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In Personam Jurisdiction of the Federal Courts Over Foreign Corporations in Diversity Cases: State Versus Federal Law Under Erie R.R. v. Tompkins

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IN PERSONAM JURISDICTION OF THE FEDERAL COURTS OVER FOREIGN CORPORATIONS IN DIVERSITY CASES: STATE VERSUS FEDERAL LAW UNDER ERIE R.R. v. TOMPKINS

Unto each Caesar, State or Federal, is thus rendered that which properly belongs to that particular Caesar, supreme in its distinctive field.[1]

Introduction

Since that historic decision of Mr. Justice Brandeis in 1938,[2] an especially perplexing question has plagued the federal courts: In what instances involving diversity of citizenship cases is state law vis-a-vis federal law applied?[3] One particular area in which the answer to this question is yet unsettled deals with the jurisdiction of a federal court over the person of a foreign corporation.[4] The Court of Appeals for the Second Circuit faced this question in June 1963, and held that the federal courts are to apply local state law in determining whether a foreign corporation is sufficiently present in the state so as to be amenable to suit.[5] While the decision might at first glance seem relatively consistent with our preconceived ideas of the substance-procedure dichotomy supposedly promulgated by *Erie R.R. v. Tompkins,* it takes on much greater significance in light of both the late Judge Clark's vigorous dissent[6] and the fact that in reaching its decision the circuit court sitting *en banc* expressly overruled the alternate ground for decision—the assertion of a federal standard—in a case it had decided but three years previously.[7]

1. *Arrowsmith v. United Press Int'l*

In the Federal District Court of Vermont, Harold Noel Arrowsmith, a Maryland resident, brought a libel action against United Press International, a foreign corporation formed under

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[1] Address by Judge Dobie, *The Conflict of State and Federal Judicial Power,* Association of the Bar of the City of New York, February 26, 1951, quoted in Friendly, *In Praise of Erie—and of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64, 82 (1964).

[2] Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[3] See generally HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 610-78 (1953); WRIGHT, FEDERAL COURTS §§ 55-60 (1963).

[4] Friendly, *supra* note 1, at 78. See Kaplan, *Amendments of the Federal Rules of Civil Procedure,* 1961-1963 (I), 77 HARV. L. REV. 601, 631-39 (1964).

[5] Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

[6] *Id.* at 234.

[7] *Id.* at 225, *overruling* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).

the laws of New York.[8] United Press International moved to dismiss on various grounds, including lack of personal jurisdiction, improper venue, and failure of the complaint to state a claim upon which relief could be granted. Judge Gibson granted the defendant's motion, not on the jurisdictional grounds, but because of plaintiff's failure to state a valid claim.[9] On appeal, however, the Second Circuit ruled that Judge Gibson's failure to consider the defendant's principal contention for dismissal, viz., lack of personal jurisdiction over the foreign corporation, was sufficient to necessitate reversal. Consequently, the case was remanded to the lower court for a determination of the issue of jurisdiction.[10] Not content with merely reversing, however, the court also detailed the standards to be applied by the lower court in determining whether it has jurisdiction over the foreign corporate defendant. It directed the use of Vermont state law in answering the jurisdictional question presented. By so doing, the Court of Appeals, sitting *en banc,* used *Arrowsmith v. United Press Int'l* to *expressly* overrule the alternate ground for decision in *Jaftex Corp. v. Randolph Mills, Inc.*[11]

2. *Jaftex Corp. v. Randolph Mills, Inc.*

To understand Judge Friendly's majority opinion in *Arrowsmith,* the rationale of *Jaftex* must first be examined. Judge Clark, a recognized authority in the area of federal practice,[12] speaking on behalf of the court in *Jaftex,* recognized both federal and New York law as alternate grounds for holding the particular service in question valid.[13] He then declared that the issue as to "whether a foreign corporation is *present* in a district to permit of service of process upon it is one of federal

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[8] Arrowsmith v. United Press Int'l, 205 F.Supp. 56 (D. Vt. 1962).

[9] *Id.* at 57-58. Since the allegedly libellous article was not defamatory per se, plaintiff's failure to allege special damages precluded the granting of any relief.

[10] Arrowsmith v. United Press Int'l, *supra* note 5, at 221. If the case were dismissed for lack of jurisdiction, this would not preclude a subsequent action in an appropriate forum. However, the doctrine of res judicata would prevent further litigation if the case were dismissed for failure to state a valid claim.

From the thoroughness of their opinions and the number of authorities cited therein, it appears that both Judges Clark and Friendly expected the jurisdictional issue here raised to be passed on by the Supreme Court. Unfortunately, however, certiorari has not been applied for.

[11] Jaftex Corp. v. Randolph Mills, Inc., *supra* note 7. Such sentiments are expressed by Judge Clark in his dissent, where he describes the *Arrowsmith* case as "a rather poor vehicle" for accomplishing the destruction of *Jaftex.* Arrowsmith v. United Press Int'l, *supra* note 5, at 235.

[12] Monarch Ins. Co. v. Spach, 281 F.2d 401, 406 (5th Cir. 1960).

[13] Jaftex Corp. v. Randolph Mills, Inc., *supra* note 7, at 510.

law governing the procedure of United States courts and is to be determined accordingly." [14] The court concentrated on the *historical background* of the federal "procedural" requirements for both service and venue and, in homogenizing the two, concluded that they should be "treated together, a not unnatural course in view of their close connection." [15] Once having accepted this questionable premise,[16] the court noted that the requisites for each were separated with the adoption of the Federal Rules of Civil Procedure in 1938, but deduced that the requirement of "presence" still applied to both, notwithstanding the fact that said requirement was included in the venue section only. "Wholly consistent and apparently required by this *background* is the parallel condition that a corporation must be 'present,' *i.e.,* doing business, within the district in order to be subject to suit there."[17] It is this basis of Judge Clark's opinion, this background, this juxtaposing of venue and jurisdiction, with which Judge Friendly in the dissent took issue and which he subsequently overruled in *Arrowsmith.*

3. *A Comparison*

Initially the *Arrowsmith* court notes that eight other circuits have decided the issue contrary to the *Jaftex* rationale.[18] However, this does not seem to be entirely accurate, since in the main the cases cited by Judge Friendly in support of this statement are "removal" cases or cases arising under Federal Rule 4(d)(7), which authorizes service according to state law, as opposed to Federal Rule 4(d)(3), which does not specifically mention state law and which is involved both in *Jaftex* and *Arrowsmith.*[19] While, as a result, the contention Judge Friendly makes is somewhat diluted, his conclusion appears to be nonetheless valid based on his subsequent arguments. He states that there is no federal statute or rule governing the area either expressly or by implication.[20] The federal venue statute,[21] which stipulates a "doing business" test, applies only to venue and not to jurisdiction.[22] While rule 4(d)(7) authorizes service prescribed by state law, it does not indicate that

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[14] *Id.* at 516.
[15] *Id.* at 512.
[16] *Id.* at 516-22. Arrowsmith v. United Press Int'l, *supra* note 5, at 225.
[17] Jaftex Corp. v. Randolph Mills, Inc., *supra* note 7, at 512. (Emphasis added.)
[18] Arrowsmith v. United Press Int'l, *supra* note 5, at 223.
[19] *Id.* at 242-44.
[20] *Id.* at 225.
[21] 28 U.S.C. § 1391(c) (1958).
[22] Arrowsmith v. United Press Int'l, *supra* note 5, at 225.

rule 4(d)(3) authorizes a federal standard to be applied in determining jurisdiction.[23] In concluding this argument, Judge Friendly states that

> . . . Rule 4(d)(3) of the Rules of Civil Procedure tells *how* service of process is to be made upon a corporation which is subject to service; but it does not tell *when* the corporation is so subject.[24]

Thus one of Judge Clark's chief arguments is rejected, viz., that there is a federal statutory or quasi-statutory basis for establishing as a matter of federal law, the requirement of "presence" of a foreign corporation as grounds for personal jurisdiction. Such does not seem to be the case, especially in light of the wording in the pertinent statutes.[25] Venue and the forum non conveniens doctrine are premised on the convenience and *locale* of the suit;[26] service of process is based on the *manner* in which a defendant is served;[27] jurisdiction is founded on the *power* of a court to so litigate an issue.[28] These distinctions seem to be fundamental and hence support the *Arrowsmith* decision.

Upon an examination of Judge Clark's additional arguments for the application of a federal standard, Judge Friendly points out that the background of the diversity clause in the Constitution appears to indicate that the same standard be applied in the federal courts as in the state courts, absent any specific legislation to the contrary.[29] Moreover, he concludes that the writer of an opinion[30] relied on by Judge Clark was "unconscious that he was giving birth to a 'federal standard' of jurisdiction over foreign corporations;"[31] that there is no countervailing federal policy demanding disregard of state jurisdictional laws;[32] and that therefore the "jurisdiction over the person of the defendant is to be determined . . . on the basis of constitutionally valid Vermont law. . . ."[33]

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[23] "[I]t is also sufficient if the summons and complaint are served in the manner prescribed by . . . the law of the state in which service is made. . . ." FED. R. CIV. P. 4(d)(7). No reference is made here or in FED. R. CIV. P. 4(d)(3) to a federal standard on which to predicate jurisdiction.

[24] Arrowsmith v. United Press Int'l, *supra* note 5, at 226, quoting HART & WECHSLER, *op. cit. supra* note 3, at 959. (Emphasis added.)

[25] *Compare*, 28 U.S.C. § 1391(c) (1958), *with* FED. R. CIV. P. 4(d)(3).

[26] 28 U.S.C. § 1391(c) (1958).

[27] FED. R. CIV. P. 4(d)(3), (7).

[28] 28 U.S.C. ch. 85 (1958).

[29] Arrowsmith v. United Press Int'l, *supra* note 5, at 226-27.

[30] Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898).

[31] Arrowsmith v. United Press Int'l, 320 F.2d 219, 229 (2d Cir. 1963).

[32] *Id.* at 230.

[33] *Id.* at 231.

4. *The Conflict*

Thus the two opposing camps have drawn their battlelines. On the one side we have the "Friendly" forces, wearing the "erieantompkinated" colors of state law,[34] armed with the *Erie* rationale and a clear intent to overrule *Jaftex*.[35] On the other side are the "not-so-Friendly" forces, wearing the injured colors of federalism, and armed with Federal Rule 4(d)(3), section 1391(c) and the *Jaftex* rationale.[36] Judge Clark argues that the issue does not involve such a significant reflection of state policy as to make the matter substantive for *Erie* purposes. The federal courts constitute an independent judicial system, and litigants invoking their jurisdiction are entitled to the essentials of a trial according to federal standards.[37]

Judge Friendly, however, states that the federal rules relied on by Judge Clark refer only to the manner of service, not to the jurisdictional power of the courts.[38] The purpose of the diversity clause is to prevent discrimination and to discourage forum-shopping. Furthermore, as has been indicated, "the post-*Erie* body of precedent overwhelmingly supports the application of a state standard."[39] Because of this serious conflict, an analysis of the *Erie* case and its offspring is essential.

Erie and the Federal Rules of Civil Procedure

These rules govern the procedure in the United States district courts in all suits of a civil nature. . . .[40]

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State. . . .[41]

The sources of these two almost simultaneous edicts promulgated twenty-six years ago by the Supreme Court have apparently had equally significant, yet somewhat contrary, effects on the processes of the federal judicial system. They "revolutionized almost every phase of practice in the federal courts."[42] While the Federal Rules of Civil Procedure have

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[34] See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 269 (1946).
[35] Arrowsmith v. United Press Int'l, *supra* note 31, at 225.
[36] Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960).
[37] Arrowsmith v. United Press Int'l, *supra* note 31, at 235.
[38] *Id.* at 225-26.
[39] 77 HARV. L. REV. 559, 560 (1964).
[40] FED. R. CIV. P. 1.
[41] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
[42] Merrigan, *Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711 (1950).

proved to be a unifying guide for procedure in the lower federal courts, the *Erie* edict has not only greatly reduced substantive unity among these courts, but has also stimulated a much greater deference to varying state laws and policies.[43] Irrespective of the desirability of either,[44] their concurrent birth gave rise to discord in the area of the diversity case[45] and led to the problems presented in *Arrowsmith.*

In overruling *Swift v. Tyson,*[46] the Supreme Court succumbed to the strong opposition which the ninety-six year old landmark case had elicited.[47] However, the new principles evolved were vague and indefinite, and left the lower federal courts, to some extent, in a state of turmoil and confusion.[48] While there was no doubt that *Erie* meant that state decisional law was to be applied by federal courts, the following problems remained. When are the district courts to apply state decisional law and what standard is to be applied in so doing?

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[43] *Ibid.* Four months prior to the *Erie* decision "the Supreme Court had adopted rules of civil procedure, effective only several months later, designed to make uniform the procedure in all the federal courts throughout the country. Thus at the time the Court was substituting uniformity for state conformity in procedure, it was requiring state conformity in substantive matters." Clark, *supra* note 34, at 288.

[44] It is not within the scope of this article to discuss the relative merits of *Erie* vis-a-vis the Federal Rules of Civil Procedure, but for a general discussion, see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 610-78 (1953); Boner, *Erie v. Tompkins: A Study in Judicial Precedent* (pts. I & II), 40 TEXAS L. REV. 509, 619 (1962); Clark, *The Tompkins Case and The Federal Rules,* 1 F.R.D. 417 (1940); Hart, *The Relations Between State And Federal Law,* 54 COLUM. L. REV. 489 (1954); Keeffe, Gilhooley, Bailey & Day, *Weary Erie,* 34 CORNELL L.Q. 494 (1949); Vestal, *Expanding The Jurisdictional Reach Of The Federal Courts: The 1963 Changes in Federal Rule 4,* 38 N.Y.U.L. REV. 1053 (1963).

[45] The following statement by Chief Judge Parker, Court of Appeals (4th Cir.), is indicative of the negative reaction with which *Erie* was received: "I shall never forget hearing one of the ablest and most forward-looking of our federal judges say shortly afterward [*i.e.,* after *Erie*] that he regarded it as the greatest backward step in the development of the law that had been taken in his lifetime." Parker, *Erie v. Tompkins in Retrospect: An Analysis of Its Proper Area and Limits,* 35 A.B.A.J. 19 (1949).

[46] 41 U.S. (16 Pet.) 1 (1842).

[47] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928); Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 *passim* (1923).

[48] "Naturally we must begin with Mr. Tompkins' unfortunate error in getting tangled up with the Erie Railroad—unfortunate certainly for himself, if not for us 'lower' federal judges." Clark, *Procedural Aspects of the New State Independence,* 8 GEO. WASH. L. REV. 1230 (1940).

Development of an Erie Standard

The first test formulated in answer to these questions was the ineffectual "substance-procedure" criterion, expounded in *Klaxon Co. v. Stentor Elec. Mfg. Co.*[49] As seen in retrospect, this first attempt at interpreting *Erie* did not prove to be entirely adequate.[50] While in some instances there are patent differences between what is characterized as procedural law as opposed to substantive law, nevertheless there exist many situations in which such characterization approaches the impossible. Hence this first test did not aid greatly in solving the troublesome problems to which *Erie* was applied. Consequently, in *Guaranty Trust Co. v. York*,[51] the Supreme Court saw fit to enunciate the "outcome-determinative" test, the second major step taken in broadening the purview of the famous *Erie* decision.[52]

In describing *Erie*, and at the same time providing the basic rationale for the *York* decision, the Court maintained that:

> *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology [such as the substance-procedure test]. . . . In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation, in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation as it would be if tried in a State court.[53]

The difference in approach is immediately apparent. The mechanical substance-procedure test was to some extent discarded in favor of a more liberal and encompassing standard. The test here evolved to determine *Erie's* applicability depends on the predictable *outcome* of a case. If the result would vary substantially under federal law, then state law must be applied. There are two basic reasons for this approach: (1) forum-shopping will thereby be greatly discouraged; and (2) historically there is no reason to have different law applied in pure diversity cases.[54] Certainly the extent to which this doctrine increased the application of state law by the federal courts is manifest. If there was a foreseeable difference of outcome between the state courts' processes and those of the district courts, the former would prevail.

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[49] 313 U.S. 487 (1941). See generally Hart, *supra* note 44, at 510-13; Tunks, *Categorization And Federalism: "Substance" And "Procedure" After Erie Railroad* v. *Tompkins*, 34 ILL. L. REV. 271 (1939).

[50] Keeffe, Gilhooley, Bailey & Day, *supra* note 44.

[51] 326 U.S. 99 (1945).

[52] "Since 1945 . . . it has become increasingly apparent that the Court does not intend to be bound by any imaginary line of demarcation between substance and procedure." Merrigan, *supra* note 42.

[53] Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

[54] Arrowsmith v. United Press Int'l, *supra* note 31.

In *Angel v. Bullington*,[55] this rationale was apparently applied. The plaintiff sued for a deficiency judgment in the North Carolina state courts on a cause of action expressly barred by a state statute. After dismissal by the highest state court, Bullington, rather than appeal to the Supreme Court, instituted an identical suit in the federal district court. After both the lower court and the Court of Appeals for the Fourth Circuit found for the plaintiff the Supreme Court reversed, basing its decision partly on the *York* interpretation of *Erie* and, in part, on res judicata.[56] The Court stated that, "For purposes of diversity jurisdiction a federal court is, 'in effect, only another court of the State.'" [57] The rationale, based on *Erie*, was clear:

> . . . a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces State law and State policy. . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.[58]

Hence, the state statute, actually described by the state court as *procedural*,[59] was held to be indicative of state policy and, because of the state court's decision, precluded any other result in the federal courts.

As was to be expected, this outcome-determinative test was the subject of much discussion and criticism, often emanating from the Supreme Court itself. For example, Mr. Justice Rutledge criticized this departure from the substance-procedure test.[60] Dissenting in *Cohen v. Beneficial Industrial Loan Corp.*,[61] he referred to the original standard, and at the same time presaged the next development in the Supreme Court's interpretation of *Erie*:

> The real question is not whether the separation [substance-procedure] shall be made, but how it shall be made: whether mechanically by reference to whether the state courts' doors are open or closed, or by a consideration of the policies . . . of the *Erie* rule with Congress' power to govern the incidents of litigation in diversity suits.[62]

Nevertheless, acceptance of the outcome-determinative test was forthcoming, and with it came considerable anxiety for those who feared the complete sterilization of the district court in diversity

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[55] 330 U.S. 183 (1947).
[56] *Id.* at 192.
[57] *Id.* at 187.
[58] *Id.* at 191-92.
[59] *Id.* at 189.
[60] Guaranty Trust Co. v. York, *supra* note 53, at 112.
[61] 337 U.S. 541, 557 (1949).
[62] *Id.* at 559.

cases.[63] As Mr. Justice Rutledge emphasized, "the accepted dichotomy is the familiar 'procedural-substantive' one. . . . [T]his fact [that rational separation becomes almost impossible] cannot dispense with the necessity of making a distinction." [64] In *Ragan v. Merchants Transfer & Warehouse Co.*,[65] decided the same day as *Cohen*, the Court gave a further example of the use of the outcome-determinative test. There a conflict of laws question was presented. A Kansas two-year statute of limitations pertaining to causes of action arising out of motor vehicle accidents could not be tolled in the state courts until service of summons. However, since this was a diversity suit brought in the federal district court, the plaintiff claimed that the Kansas statute of limitations should be tolled upon filing of the complaint which he had done within the two years, as opposed to the serving of summons, which he had not done within the required period. In finding for the defendant, the Court held that it was a local cause of action, and hence the local rule as to tolling of the statute must be applied.[66] Invoking the *Erie* doctrine as interpreted by *York*, the Court stated that "if recovery could not be had in the state court, it should be denied in the federal court." [67]

This "outcome" standard thus seemed firmly entrenched in the judicial attitude of the Supreme Court. However, the gradual tendency since 1938 to increase the areas of law wherein federal courts were to apply state law received somewhat of a setback in *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*,[68] where it was decided by a divided Court that a right to a jury trial could not be denied despite a state policy to the contrary. While the test formulated by *York* was by no means overruled, its application was limited to the extent that it was no longer all-pervasive. This new interpretation of *Erie*, a further addition to the "erieantompkinated" body of law already discussed in reams of legal writings, brought to the *York* test the considerations desired by Mr. Justice Rutledge ten years earlier.[69] While the *Byrd* court recognized the outcome-determinative test, it added a significant *caveat*, the effect of which has not yet been fully determined. Even if there is a definite state policy indicated, nonetheless federal law may be

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[63] "Notice that an 'outcome' test, unless worded with much greater nicety than in the York opinion, yields no stopping place, since virtually all procedural rules may, and on occasion do, affect the result of the litigation." HART & WECHSLER, *op. cit. supra* note 44, at 678.

[64] Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 557 (1949).

[65] 337 U.S. 530 (1949).

[66] *Id.* at 533.

[67] *Id.* at 532.

[68] 356 U.S. 525 (1958).

[69] See text accompanying note 62 *supra*.

applied if there is a "strong countervailing federal policy" [70] which the state rule disrupts. There thus appears to be a limitation on the outcome-determinative test, although it has been suggested that the *Byrd* decision is based primarily on a seventh amendment constitutional right, and hence, to a great extent, distinguishable from the preceding cases in the area.[71] Such an interpretation seems to receive support from the Supreme Court's recent 1963 decision of *Simler v. Connor*.[72] Citing the *Byrd* case as authority, the Court agreed with the respondent "that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength." [73] If this be primarily a constitutional consideration, the outcome-determinative test is not greatly affected. Judge Friendly, in *Arrowsmith*, indicates that these two cases are based on a federal policy favoring jury decisions of disputed factual questions, "a policy framed 'under the influence—if not the command—of the Seventh Amendment.'" [74] If this approach is followed by the Supreme Court, the *York* test still stands, and as such must be the focal point in any discussion, criticism or application of *Erie* today.[75]

Erie Applied by Lower Federal Courts

In order to appreciate the perplexities thus faced by the *Arrowsmith* court in applying the *Erie* rule, several other lower federal court decisions must also be considered because of their manifest influence on the opinions of Judge Friendly and Judge Clark. Two of these decisions dealt at some length with the controversy of state versus federal law. Notwithstanding any

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[70] For an interesting discussion of the *Byrd* case, see Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443 (1962).

[71] *Id.* at 448-51.

[72] 372 U.S. 221 (1963).

[73] *Id.* at 222.

[74] Arrowsmith v. United Press Int'l, 320 F.2d 219, 230 (2d Cir. 1963).

[75] While it is not within the scope of this note to attempt to suggest the ideal solution to the problems arising from *Erie*, it is appropriate to mention several suggestions that have already been proposed: (1) Abolish federal diversity jurisdiction by constitutional amendment, or overrule *Erie*, Boner, *Erie* v. *Tompkins: A Study in Judicial Precedent* (pt. II), 40 TEXAS L. REV. 619, 638 (1962); (2) Apply state procedural law in all diversity cases, *Merrigan, Erie to York to Ragan—A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 726 (1950); (3) Apply federal law only when authorized to do so by statute, Note, 67 YALE L.J. 1094, 1103 (1958), commented on in Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 515-16 (2d Cir. 1960); (4) Adopt an elimination-of-forum-shopping test, Horowitz, *Erie R.R.* v. *Tompkins—A Test To Determine Those Rules of State Law*

prevalent tendency to the contrary, they resulted in an application of federal law.[76]

In *Iovino v. Waterson,*[77] the plaintiff moved under Federal Rule 25(a)(1)[78] to have the New York District Court appoint and substitute an administratrix *ad litem* for the deceased New Jersey defendant. The substituted administratrix, also a New Jersey resident, objected to this on the grounds that such substitution was contrary to New Jersey policy. Therefore, it was argued, any application of rule 25(a)(1) to the non-resident defendant would be contrary to the outcome-determinative standard and would thus transcend federal legislative power.[79] The Court of Appeals, however, distinguished *Iovino* from *York* on two grounds: (1) the district court sat in New York, and there was no evidence of a New York policy against such substitution; and (2) there was a federal statute directly governing the area, a factor lacking in the *York* decision.[80]

In a more recent case, *Hope v. Hearst Consol. Publications, Inc.,*[81] the Court of Appeals for the Second Circuit again came to grips with the *Erie* problem. Evidence showing that a libel had caused injury to property rights, had been coercive and had been in restraint of trade was admissible under Federal Rule 43(a),[82] but inadmissible under New York law.[83] In accordance with the federal standard, the evidence was admitted on the following grounds: (1) it would have been admissible under the pre-1938 equity rules;[84] (2) there was a federal statute directly governing the area;[85] and (3) ". . . the New York exclusionary rule represents a distinct, if not a lone, minority voice" in contradistinction to "the vast majority of reported cases."[86]

The rationale of these two cases may seem inconsistent with that of *Arrowsmith,* since a strict application of the outcome-determinative standard in both cases would have resulted in an

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To Which Its Doctrine Applies, 23 So. CAL. L. REV. 204, 219 (1950); and (5) Return to the substance-procedure test, HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 610-78 (1953).

[76] Hope v. Hearst Consol. Publications, Inc., 294 F.2d 681 (2d Cir. 1961); Iovino v. Waterson, 274 F.2d 41 (2d Cir. 1959).

[77] *Supra* note 76.

[78] "If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties." FED. R. CIV. P. 25(a)(1).

[79] Iovino v. Waterson, *supra* note 76, at 47.

[80] *Ibid.*

[81] *Supra* note 76.

[82] FED. R. CIV. P. 43(a).

[83] Van Vechten v. Hopkins, 5 Johns. R. 211 (N.Y. Sup. Ct. Jud. 1809).

[84] Hope v. Hearst Consol. Publications, Inc., *supra* note 76, at 690.

[85] *Id.* at 683.

[86] *Id.* at 688.

application of state law, as was done in *Arrowsmith.* The significant difference in *Iovino* and *Hope* is the emphasis by the court on federal law and federal policy. Although Judge Clark finds them irreconcilable with *Arrowsmith,*[87] both cases were reaffirmed by Judge Friendly, and apparently validly distinguished:

> [A]nd we reaffirm decisions of this Court that have sustained the application of certain Federal Rules of Civil Procedure differing from the rules applied by the state where the court sits [citing both *Iovino* and *Hope*] . . . . But we find no federal policy that should lead federal courts in diversity cases to override valid state laws as to the subjection of foreign corporations to suit, *in the absence of direction by federal statute or rule.*[88]

It must be noted that both Judge Clark's dissent in *Arrowsmith* and the majority opinion in *Hope v. Hearst Consol. Publications, Inc.* rely heavily on a Fifth Circuit decision dealing with the admissibility of evidence. However, that case, *Monarch Ins. Co. v. Spach,*[89] is readily distinguishably from *Arrowsmith,* since the application of the outcome-determinative test would not have had a significant effect on the decision. Although a Florida statute would have excluded the evidence in question, because of certain procedures embodied in the Federal Rules, "only to the most unresourceful advocate would this Florida statute ever . . ." present an effective bar to the introduction of such evidence.[90] In reaching its decision in favor of applying the federal law, moreover, the court expounded its philosophy regarding the *Erie* doctrine. It agreed with Mr. Justice Rutledge, in that the artificial labeling of state rules as procedural or substantive is not an effective solution to the *Erie* problem.[91] This is not to say that there could be no such distinction drawn. However, even where it can be made, it may prove to be inconclusive regarding which law is to be applied.

> [The Supreme Court] recognized that in this profound realm of federalism there were some [state] procedural rules which so far affect rights and the outcome of the case as to require that they be followed by the federal court.[92]

Thus, the court realized that the substance-procedure test, the initial test begotten by *Erie,* was no longer the rule to be applied. Yet, its willingness to accept the outcome-determinative test was less than enthusiastic, as the court feared an attack on the Federal Rules by shrewd lawyers and obedient lower tribunals.[93]

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[87] Arrowsmith v. United Press Int'l, *supra* note 74, at 238.
[88] *Id.* at 225 (Emphasis added.)
[89] 281 F.2d 401 (5th Cir. 1960).
[90] *Id.* at 412.
[91] *Id.* at 404.
[92] *Id.* at 405.
[93] *Id.* at 406.

Conclusion

Judge Clark relied on the *Monarch* case to support his dissent in *Arrowsmith.* In addition, he cited many secondary authorities to suggest that *Monarch, Iovino* and *Jaftex* support the conclusion that there is an increasing trend toward federal court control over its own organization and procedure.[94] Although this contention may be true, it does little to strengthen Judge Clark's argument. The authorities he cites seem to deal primarily with *Erie* problems in general; only one appears to refer specifically to the question of in personam jurisdiction over a foreign corporation.[95] Hence, while the late Judge's judicial philosophy advocating a stronger and more independent federal court system receives some support, his legal analysis of the issue in *Arrowsmith* does not seem to fare as well.

In his dissent Judge Clark claims that to make use of state law in determining whether a foreign corporation is present within a district court's jurisdiction so as to be amenable to suit is contrary to learned authority, strong precedent, and statutory construction of the Federal Rules of Civil Procedure. It is here suggested that not only is this an unsound approach, but that regardless of the year of the *Arrowsmith* decision, the result reached should have been the same. That is, the law of the state wherein the district court sits should determine whether a foreign corporation is subject to the court's jurisdiction, whether this is accomplished by the explicit language of Mr. Justice Brandeis in *Erie;* by the substance-procedure and outcome-determinative standards developed in the *York* and *Bullington* line of decisions; or through the countervailing federal policy test imposed by *Byrd* and *Simler.*

The statement in *Erie* seems very clear: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state. . . ." [96] Since this jurisdictional issue is not governed by the Constitution,[97] and since Federal Rule 4(d)(3) (service of process) and section 1391(c) (venue) do not expressly provide statutory authorization

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[94] See, *e.g., Degnan, The Law of Federal Evidence Reform,* 76 HARV. L. REV. 275 (1962); Ladd, *Uniform Evidence Rules in the Federal Courts,* 49 VA. L. REV. 692 (1963).

[95] Green, *Federal Jurisdiction In Personam of Corporations And Due Process,* 14 VAND. L. REV. 967 (1961).

[96] Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

[97] Friendly, *In Praise of Erie—and of the New Federal Common Law,* 19 RECORD OF N.Y.C.B.A. 64, 94 n.23 (1964); *cf.* Hill, *The Erie Doctrine and the Constitution,* 53 NW. U.L. REV. 427 (1958). For an excellent discussion of the constitutional issues, see Kurland, *Mr. Justice Frankfurter, The Supreme Court And The Erie Doctrine in Diversity Cases,* 67 YALE L.J. 187, 188-204 (1957).

for application of a federal standard,[98] *Erie's* language itself would indicate that the *Arrowsmith* decision is correct. Likewise, under the outcome-determinative test of *York,* it would seem clear that state law is to be applied in a determination of the court's jurisdiction. What could affect the outcome of a case more substantially than the rules determining whether a court has jurisdiction? Finally, under the *Byrd* test there is no countervailing federal policy demanding the application of a federal standard to the jurisdictional problem.

If the application of these various tests demonstrates that there is a sound and substantial basis in *Erie* for the *Arrowsmith* decision, the fact that the Court of Appeals for the Second Circuit reached this result only by expressly overruling one of its recent decisions is disturbing. This sharp reversal seems to result from the confusion and apprehension with which the federal courts greeted *Erie* in 1938.[99]

There was an immediate and vigorous reaction to *Erie.* Federal judges were not sure if they liked the new rule, or even if they understood it. Gradually, however, their reluctant acceptance of its basic rationale became evident.[100] Despite this acceptance, there remains much opposition to the current interpretation of *Erie.*[101] Confusion on the part of federal judges twenty-five years ago was to be expected, especially in view of the many interpretations surrounding the decision. However, continued confusion seems fruitless and unnecessary. It is suggested that a fair and workable standard has already been developed under which "erieantompkinated" problems may be adequately resolved. While the Supreme Court has yet to pass on the *Arrowsmith* issue, to do so might be unnecessary. It seems that the majority of circuits agree that in such circumstances state law is to be applied.[102] Furthermore, a rationale drawn from the *Monarch, Iovino, Hope* and *Arrowsmith* opinions can supply the federal courts with the necessary standards to be applied in diversity cases involving problems of state versus federal law.

To further define the standard to be applied in such cases, Judge Friendly is careful to distinguish between instances where there is a strong federal policy directing one result and instances lacking such policy considerations and requiring deference to state law.

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98 Arrowsmith v. United Press Int'l, *supra* note 74, at 224-26.

99 Parker, *Erie* v. *Tompkins in Retrospect: An Analysis of Its Proper Area and Limits,* 35 A.B.A.J. 19 (1949).

100 Smith, *Blue Ridge And Beyond: A Byrd's-Eye View Of Federalism In Diversity Litigation,* 36 TUL. L. REV. 443 (1963).

101 Arrowsmith v. United Press Int'l, 320 F.2d 219, 242 (2d Cir. 1963) (dissenting opinion); HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 678 (1953).

102 Arrowsmith v. United Press Int'l, *supra* note 101, at 222.

Judge Friendly may well be correct in decrying the confusion caused by unsound and obsolete standards once promulgated by *Swift v. Tyson* and oftentimes espoused by our modern federal courts and commentators directly in the face of the *Erie* edict.[103] He states:

> The complementary concepts—that federal courts must follow state decisions on matters of substantive law appropriately cognizable by the states whereas state courts must follow federal decisions on subjects within national legislative power where Congress has so directed—seem so beautifully simple and so simply beautiful, that we must wonder why a century and a half were needed to discover them, and must wonder even more why anyone should want to shy away once the discovery was made.[104]

Perhaps Judge Friendly thus strikes the note of harmony between federal and state laws in diversity cases which will in time prove to be the wisest and most prudent standard formulated.

SERVICE IN CIVIL CONTEMPT PROCEEDINGS

The contempt power was known and enforced by the courts at an early stage in the development of the common law.[1] Historically, the law has distinguished between two distinct types of contempt.[2] When courts employed their contempt power chiefly as a punitive measure to preserve their authority, vindicate their judicial dignity and punish the disobedience of their mandates, the act it disciplined was defined as a criminal contempt.[3] However, when utilized as a coercive instrument to safeguard the private rights of litigants and to compel obedience to decrees to which parties were entitled, the chastised act was designated as a civil contempt.[4] Although the distinction between these two contempt powers is real, one and the same act may often be considered a criminal as well as a civil contempt.[5]

In New York, the civil contempt power is embodied in Section 753 of the Judiciary Law. This statute generally defines civil

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[103] Friendly, *supra* note 97, at 92.
[104] *Ibid.*

[1] See Fox, *The Practice in Contempt of Court Cases,* 38 L.Q. REV. 185 (1923).
[2] People *ex rel.* Munsell v. The Court of Oyer & Terminer, 101 N.Y. 245, 4 N.E. 259 (1886).
[3] *In re* Nevitt, 117 Fed. 448, 458 (8th Cir. 1902).
[4] *Id.* at 453-54.
[5] United States v. United Mineworkers of America, 330 U.S. 258, 294-95 (1947).