

CHOICE OF LAW IN THE FEDERAL COURTS: USE OF STATE OR FEDERAL LAW TO DETERMINE FOREIGN CORPORATION'S AMENABILITY TO SUIT

IN THE quarter-century that has elapsed since the Supreme Court's decision in *Erie R.R. v. Tompkins*¹ the federal courts have struggled incessantly with the problem of placing definitive limits on the application of the *Erie* doctrine in a variety of areas.² Particular difficulty has been encountered in attempting to decide whether state or federal rules of law should obtain in matters which conceptually might be classified with equal logic as either substantive or procedural. In passing upon a foreign corporate defendant's objections to personal jurisdiction, for example, a federal district court is initially confronted with the question whether a state or federal standard is to be employed in determining whether the corporation is "doing business"³ in the jurisdiction so as to make it amenable to suit there.⁴ The disposition accorded this prelimi-

¹ 304 U.S. 64 (1938). The *Erie* decision requires the federal courts to apply the substantive law of the state in which the court is sitting whenever state created rights are being adjudicated, regardless of whether such law has been fashioned by statutory or judicial pronouncement. In those matters encompassed by the rubric "procedural," federal rules apply.

² For a chronological discussion of Supreme Court decisions dealing with post-*Erie* problems see 1A MOORE, FEDERAL PRACTICE ¶ 0.306 (2d ed. 1961) [hereinafter cited as MOORE].

³ The term "doing business" is "simply a shorthand label describing judicial and statutory tests used to determine different legal consequences of a corporation's ties, contacts or relations with other states." CAPLIN, DOING BUSINESS IN OTHER STATES III (1959). "Doing business" as used in this comment refers to those activities in a state which render a corporation amenable to service of process. Other legal consequences which turn upon a determination as to whether a foreign corporation is "doing business" in a state include the state's ability to tax the corporation and to exact from it compliance with state qualification requirements. Activities which are sufficient to subject a corporation to service of process may not be extensive enough to permit taxation of the corporation or require it to qualify in the state as a condition to the lawful conduct of such activities. See generally CAPLIN, *op. cit. supra* at III-VII; 1 CCH CORP. L. GUIDE ¶¶ 1000-19; 23 CORP. J. 163 (1961). For a synopsis of "doing business" tests in the various states for each of these areas see CAPLIN, *op. cit. supra*.

⁴ In contesting its amenability to suit a foreign corporation may also challenge the propriety of venue in the district. This comment, however, will consider only the jurisdictional aspects of amenability, since there is virtual unanimity of opinion to the effect that a federal court should employ federal law in determining whether a foreign corporate defendant's activities in the district are sufficient to constitute "doing business" for venue purposes. See, e.g., *Paragon Oil Co. v. Panama Ref. & Petrochem. Co.*, 192 F. Supp. 259, 261 (S.D.N.Y. 1961); *Rensing v. Turner Aviation Corp.*, 166 F. Supp. 790, 795 (N.D. Ill. 1958); *Remington Rand, Inc. v. Knapp-*

nary inquiry is, in essence, a classification of "doing business" standards as either substantive or procedural for *Erie* purposes, and is of particular significance in those cases wherein jurisdiction of the court is posited upon diversity of citizenship of the parties.⁵

The inadequacy and difficulty of application characterizing the substantive-procedural dichotomy adopted in *Erie* have provoked several attempts by the Supreme Court to clarify its intent in this area. In *Guaranty Trust Co. v. York*⁶ the Court propounded the so-called "outcome-determinative" test for use in deciding whether

Monarch Co., 139 F. Supp. 613, 617 (E.D. Pa. 1956); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 179, at 697 (1960) [hereinafter cited as BARRON & HOLTZOFF]; I MOORE ¶ 0.142 [5.-3], at 1499; 67 YALE L.J. 1094, 1099 n.18 (1958). Indeed the federal venue statute embodies the very term "doing business" as the criterion to be used in determining whether suit in the district is proper when the corporation is neither incorporated nor licensed to do business in the jurisdiction. 28 U.S.C. § 1391 (c) (1958). This fact alone may be indicative of a congressional intent that the federal courts fashion an independent federal standard of "doing business" for use in applying the venue statute. 5 DUKE B.J. 129, 134 (1956).

⁵The issue of which "doing business" standard to apply also arises with some frequency in federal question cases, but its importance in this context is overshadowed by the magnitude of the controversy in diversity cases. By the great weight of authority, it is clear that the federal standard should be applied in cases wherein vindication of substantial federally-created rights is sought. See, e.g., *Goldberg v. Mutual Readers League*, 195 F. Supp. 778, 781 (E.D. Pa. 1961); *Singleton v. Atlantic Coast Line R.R.*, 20 F.R.D. 15, 17 (E.D. Mich. 1956); 1 BARRON & HOLTZOFF § 179, at 696. *But see* *Arrowsmith v. UPI*, 320 F.2d 219, 228 n.9 (2d Cir. 1963). This view is not confined solely to those actions denominated as federal question cases, and a mere allegation of diversity will not preclude a federal court from applying the federal standard where a substantial federal question is involved. See, e.g., *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147, 154 (5th Cir. 1954); *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730, 735 (E.D. Tenn. 1962). Although seldom discussed by the courts, it would seem that jurisdiction obtained over a corporation through use of the federal standard in such cases is complete, giving a court power to adjudicate pendant state created claims. *First Flight Co. v. National Carloading Corp.*, *supra* at 735. This would certainly be in keeping with the policy of conserving judicial resources which underlies the concept of pendant jurisdiction. On the subject of pendant jurisdiction, see generally, Note, 62 COLUM. L. REV. 1018 (1962). In a related and somewhat analogous situation, a line of authority has recently developed to the effect that extra-territorial service of process on a defendant pursuant to a federal statute containing a "long-arm" provision gives a district court jurisdiction over the defendant to adjudicate pendant non-federal claims. *Schwartz v. Eaton*, 264 F.2d 195 (2d Cir. 1959); *Townsend Corp. of America v. Davidson*, 222 F. Supp. 1 (D.N.J. 1963). *Contra*, *International Ladies' Garment Workers' Union v. Shields & Co.*, 209 F. Supp. 145 (S.D.N.Y. 1962).

With regard to removed cases, it is well established that the "doing business" standard of the state in whose courts the action was commenced should be employed in reviewing a foreign corporation's objections to personal jurisdiction, since the removal jurisdiction exercised by the federal courts is essentially derivative in nature. See, e.g., *Bomze v. Nardis Sportswear, Inc.*, 165 F.2d 33, 35 (2d Cir. 1948); *Stimler v. Yoshida Shoji Co.*, 195 F. Supp. 671 (S.D.N.Y. 1961); *Ultra Suco Co. v. Illinois Water Treatment Co.*, 146 F. Supp. 393, 395 (S.D.N.Y. 1956).

⁶ 326 U.S. 99 (1945).

to apply state or federal rules of law in any given situation, regardless of whether such rules had traditionally been classified as substantive or procedural. The Court pointed out that the objective of *Erie* was to insure substantial uniformity of result within the forum state whenever state created rights are being adjudicated. It concluded, therefore, that where such rights are being adjudicated in the federal courts solely because of the diversity of citizenship of the parties, the court should give effect to any state rule of law the derogation of which would substantially affect the outcome of the litigation.⁷

Following the *Guaranty Trust* decision, one of the most important questions became that of how far this modified *Erie* compulsion would be extended in contravention of the policy of insuring procedural uniformity among the federal courts exemplified by promulgation of the Federal Rules of Civil Procedure.⁸ Applied *in extremis*, the "outcome-determinative" approach would result in relegation of the federal courts to a position of almost complete subservience to state law whenever state created rights are being litigated, since outcome affecting arguments can be advanced with regard to practically any rule of law which may be invoked during the course of litigation. Accordingly, the Supreme Court's decision in *Byrd v. Blue Ridge Rural Elec. Co-op.*⁹ has been interpreted by some writers and lower federal courts¹⁰ as a commendable effort to place restraint upon unduly rigid application of the "outcome-determinative" approach through use of an "interest-weighting" test. Such a test would entail a two step inquiry involving more than mere outcome considerations. Recognition of state rules of law in the federal courts would be conditioned upon their reflection of significant state interests which not only would be subverted by the application of federal law, but which outweigh any relevant

⁷ *Id.* at 109.

⁸ See Note, 37 IND. L.J. 352, 354 (1962). Indeed the whole question of the relation between the *Erie* doctrine and the federal rules, thrust almost simultaneously upon the federal courts in the year 1938, has been the subject of considerable discussion. See, e.g., HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 674 (1953); Clark, *The Tompkins Case and the Federal Rules*, 24 J. AM. JUD. Soc'y 158 (1941).

⁹ 356 U.S. 525 (1958).

¹⁰ E.g., *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 406 (5th Cir. 1960); *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 513 (2d Cir. 1960); *Vestal, Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248, 268 (1963); *The Supreme Court, 1957 Term*, 72 HARV. L. REV. 77, 147 (1958).

federal interests.¹¹ Criticism of the *Byrd* case has been equally as enthusiastic,¹² however, particularly in view of the equivocal language used by the Court in the opinion¹³ and the far-reaching effect ascribed to the decision by many of the lower courts.¹⁴

This then is the present status of the *Erie* doctrine, within the context of which the federal courts must resolve the question whether a state or federal "doing business" standard is to be utilized for jurisdictional purposes in ordinary diversity cases.

In comparing state and federal law in the "doing business" context, it should be noted that one important distinction exists. State service of process provisions indicating the circumstances under which foreign corporations will become amenable to the personal jurisdiction of the state's courts normally include the term "doing business" or "transacting business" as one of the criteria resulting

¹¹ In the *Byrd* case the Court held that plaintiff in a diversity action based upon a state-created right was entitled to a jury determination of a factual issue raised by defendant's affirmative defense in accordance with federal practice, notwithstanding a South Carolina practice assigning such determinations to the presiding judge. The Court recognized the obligation of the federal courts under the *Erie* and *Guaranty Trust Co.* decisions to "conform as near as may be" to state rules of law bearing substantially upon the outcome of the litigation where state-created rights are being adjudicated, but went on to assert that where such rules are not "bound up with the definition of the rights and obligations of the parties" and where there are "affirmative countervailing considerations" present, the federal courts may be justified in departing from state law. The Court viewed the South Carolina rule as "merely a form and mode of enforcing" the state-created right in question, and found in the independent nature of the federal judiciary and the influence of the seventh amendment a countervailing federal policy sufficient to require vitiation of the state rule in the federal courts. 356 U.S. at 536-37.

¹² See generally Hill, *The Erie Doctrine and the Constitution* (pts. I & 2), 53 NW. U.L. REV. 427, 541, 604-07, 609 (1958); Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962). The principal exception taken to *Byrd* by these writers is the Court's failure to meet the constitutional issue implicit in the decision, namely whether the Constitution requires the *Erie* result. If the *Erie* doctrine is based upon constitutional considerations then it would seem that the *Byrd* "interest-weighting" approach is improper except in those cases involving a federal practice of clear constitutional origin.

¹³ After considering the role of state law in the federal courts and recommending what could be construed as a sweeping departure from the "outcome-determinative" approach, see note 11 *supra*, the Court noted in the closing paragraphs of its opinion that the outcome of the case under consideration would probably not be altered by the application of federal law. 356 U.S. at 539-40. This equivocation by the Court obviously served to weaken the impact of the decision upon the existing body of precedent which it sought to streamline. See Smith, *supra* note 12, at 449.

¹⁴ See cases discussed in Smith, *supra* note 12, at 454-65. Most of the writers commenting on *Byrd* have recognized the desirability of limiting its application. See 43 MINN. L. REV. 580 (1959) (application of *Byrd* in contravention of *Erie* doctrine limited to cases involving clearly defined federal policies); 28 U. CINC. L. REV. 390 (1959) (*Byrd* not regarded as modification of *Erie* doctrine, but rather an exception to it in the narrow area of distribution of judge-jury functions).

in such amenability.¹⁵ These provisions provide a basis for judicial interpretation culminating in a "doing business" standard. On the other hand, there is no federal statute or rule of general application addressing itself to the question of when a foreign corporation becomes amenable to the personal jurisdiction of the federal courts.¹⁶ To fill this interstice the federal courts have apparently adopted the "minimum contacts" concept advanced by the Supreme Court in *International Shoe Co. v. Washington*¹⁷ as a federal "doing business" standard.¹⁸ Adoption of the *International Shoe* test by

¹⁵ See, e.g., ALA. CODE tit. 7, § 193 (1960); ILL. ANN. STAT. ch. 110, § 17 (1956); N.Y. CIV. PRAC. LAW § 302; TEX. REV. CIV. STAT. tit. 42, art. 2031 b (Supp. 1963). Use of the term "transacting business" in the more modern statutes apparently reflects a desire to extend the state's jurisdiction over foreign corporations to the constitutionally permissible limit, and it has been held that less activity is required to constitute "transacting business" than that required for "doing business." *Haas v. Fancher Furniture Co.*, 156 F. Supp. 564 (N.D. Ill. 1957).

¹⁶ See *Arrowsmith v. UPI*, 320 F.2d 219, 225 (2d Cir. 1963). This absence of federal legislative guidance was deemed quite significant by Judge Friendly, leading him to question the very existence of a federal "doing business" standard which could be used by the federal courts in diversity cases to the exclusion of state law on the point. *Id.* at 226-28.

The suggestion has been advanced that Congress might dispel the existing confusion in this area by supplying a uniform federal "doing business" standard, thus in effect defining "doing business" as procedural for *Erie* purposes. 102 U. PA. L. REV. 415, 417 (1954). See also 67 YALE L.J. 1094, 1105 (1958) (in matters not clearly procedural, federal courts should apply state law when adjudicating state-created rights absent congressional intervention). *But see JafTex Corp. v. Randolph Mills, Inc.*, 282 F.2d 508, 515-16 (2d Cir. 1960).

¹⁷ 326 U.S. 310 (1945).

¹⁸ See, e.g., *Houston Fearless Corp. v. Teter*, 318 F.2d 822, 825 (10th Cir. 1963); *Goldberg v. Mutual Readers League*, 195 F. Supp. 778, 781-82 (E.D. Pa. 1961); *K. Shapiro, Inc. v. New York Cent. R.R.*, 152 F. Supp. 722, 725 (E.D. Mich. 1957); 74 HARV. L. REV. 1662, 1663 (1961); 69 HARV. L. REV. 508, 514 n.56 (1956).

It should be noted that this action by the federal courts is somewhat anomalous, since the decision in *International Shoe Co. v. Washington*, *supra* note 17, did not purport to be productive of a federal "doing business" standard, but rather was an attempt to define the limit to which a state may extend its jurisdiction over foreign corporations consistent with the due process clause of the fourteenth amendment. See 69 HARV. L. REV. 508, 515 (1956); 7 VILL. L. REV. 117, 119 (1956).

One possible explanation for the deference given to *International Shoe* by the courts in this respect is that the constitutional proscriptions set forth there may be binding on the federal courts under the fifth amendment due process clause. See *Woodworkers Tool Works v. Byrne*, 191 F.2d 667, 672 (9th Cir. 1951).

While it is well settled that federal law controls venue in the federal courts, see note 4 *supra*, the question of whether or not this same standard may be applied for venue purposes under 28 U.S.C. § 1391 (c) (1958), is a matter of considerable dispute. *Compare Remington Rand, Inc. v. Knapp-Monarch Co.*, 139 F. Supp. 613, 618-19 (E.D. Pa. 1956), with *Paragon Oil Co. v. Panama Ref. & Petrochem. Co.*, 192 F. Supp. 259, 261-62 (S.D.N.Y. 1961). The contention has been advanced that use of the same "doing business" standard for venue and jurisdiction would restrict the jurisdiction of the federal courts, since a defect in venue would automatically result in a lack of personal jurisdiction and thus prevent transfer of the case to a district where venue would be proper under 28 U.S.C. § 1406 (a) (1958). 67 YALE L.J. 1094,

the federal courts for jurisdictional purposes has, of course, rendered academic the question of which "doing business" standard should be applied in those states which have reacted to *International Shoe* by extending the jurisdiction of their own courts over foreign corporations to this constitutionally permissible limit.¹⁹ It is only when the state standard is more restrictive than it must be, that controversy ensues.

Those courts employing a state "doing business" standard base their decision to that effect either on the premise that the *Erie* principle requires such a result,²⁰ or on an interpretation of the federal service of process provisions which incorporates into rule 4 (d) (7), Federal Rules of Civil Procedure,²¹ the forum state's concept of what constitutes "doing business" for jurisdictional purposes.²² Courts relying on the latter rationale generally apply the federal standard in those cases where service of process has been effected under rule 4 (d) (3),²³ in effect treating the two provisions as independent, alternative means of asserting jurisdiction over a

1099 n.18 (1958). This contention loses its validity, however, in light of the Supreme Court's recent holding in *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 (1962), 1963 DUKE L.J. 168, allowing transfer under § 1406 (a) by a court lacking personal jurisdiction.

¹⁹ See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219, 235 (2d Cir. 1963) (dissenting opinion); *K. Shapiro, Inc. v. New York Cent. R.R.*, *supra* note 18, at 725. The trend among the states is definitely in the direction of expanding their jurisdiction over foreign corporations. See, e.g., *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919-33 (1960); Note, 44 IOWA L. REV. 361 (1959). See also note 15 *supra*.

²⁰ See, e.g., *Arrowsmith v. UPI*, *supra* note 19, at 226-27; *Smartt v. Coca-Cola Bottling Corp.*, 318 F.2d 447, 448 (6th Cir. 1963); *Green v. Robertshaw-Fulton Controls Co.*, 204 F. Supp. 117, 127 (S.D. Ind. 1962); *Rensing v. Turner Aviation Corp.*, 166 F. Supp. 790, 796 (N.D. Ill. 1958); *Kenny v. Alaska Airlines, Inc.*, 132 F. Supp. 838, 847-49 (S.D. Cal. 1955); 30 IND. L.J. 324, 330-31 (1955).

²¹ FED. R. CIV. P. 4 (d) (3) provides that service of process shall be made "upon a . . . foreign corporation . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant."

FED. R. CIV. P. 4 (d) (7) provides as follows: "Upon a defendant of any class referred to in paragraph . . . (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served 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."

²² See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219, 242 (2d Cir. 1963) (appendix to dissenting opinion); *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 548 (5th Cir. 1959); *Pulson v. American Rolling Mill Co.*, 170 F.2d 193, 194 (1st Cir. 1948); 30 IND. L.J. 324, 330 (1955).

²³ See note 21 *supra*.

defendant.²⁴ The better view, however, would seem to be that these provisions provide only for the more mechanical aspects of service of process, rather than containing by inference, differing indicia as to *when* a defendant becomes amenable to such service.²⁵

Courts applying a state standard because of the *Erie* principle are probably on much firmer ground. In light of *Erie* and its progeny, the proper preliminary inquiry for a court to make in determining whether to give effect to a state "doing business" standard would seem to be whether that standard reflects significant state interests²⁶ which would be subverted by use of the federal standard. If, for example, a state has declined to extend its jurisdiction over foreign corporations to the constitutionally permissible limit in an attempt to encourage limited, exploratory activity in the state by such corporations,²⁷ then recognition of the state's more restrictive

²⁴ Compare *Walker v. General Features Corp.*, 319 F.2d 583 (10th Cir. 1963) (service under rule 4(d)(7), state standard applied), with *Houston Fearless Corp. v. Teter*, 318 F.2d 822 (10th Cir. 1963) (service under rule 4(d)(3), federal standard applied). In a state which employs a more restrictive "doing business" standard than the federal test, this distinction may cause the question whether a foreign corporation is amenable to suit in the federal courts there to turn on the illogical criterion of which of the two applicable service of process provisions is utilized.

²⁵ See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219, 225-26 (2d Cir. 1963); 5 DUKE B.J. 129, 131-32 (1956).

²⁶ This may be an extremely difficult determination for the federal courts to make on any basis other than conjecture, since state court decisions in the "doing business" area are typically silent as to the policy factors influencing their opinions. On occasion, judicial decisions or manifestations of legislative intent do evince a state interest of considered merit which should be recognized by the federal courts. See note 27 *infra*. On the other hand, such indicia may serve to emphasize the absence of any state interest implicit in the "doing business" standard adopted. See note 29 *infra*. Where no such guidelines are available, however, it is submitted that no determination should be attempted by the federal courts, and that a restrictive state "doing business" standard should be presumed grounded upon a significant state policy.

²⁷ ABA-ALI MODEL BUS. CORP. ACT § 99, ¶ 2 (1953), provides that "a foreign corporation shall not be considered to be transacting business..." in a state, "for the purposes of this Act, by reason of carrying on..." in the state "any one or more..." of certain enumerated corporate activities, such as holding shareholder or directors meetings, maintaining bank accounts, selling through independent contractors and conducting isolated transactions. (Emphasis added.) This section has been enacted in substance in a number of jurisdictions, see 2 MODEL BUS. CORP. ACT ANN. § 99, ¶ 2.01, at 556 (1960), and while the draftsmen of the model act intended it to apply only for qualification purposes, see *id.* § 99, ¶ 4, at 565-66, it is clear that several states have utilized it to exempt foreign corporations from service of process where they are engaged only in the specified activities.

In Connecticut the above italicized portion of the provision, CONN. GEN. STAT. ANN. § 33-397 (b) (1960), is particularly significant, since the chapter dealing with stock corporations contains the state's entire service of process scheme with regard to foreign stock corporations. CONN. GEN. STAT. ANN. § 33-411 (1960). A prior reference to foreign corporations in the state's general service of process provisions was deleted

standard would appear to be justified.²⁸ On the other hand, if the state standard is merely an outmoded expression of what the state considers to be the limit to which it can extend its jurisdiction over foreign corporations consistent with due process,²⁹ or an attempt to

by a 1961 amendment, CONN. GEN. STAT. ANN. § 52-59a (Supp. 1962), and a pair of recent decisions have recognized a legislative intent to immunize from amenability to suit in the state those foreign corporations engaged only in one or more of the activities enumerated in § 33-397 (b). *Powell v. Sealectro, Inc.*, 205 F. Supp. 6, 8 (D. Conn. 1962); *Southern New England Distrib. Corp. v. Berkeley Fin. Corp.*, 30 F.R.D. 43, 48 (D. Conn. 1962). Compare *Connecticut Tool & Mfg. Co. v. Bowsteel Distribs., Inc.*, 24 Conn. Supp. 290, 190 A.2d 236 (Conn. C.P. 1963) (foreign corporation engaged in non-enumerated activity in state not allowed immunity because of conduct of enumerated activity). The comparable Iowa provision, IOWA CODE ANN. § 496A.103 (1962), and the Maryland provision, MD. ANN. CODE art. 23, § 84 (b) (1951) (now art. 23, § 88 (b) (1957)), have been similarly construed. *Hill v. Electronics Corp. of America*, 253 Iowa 581, 113 N.W.2d 313 (1962); *Compania De Astral, S.A. v. Boston Metals Co.*, 205 Md. 237, 258, 107 A.2d 357, 366 (1954), *cert. denied*, 348 U.S. 943 (1955).

In *Arrowsmith v. UPI*, 320 F.2d 219, 226 (2d Cir. 1963), the suggestion is made that "state statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whims; like most legislation they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, while avoiding the discouragement of activity within the state by foreign corporations."

See also ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1303 (Tent. Draft No. 1, 1963), providing that service of process issuing from a district court in diversity cases "shall have binding effect upon any party only to the extent that the law of the state in which the district court is held proscribes in like actions brought in its courts of general jurisdiction." In the commentary to § 1303, at 55, the draftsmen indicate that "federal power ought not to be available as a matter of course to bring before a federal court in a diversity action parties beyond the reach of state process whenever it is thought tactically desirable to do so."

²⁸ Cf. *Massachusetts Mut. Life Ins. Co. v. Brei*, 311 F.2d 463 (2d Cir. 1962), where the court held that the New York rule regarding the patient-physician privilege should govern in the federal courts there in diversity cases, stating that "the privilege reflects a legislatively determined state policy. It is designed to encourage confidential communications between persons in [that] relationship... by protecting these communications from compulsion to reveal them. The rule of privilege is unlike the ordinary rules of practice which refer to the processes of litigation, in that it affects private conduct before litigation arises... The patient-physician privilege is more than a rule of procedure since it goes to relationships established and maintained outside the area of litigation, and 'affect[s] people's conduct at the stage of primary private activity and should therefore be classified as substantive or quasi-substantive.'" *Id.* at 466.

²⁹ Even where the application of state law is clearly demanded, the federal courts are not bound by state precedent which would no longer be followed by the courts of the state in question. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 209-12 (1956). Thus where state precedent indicates restraint in the "doing business" area because of due process limitations no longer in effect or erroneously conceived, the federal courts quite properly feel no compulsion to be bound thereby. See, e.g., *Westcott-Alexander, Inc. v. Dailey*, 264 F.2d 853, 859 (4th Cir. 1959). Similarly, where state judicial expression concerning "doing business" antedates legislative developments indicating a desire to expand the state's jurisdiction over foreign

control crowded dockets in its own courts by restricting their jurisdiction,³⁰ then application of a more liberal standard to permit the federal courts to take jurisdiction would in no way impugn state policy.

Even assuming, however, that the restrictive state standard in question is based upon a significant state policy which would be subverted by federal assertion of jurisdiction through use of the federal standard, the two-pronged "interest-weighting" test adopted in the *Byrd* case would seem to require further that the state policy involved outweigh any relevant federal policies. Relying on the *Byrd* case, at least one federal court has found new impetus to apply the federal standard in all diversity cases. In *Jaftex Corp. v. Randolph Mills, Inc.*³¹ Judge Clark asserted that there is a countervailing federal policy of assuring to those litigants who properly invoke the jurisdiction of the federal courts the essentials of a trial according to uniform federal standards. Moreover, he felt that the independence and integrity of the federal judicial system would be undermined if state law were allowed to control access to the federal courts.³²

corporations, the federal courts may again disregard the obsolete state precedent. See, e.g., *Stanga v. McCormick Shipping Corp.*, 268 F.2d 544, 550 (5th Cir. 1959).

³⁰ See 47 CORNELL L.Q. 286, 293 (1962); 74 HARV. L. REV. 1662, 1664 (1961).

³¹ 282 F.2d 508 (2d Cir. 1960). Prior to *Jaftex*, there was very little authority for the proposition that the federal standard should be applied in *all* diversity cases. Broad statements to this effect by some courts were usually explicable in terms of a distinction drawn by the court between subdivisions (3) and (7) of FED. R. CIV. P. 4(d). See, e.g., *Nash-Ringel, Inc. v. Amana Refrigeration, Inc.*, 172 F. Supp. 524, 525-27 (S.D.N.Y. 1959). In *K. Shapiro, Inc. v. New York Cent. R.R.*, 152 F. Supp. 722, 725 (E.D. Mich. 1957), the court held without qualification that federal courts should employ the federal standard in all diversity cases, citing as authority a per curiam opinion of the Supreme Court in *Riverbank Labs. v. Hardwood Prods. Corp.*, 350 U.S. 1003, *reversing* 220 F.2d 465 (7th Cir. 1955). *Shapiro* has been sharply criticized, however, because of the inconclusive nature of the Supreme Court decision relied upon as controlling authority. See, e.g., *Kurland, Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 211-12 n.120 (1957); 67 YALE L.J. 1094, 1097-98 (1958).

Jaftex has been religiously followed, however, in subsequent district court decisions in the Second Circuit. E.g., *Winchester Electronics Corp. v. General Prods. Corp.*, 198 F. Supp. 355 (D. Conn. 1961); *Kennedy v. Long Island R.R.*, 26 F.R.D. 589 (S.D.N.Y. 1960).

³² 282 F.2d at 513. Although *Jaftex* was expressly overruled by the Second Circuit en banc in *Arrowsmith v. UPI*, 320 F.2d 219, 225 (2d Cir. 1963), Judge Clark's position was reaffirmed in a vigorous dissent to that decision. It should be noted, however, that reference was made in that dissent to the familiar distinction drawn between subdivisions (3) and (7) of FED. R. CIV. P. 4(d), *id.* at 240, 242, indicating a partial retreat by Judge Clark from his unequivocal position in *Jaftex* that "the question whether a foreign corporation is *present* in a district to permit of service of process

In essence, then, use of the *Byrd* "interest-weighting" approach in this context has accentuated the basic controversy between *Erie* and the policy considerations underlying diversity jurisdiction. The *Erie* doctrine is premised upon the assumption that it is desirable, if not constitutionally mandatory, that effect be given to legitimate state rules of law in the federal courts whenever state-created rights are being adjudicated. Diversity jurisdiction, on the other hand, was provided for the purpose of preventing discrimination against foreign litigants,³³ and its proponents insist that all federal citizens should be entitled to invoke certain minimum procedural standards through use of the federal courts in appropriate cases. The Supreme Court has not yet ruled on the question whether this is a proper application of the *Byrd* test, or, in fact, on the propriety of the alternative treatment mentioned above which many courts accord sections (3) and (7) of federal rule 4(d). The fate of restrictive, policy-reflecting state "doing business" standards in the federal courts can be definitively determined only by such a decision.

The Court has decided, however, that effect should be given to state "door-closing" statutes in the federal courts. In *Angel v. Bullington*³⁴ and *Woods v. Interstate Realty Co.*³⁵ the Court held that constitutionally valid state statutes abolishing a state-created cause of action or limiting capacity to sue in the state courts would preclude use of the federal courts in the state by diversity litigants to circumvent such statutes. Some courts have seen in these sanctions of state law an indication that binding effect should also be given to state "doing business" standards in the federal courts.³⁶ It has been suggested with perhaps equal cogency, however, that capacity to sue and existence of a substantive cause of action should not be equated with jurisdictional criteria.³⁷

upon it is one of federal law governing the procedure of the United States courts and is to be determined accordingly." 282 F.2d at 516.

³³ See generally Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROB. 3, 22-28 (1948); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

Concerning the contemporary utility of diversity jurisdiction, see Doub, *An Old Problem: The Federal Diversity Jurisdiction*, 45 A.B.A.J. 1273 (1959). Compare Marbury, *Why Should We Limit Federal Diversity Jurisdiction?*, 46 A.B.A.J. 379 (1960), with Meador, *A New Approach to Limiting Diversity Jurisdiction*, 46 A.B.A.J. 383 (1960).

³⁴ 330 U.S. 183 (1947).

³⁵ 337 U.S. 535 (1949).

³⁶ See, e.g., *Arrowsmith v. UPI*, 320 F.2d 219, 227 (2d Cir. 1963); *Lone Star Package Car Co. v. Baltimore & O.R.R.*, 212 F.2d 147, 153 n.4 (5th Cir. 1954).

³⁷ See 56 COLUM. L. REV. 394, 399 (1956); 5 DUKE B.J. 129, 134-36 (1956).

The fact remains that considerable confusion persists with regard to whether a state or federal "doing business" standard should be employed by the federal courts for jurisdictional purposes in diversity cases. While many of the courts considering the problem still rely on dubious distinctions between the two relevant service of process provisions of the Federal Rules of Civil Procedure, it appears that reliance upon the *Byrd* doctrine as a basis for applying the federal standard, in contradistinction to the view that *Erie* requires use of a state standard, has for the first time put the issue in a suitable posture for a meaningful Supreme Court decision. In light of the trend established by the Court's holdings in *Angel v. Bullington* and *Woods v. Interstate Realty Co.* and the questionable extent to which the *Byrd* case may be relied upon as a comprehensive modification of *Erie*,³⁸ it seems probable that the Court would determine that restrictive state "doing business" standards should be adhered to by the federal courts in diversity cases insofar as they actually or presumptively represent the implementation of legitimate state policies³⁹ which would be adversely affected by federal assertion of jurisdiction over foreign corporations.

³⁸ See notes 12-14 *supra*.

³⁹ See note 26 *supra*.