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CONSTITUTIONAL LIMITATIONS UPON THE
TERRITORIAL REACH OF FEDERAL PROCESS†

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I.

EXTRATERRITORIAL SERVICE OF FEDERAL PROCESS IN
MULTI-PARTY CASES

THE EXTENT OF A state court's power to take personal jurisdiction over persons and corporations located outside the state has been expanding steadily since it reached its low-water mark in *Pennoyer v. Neff*.¹ Not only have the constitutional limitations upon state court jurisdiction been loosened considerably,² but more and more states are pushing their power close to the constitutional brink by means of various "longarm" statutes.³ As a result, the jurisdictional hurdle facing the litigant who wishes to join two or more parties located in different states is not nearly as formidable as it once was.

Nevertheless, this situation may often present a serious, and sometimes an insoluble problem. There are still many cases in which state courts find themselves unable to reach persons whose presence as parties is desirable if complete justice is to be done. Occasionally, when such persons are regarded as "indispensable", the court may not be able to proceed with the action at all.⁴

Generally speaking, the reach of federal process in diversity cases has paralleled that of the courts of the state in which the federal court sits.⁵ Consequently, the hapless plaintiff who finds himself confronted with indispensable party defendants located in different states may be

† Some of the ideas in this article were contained in an address delivered to the twenty-fifth annual Judicial Conference of the Third Judicial Circuit of the United States, reprinted in 32 F.R.D. 83 (1963).

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1. 95 U.S. 714 (1877). Before *Pennoyer*, State power had been broader and more flexible. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L. J. 289 (1956).

2. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), to be discussed in Part III, *infra*.

3. See, e.g., ILL. ANN. STAT. ch. 110, §§ 16, 17 (1956); WIS. STAT. ANN. § 262.05 (Supp. 1963); UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT §§ 1.02, 1.04. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 1000-08 (1960).

4. *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); See Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483 (1957).

5. The reasons for this parallel will be discussed in Parts II and III, *infra*.

without a remedy in any court—state or federal—because of his inability to serve all necessary parties from a single forum. His plight has not been without a certain amount of scholarly sympathy. Professor Barrett, for example, has seen in the multi-party, multi-state jurisdictional problem a unique role for a national court system and a realistic modern justification for diversity jurisdiction. He has suggested an extension of the reach of federal process to allow the federal courts to play this role.⁶ But, aside from providing for extraterritorial service of process in federal interpleader actions⁷ and in certain other special statutory actions,⁸ Congress has not responded to such suggestions.

Within the past few months, however, two significant developments have taken place in this area. One is the "100-mile bulge" amendment to Rule 4(f) of the Federal Rules of Civil Procedure, which became effective on July 1, 1963. The other is the publication, on April 30, by Professors Richard H. Field and Paul J. Mishkin, as reporters for the American Law Institute, of a series of proposed amendments to the United States Judicial Code, creating multi-party, multi-state diversity jurisdiction with world-wide service of process.⁹

The "100-mile bulge" amendment authorizes service of federal process, regardless of state lines, anywhere within 100 miles of the courthouse, on persons who are brought into the action as additional parties to a counterclaim or cross-claim,¹⁰ as impleaded parties,¹¹ as indispensable or conditionally necessary parties,¹² and to secure compliance with an order of commitment for civil contempt.¹³ This is the first time, in absence of statute, that the Federal Rules have permitted service of federal process beyond the reach of the process of the state in which the district court sits.¹⁴

6. Barrett, *Venue and Process in the Federal Courts—Suggestions for Reform*, 7 VAND. L. REV. 608 (1954). See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 744 (Wright ed. 1960); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 993-95 (1958).

7. 28 U.S.C. § 2361 (1958).

8. *E.g.*, 26 Stat. 210 (1890), 15 U.S.C. § 5, 62 Stat. 909 (1948), 15 U.S.C. § 25 (antitrust); 28 U.S.C. §§ 1692 (federal receivership), 1695 (stockholder's derivative action), 2321 (I.C.C.) (1958). See 2 MOORE, FEDERAL PRACTICE ¶ 4.42 (2d ed. 1948).

9. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 1, 1963) [hereinafter cited as ALI].

10. FED. R. CIV. P. 13 (h).

11. FED. R. CIV. P. 14.

12. FED. R. CIV. P. 19.

13. See generally ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS 8-9 (1962) [hereinafter cited as ADVISORY COMMITTEE REPORT].

14. Mr. Justice Black and Mr. Justice Douglas objected to the adoption of this amendment. Rule 4(d)(7) has previously been interpreted to permit extraterritorial service of federal process, but only where a state statute authorizes it. See *Farr & Co. v. Cia. Intercontinental de Navi de Cuba*, 243 F. 2d 342 (2d Cir. 1957); ADVISORY COMMITTEE REPORT 6. A similar 100-mile bulge amendment had been recommended in 1955 but was not adopted by the Supreme Court. See ADVISORY COMMITTEE ON

The Field-Mishkin proposal is considerably more far-reaching than the amendment to Rule 4(f). It would create a special kind of diversity jurisdiction where "several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction. . . ."¹⁵ In such cases, worldwide service of federal process is authorized.¹⁶

Quite clearly, both the "100-mile bulge" amendment and the Field-Mishkin proposals constitute extremely useful additions to the federal jurisdictional armory. They fill a very definite gap in which neither the state nor the federal courts could do complete justice, and sometimes could do no justice at all, simply because of their inability to reach all of the parties. Both the amendment and the proposals have been carefully thought out and drafted by eminent scholars. But are they constitutional? It is the purpose of this article to examine that question.

Both the Advisory Committee that drafted the amendments to the Federal Rules and Professors Field and Mishkin have considered the question and have concluded that there is no constitutional doubt. In fact, Professors Field and Mishkin felt that it was "almost superfluous to address a memorandum to that point. Indeed, the very fact of discussion may serve to stir more doubt than would otherwise have existed."¹⁷ The Advisory Committee confines its comment to one citation, *Mississippi Publishing Corp. v. Murphree*.¹⁸

The *Murphree* case upheld the validity of the expansion by Federal Rule 4(f) of the reach of federal process from the district to the state. In the course of the opinion, Chief Justice Stone told us that "Congress could provide for service of process anywhere in the United States."¹⁹ His sweeping dicta is supported by similar statements in a succession of Supreme Court cases dating back to 1838.²⁰ The same view has also

RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 1-2, 5-6, (1954); 2 MOORE, FEDERAL PRACTICE ¶ 4.01 [11], [12] (1962 Supp.).

15. ALI § 2341(a). Jurisdiction is based upon minimal diversity of citizenship, that is, where "one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction." *Ibid.* This article is not concerned with the constitutionality of this modification of the rule in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806). See ALI 127-37.

16. "Such process may run anywhere within the territorial limits of the United States, and, subject to the provisions of any treaty, anywhere outside those territorial limits that process of the United States can reach. . . ." ALI § 2344 (a). With respect to this type of jurisdiction, the proposals also provide for: venue only in a district bearing a substantial relationship to the events or property sued upon, ALI § 2342; a forum non conveniens transfer to any other district, ALI § 2344(b); federal choice of law rules, ALI § 2344(c); proceeding without absent parties even though they are "indispensable," ALI § 2344(d), (f); discretionary dismissal of actions in which no interest exceeds five thousand dollars, ALI § 2344(e).

17. ALI 138.

18. 326 U.S. 438 (1946); ADVISORY COMMITTEE REPORT 9 (1962).

19. 326 U.S. 438, 442 (1946).

20. See *Eastman Kodak Co. of N. Y. v. Southern Photo Materials Co.*, 273 U.S. 359, 374 (1927); *Robertson v. Railroad Labor Board*, 268 U.S. 619, 622 (1925); *U. S. v. Union Pacific R.R.*, 98 U.S. 569, 602-04 (1879); *Toland v. Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838).

been expressed by the lower federal courts,²¹ and is usually assumed without extended discussion by commentators.²² Congress has never taken full advantage of the blank check so generously offered to it by the courts and commentators, but has provided for extraterritorial service of federal process in a number of special statutory actions.²³

Clearly, the testimony in favor of the constitutionality of nationwide service of federal process is quite formidable. But the fact remains that the Supreme Court has never been called upon to squarely decide the issue. The question, therefore, is still an open one and, in view of recent developments, one that deserves closer examination. This article will consider two possible sources of constitutional limitations upon the territorial reach of federal process: (1) the doctrine of *Erie R. Co. v. Tompkins*²⁴ and (2) the due process clause of the Fifth Amendment to the United States Constitution.

II.

THE ERIE DOCTRINE

To determine the effect of the *Erie* doctrine upon this problem, it is necessary to consider two questions: first, whether *Erie* requires the federal courts to apply state law, and the constitutional limitations upon state law to determine the territorial reach of federal process; second, if so, whether this aspect of *Erie* is a constitutional command.

There has been a good deal of judicial and scholarly controversy as to both of these questions. But, curiously, the two answers have rarely been added together and applied to the general assumption of Congressional omnipotence in this field.²⁵ If *Erie* applied and were a constitutional command, Congress would be powerless. Both amended Federal Rule 4(f) and any statutory provisions for nationwide service, including the Field-Mishkin proposals, would be invalid insofar as they purport to authorize the federal courts in diversity cases to exceed the limitations on the reach of state process.

21. See, e.g., *Limerick v. T. F. Scholes, Inc.* 292 F. 2d 195, 196 (10th Cir. 1961); *Iovino v. Waterson*, 274 F. 2d 41, 45 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960); *Haynes Supply Co., Inc. v. Valley Evaporating Co.*, 261 F. 2d 29, 34 (5th Cir. 1956); *N.L.R.B. v. Gunaca*, 230 F. 2d 542, 543 (7th Cir. 1956), *remanded with directions to dismiss as moot*, 353 U.S. 902 (1957); *Piguet v. Swan*, 19 Fed. Cas. 609, 611 (No. 11134) (C.C.D. Mass. 1828).

22. See I BARRON & HOLTZOFF, *op. cit. supra*, note 6, at 747; HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 948 (1953); Barrett, *supra* note 6, at 629-30; Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 981 (1961); Hill, *The Erie Doctrine and the Constitution*, 53 NW. U. L. REV. 427, 541, 557-58, 566-67 (1958); 56 COLUM. L. REV. 394 (1956); 69 HARV. L. REV. 508 (1956); 73 HARV. L. REV. 1164 (1960); 30 IND. L. J. 324 (1955).

23. See statutes cited notes 7 and 8 *supra*.

24. 304 U.S. 64 (1938).

25. But see Hill, *supra* note 22, at 435.

In considering these two questions, it might be useful to go over some familiar ground and briefly retrace the origins and development of the *Erie* doctrine. The crucial issue throughout this investigation will concern the proper function of diversity of citizenship jurisdiction. Despite considerable scholarly controversy as to the nature of this proper function,²⁶ the Supreme Court has been remarkably consistent in its view.

Almost from the beginning, the Court has expressed the opinion that the only purpose of diversity jurisdiction is to provide an alternative impartial tribunal in each state to protect the out-of-state litigant from local prejudice in the state courts. Thus, Chief Justice Marshall stated in *Bank of the U.S. v. Deveaux*:²⁷

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on the subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

A few years later Mr. Justice Story, in *Martin v. Hunter's Lessee*,²⁸ added that:

No other reason than that which has been stated can be assigned, why some, at least of those cases should not have been left to the cognizance of the state courts.

If this were the only purpose of diversity jurisdiction, it would appear to be a clearly unwarranted usurpation of authority, entirely aside from any Tenth Amendment problem, for the federal courts to

26. See 1 BARRON & HOLTZOFF, *op. cit. supra* note 6, § 26; 1 CROSSKEY, *POLITICS AND THE CONSTITUTION* 641-74 (1953); FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 8-10 (1928); HART & WECHSLER, *op. cit. supra* note 22, at 896-97; 1 MOORE, *op. cit. supra* note 8, at 4; ALI 36-44, 70-74, 138-149; Frank, *Historical Bases of the Federal Judicial System*, 13 *LAW & CONTEMP. PROB.* 3, 22-28 (1948); Frankfurter, *Distribution of Judicial Power Between the United States and State Courts*, 13 *CORNELL L. Q.* 499, 520-30 (1928); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 *HARV. L. REV.* 483 (1928); Hill, *supra* note 22, at 451-55; Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 *YALE L. J.*, 187, 195-97 (1957); Quigley, *Congressional Repair of the Erie Derailment*, 60 *MICH. L. REV.* 1031, 1043-51 (1962); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *HARV. L. REV.* 49, 81-85 (1923); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 *LAW & CONTEMP. PROB.* 216, 234-40 (1948); Yntema & Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 *U. PA. L. REV.* 869 (1931).

27. 9 U.S. (5 Cranch) 61, 87 (1809).

28. 14 U.S. (1 Wheat.) 304, 347 (1816). For additional citations to early cases see Warren, *op. cit. supra* note 26, at 83, where Professor Warren also expresses the opinion, after an analysis of the historical sources, that there is "not a trace" of any purpose for diversity jurisdiction to be found in any of the arguments made in 1787-

make federal law in diversity cases. Yet this is exactly what the federal courts did under *Swift v. Tyson*.²⁹ Did the Supreme Court abandon the classical view of diversity jurisdiction in *Swift*? There is strong evidence that it did not. *Swift* represented, as Mr. Justice Frankfurter has put it, "a particular way of looking at the law."³⁰ The federal courts under *Swift* did not regard themselves as "making" federal law. Both federal and state courts were considered to be applying "a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves controlling formulations."³¹

Erie abandoned the *Swift* way of looking at the law. The federal courts were frankly regarded as making federal law whenever they applied "general" law. The conflict between federal and state law-making power thus became a crucial issue. The Court approached the problem from two different directions: first, from the point of view of the division of power nationally between the federal government and the states and second, from the point of view of the purpose of diversity jurisdiction.

Thus it was decided that when the federal courts made law in diversity cases, they were encroaching upon power reserved to the states.³² At the same time, the Court reiterated the classic view that: "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state."³³ Under this view, federal law-making in diversity cases, in addition to encroaching upon state law-making power, would go far beyond what was necessary to achieve the limited purpose of diversity jurisdiction. This purpose would be achieved as soon as impartial judicial personnel were made available in each state to the out-of-state litigant, as an alternative to the courts of that state. This purpose should exclude any intention of affording the out-of-stater the possibility of a different result in the federal court (due to the application of different rules) than he could get in the courts of the state in which the federal court was located. In other words, the Court did not seem to be interested simply in the over-all balance between federal and state law-making power, it was also concerned with the fact that the federal courts in the exercise of diversity jurisdiction should not interfere with "uniformity in the administration of the law of the State."³⁴ The impact of the federal courts within the borders of each state was considered

29. 41 U.S. (16 Pet.) 1 (1842).

30. *Guaranty Trust Co. of N. Y. v. York*, 326 U.S. 99, 101 (1945).

31. *Id.* at 102.

32. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). This aspect of *Erie* will be discussed in Part III, *infra*.

33. *Id.* at 74.

34. *Id.* at 75.

as serious a problem as the nationwide distribution of power between the federal government and the states.

A few years later this aspect of the *Erie* doctrine was given even further emphasis and, from then on, controlled the development of the doctrine. If the distribution of law-making power were the only basis for *Erie*, the federal courts would be required to apply state law in diversity cases, but they would be free to choose which state's law according to their own choice of law rules. *Klaxon v. Stentor Electric Manufacturing Co.*,³⁵ however, held that the federal courts were not free to choose. They were required to decide as would the courts of the state in which they were sitting, and this required them to apply that state's choice of law rules. This requirement was based upon "the principle of uniformity within the state," or that of "equal administration of justice in coordinate state and federal courts sitting side by side."³⁶

Mr. Justice Frankfurter gave this principle its classic expression in *Guaranty Trust Co. of N. Y. v. York*,³⁷ in which it was held that a federal court must apply the statute of limitations of the state in which it sits. Again emphasizing the limited purpose of diversity jurisdiction,³⁸ Mr. Justice Frankfurter concluded, in an often quoted statement, that in diversity cases "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 . . . the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away, should not lead to a substantially different result."³⁹ It does not matter whether the state rule in question is classified as substantive or procedural, if it is outcome determinative, the Federal courts must apply it. In short, a Federal court in a diversity case is "in effect only another court of the State. . . ."⁴⁰

This principle of uniformity of outcome has been roundly criticized by some scholars,⁴¹ but it has been fairly consistently adhered to by the

35. 313 U.S. 487 (1941).

36. *Id.* at 496.

37. 326 U.S. 99 (1945).

38. "Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. . . . And so Congress afforded out-of-state litigants another tribunal, not another body of law." *Id.* at 111-12.

39. *Id.* at 109.

40. *Id.* at 108.

41. See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 512 (1954): "Thus far the Supreme Court's decisions on these matters seem to be founded on no higher principle than that of eliminating every possible reason for a litigant to prefer a federal to a state court. The principle having no readily apparent stopping place, the reach of the decisions is unclear. What is more important is the triviality of the principle. The more faithfully it is carried out the more completely the constitutional and statutory grants of diversity jurisdiction are emptied of intelligible meaning." See also Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267 (1946); Hill, *supra* note 22,

courts. Thus, it has been applied by the Supreme Court to require the application of State law with respect to such "procedural" matters as: burden of proof,⁴² availability of a deficiency judgment remedy,⁴³ time of commencement of an action,⁴⁴ capacity of a corporation to sue,⁴⁵ security in a derivative stockholders suit,⁴⁶ and stay of an action pending arbitration.⁴⁷ The fact that in some of these cases one of the Federal Rules of Civil Procedure was relied upon in opposition to the state rule, did not prevent the application of *Erie*.⁴⁸

In the opinion of some commentators the Supreme Court has retreated from, or at least tempered, the uniformity of outcome principle in *Byrd v. Blue Ridge Rural Electric Corp.*⁴⁹ That observation is certainly correct with respect to the facts of the case itself. In deciding not to follow the state rule that facts determining the coverage of the state workmen's compensation statute were to be decided by a judge and not a jury, Mr. Justice Brennan was willing to concede that the rule might be outcome-determinative. But, noting that the rule was not bound up with substantive rights and obligations, he found "affirmative countervailing considerations at work."⁵⁰ He decided that rules with respect to the judge-jury relationship were an "essential characteristic" of the Federal courts as "an independent system for administering justice."⁵¹ Mr. Justice Brennan concluded that "the Federal policy favoring jury decisions of disputed fact questions," which was "under the influence—if not the command—of the Seventh Amendment," outweighed the policy behind uniformity of outcome and any state policy involved.⁵²

A few courts have apparently interpreted *Byrd* as authorizing a departure from a state outcome-determinative procedural rule whenever there is a strong federal interest in applying a federal rule.⁵³ But most

at 427-37, 449-56; Keefe, Gilhooley, Bailey & Day, *Weary Erie*, 34 CORNELL L. Q. 494 (1949); Quigley, *supra* note 26, 1032-34; Vestal, *Erie R.R. v. Tompkins: A Projection*, 48 IOWA L. REV. 248 (1963).

42. *Palmer v. Hoffman*, 318 U.S. 109 (1943); *Cities Service Co. v. Dunlap*, 308 U.S. 208 (1939).

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

44. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

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

46. *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

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

48. See *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949) (FED. R. CIV. P. 3); *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949) (FED. R. CIV. P. 17 (b)); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (FED. R. CIV. P. 23 (b)).

49. 356 U.S. 525 (1958). See Quigley, *supra* note 26, at 1037-41; Smith, *Blue Ridge and Beyond: A Byrd's Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962); Vestal, *supra* note 41, at 262-72.

50. 356 U.S. 525, 537 (1958).

51. *Ibid.*

52. *Id.* at 537-38.

53. See *Monarch Insurance Co. of Ohio v. Spach*, 281 F. 2d 401, 406-09 (5th Cir. 1960); *Iovino v. Waterson*, 274 F. 2d 41, 48 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1960); Smith, *supra* note 49, at 449-70; Vestal, *supra* note 41, at 264-72.

post-*Byrd* decisions seem to have confined the case to rules affecting the judge-jury relationship.⁵⁴ At any rate, the reports of the demise of the uniformity of outcome principle have been greatly exaggerated.

If this principle is applied to rules governing the territorial reach of process, it seems clear that such rules are outcome-determinative. Certainly, a rule which determines whether a particular defendant is amenable to the service of the process of the courts of the state in which the federal court is located, that is, a rule which determines whether the action can be maintained in that state at all, bears a greater relation to the outcome of the litigation than many of the rules which the Supreme Court has already classified as outcome-determinative. As Mr. Justice Douglas indicated, when the Court required the application of a state rule for the time of commencement of an action: "If recovery could not be had in the State court, it should be denied in the Federal court."⁵⁵

Moreover, a federal rule extending the reach of federal process beyond that of state process seems entirely inconsistent with what is, in view of *Klaxon*, the geographically limited nature of the federal courts in diversity cases. It is incongruous to permit a court, whose rules of decision in diversity cases are determined entirely by where its courthouse happens to be situated, to extend its jurisdiction throughout the nation. To do so, extends the law of the state where the court is located to persons over whom that state has no jurisdiction.⁵⁶

The Supreme Court has not yet ruled on the question of whether state rules governing the territorial reach of process, or the amenability of a defendant to service of process, must be applied by the federal courts in diversity cases.⁵⁷ But in every circuit in which the question

54. See Smith, *supra* note 49, at 454-56; Wicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEXAS L. REV. 549 (1959). In many cases, the court has continued to apply the outcome-determinative test without mentioning *Byrd*. See, e.g., *Aponte v. American Surety Co. of N. Y.*, 276 F. 2d 678, 680 (1st Cir. 1960); *Sun Insurance Office Ltd. v. Clay*, 265 F. 2d 522, 524-25 (5th Cir. 1959), *remanded for determination of state law*, 363 U.S. 207 (1960).

55. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 532 (1949).

56. This seems to have been the result reached in the much criticized case of *Griffin v. McCoach*, 313 U.S. 498 (1941), in which *Klaxon* was applied in spite of nation-wide service under the Interpleader Act, 28 U.S.C. § 2361 (1952). See Hill, *supra* note 22, at 554, 567. It is to avoid this anomaly that the Field-Mishkin proposals release the federal courts from *Klaxon* where they provide for world wide service of process. ALI § 2344(c), 98-101.

57. *Riverbank Laboratories v. Hardwood Products Corp.*, 350 U.S. 1003 (1956), reversed a Seventh Circuit decision which applied state law to hold a defendant not amenable to service of process. But the court's two sentence per curiam opinion tells us little about its reasons for reversing: "The Court is of the opinion that the District Court correctly found there was proper service upon the defendant in this case. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings." Compare the interpretation of *Riverbank* in *K. Shapiro, Inc. v. New York Cent. R.R.*, 152 F. Supp. 722, 725 (E.D. Mich. 1957), with that in *Jaflex Corp. v. Randolph Mills, Inc.*, 282 F. 2d 508, 513

has been considered, the Court of Appeals has decided to apply state law.⁵⁸ At first, the second circuit was contrary. In *Jaftex Corp. v. Randolph Mills, Inc.*⁵⁹ a divided panel decided to apply federal law because federal standards for amenability to process were part of the "essentials of a trial according to federal standards."⁶⁰ But in *Arrow-smith v. United Press International*⁶¹ the entire court, sitting en banc, reconsidered the question. Noting that the "overwhelming consensus" was against *Jaftex*, the court overruled that case and concluded that under *Erie* state law must govern.

Even if *Erie* does apply to the territorial reach of federal process, the question remains whether *Erie* is a constitutional command. On this point *Erie* was unambiguous. Mr. Justice Brandeis made it clear that the Court would not have overruled *Swift* if it had not been convinced of "the unconstitutionality of the course pursued."⁶² The opinion indicated two possible sources of this unconstitutionality.

Its major emphasis was upon constitutional principles of federalism. "Congress has no power," Mr. Justice Brandeis stated, "to declare substantive rules of common law applicable in a state. . . . And no clause in the Constitution purports to confer such a power upon the federal courts."⁶³ It can be argued that if this were the only constitutional foundation for *Erie*, the constitutional core of the doctrine would be much narrower than its application. *Klaxon* and the principle of uniformity of outcome would be outside the core, a mere "gloss"⁶⁴ on the basic doctrine. It would follow that the application of *Erie* to the territorial reach of process would not be required.

58. See *e.g.*, *Smartt v. Coca-Cola Bottling Corp.*, 318 F. 2d 447 (6th Cir. 1963); *Walker v. General Features Corp.*, 31 U.S.L. Week 2642 (10th Cir. June 25, 1963); *Shealy v. Challenger Manufacturing Co.*, 304 F. 2d 102 (4th Cir. 1962); *Ark-La Feed & Fertilizer Co. v. Marco Chemicals Co.*, 292 F. 2d 197 (8th Cir. 1961); *Stanga v. McCormick Shipping Corp.*, 268 F. 2d 544 (5th Cir. 1959); *Partin v. Michaels Art Bronze Co.*, 202 F. 2d 541 (3d Cir. 1953); *Canvas Fabricators, Inc. v. Hooper & Sons Co.*, 199 F. 2d 485 (7th Cir. 1952); *Gravelly Motor Plow & Cultivator Co. v. H. V. Carter Co.*, 193 F. 2d 158 (9th Cir. 1951); *Pulson v. American Rolling Mill Co.*, 170 F. 2d 193 (1st Cir. 1948); *Kenny v. Alaska Airlines Inc.*, 132 F. Supp. 838 (S.D. Cal. 1955).

59. 282 F. 2d 508 (2d Cir. 1960).

60. *Id.* at 513. See also from other circuits, *K. Shapiro Inc. v. New York Cent. R.R.*, 152 F. Supp. 722 (E.D. Mich. 1957); *General Electric Co. v. Central Transit Warehouse Co.*, 127 F. Supp. 817 (W.D. Mo. 1955). This position also has some scholarly support. See 2 MOORE, FEDERAL PRACTICE, ¶ 4.25 (2d ed. 1948); Green, *supra* note 22, at 977-80; Notes, 56 COLUM. L. REV. 394 (1956); 69 HARV. L. REV. 508 (1956). Compare 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 696 (Wright ed. 1960); Notes, 6 VILL. L. REV. 404 (1961); 67 YALE L. J. 1094 (1958).

61. 31 U.S.L. Week 2641 (2d Cir. June 25, 1963) (Judge Friendly, who concurred in the *Jaftex* case, wrote the majority opinion. Judge Clark, who wrote the majority opinion in *Jaftex*, dissented).

62. 304 U.S. 64, 77-78 (1938).

63. *Id.* at 78.

64. Mr. Justice Rutledge dissenting in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 558 (1949).

But the classic view that the purpose of diversity jurisdiction is limited to providing an impartial forum for the out-of-state litigant has been traditionally enunciated as a constitutional doctrine.⁶⁵ When Mr. Justice Brandeis reiterated it in *Erie*, he indicated no departure from this position. This is a constitutional base of *Erie* that would encompass the principle of uniformity of outcome. If the purpose of diversity is thus constitutionally limited and the principle of uniformity of outcome were not faithfully carried out, the federal courts would be performing a function in diversity cases beyond that authorized by Article III. That the fear of local bias may have no modern basis in fact⁶⁶ seems more relevant to Congressional policy than to constitutional doctrine. If true, perhaps Congress should abolish diversity jurisdiction, rather than adapt it for some other purpose.

Moreover, a departure from the principle of uniformity of outcome, might result in an even more serious interference with the constitutional plan than a violation of Article III. It might increase the tension of the federal presence within each state. As a practical matter the major dissatisfaction with *Swift* seems to have been not that the federal courts were violating an abstract principle of federalism, but the spectacle of two sets of courts located within the borders of the same state coming to divergent results in similar cases. Mr. Justice Brandeis recognized this when in *Erie* he spoke of the "injustice and confusion," the "discrimination" in favor of the non-resident, and the uncertainty of legal obligation that resulted from the lack of "uniformity in the administration of the law of the State."⁶⁷

More recently, in *Bernhardt v. Polygraphic Co. of America*,⁶⁸ the Supreme Court has indicated much more clearly the view that the principle of uniformity of outcome is a constitutional doctrine. The Court held that a state rule making an agreement to arbitrate unenforceable was outcome-determinative and had to be applied by the court in deciding a motion to stay pending arbitration. Mr. Justice Douglas stated that the United States Arbitration Act⁶⁹ was being narrowly construed as inapplicable in order to avoid the "constitutional question"⁷⁰ of the power of Congress under *Erie* to supersede state outcome-determinative rules in diversity cases.

65. See *Guaranty Trust Co. of N. Y. v. York*, 326 U.S. 99, 111-12 (1945); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816); *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809).

66. See authorities cited note 26 *supra*; Summers, *Analysis of Factors that Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962).

67. 304 U.S. 64, 74-77 (1938).

68. 350 U.S. 198 (1956).

69. 9 U.S.C. §§ 1-14 (1952).

70. 350 U.S. 198, 207 (1956).

Not all scholarly opinion accepts the Supreme Court view that *Erie* is a constitutional command. Some commentators have refused to accept any constitutional base for *Erie* at all.⁷¹ Others confine *Erie*'s constitutional impact to a limitation upon the substantive law-making power of the federal government as opposed to that of the states, a constitutional base which would not include the principle of uniformity of outcome.⁷² Ultimately, the answer depends upon one's view of the proper place of diversity jurisdiction in the constitutional plan, an issue to which little objective legal authority can be brought to bear.

III.

THE FIFTH AMENDMENT

Aside from *Erie*, another possible source of constitutional limitations upon the territorial reach of federal process is the due process clause of the Fifth Amendment. In order to determine the nature of these limitations it is necessary to examine the nature of the limitations upon state process.

Early restrictions upon the reach of state process were based primarily upon then current international law notions of territorial sovereignty.⁷³ For this purpose, the states were considered independent sovereignties. Mr. Justice Field aptly expressed this concept in *Pennoyer v. Neff*:⁷⁴ "The authority of every tribunal is necessarily restricted to the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power, and be resisted as mere abuse." The courts, in

71. "I take it to be the general understanding that Mr. Justice Brandeis' invocation of the Constitution as a basis for overruling *Swift v. Tyson* was a bit of judicial hyperbole which, having served its purpose, should not be permitted to mislead even the most literal-minded reader." Currie, *Change of Venue and the Conflict of Laws*, 22 U. CHI. L. REV. 405, 468-69 (1955). See Cook, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 136-46 (1942); 1A MOORE, *op. cit. supra* note 60, at 3050; Clark, *supra* note 41, at 278-79; Keefe, *supra* note 41, at 496-97. Indeed, Professor Crosskey goes so far as to say that *Erie* is unconstitutional. 2 CROSSKEY, *op. cit. supra* note 26, at 865-937.

72. See Hart, *supra* note 41, at 509-10; Hill, *supra* note 22, at 427-28, 437-48; Quigley, *supra* note 26, at 1056-61; Vestal, *supra* note 41, at 252-59, 268-69; Wechsler, *supra* note 26, at 239 n. 121. See also Kurland, *supra* note 26, at 188-204. Compare Wicher, *supra* note 54, at 550-53.

73. See Cleary, *The Length of the Long Arm*, 9 J. PUB. L. 293, 294 (1960); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 791-817 (1955); Sobeloff, *Jurisdiction of State Courts Over Nonresidents in our Federal System*, 43 CORNELL L. Q. 196, 197 (1957). These notions had particular influence upon the common law because they coincided with the English conception of the King as a territorial rather than a feudal sovereign. Beale, *Jurisdiction of Courts over Foreigners*, 26 HARV. L. REV. 193, 283-84 (1913). These notions are not consistent with modern international law. Rheinstein, *supra*, at 797-801.

74. 95 U.S. 714, 720 (1877).

this early period made no effort to relate these limitations to the Constitution.

Presumably under the territorial sovereignty theory, federal process could have reached throughout the nation. But the Judiciary Act of 1789 confined it to the district in which the court was sitting.⁷⁵ The courts also derived this limitation from the very fact that they were organized into districts,⁷⁶ and from the belief that any other rule would constitute "an oppression upon suitors, too intolerable to be endured."⁷⁷

With the adoption of the Fourteenth Amendment, the courts read the territorial sovereignty concept into the due process clause.⁷⁸ The limitations on state process were thus given a constitutional foundation. But the reliance on the Fourteenth Amendment was at first somewhat misleading, for the courts continued to place the emphasis on state's rights rather than on individual liberty. That is, they were more concerned with the encroachment upon a sister state's sovereignty which resulted from extraterritorial service, than they were with the rights of the defendant. As the limitations were then interpreted, a more appropriate source would have been the Full Faith and Credit clause.⁷⁹

After the Fourteenth Amendment, federal process limitations paralleled developments upon the reach of state process, with the exception that the territory was the district instead of the state. Thus when corporations were permitted to be sued outside the state of their incorporation, the constitutional requirement that they be "doing business" within a state in order to be amenable to that state's process,⁸⁰ was applied without question to require doing business in the district for amenability to federal process.⁸¹ The same standards were employed to define "doing business," with federal and state precedents cited interchangeably.

75. "But no person shall be arrested in one district for trial in another, in any civil action. . . ." 1 Stat. 79 (now 28 U.S.C. § 1693 (1952)).

76. As Mr. Justice Story explained in *Piguet v. Swan*, 19 Fed. Cas. 609, 611 (No. 11134) (C.C.D. Mass. 1828), the limitation of federal process to the district in which the action is commenced "results from the general principle, that a court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. It matters not, whether it be a Kingdom, a state, a county, or a city, or other local district."

77. *Ex parte Graham*, 10 Fed. Cas. 911, 912 (No. 5657) (C.C.E.D. Pa. 1818).

78. See *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877).

79. See *Rheinstein*, *supra* note 73, at 791, 796.

80. See *International Harvester Co. of America v. Kentucky*, 234 U.S. 579 (1914); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 919-23 (1960).

81. See *Louisville & N.R.R. v. Chatters*, 279 U.S. 320 (1929); *Philadelphia & R. Ry. v. McKibbin*, 243 U.S. 264 (1917); 2 MOORE, *op. cit. supra* note 60, at 969; *Notes*, 35 COLUM. L. REV. 591 (1935); 69 HARV. L. REV. 508 (1956).

Did this parallelism mean that federal as well as state limitations were beginning to be tied to due process? One or two federal courts so indicated.⁸² But generally, until more recently, the courts did not discuss the source of the limitations on federal process at all. Part of the reason for avoiding any constitutional discussion with respect to federal process may have been that the territorial sovereignty approach to the Fourteenth Amendment limitations on the states had little federal relevance.

International Shoe Corp. v. Washington,⁸³ however, shifted the emphasis of these limitations from nineteenth century notions of territorial sovereignty to a concern for fairness to the defendant. Considering the relationship of the Fourteenth Amendment to the territorial reach of state process, the Court concluded that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' . . . An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principle place of business is relevant in this connection."⁸⁴ It is true, as the court has since pointed out, that the territorial sovereignty concept has not been completely abandoned.⁸⁵ But the shift in emphasis to the interests of the defendant, rather than those of other states, marked a significant change in the Court's view of the nature of judicial jurisdiction.

Certainly, the new viewpoint is a great deal more relevant to federal jurisdiction than was the old territorial sovereignty concept. If a defendant is forced to litigate in the courts of a distant state with which he has had no contact, it is considered so unfair to him as to offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the Fourteenth Amendment. Might it not also be unfair to force him to litigate in the federal court

82. See *Chase Bag Co. v. Munson Steamship Line*, 295 Fed. 990, 994 (D.C. Cir. 1924); *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 286 Fed. 566, 577, 588-92 (E.D. Ky. 1922).

83. 326 U.S. 310 (1945).

84. *Id.* at 316-17.

85. See the declaration of the Chief Justice in *Hanson v. Denkla*, 357 U.S. 235, 251 (1958), that restrictions on the personal jurisdiction of state courts "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." See Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts*, 25 U. CHI. L. REV. 569, 619-24 (1958).

across the street? Might this unfairness not offend the "traditional notions of fair play and substantial justice" embodied in the due process clause of the Fifth Amendment?

The Supreme Court has not yet answered these questions.⁸⁶ Nor has the problem been squarely faced by any more than a very few lower courts⁸⁷ and commentators.⁸⁸ In practice, however, the federal courts have been fairly uniformly applying the *International Shoe* due process standards to federal jurisdiction, often relying on that case by name without discussing why.⁸⁹

This practice may have a number of different explanations. In diversity cases, the courts may be applying the *Erie* doctrine without saying so, and consequently, using state law "seasoned with appropriate due process concepts."⁹⁰ In non-diversity cases, and in circuits where the application of *Erie* has been rejected, the courts may merely be following "Congressional policy."⁹¹ Where service is under Federal Rule 4(d)(7), the courts may be adopting limitations on state process along with state rules as to the "manner" of service.⁹² Even where service is not under Rule 4(d)(7), it may be that Rule 4(f) is being read as expressing a policy of confining the territorial reach of federal process generally to that of state process.⁹³

86. In *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 666-67 (1953), the majority opinion stated that the Court expressed no opinion whether the defendant in a federal court action was doing business in the state "within the meaning of the due process requirements set out in *International Shoe Co. v. State of Washington*. . . ."

87. See *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F. 2d 508, 510 (2d Cir. 1960); *Lone Star Package Car Inc. v. Baltimore & O. R.R.*, 212 F. 2d 147, 153-54 (5th Cir. 1954); *Woodworkers Tool Works v. Byrne*, 191 F. 2d 667, 672 (9th Cir. 1951); *Goldberg v. Mutual Readers League, Inc.*, 195 F. Supp. 778, 782-83 (E.D. Pa. 1961).

88. See Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 VAND. L. REV. 967, 970 (1961); 35 COLUM. L. REV. 591 (1935); 69 HARV. L. REV. 508 (1956); 30 IND. L. J. 324 (1955).

89. See, e.g., *L. D. Reeder Contractors of Ariz. v. Higgins Industries, Inc.*, 265 F. 2d 768 (9th Cir. 1959); *Scholnik v. National Airlines, Inc.* 219 F. 2d 115 (6th Cir. 1955) *cert. denied*, 349 U.S. 956 (1955); *Consolidated Cosmetics v. D-A Publishing Co.*, 186 F. 2d 906 (7th Cir. 1951); *Latimer v. S/A Industrias Reunidas F. Matarazzo*, 175 F. 2d 184 (2d Cir. 1949), *cert. denied*, 338 U.S. 867 (1949); *Bach v. Friden Calculating Machine Co.*, 167 F. 2d 679 (6th Cir. 1948); *Clover Leaf Freight Lines, Inc. v. Pacific Coast Wholesalers Ass'n*, 166 F. 2d 626 (7th Cir. 1948), *cert. denied*, 335 U.S. 823 (1948); *Powell v. Sealectro Inc.*, 205 F. Supp. 6 (D. Conn. 1962); *The Southern New England Distributing Corp. v. Berkly Finance Corp.*, 30 F.R.D. 43 (D. Conn. 1962); *Ostow & Jacobs, Inc. v. Morgan-Jones, Inc.* 178 F. Supp. 150 (S.D.N.Y. 1959); *Clifton Products, Inc. v. American Universal Insurance Co.* 169 F. Supp. 842 (S.D.N.Y. 1959); *Dam v. General Electric Co.*, 111 F. Supp. 342 (E.D. Wash. 1953); *Ott v. Hudnut Sales Co., Inc.*, 107 F. Supp. 919 (D. Col. 1952).

90. *Bar's Leaks Western Inc. v. Pollock*, 148 F. Supp. 710, 713 (N.D. Cal. 1957) (dictum).

91. See *Jaftex Corp. v. Randolph Mills, Inc.* 282 F. 2d 508, 510, 512, 516 (2d Cir. 1960).

92. See *Pulson v. American Rolling Mill Co.* 170 F. 2d 193 (1st Cir. 1948).

93. See *Jaftex Corp. v. Randolph Mills, Inc.*, 282 F. 2d 508, 516 (2d Cir. 1960).

On the other hand, it is possible that the courts, in at least some of these cases, are evolving Fifth Amendment due process standards to parallel the Fourteenth Amendment due process standards being developed with respect to the states. At any rate, the question with respect to the power of Congress is still open since no due process objection, based on unfairness to the defendant, has yet been raised to a statute in which Congress has expressly authorized nationwide service of process.

The Advisory Committee avoided this question in connection with the "100-mile bulge" amendment. They pointed out that "In the light of present-day facilities for communication and travel, the territorial range of service allowed . . . can hardly work hardship upon the parties summoned. . . . The amendment is but a moderate extension of the territorial reach of Federal process. . . ." ⁹⁴ This is probably correct in most cases. ⁹⁵ Even if the Fifth Amendment places restrictions of fairness upon the territorial reach of federal process, the outer limits of fairness do not necessarily run along state borderlines.

The Field-Mishkin proposals, however, present more of a due process problem. ⁹⁶ They authorize world-wide service of process. It is true that the proposals minimize the possibilities of hardship by confining venue to a district substantially related to the events being sued upon, ⁹⁷ by authorizing a transfer to any other district, ⁹⁸ and by authorizing a dismissal as to a particular party, or of the entire action, "when the application of the section would lead to undue burden on distant parties, and the monetary value of each interest which may be adversely affected by such disposition does not exceed the sum of \$5,000. . . ." ⁹⁹ But, in actions in which an interest worth more than five thousand dollars may be affected, there remains the possibility of serious hardship to a party brought into a distant state with which he has never had any contact. The proposals contain no provisions for relief to such distressed parties.

The Reporters argue that "Since these are by hypothesis parties whose absence could prevent a just adjudication, there is sufficient justification to bring them into court even from substantial distances." ¹⁰⁰

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95. But the very act of crossing over into another state for litigation, no matter what the distances are, may cause a certain amount of hardship. See the comment of Judge Nordbye on the 1955 "100-mile bulge proposal". *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*. 18 F.R.D. 105, 106 (1956). It may also be desirable, as a matter of policy, to continue using the permissible reach of state process as a convenient guide line of fairness.

96. The Reporters side-step the due process question in their supporting memorandum on "the constitutionality of service of federal court process without regard to State boundaries." ALI 138, n. 1.

97. ALI § 2342.

98. ALI § 2344(b).

99. ALI § 2344(e).

100. ALI § 97.

Any hardship to the non-resident litigant, they conclude, "may well be deemed a cost which he must bear as a part of organized society."¹⁰¹ Of course, in this last conclusion, lies the whole constitutional issue.

The courts have traditionally placed limits upon the price that we must pay, in the form of responding to service of process, for living in an organized society. At least with respect to state process, these limits have in part had a constitutional basis in the form of due process protection against inconvenient litigation. Inevitably, any such protection extended to a defendant interferes with the plaintiff's ability to obtain a judicial remedy. But the nature and extent of such protection has never varied with the need of the plaintiff or the amount in controversy. The constitutional bias has been in favor of protecting the individual from government coercion, rather than in favor of making it available to him.

There appears to be more than a similarity of verbiage between the due process clauses of the Fourteenth and Fifth Amendments. There is no clear reason why the "traditional notions of fair play and substantial justice" embodied in the Fifth Amendment should not also encompass some measure of protection against inconvenient litigation, even though the protection is not identical to that afforded by the Fourteenth Amendment. While the Field-Mishkin proposals make no specific provision for permitting the litigant in a case involving more than five thousand dollars to claim such constitutional protection, it is clear that they cannot prevent him from doing so. But it seems unwise to force the litigant to the constitutional brink in each instance. Some orderly procedure should be provided whereby the court has discretionary authority, without making a constitutional decision, to relieve a litigant of the duty to respond to inconvenient litigation.

One possible solution would be to extend the provisions of Section 2344(e)¹⁰² to cases involving more than five thousand dollars. Such a change would be desirable even if it is felt that the individual is entitled to no Fifth Amendment protection from inconvenient federal litigation. It is difficult to say that in *no* case involving more than five thousand dollars could greater injustice result to a defendant by forcing him to respond, than to the plaintiff by continuing the case without that defendant or by dismissing it altogether. The change may result in some loss in the overall efficiency of the proposals because of increased motion practice, but in view of the fundamental, if not constitutional, rights involved, that would be a small price to pay.

101. ALI 102.

102. See text at note 99, *supra*.

IV.

CONCLUSION

It is generally assumed that there are no constitutional limitations upon the territorial reach of federal process. Closer examination, however, reveals judicial authority which may be added up to yield two possible sources of constitutional limitations.

One source is the *Erie* doctrine, which has been widely applied to rules governing the reach of federal process. There is evidence that the Supreme Court continues to hold the view expressed in the original opinion; namely, that the *Erie* doctrine is constitutionally compelled. The other source is the due process clause of the Fifth Amendment. The due process clause of the Fourteenth Amendment has been construed to protect an individual from inconvenient state litigation. Similar protections have been afforded in federal litigation. There are indications that the courts consider at least part of the basis of this protection of the federal litigant to be the parallel provisions of the Fifth Amendment.

These possible constitutional limitations cast doubt upon the validity of existing provisions for extraterritorial service of federal process, including the recent "100-mile bulge" amendment to the Federal Rules of Civil Procedure. They also bear upon the validity or the wisdom of some of the proposals by Professors Field and Mishkin to the American Law Institute for world-wide service of process in multi-party, multi-state cases.