LONG-ARM JURISDICTION IN FEDERAL COURTS†

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The development of long-arm jurisdiction for federal courts has been comparatively recent. Although this development has helped to promote a workable and cooperative federalism, Professor Foster suggests that more needs to be done to more fully realize the goals of economy, fairness, and convenience. He examines existing long-arm usages, relates these to other contemporary policies of federal judicial administration, and sets forth some suggestions for future lines of development.

The ample federal powers to extend the national judicial arm beyond the boundaries of a judicial district[1] have until recently been but sparingly used. The federal courts commenced with the practice of confining personal jurisdiction to defendants who were actually or fictionally within the judicial district or who otherwise consented to suit there. Not until 1938 did federal process generally run statewide where more than one judicial district existed in the same state.[2]

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1 *See* discussion in notes 39-40 and text accompanying notes 76-114 *infra*.

2 Section 11 of the Judiciary Act of 1789 laid down a general rule, the effect of which was to confine the range of federal process to the territorial limits of the judicial district:

> But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that where he is an inhabitant, or in which he shall be found at the time of serving the writ . . . .

Act of Sept. 24, 1789, 1 Stat. 73, 79.

The first quoted sentence survives as 28 U.S.C. § 1693 (1964) although its force is largely eclipsed by the effect of Rule 4(f) of the Federal Rules of Civil Procedure in extending the general rule to permit process to run throughout the state where the district court is held. The late Judge Charles E. Clark, however, argued powerfully that § 1693 and its statutory predecessors provided the foundation for a uniform federal standard of amenability applicable to all cases brought in federal trial courts. See Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960)(majority opinion); Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963) (minority opinion). The debate on the point appears more esoteric than practical. It is generally conceded that Congress has broad authority to regulate the exercise of personal jurisdiction either directly or through its rule-making delegate, in diversity as well as under other heads of subject matter jurisdiction. Indeed it has done so since the discussion in

Over the years a handful of acts of Congress has accumulated which provide limited, federally based service beyond the state in which the district court is held.[3] After 1963, Rule 4(f) of the Federal Rules of Civil Procedure provided a limited means of adding parties found within 100 miles of the federal court house.[4] Collectively considered, however, these were only modest and quite specialized exceptions to the general rule of statewide limits on federally based service.

What accounted for the significant extension in the extraterritorial powers of federal courts during the middle third of the twentieth century was the incorporation into federal Rule 4 of state developments in "long-arm" jurisdiction. The history of these state statutes and court rules is not retraced here but they are notable as one of the major contributions which the states have made in this century toward a workable and cooperative federalism.[5]

Long-arm jurisdiction can be, and has been, made to serve the ends of judicial economy and to promote the goal of fairness and convenience in selecting a place of trial. With these objectives in mind, this article examines existing long-arm usages in the district court, suggests some relationships between these usages and other contemporary policies of federal judicial administration, and sets forth some suggestions for future lines of development for long-arm jurisdiction.

I. LONG-ARM USAGES IN THE DISTRICT COURT

A. Requirements for Personal Jurisdiction: General

As analyzed today, the exercise of personal jurisdiction over a nonconsenting party involves two requirements: (1) *Notice* (ordi-

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Jaftex and *Arrowsmith*. See discussion at notes 50-67 *infra*.

Rule 4(f), effective September 16, 1938, extended the range of federal civil process to a statewide basis.

[3] *See* discussion at notes 44-45 *infra*.

[4] *See* discussion at notes 33-45 *infra*.

[5] There is a considerable literature on the state long-arm process developments. For a sense of the way that perception of the problems changed with the passage of time, see Reiblich, *Jurisdiction of Maryland Courts over Foreign Corporations under the Act of 1937*, 3 MD. L. REV. 35 (1938); VT. STAT. ANN. tit. 12, §§ 855-56 (Supp. 1968) and Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951); Cleary & Seder, *Extended Jurisdictional Bases for the Illinois Court*, 50 NW. U.L. REV. 599 (1955) (Professor Cleary served as Reporter for the Joint Committee on Illinois Civil Procedure which developed the influential Illinois long-arm statute); Foster, *Revision Notes*, WIS. STAT. ANN. §§ 262.05-.06, 262.19 (Supp. 1968) (Reporter's notes indicate cases and statutes relied on in the development of the 1959 Wisconsin long-arm statute, provisions of which were widely copied elsewhere thereafter); Currie, *The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533 (1963); von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966); Carrington & Martin, *Substantive Interests and the Jurisdiction of State Courts*, 66 MICH. L. REV. 227 (1967).

narily achieved by service of a summons or other process announcing the commencement or pendency of judicial proceedings);[6] and (2) *Amenability* (*i.e.*, a statement of the grounds or conditions that link a defendant to the forum sufficiently to justify entry of a personal judgment against him in the action at hand).[7]

As with other aspects of its jurisdiction, the exercise of personal jurisdiction by the district court is legislatively grounded. The generally prevailing view is that the district court cannot, sua sponte, assert personal jurisdiction merely on the ground that to do so would be constitutionally possible; the basis for personal jurisdiction must be found in a statute or in a procedural rule having the force of a statute.[8] The principal guide to the exercise of personal jurisdiction by a district court has been Rule 4 of the Federal Rules of Civil Procedure. This Rule, which has the force of a statute, in turn rests on the authority delegated in the Enabling Act of 1934 and its later amendments.[9]

The basic framework of Rule 4 was laid down in the immediate pre-*Erie* period,[10] before either state or federal courts had much

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[6] Pennoyer v. Neff, 95 U.S. 714 (1877), held that notice was valid only when process could be served within the territory over which the court's jurisdiction extended. But in the modern context, notice is not viewed in terms of territorial restrictions. The question instead is whether the manner of service employed was reasonably calculated to give actual notice or, at least, was the best that could have been done under the circumstances. The classic statement comes from Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), which held that due process requirements regarding notice and opportunity to be heard do not depend upon a distinction between proceedings in personam and proceedings in rem. The Court framed the due process requirement of notice thus:

> But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected . . . .

Id. at 315.

[7] Standards for amenability vary considerably from jurisdiction to jurisdiction as to the extent of coverage and the particularity with which amenability is defined. Compare ILL. ANN. STAT. ch. 110, § 17 (Smith-Hurd 1956) and WIS. STAT. § 262.05 (1965) with Rule 4(f) defining amenability over specified additional parties found within 100 miles of the place where the district court is held. For discussion of the constitutional limitations on amenability, see notes 88-95 *infra* and the accompanying text.

[8] *See* Beaty v. M.S. Steel Co., 401 F.2d 157 (4th Cir. 1968). In other than diversity cases the federal courts have occasionally fashioned a federal standard of "presence" within the state where the district court is held but such decisions are explainable as implementations of amenability provisions in Rule 4(f). See notes 27-32 *infra* and accompanying text.

[9] Act of June 19, 1934, 48 Stat. 1064, *as amended*, 28 U.S.C. § 2072 (1964). Since 1958 the Judicial Conference of the United States has been under a congressional duty to carry a continuous study of the general rules of practice and procedure and recommend changes to the Supreme Court. See 28 U.S.C. § 331 (1964).

[10] The Federal Rules of Civil Procedure first became effective Sep-

real experience with the exercise of extraterritorial jurisdiction.[11] Much of the original language of Rule 4 remains. But a combination of new meanings for old judicial concepts together with scissors-and-paste-pot amendments (principally in 1963), has radically altered the function and scope of the Rule. Thus there is at the very least sore need for a simplifying restatement of Rule 4; for as Rule 4 stands in 1968, its redundant language quite effectively conceals what is a comparatively simple and relatively straightforward, if substantially questionable, scheme for the exercise of personal jurisdiction by a district court.

B. Scope of Rule 4

Rule 4 permits a district court to acquire personal jurisdiction through the use of either the law applicable in the courts of the state where the district court sits, or distinctive federal standards. Problems arising from the use of state law, pursuant to Rule 4, will be first discussed. Thereafter, the use of Rule 4 to acquire personal jurisdiction according to federal standards will be considered, first in terms of manner of service and, then, in terms of amenability.

1. RULE 4, STATE LAW OPTION FOR PERSONAL JURISDICTION

Differences in federal venue statutes have made state long-arm process more useful in diversity cases than in actions arising under other heads of federal jurisdiction. For this reason it is useful to consider diversity separately from other federal actions when dealing with the use of state law under Rule 4. Also, because of congressional action in 1966 it is now possible to lay venue "where the claim arose" in all federal civil actions. The implications of this change for the use of state long-arm process will be separately considered. Finally, the discussion will consider the extent to which Rule 4 engrosses state law as an optional means of acquiring personal jurisdiction in the district court.

a. The state long-arm in diversity

In a diversity action a plaintiff may lay venue on the basis of his own residence in the federal judicial district.[12] Where this is done

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tember 16, 1938, at the close of the congressional session, having been submitted to Congress at the start of its session in January 1938. Erie R.R. v. Tompkins, 304 U.S. 64, was decided April 25, 1938.

[11] The nonresident motor vehicle process statutes came into their own after Supreme Court indorsement of the basic principle in Hess v. Pawloski, 274 U.S. 352 (1927), but extension of the underlying principle to other tort situations or to litigation arising out of other forum-related circumstances was slow to follow. The Maryland statute of 1937, discussed in Reiblich, note 5, *supra*, one of the earliest to extend the principle, had a coverage confined to corporate defendants.

[12] 28 U.S.C. § 1391(a) (1964).

the likelihood arises that one or more of the defendants will be a nonresident and long-arm process will be needed.[13] The comparatively few federal statutes which authorize service beyond the state are linked to federal questions and are apparently too narrow to apply in diversity actions. Thus if it becomes necessary to make service outside the state in which the district court is held, reliance will have to be placed on the law of the state or, if the defendant can be served outside the state but within 100 miles of the federal court house, on Rule 4(f).

The administration of state long-arm statutes in diversity actions has been comparatively free of problems. When used, they assure coextensive coverage over the parties in state and federal courts and thus obviate claims of federal nonconformity that might radiate from the *Erie* doctrine. Now and then questions have arisen in diversity actions over the scope of state long-arm process provisions or the constitutionality of their application to the case at hand.[14] But the difficulties for the district court have in general been no greater than those that would have been encountered had the action arisen in the state court.

b. The state long-arm in federal question cases

The growth of long-arm jurisdiction in federal question cases has been stunted by the basic venue policy applicable in federal question cases that until recently required venue to be laid in the district where all defendants reside. State long-arm provisions have been relied on, however, to enforce federal rights where special venue statutes have been grounded on considerations other than residence of the defendant. Examples are patent infringement cases,[15] tax enforcement actions,[16] and—although not technically "federal question" cases—even actions in admiralty.[17] Indeed, even where federal jurisdiction has been exclusive, state long-arm service has been permitted over the objection that service could not have been made from the corresponding state courts in the same case.[18] State service pursuant to Rule 4 has also reached non-

[13] Some nonresidents may, of course, be subject to service made within the forum state—*e.g.*, service made on a state official as a statutory "agent" of a nonresident involved in a local automobile accident.

[14] *See* discussion at notes 111-16 *infra*.

[15] *See, e.g.*, Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219 (D.N.J. 1966); Olin Mathieson Chemical Corp. v. Molins Organizations, Ltd., 261 F. Supp. 436 (E.D. Va. 1966).

[16] *See, e.g.*, United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir. 1966); *cf.* United States v. First Nat'l City Bank, 379 U.S. 378 (1965).

[17] For a recent, careful application of the earlier Maryland long-arm statute to an admiralty case, *see* Gkiafis v. Steamship Yiosonas, 342 F.2d 546 (4th Cir. 1965). Earlier authority for a like use in admiralty of state process is cited in *id.* at 549 n.4. *Gkiafis* is noted in 25 MD. L. REV. 361 (1965). *See also* Chilean Line Inc. v. United States, 344 F.2d 757 (2d Cir. 1965).

[18] *See* Metropolitan Sanitary Dist. v. General Elec. Co., 35 F.R.D. 131 (N.D. Ill. 1964).

residents in connection with their activities at a federal enclave within the state.[19]

c. The state long-arm in districts "where the claim arose"

In 1966 Congress amended the general venue statutes applying to civil actions to provide the further alternative of laying venue in the district "where the claim arose."[20] The new provisions apply to diversity and all other heads of federal subject matter jurisdiction and will introduce a desirable new flexibility in selecting a reasonable place of trial. There are likely to be occasional difficulties in determining the place "where the claim arose,"[21] but in any event the provisions will enlarge the number of actions in which nonresidents are named as defendants and will increase use of state long-arm provisions in federal courts.

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[19] *See* Swanson Painting Co. v. Painters Local Union No. 260, 391 F.2d 523 (9th Cir. 1968).

[20] Act of Nov. 2, 1966, Pub. L. No. 89-714, 80 Stat. 1111, repealing subsection (f) and amending subsections (a) and (b) of section 1391 of title 28 of the United States Code to read as follows (the italicized language is new):

> (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside, *or in which the claim arose.*
>
> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, *or in which the claim arose,* except as otherwise provided by law.

[21] The venue proposals of the American Law Institute (ALI) appear preferable to the congressional test of venue "where the claim arose" since the congressional standard embodies a procedural concept, the meaning of which has invited much dispute. ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1314(a) (Tentative Draft No. 6, 1968) provides generally that federal question cases may be brought only in a district wherein

> (1) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated; or
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> (2) any defendant resides, if all defendants reside in the same State; or
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> (3) any defendant may be found, if there is no district within the United States in which the action may otherwise be brought under this subsection.

A more or less comparable provision for general diversity cases is proposed in ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1303(a) (Proposed Final Draft No. 1, 1965).

Under the ALI test there might be several districts in which substantial parts of the events or omission giving rise to the claim occurred. Because of such flexibility, the "substantial part" test is likely to cause much less difficulty in administration than the "where the claim arose" test.

Proposed ALI § 1314(b) would narrow the current definitions of residence used for venue purposes in dealing with corporations, partnerships, and unincorporated associations by treating them as residents only of the district in which they have their principal place of business (and in the case of corporations, also of any district in which they are incorporated.)

d. The state long-arm: extent of incorporation into rule 4

Professor Benjamin Kaplan, Reporter for the Advisory Committee at the time of the adoption of the 1963 amendments to Rule 4, has asserted that they were intended fully to engross state process law as an alternative device for authorizing the exercise of personal jurisdiction in the district court.[22] The suggestion surely is a practical one, as is his further suggestion that sharp lines not be drawn between Rule 4(d) and Rule 4(e). But the language of the two sections gives rise to difficulties. The principal changes affecting the incorporation of state law brought about by the 1963 amendments are to be found in Rule 4(e). The first change was the retitling of Rule 4(e) to make it applicable to "service upon party not inhabitant of or found within state," a change which suggested that Rule 4(d) was intended for service on those who *were* inhabitants of or found within the state. The second change was the addition of a new sentence to Rule 4(e) which wholly engrossed state law for use upon nonresidents.[23] The rub arises out of the fact that Rule 4(d) engrosses state law only for service on defendants in the classes referred to in Rule 4(d)(1) (competent natural persons) and Rule 4(d)(3) (corporations, partnerships and unincorporated associations), thereby excluding the use of state service on the other classes of defendants referred to in Rule 4(d)(2),(4), (5), and (6). Thus whether the 1963 amendments were intended to engross state law for service on defendants who *were* inhabitants or found within the state and were among the classes excluded in Rule 4(d) is a question in need of further attention.

2. RULE 4, THE FEDERAL OPTIONS: MANNER OF SERVICE

Rule 4(d)(1) through (6) specify distinctive federal provisions for serving natural persons, corporations and other classes of parties. The option of serving in the federal manner thus provided may be used in diversity as well as under other heads of subject matter jurisdiction, assuming of course that a proper basis for amenability also exists.[24] Where an appropriate basis for amenability exists but no manner for serving, say, a foreign sovereign

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[22] Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 HARV. L. REV. 601, 619-23 (1964). In particular see *id.* at 621 n.90 and accompanying text.

[23] Rule 4(e) reads in part:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state . . . service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

[24] For service in a federal manner in a diversity action when no corresponding provision existed under the law of the state where the district court was held, see Hanna v. Plumer, 380 U.S. 460 (1965) discussed at notes 72-74 *infra*.

can be found either in Rule 4 or under provisions of state law, the district court may look outside Rule 4 to Rule 83 and section 2071 of the Judicial Code to fashion its own rule for making service.[25]

Rule 4 provides for service in a federal manner upon the parties specified by Rule 4(d)(1) through (6): (a) within the state in which the district court is held, pursuant to the first sentence of Rule 4(f); (b) outside the state in which the district court is held but in the United States and within 100 miles of the federal court house, pursuant to the second sentence of Rule 4(f); or (c) outside the state in which the district court is held pursuant to the first sentence of Rule 4(e) under any federal statute that confers amenability and fails to prescribe its own mode of service.[26]

3. RULE 4, THE FEDERAL OPTIONS: AMENABILITY

Optional federal standards of amenability under Rule 4 will be considered in three separate contexts: amenability (a) within the state where the district court is held; (b) within the 100-mile bulge provision; and (c) under special federal statutes.

a. Amenability within state where the district court is held

Prior to 1938 it was the general rule that district court amenability extended only to defendants who were inhabitants of the judicial district or who could be found there. In addition it was recognized that Congress could extend amenability to parties outside the district: in fact, it had done so under some circumstances.[27] In 1938 Rule 4(f) extended the general rule of district court amenability to a statewide basis where two or more federal judicial districts existed in the same state. The power to do this under the delegated rule-making authority was unanimously affirmed by the Supreme Court.[28]

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[25] *See* Petrol Shipping Corp. v. Greece, 360 F.2d 103 (2d Cir. 1966).

[26] Where a federal statute permits service upon a party in a foreign country but fails to prescribe the manner of service, Rule 4 provides two options. First, Rule 4(d)(1) has been relied on to authorize substituted service at the domicile in Canada on a nonresident's wife where 15 U.S.C. § 78aa was looked to as the basis for amenability. SEC v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 287 (S.D.N.Y. 1966). Service pursuant to the same amenability statute has also made use of Rule 4(i). SEC v. VTR., Inc., 39 F.R.D. 19 (S.D.N.Y. 1966). *Cf.* Petrol Shipping Corp. v. Greece, 360 F.2d 103, 109 (2d Cir. 1966), where a court-made rule was relied on for making service upon a foreign sovereign when it appeared that neither the federal rules nor any provision of state law prescribed a manner of service upon a sovereign.

[27] The definitive discussion of the personal jurisdiction powers of the district court prior to adoption of the Federal Rules of Civil Procedure is found in Robertson v. R.R. Labor Bd., 268 U.S. 619 (1925).

[28] Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946), discussed in notes 39-40 *infra*. It continues to be said of Rule 4, however, that it speaks "to service alone and not both service and amenability." Petrol

In other than diversity actions it is generally assumed that judicially-fashioned federal standards of "consent" or "presence" measure the amenability of the defendant within the state where the district court is held, and thus provide options of federal as well as state standards of amenability when service is made within the state.[29] The cases have not yet detailed the dimensions of a distinctive federal standard of "presence" applicable when service is made in the state where the district court is held.[30] However, a more rapid evolution of federal standards seems likely now that venue in federal question cases is no longer solely dependent upon residence of all defendants in the district where the action is brought.[31] Where district court jurisdiction rested on diversity, on the other hand, the various circuit courts reached accord by 1963 that neither Rule 4 nor any federal statute provides an optional federal standard of amenability for adding parties not otherwise amenable in the courts of the state where the district court is held. The question of state limitations on amenability in diversity actions is given more extensive treatment later in this paper.[32] For the present it suffices to say that where district court process is served within the state, the plaintiff is confined to state standards of amenability in diversity actions but has a choice of serving defendants by state or federal amenability standards in actions brought under other heads of federal jurisdiction.

b. *Amenability within 100-mile "bulge" provision*

The second sentence of Rule 4(f) was amended in 1963 to read:

Shipping Co. v. Greece, 360 F.2d 103, 109 (2d Cir. 1966); Karsen v. Manchonoch Trawler Corp., 278 F. Supp. 864, 865 (S.D.N.Y. 1967). Such a statement is clearly accurate as to much of Rule 4. On the other hand, it fails to take into account the first two sentences of Rule 4(f) which manifestly extended the territorial range of district court amenability beyond pre-existing limits. True, there has remained the question whether a defendant is "present" or has given his "consent" to service in the enlarged territorial range of service. Nevertheless, it does not appear accurate to say that Rule 4 deals merely with manner of service.

[29] For cases authorizing federal standards of amenability, *see* Lone Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 153-54 (5th Cir. 1954); First Flight Co. v. Nat'l Carloading Corp., 209 F. Supp. 730 (E.D. Tenn. 1962); Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 440 n.3 (1st Cir. 1966); Fraley v. Chesapeake & O. Ry., 397 F.2d 1 (3d Cir. 1968). *Cf.* Scott v. Middle East Airlines Co., 240 F. Supp. 1, 4 (S.D.N.Y. 1965) and dictum in Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 389-90 (S.D. Ohio 1967).

[30] In cases where federal venue requirements have insisted that the defendant must "reside" or be "found" in the district, discussions of venue and amenability have been so mingled that the two concepts are indistinguishable. See Note, *Doing Business as a Test of Venue and Jurisdiction over Foreign Corporations in the Federal Courts*, 56 COLUM. L. REV. 394 (1956); and for a recent example see Snyder v. Eastern Auto Distributors, Inc., 357 F.2d 552 (4th Cir. 1966).

[31] *See* notes 20-21 *supra* and accompanying text.

[32] *See* notes 50-75 *infra* and accompanying text.

> In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action, or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places.

Thus, the area of territorial "presence" within which a defendant can be subjected to personal jurisdiction in a district court was further extended. This extension, however, differs in two respects from the statewide extension of amenability in 1938. First, the provision has a reach that extends across state lines.[33] Second, the provision is not available to originate an action but only to add necessary or desirable parties, not otherwise amenable, when they can be found within 100 miles of the court house.[34] The 1963 Advisory Committee on the Federal Rules of Civil Procedure apparently intended that it apply to diversity as well as other heads of subject matter jurisdiction.[35] The comparatively few cases in which the use of the "bulge" provision has been reported are in accord.[36] Indeed, to have read an exclusion of diversity cases into the provision would have been to strip it of the bulk of what limited contribution it was able to make, given venue statutes as they stood when the amendment was made.[37]

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[33] The power of Congress or its rule-making delegate to extend the judicial reach of the district court across state lines seems clear. *See also* note 40 *infra* and accompanying text. While in general federal judicial districts do not cross state lines, the district court for Wyoming extends into "those portions of Yellowstone National Park situated in Montana and Idaho." 28 U.S.C. § 131 (1964).

[34] But where a party against whom a third party complaint is asserted may be separately reached by the third party plaintiff through the use of the 100-mile bulge provision, such third party defendant cannot object on the basis that the original plaintiff failed in his efforts to subject him to personal jurisdiction as an original defendant. Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887, 891 (S.D.N.Y. 1967).

[35] The Rule itself and the Advisory Committee's Notes are devoid of any suggestion that the bulge provision is inapplicable in diversity actions. Professor Kaplan has assumed that diversity actions were included. *See* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963*, 77 HARV. L. REV. 601, 631-32 (1964). Professor Moore, a member of the Advisory Committee, also assumed in his treatise that the provision applies to diversity. 2 J. MOORE, FEDERAL PRACTICE ¶ 4.42 [2], at 1293.34-.35 (2d ed. 1967).

[36] *See* Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967); Broden v. Bowles, 35 F.R.D. 13 (D.D.C. 1964). *See also* suggestion of the court in Debbis v. Hertz Corp., 269 F. Supp. 671, 684 (D. Md. 1967).

[37] Because in diversity cases a plaintiff may lay venue on the basis of his own residence (28 U.S.C. § 1391[a]), it is possible in some cases to disregard the residence of defendants. Here the addition of nonresidents served outside the state but within the 100-mile bulge creates no venue

It should be noted that the provision does not spell out standards for ascertaining the "presence" required to sustain service made within the 100-mile bulge. Accordingly, it is not surprising that interpretive difficulties have arisen. One district court has concluded that the Constitution requires a defendant to have contacts both in the district where the district court sits and in the district within the 100-mile radius in which the service is made.[38] The ruling is unnecessarily restrictive, inconsistent with the Supreme Court's interpretation of the first sentence in Rule 4(f),[39]

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difficulty. On the other hand, in 1963 the venue provision applicable to general federal question cases required venue to be laid in the "judicial district where all defendants reside." 28 U.S.C. § 1391(b) (1964). As the Advisory Committee's Notes point out, citing cases, there has been some judicial recognition of ancillary concepts of venue and subject matter jurisdiction that could permit use of the bulge provision. In 1966, however, § 1391 was amended to also permit venue in general diversity and federal question cases to be laid in the district "where the claim arose." When this is the basis there will be no venue obstacles to service on nonresidents of the forum state who can be served within 100 miles of the court house.

[38] Karlsen v. Hanff, 278 F. Supp. 864 (S.D.N.Y. 1967). The action in *Karlsen* was in admiralty, commenced in the southern district of New York against two vessel owners to recover for a seaman's death at a nearby dock in New Jersey. The original defendants sought to implead the dock owner, a New Jersey corporation, as a third party defendant, relying on service made pursuant to the 100-mile bulge provision. It was found that although the acts complained of occurred within the 100-mile bulge, the dock company neither did nor transacted business in New York. Citing Hanson v. Denckla, 357 U.S. 235 (1958), for the proposition that the defendant must have some "minimal contacts" with the forum and, finding none with the southern district, the court held that it was without personal jurisdiction over the third party defendant dock company.

Recently the Court of Appeals for the Second Circuit rejected the ruling used in the *Karlsen* case. In Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir. 1968), service from the southern district of New York upon a third party defendant in Philadelphia was sustained over the objection that the party served was not amenable to personal jurisdiction in New York. The controlling test as the court of appeals saw it was whether the person served in another state within the bulge was one "over whom the state has jurisdiction, and, very likely, only on persons within that class over whom it has chosen to exercise it." The language of Rule 4(f) certainly does not command such an interpretation and the result is simply to build into Rule 4 yet another example of nonuniformity resulting from incorporating state amenability standards rather than uniform federal standards of presence where no strongly held state policies are shown to be offended. See also note 43 *infra* and accompanying text.

[39] In Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946), the Supreme Court sustained the validity of the provision extending the territorial amenability of the district court to statewide limits. The defendant Mississippi Publishing Corporation was a Delaware corporation having its office and place of business in the southern district of Mississippi. Accordingly, the summons was served upon the defendant in this district. The Court's analysis explicitly assumed that the "presence" of the defendant in the southern district subjected it to amenability in the action commenced against it in the northern district. *Id.* at 442. True, the Court also

and out of line with numerous authorities recognizing that district court amenability can extend across state lines.[40] A more reasonable construction is to treat the provision as subjecting a defendant to personal jurisdiction in the district court whenever he is "present" in any part of the newly enlarged area of amenability, irrespective of his amenability in a state forming another part of this enlarged area.[41] To the extent the defendant is "found" outside the state where the district court is held, the reach does not exceed 100 miles—a distance well within the reach of service long accepted as consistent with due process under the fourteenth amendment. Surely the fifth amendment due process requirements, requirements that should control the validity of Rule 4(f), ought be no more restrictive of the federal courts than the fourteenth amendment is of the state courts.[42] Practical considerations also point to the use of a distinctive federal standard of "presence" within the enlarged area of service.[43]

While the 100-mile bulge provision is encumbered by other problems,[44] and cannot be regarded as the final answer to everything,

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relied on the fact that the defendant had given its consent to suit in Mississippi, construing such consent to be consent to suit in federal as well as state courts located in Mississippi. *Id.* at 443-44. Nevertheless, the case appears clearly to stand for the proposition that the defendant's "presence" is not required in the district where the district court is held if it is present in another district within the scope of Rule 4(f).

[40] *See* Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946) and the cases there cited at 442. *See also* Supporting Memorandum B, *The Constitutionality of Service of Federal Court Process Without Regard to State Boundaries*, in ALI (Proposed Final No. 1, 1965), *supra* note 21, at 187. *But compare* dissenting opinion of Mr. Justice Black in Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 331 (1964); Abraham, *Constitutional Limitations Upon the Territorial Reach of Federal Process*, 8 VILL. L. REV. 520 (1963).

[41] *See* Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y. 1967) (diversity action); Monsieur Henri Wines, Ltd. v. S.S. Covadonga, 222 F. Supp. 139 (D.N.J. 1963) (admiralty action); Broden v. Bowles, 35 F.R.D. 13 (D.D.C. 1964) (diversity action).

[42] For discussion of constitutional standards applicable to district court amenability, *see* notes 76-114 *infra* and accompanying text.

[43] *See* notes 50-53 *infra* and accompanying text. *Cf.* 2 J. MOORE, *supra* note 35, ¶ 4.42 [2], at 1293.37 for the suggestion that the law of the state where the bulge is located should control amenability.

[44] *See* Cavers, *The Changing Choice-of-Law Process and the Federal Courts*, 28 Law & Contemp. Prob. 732, 750-51 (1963). *See* particularly *id.* at 750-51 nn.48 & 49. The evolution of a uniform federal standard of "presence" within the enlarged area of territorial amenability of the district court would resolve many of the problems raised by Professor Cavers, particularly if that standard also applied to diversity actions. *See also* notes 50-75 *infra* and accompanying text. There would remain, however, some choice of law problems, among them that of applying the rule of Klaxon Co. v. Stentor Co., 313 U.S. 487 (1941), to parties not amenable to jurisdiction in the courts of the state where the district court sits. A like problem has long existed in statutory interpleader actions under the doctrine of Griffin v. McCoach, 313 U.S. 498 (1941), and as Professor Cavers concedes, there is little to suggest that harsh results have followed.

it does add to the ability of federal courts to settle disputes "by wholes"[45] and does so without significant interference with substantial state or federal interests.

c. Amenability under special federal statutes

As Rule 4 recognizes, Congress by statute has also provided some federal amenability standards.[46] These statutory provisions differ in important respects from the federal amenability standards created in Rule 4. First, Rule 4(f) can be regarded simply as expanding the territorial amenability of the district court and amenability depends upon the fictional or real "presence" of the defendant in a comparatively small geographic area surrounding the federal court house. Second, Rule 4's territorial amenability is not in terms restricted to any particular causes of action. By comparison, the federal statutes providing for extraterritorial amenability are specialized, apply to particular kinds of actions only, and in some respects resemble the specialized state long-arm provisions. Like the state statutes, they focus on the relationship between the particular forum and the defendant's activities in that forum, subjecting the defendant, wherever he may be found, to amenability in a particular district when it is reasonable to require him to stand trial there. Thus, in civil antitrust actions the defendant is amenable in any district in which he transacts business and process may be served extraterritorially, if required, in any district in which the defendant is an inhabitant or in which he may be found.[47] However, these special federal statutory provisions for

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Klaxon was, after all, a judge-made rule at the outset and a bit of further judicial flexibility should be able to accommodate whatever additional considerations relevant to a just result are injected by the presence of parties reached through service in the 100-mile bulge. The ALI, it is to be observed, has recommended a suspension of the *Klaxon* rule in multiparty, multistate actions based on diversity. See ALI (Proposed Final Draft No. 1, 1965), *supra* note 21, at § 2344(c).

[45] The phrase is that of Mr. Justice Harlan, speaking for the Court in Provident Bank v. Patterson, 390 U.S. 102, 111 (1968), remarking the "public stake in settling disputes by wholes, whenever possible . . . ."

[46] *See* C. WRIGHT, HANDBOOK OF THE LAW OF THE FEDERAL COURTS 234 n.51 (1963); 2 J. MOORE, *supra* note 35, ¶ 4.42[1], at 1293.8-.10 for a partial enumeration of federal statutes authorizing the exercise of personal jurisdiction by service made beyond the territorial limits of the state where the district court is held. It is difficult to give high marks to the special congressional provisions for extraterritorial service. In some instances, the authority granted has been inadequate to meet the enforcement duties of the agency for which the special provisions were made. See ICC v. Agricultural Cooperative Ass'n, 34 F.R.D. 497 (S.D. Iowa 1964). In other instances, it has fallen short of providing adequate protection for the federal rights of private litigants. Two recent examples of the inadequate workings of the special process and venue statutes applicable to enforcement of rights under the Securities and Exchange Act are Chambliss v. Coca-Cola Bottling Corp., 274 F. Supp. 401 (E.D. Tenn. 1967) and Levin v. Great Western Sugar Co., 274 F. Supp. 974 (D.N.J. 1967).

[47] Any suit, action, or proceedings under the antitrust laws against a

extraterritorial amenability are so limited in character that they are probably inapplicable to actions arising under the general diversity jurisdiction and thereby avoid collision with what might be different state standards of amenability in such cases.[48]

As noted above, the federal standards of extraterritorial amenability are not exclusive. Accordingly, plaintiffs may at their option rely either on state or federal provisions for extraterritorial amenability.[49]

C. *State Limitations on Amenability in Diversity Actions*

If considerations of administrative simplicity were alone controlling, Rule 4 would be read so as to provide plaintiffs with the option of acquiring personal jurisdiction: (a) In a state manner pursuant to state amenability standards; or (b) In a federal manner pursuant to federal amenability standards, for all heads of jurisdiction, including diversity. The language of the Rule lends itself generally to this construction and in places points to such a reading.[50] Moreover, modern state long-arm statutes, now incorporated in Rule 4,[51] often link their standards of amenability so closely with their manner of service that the two cannot practically be separated. And correspondingly, when making service pursuant to the federal manner prescribed in Rule 4(d) (1)-(6), it would seem reasonable to look to a uniform federal standard of amenability. Indeed such a result is required by the first sentence of Rule 4(e) when making service in a federal manner upon a party "not an inhabitant of or found within the state where the district court is held."[52]

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corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in either place.

15 U.S.C. § 22 (1964).

[48] *See* discussion at note 54 *infra* and accompanying text.

[49] *See* discussion at notes 15-19 *supra* and accompanying text.

[50] The language of Rule 4 contains no hint that it should be applied differently in diversity than in other actions. More specifically, the second sentence of Rule 4(e) engrosses state law for extraterritorial amenability of the district court through its direction that service may be "made under the circumstances and in the manner prescribed in the [state] statute or rule." In like fashion the first sentence of Rule 4(e) links federal amenability standards to federal manner of service where federal means are resorted to for extraterritorial amenability. *See* also discussion at notes 35-36 *supra*.

[51] *See* discussion at notes 22-23 *supra* and accompanying text.

[52] Rule 4(e) provides:

> *Same: Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule . . . .

The comparatively few problems left for debate center on diversity actions where service is made within the state where the district court is held, or within that part of an adjoining state embraced by the 100-mile bulge provision. The central question is whether, in a diversity action, either the Federal Rules of Civil Procedure or any federal statutes provide an additional basis for amenability for parties not amenable under the law of the state where the district court is held. Or, put more succinctly if less accurately, whether in diversity actions state standards of amenability are exclusive.

The Supreme Court has never passed on this question.[53] The circuit courts, however, appear united in the conclusion that neither federal statutes nor the federal rules authorize a district court to assume jurisdiction in a diversity action over a foreign corporation served within a state whose courts would not assume jurisdiction.[54] On the other hand, additional parties have been brought into diversity actions by service outside the state and within the 100-mile bulge although state courts where the district court sat would not have assumed jurisdiction.[55]

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[53] Two cases in which the Supreme Court passed over opportunities to throw light on whether state amenability standards are exclusive in diversity actions are Nat'l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964) and Hanna v. Plumer, 380 U.S. 460 (1965).

In *Nat'l Equip. Rental, Ltd.* the question was whether a district court in New York acquired personal jurisdiction over Michigan residents by service made in New York on a person said to be an "agent" of the defendants. A majority of the Court sustained jurisdiction, concluding that the person served was an "agent," whether considered under New York law or under a federal standard embodied in Rule 4(d)(1). *Nat'l Equip. Rental, Ltd.*, an uncomfortable case on its facts, was a five to four decision.

Hanna v. Plumer involved service on a resident of the state in which the district court sat. The question centered on the manner of service—*viz.*, whether "in hand" service required by state law overrode the explicit provision in Rule 4 for substituted service at the defendant's usual place of abode. The Court's discussion conveyed no hint of any doubts about the defendant's amenability in the district but instead treated the question as involving the matter of notice. Finding no flaw in the service as question of notice, the Court sustained the substituted service made in the manner prescribed by Rule 4.

[54] An early case, often cited for the point, is Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948) where the court stated:

> This case is brought solely on diversity grounds in a federal court sitting in Massachusetts. Rule 4(d)(7) of the Federal Rules of Civil Procedure, 28 U.S.C.A., provides that service of process on a foreign corporation is valid if made in the manner prescribed by any statute of the United States or in a manner prescribed by the law of the state in which the service is made. There being no federal statute applicable, and service having been attempted under Massachusetts procedure, the case is governed by the requirements for valid service in that state.

A more recent reconsideration of the question by the Court of Appeals for the Second Circuit, sitting en banc, reaches a like result. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), with the accord of the other circuits listed *id.* at 222-23.

[55] *See* Sevits v. McKiernan-Terry Corp., 270 F. Supp. 887 (S.D.N.Y.

It is, of course, true that the increasingly widespread use of state long-arm process will narrow the likelihood that any distinctive federal standard of amenability will reach parties not reachable under state law. Nevertheless there will continue to be instances in which states refuse for policy reasons to extend amenability under particular circumstances or as to particular parties. For these reasons, the blanket assertion that a federal court sitting in diversity is bound exclusively by state standards of amenability has troubled some commentators, if not the courts.[56] And because many of the relevant concerns also apply to the question of whether a general federal standard of amenability should be recognized in the district court, some of these concerns will be considered here.

The doctrine of *forum non conveniens* now operates in a number of states to bring about a dismissal by a state court of an action which for reasons of fairness and justice should not be tried there. Since a state court cannot transfer a case to a court in another state, the rather harsh consequence of a dismissal is the only alternative to keeping or staying further proceedings in the action. On the other hand, a district court is able to transfer an action to another district in the federal system, not being bound by state policies of *forum non conveniens* but governed instead by federal standards for venue transfer or dismissal.[57]

Statutes regulating the jurisdiction of state courts, however, do raise complex issues for the district court sitting in the same state. The view expressed almost a quarter of a century ago in *Guaranty Trust Company v. York*,[58] that a federal court sitting in diversity is, "in effect, only another court of the State" would appear to close the doors of the district court whenever the doors of the corresponding state court would be closed in the same case. Twice before 1950—in the *Angel v. Bullington* and *Woods v. Interstate Realty Company* cases[59]—the Supreme Court applied the view literally to

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1967); Broden v. Bowles, 35 F.R.D. 13 (D.D.C. 1964); *cf.* suggestion of the court in Debbis v. Hertz Corp., 269 F. Supp. 671, 684 (D. Md. 1967). Compare also the admiralty action discussed in note 38 *supra*.

[56] *See* Comment, *Federal Jurisdiction over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964); Comment, *Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie*, 31 U. CHI. L. REV. 752 (1964). *See also* cases and materials cited note 40 *supra*.

[57] In a per curiam opinion rendered in an action arising under the Federal Employers' Liability Act, the Supreme Court held that "a prior state court dismissal on the round of *forum non conveniens* can never serve to divest a federal district judge of the discretionary power vested in him by Congress to rule upon a motion to transfer under § 1404(a)." Parsons v. Chesapeake & O.R.R., 375 U.S. 71, 74 (1963). The *Parsons* doctrine would appear applicable to a § 1404(a) transfer dealing with a diversity case and at least one district court has so held. Lapides v. Doner, 248 F. Supp. 883 at 893 (E.D. Mich. 1965).

[58] 326 U.S. 99, 108 (1945).

[59] Angel v. Bullington, 330 U.S. 183 (1947) and Woods v. Interstate

close the doors of the district court. But how broadly *Angel* and *Woods* reflect the law today is questionable as demonstrated by the *Byrd v. Blue Ridge Rural Electric Cooperative*[60] and *Hanna v. Plumer*[61] cases which make a more discriminating inquiry into the relative underlying state and federal interests involved in obtaining jurisdiction.

It is becoming evident that some of the reasons behind state door-closing policies do not warrant recognition by the federal courts.[62] Thus statutes intended to reduce congestion in state courts or designed to state a doctrine of *forum non conveniens* would appear irrelevant to having the district court proceed in the same case.[63] Furthermore, where states permit residents, but not nonresidents, to sue foreign corporations on causes arising elsewhere there is reason in at least some situations for invoking the classic purpose of diversity to protect nonresidents from discrimination by local courts. Certainly this would be true where some of the defendants were residents suable only in the forum and other defendants were foreign corporations.[64] And where the state closes the doors of its courts to actions arising elsewhere against its residents, there would be a special reason for opening the diversity court, particularly if the defendant was not suable elsewhere. *Angel v. Bullington* is probably wrong precisely because the district court should have been available when it appeared the doors of the state court were closed.[65]

Realty Co., 337 U.S. 535 (1949). The line of door-closing cases represented by *Angel* and *Woods* continues to generate literature suggesting doubts about the sweep of doctrine they reflect. Interesting samples include: Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427, 541, 553 (1958); Currie & Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 DUKE L.J. 1; Meador, *State Law and the Federal Judicial Power*, 49 VA. L. REV. 1082 (1963); Note, *Diversity Jurisdiction: State Door-Closing Legislation under the Erie Doctrine*, 66 COLUM. L. REV. 377 (1966).

[60] 356 U.S. 525 (1958).

[61] 380 U.S. 460 (1965). See and compare McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884 (1965); Note, *Choice of Procedure in Diversity Cases*, 75 YALE L.J. 477 (1966).

[62] *See* Note, *supra* note 59, at 383-84.

[63] *See* Judge Sobeloff's careful and sensitive opinion in Szantay v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); *see also* cases cited note 57 *supra*.

[64] The Mississippi statute considered in *Woods* closed the doors of its state courts on all foreign corporations doing business in the state with respect to causes wherever they arose until the corporation had appointed a local process agent. The cause sued upon in *Woods*, however, involved a claim for a brokerage commission on the sale of realty located in Mississippi. While the foreign corporation's failure to appoint a local process agent was not connected with its claim for the commission, it is arguably reasonable for Mississippi to regulate the corporation's conduct in Mississippi by disabling it from suit on any locally arising cause until the process agent has been appointed. Compare note 65 *infra*.

[65] *Angel* closed the doors of the district court in this situation by

On the other hand, where door-closing rules or withheld amenability reflects state policies designed to regulate local conduct or to protect significant state interests, it is clearly consistent with *Erie* policy for the district court to take these policies into account and weigh them against any countervailing federal interests present. Thus where a state closes the doors of its courts on a claim arising within the forum or having close connections with it, there may be substantial reasons for the district court to follow suit. For example, had the land in *Angel* been located in North Carolina and had it been the policy of the state to protect its residents against the enforcement of claims for a deficiency judgment, the fact that the plaintiff was a nonresident should not suffice to provide him a remedy in a district court sitting in diversity.[66] And where a state chooses to restrict the amenability of foreign corporations in its courts to encourage economic development of the state,[67] and such a policy is reasonably apparent, it should be taken into account even though it might not suffice to justify excluding the foreign corporation from a multiparty action that also involved defendants only suable in the forum state.

The above discussion suggests that there may be substantial federal interests that would justify making available an alternative and distinctly federal standard of amenability applicable in diversity situations. Some state long-arm statutes are restricted to resident plaintiffs, a situation discriminating against a nonresident plaintiff who may thus be denied the opportunity to try his action where most of the operative facts have occurred.[68] Both more complex and probably more numerous, however, are actions involving multiple parties and multiple districts. It has been one of the primary objectives of the Federal Rules of Civil Procedure to assist in the resolution of multiparty, multistate problems by providing flexibility so as to avoid multiplicity of actions where possible, and sever claims or issues where convenience, practicality and considerations of justice called for such a result. Manifestly, amenability of the parties is a cardinal element in the solution of many of these problems. The 100-mile bulge provision authorized

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assuming that the diversity court must close its doors on any case excluded from the courts of the state where the district court is held. The court further held that the doctrine of res judicata barred Bullington from litigating again his right to press his claim in the state courts. The underlying fallacy of *Angel* is the blanket assumption that the district court in a diversity action must indiscriminately close its doors whenever the corresponding state courts do so. Such a policy ignores a needed comparison of federal and state interests in the individual case.

[66] *See* discusion note 65 *supra.*

[67] *See* Comment, *Personal Jurisdiction Over Foreign Corporations in Diversity Actions: A Tiltyard for the Knights of Erie, supra* note 56.

[68] *E.g.*, N.C. GEN. STAT. § 55-145 (1965), authorizing long-arm jurisdiction over foreign corporations in actions "by a resident of this State or by a person having a usual place of business in this state . . . ."

a modest, across-the-state-line experiment in the use of the federal system to promote the ends of litigational convenience and justice.

The need for a federal standard of amenability is further suggested by the fact that in a wide range of multiparty, multistate situations, the constitutional base of diversity provides a constructive tool for coping with situations which the independent state judicial systems find difficult to handle. In a day of vast and growing court congestion there is reason to cast a skeptical eye toward the luxury of permitting the same claims to be asserted simultaneously between the same or similarly related parties in two or more states. Diversity would be able, given appropriate legislative authority,[69] to afford a base for removal, transfer and consolidation. The divisible character of the wrongful death claim in a growing number of jurisdictions, with liability determined under one body of law and damages under the law of the decedent's domicile,[70] suggests that in major airplane disasters, for example, it may be desirable to find ways to bind all relevant parties to a single determination of liability while permitting trial of the damage issue in the various districts where the passengers resided. Something akin to this has been done in the judicial administration of the civil liability claims against electrical manufacturing industry once antitrust violations had been found in criminal proceedings against the same defendants.

Although diversity may now be used for some multiparty, multistate proceedings,[71] further legislation will be required to dispense with the *Strawbridge v. Curtiss* requirement that now applies in the administration of the general diversity statute. The Subcommittee for Multiple Litigation of the Judicial Conference of the United States is currently considering various devices for dealing with actions which flood the judicial system with litigation of common questions of fact and law such as major aircraft disasters, product liability actions, and dissolutions of insurance companies. Class action proceedings based on diversity can be helpful with respect to certain of these multiparty, multidistrict situations, but clearly there is a need to provide the single party action with proceedings that can consolidate claims and reduce needs for multiple litigation.

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[69] *See* notes 141-49 *infra* and accompanying text.

[70] *See* discussion and cases cited note 136 *infra*.

[71] Today ancillary concepts of subject matter jurisdiction enable joinder of parties on some occasions and thus aid in unitary solutions of multiparty actions. See materials and cases cited note 121 *infra*. Class actions based on diversity may also provide ways of skirting the complete diversity rule of Strawbridge v. Curtiss, 1-7 U.S. (3 Cranch) 575 (1806). See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). The complete diversity requirement of *Strawbridge* is only a statutory requirement as is demonstrated by the fact that Congress may vest original jurisdiction under the article III diversity powers with only minimal diversity. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

As the above discussion suggests, it would be questionable to adhere in the future to a rule that state standards of amenability are exclusive in diversity actions. At this moment there is a widespread consensus that federal amenability standards may be created under the authority delegated to establish the Federal Rules of Civil Procedure. On the other hand, if the rules are to be looked to as the source of federal amenability standards, a few precautions are in order. In *Hanna v. Plumer*,[72] the Supreme Court laid down a rather mechanistic directive for dealing with situations in which provisions of the rules collided with state policies: The rule was to control wherever it dealt with a matter rationally capable of classification either as substance or procedure, provided of course the rule itself was otherwise within the authority granted under the enabling act.[73] Implicit in the holding of *Hanna* "was a total disregard for those state policies with which the Federal Rules might interfere, as well as a lack of concern about state-federal uniformity."[74] Viewed in this light, *Hanna* seems to disregard the kind of weighing of national and state interests which the earlier *Byrd*[75] decision appeared to usher in for administration of *Erie* policy. Yet there appear to be substantial reasons for administering a federal standard of amenability with an eye cast toward competing state and federal considerations. Thus, although one may quite rationally begin with making available an optional federal amenability standard in diversity actions, the administration of such a rule should preserve sufficient flexibility that state interests may also be protected. Not in every case surely should a federal interest in avoiding multiplicity override competing state concerns.

D. Constitutional Questions

1. DISTRICT COURT AMENABILITY BASED ON FEDERAL LAW

The late Judge John Parker once stated that the "courts of the United States comprise one great system for the administration of justice . . . ."[76] The same point has often been made by others. Nevertheless, in the day-to-day administration of personal jurisdiction questions in the district court, the systemic unity of the federal judiciary is commonly overlooked.

For example, in any action where a plaintiff seriously intends to press his claim, a district court dismissal of a party for lack of amenability should occur only under exceptional circumstances. The usual answer should be a venue transfer, rather than a dis-

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72 380 U.S. 460 (1965).
73 *Id.* at 472.
74 Note, *supra* note 61, at 480-81.
75 Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537 (1958).
76 Internatio-Rotterdam, Inc. v. Thomsen, 218 F.2d 514, 517 (4th Cir. 1955).

missal.[77] The reason is simply that any injustice or inconvenience to a particular defendant which is insufficient to warrant a change of venue is certain to fall far short of raising any serious constitutional question about requiring him to stand trial in the original district.[78] A constitutional issue of amenability, in short, should arise infrequently in a district court proceeding.

Recall in this connection that the Supreme Court has approved a venue transfer of an action laid initially in the wrong venue and against a defendant not amenable to personal jurisdiction in the transferor district.[79] And, of course where the only defect in the transferor district is the defendant's amenability there, a transfer to a proper district is also permissible.[80]

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[77] 28 U.S.C. § 1404(a) (1964) authorizes a transfer, for the convenience of parties and witnesses, in the interest of justice, to any district in which the action "might have been brought." *See* the discussion in note 131 *infra* of the restrictions imposed by the quoted language in the interpretation given those words by the Supreme Court in Hoffman v. Blaski, 363 U.S. 335 (1960).

[78] In Norwood v. Kirkpatrick, 349 U.S. 29 (1955), it was made clear that a transfer should be permitted on a lesser showing of inconvenience than would have been required to result in a dismissal of the action under the prior doctrine of *forum non conveniens.* Like considerations of convenience and justice should, in the ordinary case, call for a transfer rather than a dismissal whenever a defendant contends that requiring him to stand trial in the original federal district raises an issue of constitutional proportion. If the request for a venue transfer comes from a plaintiff who prefers this to a dismissal for lack of the defendant's amenability, the choice of law rules applicable in the original district may not follow to the transferee court. See Van Dusen v. Barrack, 376 U.S. 612 at 639-40 (1964), where the Court withheld decision on the question whether the law of the transferor court would follow the case when the request for transfer came from the plaintiff. *Van Dusen* holds that for the general transfer under § 1404 (a), the law of the transferor court follows the case when the transfer is made at the defendant's request.

[79] Goldlawr, Inc. v. Heiman, 369 U.S. 463 (1962). Where venue is improper in the district initially selected, reliance must be placed on 28 U.S.C. § 1406(a) under which the court has the option of dismissing or, if it be in the interest of justice, transferring the action to a district in which the action "could have been brought." Presumably the transferee court must be one in which both venue and personal jurisdiction would have been appropriate without the consent or waiver of the defendant. See discussion note 131 *infra.* The Court of Appeals for the Fifth Circuit, while pointing out that § 1406(a) does not refer to "wrong" venue but rather to venue laid in the "wrong" district, concluded that a district was "wrong" within the meaning of the statute whenever there exists an obstacle to an expeditious and orderly adjudication on the merits of the case. Dubin v. United States, 380 F.2d 813, 815 (5th Cir. 1967); *accord,* Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967). If a transfer is granted, the choice of law rules applicable to the action should probably be those of the state to which the action is transferred since the plaintiff, rather than the defendant, will in the usual case have been the party to seek the change. *Cf.* Van Dusen v. Barrack, 376 U.S. 612, 639-40 (1964); Mayo Clinic, *supra,* at 656.

[80] See Mayo Clinic v. Kaiser, 383 F.2d 653 (8th Cir. 1967), where the court allowed a venue transfer to protect the plaintiff against a statute of

In a simple two party action there is sure to be some federal district where the defendant will have no substantial basis for objection to standing trial, unless he is an alien or the action involves no American contacts or concerns. So far as it is asserted that there is no district within the federal system in which to try the action, the doctrine of *forum non conveniens* resolves the issues of unfairness and injustice without having to reach the largely unmapped contours of fifth amendment due process applied to jurisdiction over aliens or over actions having little contact with the United States.[81]

More complex considerations can arise on a motion to dismiss a defendant on amenability grounds in a multiparty action. The very fact that a multiparty situation is at hand injects new considerations into the determination of amenability. Almost certainly the amenability of a particular defendant in a multiparty action should not be considered in isolation, as though he alone were being sued in the case. Instead, the reasonableness of requiring a particular defendant to stand trial in a particular district in a multiparty case should revolve around such considerations as the desirability of litigating the action as a unit, bearing in mind procedures for trying some issues in one district, others in another,[82] and the availability of alternative districts as a place of trial.[83] The class-action analogy should also be considered, insofar as it suggests that persons not amenable to personal jurisdiction may nevertheless be bound as members of a class.[84] These considerations, along with ancillary concepts of venue and subject matter jurisdiction, should make it possible for the federal system to resolve some of the most complex kinds of actions as a legal unit, even though

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limitations which had run after the action was commenced in the original district.

[81] *Forum non conveniens* exists today in the federal system only for use in those cases where no fair and just place of trial can be had in any federal judicial district and hence a dismissal is the only way to avoid injustice. *See* Heitner v. Zim Israel Navigation Co., 152 F. Supp. 3 (S.D. N.Y. 1957).

[82] *See* note 136 *infra* and notes 141-49 *infra* and accompanying text.

[83] Generally, there should be one or more alternative districts in which most defendants should be suable. The new provision for laying venue in the district where the claim arose will often be available, particularly if the state where the district court is held has an applicable long-arm statute. *See* note 20, *supra*. Moreover, venue is good as to corporate defendants under 28 U.S.C. § 1391(c) in any district where the corporation is doing business. Usually the corporation will be amenable in this district (though not always, *i.e.*, foreign causes of action).

[84] *See* Comment, *The Litigant and the Absentee in Federal Multiparty Practice*, 116 U. PA. L. REV. 531, 544, et seq. (1968); Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1153, et seq. (1965); Note, *Proposed Rule 23: Class Actions Reclassified*, 51 VA. L. REV. 629 (1965). Interesting particularly for the practical suggestions it contains is Judge Marvin E. Frankel's *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967).

proceedings in more than one district may be involved.

When all is said and done, however, there doubtless will remain exceptional situations in which a defendant should be dismissed on amenability grounds. These may include dismissal of a defendant amenable in another district when it appears that a plaintiff has invoked a claim of amenability in the original district under frivolous or unduly oppressive circumstances.[85] Or they may include instances in multiparty actions where holding a defendant for trial in the original district violates the Constitution and yet there are no effective alternatives for preserving the claim against him in another federal district. All told, however, the circumstances likely to result in a dismissal for lack of personal jurisdiction should not be numerous where the claimant actively seeks to press his demands.

Despite the fact that the constitutional issues of amenability should arise only infrequently, the cases involving amenability in the district court commonly refer to and rely on asserted constitutional limitations on the exercise of personal jurisdiction.

In theory, at least, the due process clause of the fifth amendment, not the fourteenth, should control the exercise of personal jurisdiction by a district court. Moreover, the policy considerations which give rise to constitutional limitations on the courts of the several states involve different policies in some respects from those controlling the distribution of judicial power in a unitary system of national courts.[86] Nevertheless, as the fifth circuit has suggested, "the constitutional limitation upon service of process from a state court . . . provides a helpful and often-used guideline."[87]

To date, the constitutional scope of amenability has been considered almost exclusively in terms of fourteenth amendment due process considerations that limit the exercise of state judicial power.[88] As developed in this context, the due process test exam-

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[85] The Wisconsin long-arm statute, for example, in dealing with the situation in which a plaintiff hails a defendant before the court on a frivolous claim of amenability, provides that the nonresident may recover not only his usual legal costs but his out-of-pocket expenses to the sum of $500. WIS. STAT. ANN. § 262.20(1) (Supp. 1968). Perhaps where the assertion of a frivolous claim forces a party to the inconvenience of an appearance at an unduly inconvenient place, the federal courts possess in their equity powers the authority to order payment of a defendant's out-of-pocket expense under the equitable reimbursement doctrine recognized in Sprague v. Ticonic Bank, 307 U.S. 161 (1939) and Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951).

[86] *See generally* Green, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961).

[87] Time, Inc. v. Manning, 366 F.2d 690, 694 (5th Cir. 1966).

[88] *But see* Gkiafis v. Steamship Yiosonas, 342 F.2d 546, 549 (4th Cir. 1965); Japan Gas Lighter Ass'n v. Ronson Corp., 257 F. Supp. 219, 232, 236 n.34 (D.N.J. 1966); Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 440 n.3 (1st Cir. 1966).

ines the relationship between the forum state, the defendant, and the facts of the case. Or, in the language of some of the cases, amenability is simply a statement of the "contacts"[89] or the "affiliating circumstances"[90] which make it fair and reasonable for the state to exercise personal jurisdiction over a nonresident.

Collectively, state long-arm statutes extend amenability to a wide range of litigation situations having substantial local connections, among them being claims arising out of tort or warranty, claims based on promissory arrangements including ordinary contracts, as well as insurance policies and lending devices, claims involving the use or ownership of local property, and claims for delinquent taxes.[91] More recently, some long-arm statutes have

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[89] Internat. Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[90] Hanson v. Denckla, 357 U.S. 235, 246 (1958).

[91] *Torts and Product Liability Claims.* Tort amenability has been broadly defined to include claims arising when the defendant has committed a tort in whole or in part in the state. See, for example, VT. STAT. ANN. tit. 12, § 855 (Supp. 1968) and Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951). Other statutes draw a distinction based on whether the act giving rise to the claim occurred in the forum state. The nonresident motor vehicle process statutes are of course based on claims arising from an act within the forum and most of the new statutes extend the principle to any kinds of claims arising from an act within the state without relying on other contacts connecting the defendant to the forum. See, for example, VA. CODE ANN. § 8-81.2(a)(3) (Supp. 1968) and WIS. STAT. ANN. § 262.05(3) (Supp. 1968). Where injury in the state results from an act done elsewhere—the product liability claim, where privity is lacking between the parties is a commonplace example—the statutes and court decisions have tended to require that the defendant be linked to the forum by other contacts in addition to the mere presence of the item that gave rise to the claim. See WIS. STAT. ANN. § 262.05(4) (Supp. 1968); VA. CODE ANN. §§ 8-81.2(a)(4)-(5) (Supp. 1968); N.C. GEN. STAT. § 55-145(a)(3) (1965). Where the parties, however, are bound to a contract negotiated between them, a product liability claim may be heard even though the contract itself represents the defendant's only link to the forum.

Promissory Arrangements. Some statutes have also cast amenability in terms of contracts to be performed in whole or in part within the state. An example is VT. STAT. ANN. tit. 12, § 855 (Supp. 1968). At first glance these would appear to make the existence of the contract a jurisdictional fact but the courts have more realistically appeared to assume it sufficient for jurisdiction that the plaintiff asserts a claim arising out of some promissory arrangement between the parties. Although the language of both Maryland and Virginia statutes might suggest this difficulty, a practical construction of the wording should save the day. See MD. ANN. CODE art. 75, § 96(a)(2) (1965); and VA. CODE ANN. § 8-81.2(a)(2) (Supp. 1968). Compare the Wisconsin statute which details a series of promissory situations that possess or contemplate some substantial connection with the state and defines amenability in terms which do not make the existence of a contract a requirement for amenability. WIS. STAT. ANN. § 262.05(5) (Supp. 1968) and for an application, see Flambeau Plastics Corp. v. King Bee Mfg. Co., 24 Wis. 2d 459, 129 N.W.2d 237 (1940), holding a nonresident purchaser for breach of an agreement to purchase $89,000 worth of light assemblies from the Wisconsin plaintiff.

Insurance and Lending Devices. A considerable variety of provisions

added provisions for claims of alimony, support and property division against former residents of the state.[92]

The Supreme Court of the United States has played a relatively modest and largely permissive role in the development by the states of the long-arm statutes. *Hanson v. Denckla*,[93] a five to four decision in 1958, serves as a reminder that territorial restrictions on state judicial power are not totally gone in constitutional terms and that an unreasonable assertion of jurisdiction over nonresidents will remain subject to federal restraint. Some language in *Hanson* contained the limiting suggestion that the Court had theretofore only sustained jurisdiction over "nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation."[94] Even a cursory inspection of the modern statutes reveals that amenability has been extended to all sorts of activity which the states have left largely to private ordering. In the decade since *Hanson*, however, the Court has not followed up this implication as in no case has it restricted long-arm developments to activities subject to special state regulation.

The majority opinion in *Hanson* also added the thought that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[95] The statement is probably too sweeping. It would appear both just and reasonable in constitutional terms for a state to provide a forum for the protection of interests within its borders that were injured by activities outside the state even though such activities produced no benefits within the forum to the defendant. For example, it should be reasonable to require an Illinois resident to answer in a Wisconsin court in a claim for damage to Wisconsin property resulting from serious and continuing air or stream polluting activities on the Illinois side of the state line. In such a situation, although the defendant would neither have conducted privileged activities in Wisconsin nor gained benefits or protections from Wisconsin laws, his activities would have caused injury to Wisconsin interests.

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may be found in this area. Compare WIS. STAT. ANN. §§ 262.05(7) and (10) (Supp. 1968) with MD. ANN. CODE art. 75, § 96(a)(6) (1965) and VA. CODE ANN. § 8-81.2(a)(7) (Supp. 1968).

Use or Ownership of Property. WIS. STAT. ANN. § 262.05(6) (Supp. 1968); MD. ANN. CODE art. 75, § 96(a)(5) (1965); VA. CODE ANN. § 8-81.2(a)(6) (Supp. 1968).

Taxes. WIS. STAT. ANN. § 262.05(9) (Supp. 1968).

92 *E.g.*, ILL. ANN. STAT. ch. 110 § 17(1)(e) (Smith-Hurd Supp. 1967); WIS. STAT. ANN. § 262.05(11) (Supp. 1968).

93 357 U.S. 235 (1958).

94 *Id.* at 252.

95 *Id.* at 253. For the suggestion that *Hanson v. Denckla* may be explained by a traditional judicial reluctance to intervene in the administration of foreign trusts, see Carrington and Martin, *supra* note 5, at 235.

Collectively, state long-arm process developments have made a substantial contribution to the promotion of judicial economy and the accommodation of interstate interests. Under them it is often possible to bring together in one action claims that otherwise would have required several separate actions at different places. Long-arm process in the district court can assist in the attainment of the same ends, but it is evident that the reach of federal court process must respond to somewhat different shaping forces and underlying interests.

The problems of extending amenability in the federal courts are closely linked to the general problems of distributing judicial powers geographically within the system. Surely the sweeping assertions by some courts, including the Supreme Court, that district court process may run extraterritorially whenever authorized by Congess must be read in the context of venue provisions that sharply limit the number of districts from which extraterritorial process may run in a particular case. From the beginning the extraterritorial amenability of the district court has been limited by venue or venue-like provisions that impose some kind of more or less rational basis for trying a particular case in the district where the defendant is to be made amenable.[96] An extreme example of this policy is the statutory interpleader action, where the stakeholder may assert extraterritorial amenability over the various claimants merely by commencing his action in a district where at least one of the claimants resides.[97] The policies which underlie federal statutory interpleader are, of course, to avoid multiplicity of litigation and to protect the stakeholder against possibly inconsistent judgments with respect to the same fund. Provision for extraterritorial amenability is an all but indispensable adjunct to the successful achievement of those interpleader objectives, even though it is evident that the scheme subordinates the convenience of the individual claimants by making them amenable in a district with which these claimants may have no contacts, ties or relations whatever. Yet as late as 1967 the Supreme Court of the United States assumed that an injunctive decree in a statutory interpleader proceeding would bind all the claimants including, apparently, aliens who were served in Canada.[98]

It is thus apparent that the due process considerations applicable to federal statutory interpleader actions have not been interpreted so as to impose a requirement that a defendant have contacts, ties or relations with a particular district in order that he may be bound to the adjudication reached in a district that satisfies the statutory requirements of venue. Moreover, this result is not un-

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[96] *See* note 2 *supra* and accompanying text.

[97] *See* 28 U.S.C. §§ 1335, 1397, 2361 (1964). More generally, *see* C. WRIGHT, *supra* note 46, at 278-83.

[98] *See* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

reasonable, in view of the alternatives available for solution of the interpleader problem. The situation confronting a stakeholder against whom conflicting claims are asserted is one which singularly calls for a unitary determination that resolves the conflict.[99] Given the likely prospect that in some cases the conflicting claimants may be scattered across the planet, it is rational to assume that for such cases there will be no single place of trial with which all the claimants will have ties or where all the claimants will find it convenient to assert their claims. It would be surprising indeed to say that the unitary national system of courts could not provide a single district able to accommodate the manifestly desirable objectives of the statutory interpleader action without violating the due process clause of the fifth amendment. And the cases to date have held that the provision of extraterritorial amenability in this situation does not violate the fifth amendment.

Class actions represent another example of proceedings in which persons may be bound personally by a determination of a district court even though they have had no significant contacts in that district.[100] Like statutory interpleader, class actions involve situations in which numerous parties, and sometimes multiple claims, are linked by common questions of law or fact in ways which point strongly to the desirability of a unitary resolution of at least some of the common points involved. In both types of proceedings multiple adjudication invites the kind of injustice that results from uneven or conflicting judicial responses to like questions of fact and law. In both, the ends of simplified judicial administration and reduced court congestion are served. And in class actions, as in statutory interpleader, there has been no serious suggestion that the due process clause of the fifth amendment bars the way to a unitary determination of the multiple rights of parties having no contacts, ties or relations with the district in which the action was tried.

Nothing which has been said in reference to statutory interpleader and class actions is intended to suggest that fifth amendment due process considerations do not play a role in the exercise of amenability by a district court. What has been suggested is that those fourteenth amendment due process considerations apposite to the exercise of extraterritorial jurisdiction by state courts cannot be applied unthinkingly to the exercise of extraterritorial jurisdiction by federal courts. And while statutory interpleader and class action proceedings suggest examples of situations in which a district court may, without violating the due process clause of the fifth amendment, bind a party having no tie whatever to the judicial district rendering the judgment or decree, it does not neces-

[99] The statutory interpleader proceedings owe much to the efforts of the late Professor Chafee, whose articles on the subject between 1921 and 1943 are cited in C. WRIGHT, *supra* note 46, at 278 n.3.

[100] *See* materials cited note 84 *supra*.

sarily follow that a district court may do so in all cases nominally within the limits of federal subject matter jurisdiction.

In a broad sense, due process—whether derived from the fifth or the fourteenth amendments—should impose the requirement of reasonableness on the exercise of personal jurisdiction by any court, federal or state. Fourteenth amendment due process, which has provided the primary source of standard setting to date, tests whether it is fair and reasonable to require a particular defendant to stand trial at a particular place with respect to a particular claim. Analogically, the fourteenth amendment limitations on state courts suggest three respects in which fifth amendment due process considerations should restrict the exercise of personal jurisdiction by the district court:

1. *Notice and opportunity to be heard.* There are no intrinsic differences between federal and state courts that suggest a need for different due process requirements of notice and opportunity to be heard in the two systems of courts. With respect to these, the fifth and fourteenth amendments should focus on the same considerations.[101]

2. *Contacts, ties or relations with the federal judicial system.* The typical fourteenth amendment case has tested the reasonableness of subjecting a nonresident or a foreign corporation to the judicial jurisdiction of a state system of courts. The extreme cases have generally insisted that the litigation itself involve some matter which the state has an interest in protecting.[102] By analogy, it is reasonable to assume that fifth amendment due process considerations should bar federal judicial jurisdiction over parties having no contacts, ties or relations with the United States in at least those cases involving no matter which the United States has a significant interest in protecting.

3. *Contacts, ties or relations with a particular judicial district.* Federal judicial districts span from Guam on the west to Puerto Rico on the east, and from Alaska on the north to the Canal Zone on the south. Taking into account such obvious considerations as the availability of witnesses, the frequent and wide reliance on local law under every head of federal subject matter jurisdiction, and the convenience of the parties, it is evident that the reasonableness of the place of trial in the federal system is in general thought of in terms of particular judicial districts rather than in terms of trial within the system at large. Thus the imposition of an unreasonable choice of districts within the system should raise fifth amendment due process considerations.[103]

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101 *See* discussion note 6 *supra.*

102 *See* notes 88-95 *supra* and accompanying text.

103 It is apparently a tribute to narrowness of prevailing venue statutes that the geographic unreasonableness of trial in a particular federal judicial district has not raised many questions of constitutional proportion.

The fourteenth amendment cases have not produced so refined an analysis that inquiry has been made into the reasonableness of a particular venue within a given state system of courts. To satisfy due process considerations it has been sufficient to show that it is reasonable to require a defendant to stand trial within the state system, rather than in a particular court there. On the other hand, the narrowness of federal statutes which authorize extraterritorial amenability for the district courts probably largely accounts for the fact there have been no significant challenges to the reasonableness of requiring suit in a particular federal judicial district where federally-based extraterritorial service has been resorted to.

In the future, however, such questions seem likely to arise, particularly if the proposals of the American Law Institute for modifying the federal question jurisdiction of the district courts are adopted.[104] The ALI proposals would in general substantially expand both the original and removal jurisdiction of the district court to embrace much of the potential "arising under" authority granted in article III. In addition, the proposals would provide for nationwide service that is to be carefully restricted by venue requirements fixing the original district selected as the place of trial.[105] This coupling of nationwide amenability with venue—amenability is to follow venue that in turn is to be initially laid in a judicial district wherein "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated . . . ."[106]—is of the greatest practical significance. The amenability of a defendant is thus keyed in terms of the physical relationship of the claim or property in issue to the district in which original venue is laid. In this respect the proposal bears a close kinship to the numerous state extraterritorial amenability provisions that key nonresident amenability to claims having special and substantial connections with the forum state.[107] Just as these special state provisions have survived attacks based on fourteenth amendment due process con-

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[104] See notes 150-153 *infra* and accompanying text.

[105] The ALI venue proposals for use with the expanded general federal jurisdiction are set forth in note 21, *supra*. The key provision that would call into play the need for extraterritorial service is the proposed § 1314(a)(1), which fixes venue in terms of its link to the litigation sued upon. Where that provision is relied upon for venue, "service of process upon any defendant may be made in any district." Proposed § 1314(c). Why the range of service is limited to places under the territorial jurisdiction of a federal court is not explained by the ALI Reporters. It is rather surprising that they have not here used the provision proposed earlier by the ALI for extraterritorial service intended for use with the suggested multiparty, multistate diversity jurisdiction. See notes 141-149 *infra* and accompanying text and proposed ALI § 2344(a), set forth in ALI, (Proposed Final Draft No. 1, 1965), *supra* note 21.

[106] Proposed § 1314(a)(1), set forth in ALI, (Tentative Draft No. 6, 1968) *supra* note 21.

[107] *See* notes 88-95 *supra* and accompanying text.

siderations, it is reasonable to expect that the ALI proposal would survive attacks based on fifth amendment due process considerations.

To be sure, if the ALI proposals become law, a more refined attention to individual applications will doubtless surface instances in which the question of the reasonableness of binding a particular defendant to trial in a particular district with respect to a particular claim will reach constitutional proportions. As suggested above, techniques for transferring, consolidating or severing claims[108] will dispose of many of these questions before the constitutional issue is reached. But what clearly lies ahead, whether or not the ALI proposals are enacted, is the evolution of fifth amendment due process standards applicable to the exercise of district court amenability. As matters now stand, comparatively few federal statutes provide directly for extraterritorial amenability of the district court.[109] But twice since 1938 the provisions of Rule 4(f) have extended the territorial range of district court amenability beyond the limits of the judicial district. Significant policy reasons exist for fashioning fifth amendment amenability standards for determining "presence" or "consent" to amenability when federal service is made extraterritorially on the authority of these provisions.[110]

2. DISTRICT COURT AMENABILITY BASED ON STATE LAW

As previously observed, Rule 4 now fully engrosses state amenability and service provisions as an optional means of conferring district court amenability.[111] Thus, there remains the question of the constitutional scope of district court amenability when state rather than federal amenability and service provisions are relied upon.

Despite the rather obvious point that the fifth, rather than the fourteenth, amendment should be the source of due process limitation upon the exercise of federal court powers, it has generally been assumed that the incorporation of state law to confer district court amenability embraces state law as limited by federal restraints on the states themselves.[112] This construction is a practical

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108 *See* notes 76-87 *supra* and accompanying text.

109 *See* notes 46-49 *supra* and accompanying text.

110 *See* notes 27-45 *supra* and accompanying text.

111 *See* notes 22-23 *supra* and accompanying text.

112 The oft-repeated test is that first stated in Pulson v. American Rolling Mill Co., 170 F.2d 193, 194 (1st Cir. 1948):

> There are two parts to the question whether a foreign corporation can be held subject to suit within a state. The first is a question of state law: has the state provided for bringing the foreign corporation into its courts under the circumstances of the case presented? There is nothing to compel a state to exercise jurisdiction over a foreign corporation unless it chooses to do so, and the extent to which it so chooses is a matter for the law of the state as made by

one, rather than one constitutionally required, and rests essentially upon the idea that state amenability provisions should not be able to do more for federal courts than they are able to do for state courts.[113] In other words, the policy is to acknowledge that the extraterritorial reach of the district court may in some instances be extended beyond the constitutional reach of state courts but that federal authority, rather than state law, must be looked to if that result is to be achieved.[114]

As indicated earlier, it is generally acknowledged that the in personam reach of the district court in diversity may be extended to parties not reached by state courts.[115] On the other hand, prior to 1963 the circuits had concluded that neither federal statutes nor Rule 4 provided a separate federal basis for amenability of foreign corporations in diversity actions.[116] The 100-mile bulge provision added in 1963 has been applied to add parties to a diversity action who were not reachable under the law of the state where the district court is held. Certainly, there is room for substantial policy objections to limiting district court amenability in diversity actons to the test of state law.[117] Apart from service in the 100-mile bulge, however, the prevailing judicial view of Rule 4 is to key district court amenability in diversity actions to the limitations of state law.[118] This view, however, is one which can be altered by act of Congress or by exercise of the delegated rule-making power.

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its legislature. If the state has purported to exercise jurisdiction over the foreign corporation, then the question may arise whether such attempt violates the due process clause or the interstate commerce clause of the federal constitution. U.S. CONST. art. 1, § 8, cl. 3; amend. 14. This is a federal question and, of course, the state authorities are not controlling. But it is a question which is not reached for decision until it is found that the State statute is broad enough to assert jurisdiction over the defendant in a particular situation.

Cf. Time, Inc. v. Manning, 366 F.2d 690 (5th Cir. 1966), where the court did not resolve whether subject matter jurisdiction in the action rests on a federal question or upon diversity but rather looked to 14th amendment cases as a "helpful and often used guideline" for determining whether Louisiana process statutes validly conferred amenability upon the district court in the case.

113 When federal service is sought to be justified by reference to state law . . . . federal constitutional limitations upon the acquisition of jurisdiction by state courts may also be considered relevant, not because they apply directly to federal courts, but because federal consequences cannot properly be attached to an unconstitutional state law.

H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 959 (1953).

114 As indeed appears to have been done by the 100-mile bulge provision of Rule 4(f). *See* notes 33-45 *supra* and accompanying text.

115 *See* Arrowsmith v. United Press Int'l, 320 F.2d 219, 226 (2d Cir. 1963). *See also* materials and cases cited note 40 *supra.*

116 *See* note 54 *supra* and accompanying text.

117 *See* note 55 *supra* and accompanying text.

118 The possibility that other changes in Rule 4 made in 1963 suggest the use of federal amenability standards when service is made in a federal

II. LONG-ARM METHODOLOGY AND JUDICIAL ADMINISTRATION

The widespread use of state long-arm service in the district court —primarily in diversity actions because of venue restrictions—has made a notable contribution to related developments in the field of judicial administration. The two principal objectives which underlie the administration of long-arm provisions are:

> *To promote judicial economy.* By permitting the addition of parties theretofore beyond the reach of the court, the long-arm provisions serve the end of the unitary lawsuit, and thereby reduce the need for multiple litigation that has burdened the parties as well as the state or federal courts.[119]
>
> *To promote fairness and convenience in selecting a place of trial.* Because the long-arm provisions define amenability in terms of the relationship between the forum and the litigation at hand, they aid in the initial selection of a fair and convenient place of trial.[120]

Thus the objectives which underlie the long-arm provisions parallel the objectives which underlie other major contemporary developments in the field of judicial administration.

In a broader context, long-arm process is complementary to, and is complemented by other contemporary procedural developments, some of which are outlined below.

The expanding concepts of ancillary and pendent federal jurisdiction.[121]

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manner, and state amenability standards when service is made in a state manner—thus embodying the possibility that a federal standard of "presence" in the state where service is made will provide an optional ground for amenability in diversity as in other areas of federal subject matter jurisdiction—has not received any serious judicial attention. Compare notes 50-75 *supra* and accompanying text.

[119] *See* notes 69-71 *supra* and notes 141-49 *infra* and accompanying text.

[120] *See* notes 46-47 *supra* and accompanying text.

[121] Ancillary and pendant jurisdictional concepts cover a lot of ground, not all of which is clearly staked out. Some examples include:

1. *Pendent subject matter jurisdiction.* A district court, having acquired subject matter jurisdiction over a federal claim, is said to have power to exercise "pendent" jurisdiction over state-based claims derived from a common nucleus of operative facts when the claims are of such a nature that the plaintiff would ordinarily be expected to try them all in one proceeding. *See* UMW v. Gibbs, 383 U.S. 715 (1966). *See also* Comment, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657 (1968); Shakman, *The New Pendent Jurisdiction of the Federal Courts*, 20 STAN. L. REV. 262 (1968). A closely related pendent or ancillary jurisdictional theory is evolving in diversity actions. Under such a theory, original parties and claims, even though disqualified under the diversity statute when considered alone, can be included in one proceeding provided they relate to at least one controversy genuinely within the diversity statute. Thus a parent's claim for less than the jurisdictional amount has been joined with its child's claim for more than the jurisdictional amount where the two claims grew out of the same operative facts. *See* Wilson v.

The Federal Rules of Civil Procedure. The federal rules call for probing attention to the underlying issues of the case and to the interests of actual and potential parties, with respect both to the scope of the action and the place where all or part of it is to be tried.[122]

The new provision for venue in the district "where the claim arose." This provision will profoundly enhance the freedom to join necessary parties when used in conjunction with long-arm process and the broad joinder authority in the federal rules.[123]

New developments in the field of conflict of laws. These developments focus attention on the functional operation and the underlying objectives of rules applicable to individual issues in the case.[124] Widespread dissatisfaction with blind application of such

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American Chain & Cable Co., 364 F.2d 558 (3d Cir. 1966); Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3d Cir. 1968) and cases there cited.

2. *Pendent personal jurisdiction.* The lower federal courts are divided on the question whether pendent personal jurisdiction exists as to state claims where extraterritorial service has been made pursuant to federal law. *See* Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 VILL. L. REV. 56 (1965); *compare* Cooper v. North Jersey Trust Co., 226 F. Supp. 972 (S.D.N.Y. 1964) *with* Trussell v. United Underwriters, Ltd., 236 F. Supp. 801 (D. Colo. 1964). The recent proposals of the ALI for modifying federal question jurisdiction would resolve the conflict in favor of jurisdiction over related state claims where extraterritorial service is made as prescribed by federal law. *See* ALI, (Tentative Draft No. 6, 1968), *supra* note 21, at § 1313(a) and comment at 119-20.

3. *Ancillary jurisdiction.* Still more amorphous, ancillary jurisdiction may embrace such matters as jurisdiction over nondiverse parties to implement a judgment entered in a diversity action (Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 [1921]), as well as jurisdiction over various third party claims (*see* Note, *Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958); Note, *Diversity Requirements in Multi-party Litigation*, 58 COLUM. L. REV. 548 (1958)).

122 *See* Provident Bank v. Patterson, 390 U.S. 102 (1968), construing Rule 19, for a meticulous and wide-ranging inquiry into the relevant policy considerations which suggest this attention to the issues and the relationship of the various parties to these issues. The Court added that among the policies embodied in the rule was the "public stake in settling disputes by wholes, whenever possible . . . ." *Id.* at 111. *See also* UMW v. Gibbs, 383 U.S. 715, 726 n.13 (1966) for the statement that the rules embody "the whole tendency of our decisions . . . to require a plaintiff to try his . . . whole case at one time."

123 *See* notes 20-21 *supra* and accompanying text.

124 A landmark case of comparatively recent origin is Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See also *Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963) containing observations on the case by Professors Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese. For a fine example of a functional analysis applied to a tort case more difficult on its facts than *Babcock*, that also cites recent cases and literature, see Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967). For a compilation of cases and materials helpful to an understanding of the explosive new developments in choice of law, see A. VAN MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

jurisdiction-selecting rules such as the *lex delicti* has in many places caused a search for rules which apply the law of the jurisdiction most significantly concerned with the particular issue.[125] No longer are all the issues of a multistate case necessarily thought of as controlled by the law of only one state if in fact they ever were.[126] Of course, careful inquiry into the scope and underlying purposes of seemingly conflicting rules can occasionally yield the conclusion that no genuine conflict of policy exists.[127] But when a genuine conflict of policy does exist, at the very least an understanding of the purposes underlying the conflicting views can yield a better reasoned resolution of the dispute.[128] The fact that the law of more states than one may control various issues in the same case may affect both the place of trial, and the scope allowed as to parties and issues.[129]

Recent multiparty, multidistrict litigation developments. In recent years the Subcommittee for Multiple Litigation of the United States Judicial Conference has provided illuminating examples of what may be done cooperatively under existing rules and statutes to promote the ends of economy, justice and convenience in multiparty, multidistrict ligitation. Added to this is the recent Supreme Court reminder that venue transfer provide a device for consolidating actions pending in two or more districts,[130] moves that may depend on the availability of long-arm process in the transferee district.[131] Then too, there is the new section 1407 of the Judicial

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[125] A well reasoned expression of dismay over the results obtained by the blind adherence to black letter choice of law rules appears in Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[126] Probably in no case has foreign law been looked to exclusively since it has long been part of traditional conflicts lore that the forum would in all cases apply its own "procedural" law. On the other hand, even the first *ALI, Restatement, Conflict of Laws* (1934), tacitly assumed that more than one jurisdiction might be a source of substantive rule for the same case. For example, § 332 looked to the law of the place of contracting to determine the essential validity of a contract, while § 358 looked to the law of the place of performance to determine the party's duty of performance. Such cases as *Babcock, Heath* and *Wilcox* examine each issue of the case when conflicts become apparent to determine what jurisdiction is most significantly concerned with the issue.

[127] *E.g.*, Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

[128] *E.g.*, Heath v. Zellmer, 35 Wis. 2d 578, 151 N.W.2d 664 (1967).

[129] The Supreme Court has made it clear that the law applicable to the case is a relevant consideration in passing on the question of a venue transfer. Van Dusen v. Barrack, 376 U.S. 612 at 645 (1964). Like considerations should be relevant to the doctrine of *forum non conveniens.*

[130] *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 154-55 (1967). *See also* Eastern Gas and Fuel Ass'n v. Midwest-Raleigh, Inc., 374 F.2d 451, 452 (4th Cir. 1967).

[131] 28 U.S.C. § 1404(a) (1964) provides for venue transfer to any district where the action "might have been brought." This has been construed to require the transferee district to be one in which venue would have been proper in the first instance, that is, a district in which the action "might have been brought" without regard to the wishes or waiver of the

Code,[132] authorizing temporary transfer to a single district for coordinated or consolidated pretrial proceedings of civil actions pending in a number of districts and involving common questions of fact.[133] And just as actions may be consolidated, so also may segments of the action be divided off for separate trial in another district.[134] The kind of interdistrict cooperation thus evolving, promotes the unitary character of the federal court system and, accordingly, holds out the prospect of just and economical solutions to many problems which the systems of state courts, acting independently, would find much more difficult to solve. And since at least some of these developments rest on the exercise of diversity jurisdiction, the wisdom of going forward at this time with the proposals of the ALI restricting the diversity jurisdiction of the district court is subject to doubt.[135] The imposition of the

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defendant. This reasoning would seem also to require that the transferee district be one in which the defendant would have been amenable to personal jurisdiction without regard to his wishes. *See* Hoffman v. Blaski, 363 U.S. 335, 343-44 (1960). Section 1404(a), as construed in *Hoffman*, injects significant rigidity into the venue transfer scheme. A like rigidity seems to inhere in the related § 1406(a) where the transferee district must be one in which the action "could have been brought." The ALI proposals for modifying district court jurisdiction would permit transfers for the convenience of the parties and witnesses, or otherwise in the interest of justice, to any district whatever. *See* ALI, (Tentative Draft No. 6, 1968), *supra* note 21, at § 1315(a) (applicable to federal question jurisdiction) and ALI, (Proposed Final Draft No. 1, 1965), *supra* note 21, at § 1305(a) (applicable to general diversity jurisdiction).

[132] Act of April 29, 1968, Pub. L. No. 90-296, 82 Stat. 109, creating new 28 U.S.C. § 1407.

[133] *See* 28 U.S.C.A. § 1407 (Supp. July 1968). The enabling legislation also provides for the establishment of a judicial panel on multidistrict litigation which shall make transfers for pretrial purposes. On May 29, 1968, Chief Justice Earl Warren announced the appointment of seven circuit and district judges (no two being from the same circuit) who were to compose the initial panel.

[134] Rule 42, providing either for consolidation of actions involving common questions of law or fact or for separate trials of individual issues or claims, is manifestly broad enough to permit, for example, the trial of the issue of liability in one district and the question of compensation in another when considerations of convenience and justice so warrant. Something like this occurred with respect to the flood of private antitrust actions against the electrical industry following a determination that certain members of the industry had engaged in conduct violative of antitrust laws. This caused the development of coordinated discovery procedures for use on a nationwide basis so as to provide for the spate of actions to be brought in districts all over the country. Proof of damage in the individual actions was usually left to the district in which the claim had been originally filed.

[135] *See generally* ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Proposed Final Draft No. 1, 1965). Proposed §§ 1301-07 would sharply curtail general diversity jurisdiction. Proposed §§ 2341-46 would dispense with the *Strawbridge* requirements and create a new head of diversity to deal with multiparty, multistate situations. How grudging this grant is can be demonstrated by the fact that it requires jurisdictional facts all but impossible to prove and stakes out an area too

stringent restrictions suggested by the ALI would seriously impair the flexibility presently available in diversity for dealing with such complex problems as airline crashes that kill a hundred or more persons from numerous states.[136]

III. LINES FOR FUTURE DEVELOPMENT OF THE FEDERAL LONG-ARM

The incorporation of state developed long-arm provisions as optional devices for conferring district court amenability has added much to the flexibility and utility of operations in the federal system of courts. Nevertheless, the existing system for exercising personal jurisdiction in the district court, when examined collectively, has flaws which are obvious and serious.

As stated above, federal provisions for extraterritorial amenability are few in number and limited in scope. State law, not federal law, accounts primarily for the extraterritorial jurisdiction presently exercised by the district court, with the result that the powers of any particular district are importantly dependent on state law. The inevitable result of this is an uneven enforcement of federally-based rights. Further difficulties for the enforcement of federal rights grow out of the fact that state amenability provisions have been designed to serve state, rather than federal, needs and interests. Thus it is often hard, if not impossible, to find among the specialized state long-arm devices one that is broad enough to provide for enforcement of particular federal claims. While state amenability provisions have been relied upon for enforcement of such things as federal tax claims, it is fairly evident that these state provisions were not designed with this purpose in mind. It is not surprising that this heavy reliance upon state law to confer district court amenability has not escaped criticism. Indeed, Justices Black and Douglas, in dissenting to the adoption of the 1963 revisions in Rule 4, cited this heavy reliance as one of the reasons for the position they took.[137]

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small to be of broad practical utility for the sort of constructive developments now appearing in multidistrict, multiparty diversity cases.

[136] Coordination and disposition of claims arising out of major airline disasters appear particularly apposite for handling by the federal courts in a single proceeding binding on all relevant parties. Once the question of liability has been determined, however, a court at the decedent's domicile is frequently the most appropriate place to determine the matter of compensation. Certainly witnesses who can testify to the decedent's earning power and loss to the dependents are more likely to be found at the decedent's domicile than at the place of the crash if these are in different states. Moreover, some recent choice of law cases refer the issue of liability to the place of the crash and the compensation question to the place of the decedent's domicile. *See* Pearson v. Northeast Airlines, Inc., 307 F.2d 131; *rehearing en banc*, 309 F.2d 553 (2d Cir. 1962); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

[137] In dissenting to the adoption of Rule 4 as amended in 1963, Justices Black and Douglas expressed doubts about the wisdom of having the in personam powers of federal courts depend on the "existence or non-exist-

Primary reliance on state amenability provisions and limitations in the exercise of general diversity jurisdiction creates less serious problems. Nevertheless, if one accepts as no longer wholly true the assertion in *Guaranty Trust Company v. York*[138] that a federal court sitting in diversity is, "in effect, only another court of the State," there are substantial policy reasons applicable even in the exercise of general diversity jurisdiction for making a district court available in at least some instances in which state courts decline to provide a forum.[139] Some state policies which provide residents, but not nonresidents, a forum in a particular situation may invoke the historic reason for having diversity—to avoid prejudice toward nonresidents. A diversity court may also be needed where state court doors are closed to enforcement of foreign based claims asserted against forum residents. Thus, the relationship of the diversity court to state door-closing policies needs more sensitive attention than it has received to date.[140]

A. A Federal Long-Arm for Multiple Litigation

Of far greater importance than efforts to reshape diversity to serve the ends of its historic purposes are efforts to develop diversity as a constructive future source of judicial power for dealing with multiparty, multidistrict litigation which today the separate systems of state courts cannot adequately manage. The ALI

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ence of a state 'long-arm' statute" and expressed their general disagreement with the scheme embodied in Rule 4.

> MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS object to the changes in Rule 4, which for the first time permit a Federal District Court to obtain jurisdiction over a defendant by service of process outside the State or over his property by garnishment or attachment, under the circumstances and in the manner prescribed by state law. Those changes will apparently have little effect insofar as "federal question" litigation is concerned, since 28 U.S.C. § 1391(b) requires such suits to be brought "only in the judicial district where all defendants reside . . . ." Diversity actions, however, may be greatly increased, for the effect of proposed 4(e) is not limited to suits authorized by such statutes as the Federal Interpleader Act, 28 of Civil Procedure for the United States District Courts, approved by the Judicial Conference of the United States on September 19-20, 1962, pp. 5-8; 28 U.S.C. § 1391(a); Fed. Rules Civ. Proc. 1. We see no justification for an increase in the number of diversity cases. We also see no reason why the extent of a federal District Court's personal jurisdiction should depend upon the existence or nonexistence of a state "long-arm" statute. Moreover, at present a state court action commenced by attachment or garnishment can get into a District Court only if a nonresident defendant chooses to appear and remove the case, see 28 U.S.C. § 1441, and there is no good reason, absent a congressional finding, why this should be changed.

Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 869 (1963).

A careful, critical discussion of the problems which result from reliance upon state amenability provisions for the enforcement of federal rights appear in von Mehren & Trautman, *supra* note 5, at 1123-25, 1123 n.6.

138 326 U.S. 99, 108 (1945).

139 *See* notes 56-68 *supra* and accompanying text.

140 *Id.*

has included in its proposals for modifying diversity some suggestions for employing diversity in multiparty, multistate cases under limited and special circumstances.[141] These proposals reject the *Strawbridge* requirement in favor of a diversity theory that would confer original jurisdiction upon the district courts in "any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and any one of two adverse parties is a citizen of a state and the other a citizen or subject of another territorial jurisdiction."[142] And worldwide amenability would extend to all parties necessary to a "just adjudication"[143] of the multiparty action, provided that original venue is

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[141] ALI, (Proposed Final Draft No. 1, 1965), *supra* note 21, at §§ 2341-46.

[142] *Id.* § 2341. *Dispersed necessary parties; original diversity of citizenship jurisdiction.*

(a) The district courts shall have original jurisdiction of any civil action in which the several defendants who are necessary for a just adjudication of the plaintiff's claim are not all amenable to process of any one territorial jurisdiction, and one of any two adverse parties is a citizen of a State and the other is a citizen or subject of another territorial jurisdiction.

(b) A defendant is necessary for a just adjudication of the plaintiff's claim, within the meaning of this chapter, if complete relief cannot be accorded the plaintiff in his absence, or if it appears that, under federal law or relevant State law, an action on the claim would have to be dismissed if he could not be joined as a party. Persons against whom several liability is asserted shall not be deemed necessary for a just adjudication of the plaintiff's claim because liability is asserted against them jointly or alternatively as well.

(c) A person is amenable to process of a territorial jurisdiction, for the purposes of this section, if, and only if, that person—

(1) being an individual, has his domicil or an established residence or his principal place of employment or business activity in that jurisdiction; or

(2) being a corporation or other entity sued as such, is incorporated or has its principal office in that jurisdiction; or

(3) has an agent in that jurisdiction authorized by appointment to receive service of process; or

(4) may, under the laws of that jurisdiction, be subjected to a fully effective judgment of its courts without delivery of process within the territorial jurisdiction to such person or the agent of such person authorized by appointment to receive it.

[143] *Id.* § 2344. *Process and procedure in actions under dispersed parties diversity of citizenship jurisdiction.* In any action within this chapter—

(a) The district court shall, except as otherwise provided in this section, on motion issue its process for all parties necessary for a just adjudication and shall have power to restrain them until further order of the court from instituting or prosecuting any proceeding in any State or United States court relating to the property or transaction which is the subject of the action. Such process may run anywhere within the territorial limits of the United States and anywhere outside those territorial limits that process of the United States may reach, and shall be returnable at such time as the court directs.

(b) For the convenience of parties and witnesses or otherwise in the interest of justice, a district court may, on motion of any party or on its own motion, transfer the action to any other district or divi-

laid in a district "where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property which is the subject of the action is situated."[144]

In their present form, however, these ALI proposals possess limitations that strip them of any prospect that they can be of widespread utility. One limitation is that they can be invoked only by a showing that in no single state jurisdiction is it possible to make amenable all of "the several defendants necessary to a just adjudication."[145] Another limitation rests in the narrowness

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sion. If the action is transferred at the same time that process is issued under this section, such process shall be made returnable in the district court for the district or division to which the action is transferred.

(c) Whenever State law supplies the rule of decision on an issue, the district court may make its own determination as to which State rule of decision is applicable.

(d) If one or more absent parties cannot be effectively served with process issuing under this section, the district court shall order that the action proceed without such parties unless it is satisfied that greater injustice would be caused by proceeding without them than by total failure of the action.

(e) When the application of this section would lead to undue burden on distant parties, and the adverse effect of such disposition does not exceed the sum or value of $5,000 for any party, the district court may in its discretion:

(1) dismiss without prejudice as to any party or parties upon whom process has been or would have to be served outside the State where the action is to be litigated, and order that the action proceed without such parties; or

(2) if it is satisfied that, in view of the small amounts involved, greater injustice would be caused by any continuation of the proceedings than by total failure of the action, dismiss the entire action without prejudice.

(f) An order that the action proceed without one or more parties necessary for a just adjudication may be conditioned upon the taking of appropriate measures, including the shaping of relief or other provisions in the judgment, for the protection of interests which may be affected thereby. Such an order may be entered under subsection (d) or (e) of this section even though under federal law or any relevant State law an action on the claim could not otherwise be maintained without joining the absent parties.

144 *Id.* § 2342. *Venue in original actions under dispersed diversity of citizenship jurisdiction.*

(a) A civil action wherein jurisdiction is founded solely on section 2341 of this title may be brought only in a district where a substantial part of the events or omissions giving rise to the claim occurred or where a substantial part of property which is the subject of the action is situated, except that where there is no such district within the United States, the action may be brought in any district where any party resides.

(b) For purposes of this section, a corporation shall be regarded as a resident of the district where it has its principal place of business and also of each district in every State by which it has been incorporated if its principal place of business is not in that State, and a partnership or other unincorporated association shall be regarded as a resident of the district where it has its principal place of business.

(c) When under this section venue lies in a district containing more than one division, the action may be brought in any division of that district, except as otherwise provided by local rule of that district court.

145 Having to establish, for purposes of subject matter jurisdiction,

with which the concept of parties necessary to a "just adjudication has been defined."[146] Taken together these limitations so grudgingly vest jurisdiction that what might have been a great constructive contribution of diversity will in practice be all but meaningless.

It is evident that even where a single state jurisdiction can provide for amenability of all relevant parties in a multiparty action there will still be numerous instances when considerations of justice and convenience will call for the severing of issues or parties for trial elsewhere. State courts simply cannot transfer actions in whole or in part to courts of other states. Moreover, they are understandably hesitant about enjoining parties before them from concurrently proceeding elsewhere with respect to the same issues. In other words, no effective interstate machinery is available to permit the kind of unified discovery and pretrial proceedings that are visualized under the recently enacted section 1407 of the Federal Judicial Code for use in multiparty, multidistrict litigation.

Thus there are solid reasons for using diversity powers to aid in solution of problems that involve numerous parties connected by common questions of fact and law. The work of the Subcommittee for Multiple Litigation of the United States Judicial Conference suggests that diversity can be the vehicle for vastly simplifying the litigation of complex multiparty, multistate claims and for avoiding need for multiple litigation of repetitious questions of law and fact in such areas as product liability claims, major air disasters and the like.[147] So far as the evolving work of the Subcommittee on Multiple Litigation would rely on diversity jurisdiction, further developments would be virtually brought to a stop if the pending proposals of the ALI for modifying diversity jurisdiction become law for the reason that these ALI proposals for general diversity so severely restrict access to the district court that the number of multiparty proceedings would be severely re-

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the negative fact that in no single territorial jurisdiction can all the parties be made amenable is a tall order, particularly when one recalls how frequently amenability turns on factual questions of a little more or a little less contact. The limiting effect of this restriction seems intolerable simply as a matter of cost in time and effort to establish whether proposed § 2341 is available in a particular case. *See* note 142 *supra*.

[146] It is apparently another jurisdictional requirement that all parties whose amenability is in question must be "necessary for a just adjudication" as this is defined in proposed § 2341(b). *See* note 142 *supra*. This, too, imposes a burdensome requirement of proof of a jurisdictional fact that even the ALI Reporters concede may be fraught with some uncertainty. Moreover, to the extent that the restriction is clear the purpose is clearly to define the scope of what parties are necessary to be very narrow indeed. For example, a joint-and-several or several tort-feasor would not be regarded as necessary. *See* ALI (Proposed Final Draft No. 1, 1965), *supra* note 21, at 135.

[147] *See generally* notes 130-36 *supra* and accompanying text.

duced.[148] Unquestionably, then, the extremely limited scope of the ALI proposals falls far short of meeting the needs that are being surfaced by the work of the Subcommittee on Multiple Litigation.[149]

It is not suggested that the work of the ALI on its diversity proposals should be abandoned. Much that is recommended is commendable and desirable. What is suggested, however, is that the ALI proposals for using diversity in special, multiparty, multistate situations should be broadly expanded to provide for machinery that can effectively reduce the need for multiple litigation of those common questions of fact and law that now heavily burden both our state and federal court systems. Computerized descriptions of pending cases permit us quickly to see the nationwide legal consequences of such things as a design defect in a single model of a television set which is the cause of hundreds of actions involving common questions of fact and law. Unlike state courts, federal courts through diversity can provide for unified discovery and pretrial procedures. And future developments will inevitably provide other instances in which simplification, unification and reduction of issues, avoidance of repetitious litigation of the same facts, and more just and speedy judicial administration should be achieved through the functional unity of the federal system. The ALI diversity proposals, in their present form, are clearly inadequate to meet the needs of our already overburdened state and federal systems.

B. A Federal Long-Arm for Federal Questions

Standing in sharp contrast to the ALI diversity proposals are the ALI's proposals for altering general federal question jurisdiction. These proposals would vest the district court with broad original and removal jurisdiction closely approaching the full measure of the article III grant.[150] Moreover, this provision is coupled with venue provisions which select a district for commencing the

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[148] ALI proposed §§ 1301-07 would severely restrict general diversity jurisdiction by preventing access originally or on removal by parties who were residents of the forum, residents of an adjoining state who earned their living in the forum state, or foreign corporations who maintained a "local establishment" in the forum state. *See* proposed § 1302. Presumably parties thus disqualified in general diversity actions originally asserted in their behalf would have to argue for ancillary jurisdiction to support their participation in multiparty actions commenced by others able to make use of the narrowed general diversity. But the commentary of the ALI Reporters does not seem to suggest that any such ancillary jurisdiction would be available.

[149] In fairness to the ALI Reporters it must be said that their work was well under way before the significance of the simplifying and unifying efforts of the subcommittee could be appreciated.

[150] The provisions defining the original and removal subject matter jurisdiction for general federal questions appear in ALI proposed §§ 1311-15. *See* ALI, (Tentative Draft No. 6, 1968), *supra* note 21.

action on the basis of substantial contacts with the claim sued upon and then append a provision for nationwide amenability with respect to proceedings in this district.[151] As previously indicated, these proposals appear to be well within constitutional range of authority[152] and would put an end to the present uneven availability of extraterritorial amenability from district to district in enforcement of federally based claims.[153] Thus, these federal question proposals can greatly enhance the effectiveness of the national system of courts in protecting federally based rights and duties.

IV. CONCLUSION

How long-arm process in the federal courts should be developed to go beyond areas already suggested must await further experience. Already, thoughtful suggestions are appearing for the provision of more discriminating restrictions in the administration of long-arm powers. A recent article by Professors von Mehren and Trautman suggests that many of the specialized long-arm provisions include too much and should be restricted by requiring that more careful attention be given to the comparative mobility of the parties as well as to other considerations of litigational convenience and justice.[154] But both professors were doubtful of their present abilities to state these kinds of limitations in legislative form. Almost surely there is need for further development of judicial standards before it would be desirable to attempt to legislate limitations. Particularly is this true when one considers the need to keep preliminary procedural machinery free of burdensome demonstrations of jurisdiction facts; the costs in time and money of getting to the merits of a dispute cannot be allowed to be prohibitive and thus overwhelm the vindication of the rights that are the subject of dispute.[155] By and large the modern state long-arm provisions have kept these costs at a reasonable level and there is reason to believe they can be kept within tolerable limits if the ALI proposals for federal question jurisdiction are adopted.[156] But whatever develops in the future, the field of judicial procedure will forever be caught between the conflicting demands for sophisticated distinctions on the one hand and simplicity on the other.

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151 *See* note 105 *supra*.

152 *See* note 107 *supra* and accompanying text.

153 *See* note 137 *supra* and accompanying text.

154 *See* von Mehren & Trautman, *supra* note 5; *see also* Carrington & Martin, *supra* note 5.

155 *See* Carrington & Martin, *supra* note 5, at 246-48.

156 To be sure the parties are occasionally put to some burdensome proofs when amenability turns on the sufficiency of a defendant's contacts with the forum. But where the long-arm provisions ground amenability on a single act the facts relating to amenability are more easily discovered.