisdictional standard does not, however, mean that the standard is automatically applicable to the federal courts in diversity cases. *Byrd* indicated that federal courts must first ascertain whether the state rule is merely a "form and mode" of enforcing the substantive right or whether it is an integral part of the state-created right. Arguably a determination that the state rule is "substantive"<sup>80</sup> would end the matter, the federal courts being bound to apply the state rule. Yet *Byrd* suggests that even if the state rule is "substantive," a strong countervailing federal policy might prevail.<sup>81</sup> If, however, the federal courts find the state rule to be "procedural," the policy underlying the outcome-determinative test must be balanced against the policy underlying the federal standard.

Before *Erie*, with different rules of substantive law being applied in the state and federal courts within the same territorial boundaries, parties who met the diversity requirements<sup>82</sup> could choose their forum on the basis of which court offered the most favorable law. This "forum shopping" resulted in a large measure of uncertainty in "everyday, prelitigation life."<sup>83</sup> Both *Erie* and *York* aimed at eliminating this fortuity from the American federal system.<sup>84</sup> In the nearly twenty years since *York*, the Supreme Court has emphasized reaching outcomes similar to those reached by the courts of the states in which they sit.<sup>85</sup> The Court in *York* could have gone only one step farther than *Erie* and recognized

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80. A determination that a rule is "substantive" under *Byrd* is not the same as "substantive" under *Erie*. Rather, it refers to the proximity of the state rule to the state-created right. See Hill, *supra* note 40, at 604.

81. *Id.* at 606.

82. See *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1928), where a Kentucky corporation reincorporated in Tennessee in order to obtain diversity and reach a federal court.

83. Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

84. In any case where jurisdiction is in issue the parties will almost certainly be diverse. If the jurisdictional amount can be satisfied, a federal forum will generally be available. Thus, at least part of the objection to separate federal law which leads to forum-shopping is not present here: there is no advantage given to out of staters. Hence, the forum-shopping as such that may result from a separate federal standard is not an evil; the clash with state policy may be.

85. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Angel v. Bullington*, 330 U.S. 183 (1947).



that rules purportedly procedural often embody substantive policy judgments.<sup>86</sup> But if the outcome test is applied to the problem of in personam jurisdiction, it becomes clear that, whatever the Court was trying to do in *York*, by promulgating the outcome test it did more than obligate the federal courts to apply only those state procedural rules founded upon substantive policies.

In personam jurisdiction unquestionably can be outcome-determinative. No plaintiff can win his case unless he is able to bring the defendant before the court. But jurisdiction is outcome-determinative in a unique way. The nature of the typical case in which choice of jurisdictional standard becomes an issue, as a practical matter, will arise only when defendant's contact with the forum has been minimal. Thus, there will almost always be another state in which the plaintiff can enforce his rights. If *York* only requires a federal court to follow procedural rules embodying state substantive policy, then the federal court in the first forum could take jurisdiction unless there was a substantive policy — more than a form or mode of enforcing a right — behind the denial of jurisdiction by the state in which it was sitting. But a rigid application of the outcome test requires total uniformity among all courts within the state and prevents the federal court from asserting jurisdiction when in fact there may be no good reason for doing so.

*Byrd*, therefore, may have a significant impact on the choice of jurisdictional standards. Under *Byrd*, the court must first ascertain whether the state's denial of jurisdiction is based on "substantive" considerations or is merely a "form and mode" of enforcing the state-created right. If the state rule does not reflect any substantive policy, the court must then balance the federal standard against the policies underlying the outcome-determinative test. But when another forum is available to enforce the right, use of the outcome test is inappropriate, and the *Byrd* rationale would indicate that a federal standard might properly be applied.

When, as is so often the case, the state denies jurisdiction merely because it has not yet taken advantage of the widened jurisdictional limits that followed from *International Shoe* or when

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86. This certainly was what the Court was doing before *York* when it decided that contributory negligence, *Palmer v. Hoffman*, 318 U.S. 109 (1943), conflict of laws, *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and burden of proof and presumptions, *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939), were all to be determined by recourse to state law. The same is true of the statute of limitations problem decided in *York* itself. See Note, 5 DUKE B.J. 129, 135 n.24 (1956).

the denial is based solely on considerations of judicial administration, assertion of jurisdiction by the federal courts will not frustrate any state rights or policies.

A uniform federal jurisdiction standard is, in fact, a desirable goal for the federal courts. Like any court in any case involving contacts outside the forum, the federal courts, simply as a matter of convenience, ought to be able to use their own procedure, and this seems particularly true in so basic a matter as jurisdiction.<sup>87</sup> Furthermore, to repeat what the Supreme Court said in *Byrd*: "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction."<sup>88</sup> Thus, the federal courts should apply their own jurisdictional standard, unless compelling reasons to the contrary can be found rooted in the substantive policies of the forum state. Since *York* the federal courts have tended too often to lose sight of their independent role and to attempt a slavish adherence to state policies. *Byrd* announced the awareness of a countervailing federal policy.

An independent federal jurisdictional standard would mean, of course, geographically broadening corporate amenability to suit. Any unfairness and inconvenience to the corporate defendant, insofar as they are not eliminated by the jurisdictional standard itself, should be prevented by the venue provision of section 1391 and the transfer provision of section 1404 of title 28. Compensating for whatever disadvantages broadening of amenability to suit may entail for corporations, there is a gain in certainty and uniformity for corporations engaged in multistate business. The forum-shopping that results from a separate federal standard<sup>89</sup>

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87. There are, however, certain arguments against the desirability of a federal standard. They are premised on the idea that protection of nonresidents against local bias, *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), is the traditional reason for diversity jurisdiction. In the typical diversity case where jurisdiction is an issue—suit by a resident plaintiff against a foreign defendant—this policy is not present at all. Indeed, resort to the federal courts by resident plaintiffs would be abolished by the proposed amendments to the judicial code. See ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 22-24, 62-67 (tentative draft No. 2, 1963). If the defendant is concerned about local bias he can remove to the federal court. In the classic diversity case—nonresident plaintiff versus resident defendant—jurisdiction is not likely to be an issue. See *Arrowsmith v. United Press Int'l*, 320 F.2d 219, 226-27 (1960). There remains, of course, suits by nonresidents against other nonresidents, where use of a state jurisdictional standard seems particularly inappropriate.

88. 356 U.S. at 537.

89. Arguably, a broader federal standard may lead to interstate forum-shopping insofar as service would be made available in states previously closed. 77 HARV. L. REV. 559, 561 (1964). Thus in *Arrowsmith* suit was brought

should in this instance be a factor favoring uniformity — a nationwide uniformity of amenability. Further, the establishment of a uniform standard is a legitimate desideratum<sup>90</sup> for the federal courts, both from the viewpoint of stabilizing their own procedure, and because the federal courts, as arms of the national government have traditionally played a role in unifying the country.

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in Vermont by a Maryland resident against United Press International, a nationwide press service, on an alleged defamation originating in Georgia. Vermont was obviously chosen because of its longer statute of limitations. There are three factors that should minimize this problem: 1) Interstate forum-shopping is always possible in a country made up of sovereign states. A separate federal jurisdictional standard increases this possibility only to the degree that the federal standard is more liberal than the state. 2) Libel, as involved in *Arrowsmith*, is a peculiar sort of cause of action. Its situs is difficult to define. For a special treatment of defamation, see N.Y. CIV. PRAC. L. & R. ¶ 302 (a)(2). For more conventional and localized causes of action corporate defendants will be able to make use of the transfer statute, 28 U.S.C. 1404 (1958), on the ground of forum non conveniens, if they are hauled into inappropriate forums. 3) The possibility of widened liability that may follow establishment of a separate federal jurisdictional standard should be in part attributed to improper choice of law rules. Thus, although application of Vermont statutes of limitations in *Arrowsmith* may be proper, application of the forum's statute of limitations in an action between nonresidents that arose out of the state is inappropriate. It is particularly inappropriate in a federal court. See the dissent by Justice Jackson in *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 519 (1953), and his concurring opinion in *First Nat'l Bank v. United Airlines, Inc.*, 342 U.S. 396, 398 (1952). See also Hill, *The Erie Doctrine and the Constitution*, 53 Nw. U.L. Rev. 427 (1958).

90. This is particularly true in multiparty suits, as already indicated by "the thrust of the federal rules toward resolution in an integrated proceeding of all claims arising out of a single controversy." 77 HARV. L. REV. 559, 561 (1964). See ALL, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 34-45, 149-57 (tentative draft No. 2, 1963).