Personal Jurisdiction in Federal Question Cases

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The Supreme Court’s recent decisions on personal jurisdiction are far from satisfactory. In the past fourteen years, the Court has decided thirteen cases dealing with due process limitations on the bases for state court personal jurisdiction. However, these cases have not given us a coherent philosophical foundation for the constitutional restrictions they recognize. The Court has talked confusingly about such considerations as fairness to the parties, litigational efficiency, interstate federalism, territorial power, and protection of state interests. Sometimes the cases seem contradictory.¹ We are not sure whether the Fourteenth Amendment’s Due Process Clause is an instrument of interstate federalism.² We do not know whether the “stream of commerce” theory can be used to satisfy the purposeful availment requirement in product liability suits against manufacturers.³ In two recent cases, the Court unanimously supported the actual holdings, but gave completely different explanations, none of which commanded a majority of the Court.⁴ It is not surprising

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³ In World-Wide Volkswagen, 444 U.S. at 294, the Court declared that “the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.” Two years later the author of those words, Justice White, said “[The Due Process Clause] is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.” Insurance Corp. of Ireland, 456 U.S. at 702.
⁴ Compare World-Wide Volkswagen, 444 U.S at 297-98 (dictum) (observing that a state may exercise jurisdiction over a corporation that delivers its products into a stream of commerce with the expectation that they will be purchased by consumers in that state) with Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 112 (1987) (plurality opinion) (finding that the “placement of a product into the stream of commerce, without more,” does not constitute purposeful availment).
⁵ In Burnham v. Superior Court, 495 U.S. 604 (1990), the Court held that a nonresident served with process in California while briefly visiting the state was subject to the personal jurisdiction of the
that cases presenting the issue of amenability to personal jurisdiction under these confusing standards now make up a large share of reported state and federal decisions.\(^5\)

As scholarly commentators have tried to make sense out of the Supreme Court's jurisdictional jurisprudence, more and more of them have concluded that it cannot be done, and that the Court should start making sense or abandon the field.\(^6\) Professor Weinberg has declared, "\textit{International Shoe} is bankrupt,"\(^7\) and many writers in the field agree. In one respect, however, the confusion spawned by the Court's personal

__California courts.\footnote{During the period between the submission of the manuscript for the second edition of my book, \textit{JURISDICTION IN CIVIL ACTIONS}, in August, 1990, and the submission of the manuscript for the 1992 Supplement in October, 1991, 350 decisions were published dealing with the question of whether defendants had contacts with a state sufficient to support personal jurisdiction. Of these, 141 were decisions of state appellate courts, 155 were decisions of federal district courts, and 54 were decisions of federal courts of appeals. Of the federal court decisions, 39 were federal question cases.}

\footnote{See, e.g., Perdue, \textit{supra} note 1, at 573 (concluding that a coherent doctrine of personal jurisdiction requires a clear understanding of the doctrine's underlying purposes, which the Supreme Court has never clearly articulated); Patrick J. Borchers, \textit{The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again}, 24 U.C. DAVIS L. REV. 19, 102-04 (1990) (lamenting the lack of predictability that has resulted from the Court's approach to personal jurisdiction questions and suggesting that the Court stop regulating personal jurisdiction and instead leave that task to state legislatures or to Congress); Bruce Posnak, \textit{The Court Doesn't Know Its Asahi from Its Wortman: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law}, 41 SYRACUSE L. REV. 875, 885-86, 901-02 (1990) (arguing that the constitutional tests for personal jurisdiction yield unpredictable results and proposing five alternative tests); Roger H. Trangsrud, \textit{The Federal Common Law of Personal Jurisdiction}, 57 GEO. WASH. L. REV. 849, 850 (1989) (observing that the Supreme Court, despite delivering numerous opinions on the issue, "has failed to expound a coherent theory of the limits of state sovereignty over noncitizens or aliens"); Weinberg, \textit{supra} note 1, at 102 (commenting that recent jurisdictional review is a "body of rules without reasons").}

\footnote{Weinberg, \textit{supra} note 1, at 102 (referring to \textit{International Shoe} Co. v. Washington, 326 U.S. 310 (1945), which established the concept of minimum contacts).}
jurisdiction decisions has been beneficial. By forcing us to rethink the whole subject of constitutional limitations on state court jurisdiction, it has led us to a better understanding about the source of those limitations. It is now reasonably clear that the source is not just the Due Process Clause of the Fourteenth Amendment. It is possible that the Fourteenth Amendment has little if any bearing at all; some recent scholarship has made that point persuasively. Other constitutional provisions may be more important. Over and above the Full Faith and Credit Clause and the Interstate Privileges and Immunities Clause in Article IV, there apparently is an unarticulated principle of interstate federalism, implicit in our constitutional scheme, that limits what individual states can do, just as there is a constitutionally unarticulated principle, which the Supreme Court has called “Our Federalism,” that limits the exercise of federal power vis-à-vis the states. The limits on state choice of law and the exercise of personal jurisdiction are probably better viewed as manifestations of interstate federalism. Much of the current confusion could be relieved if we stopped thinking of federal limitations on state court jurisdiction in terms of due process. Old ways of thinking die hard, however. And since all of our precedential decisions are couched in due process terms, we will have to go on talking about due process for quite some time, even if we know better.

Professor Weintrub has called our attention to the fact that another federal nation, Australia, found a way to eliminate excessive litigation over questions of personal jurisdiction. The Australian solution was to authorize courts to exercise jurisdiction on a nationwide basis, relying on venue transfer to relieve problems of inconvenient forum selection. Perhaps we will come to that one day. I do not foresee it soon, however, at least not as a general solution. We are bound to continue expending countless hours of attorney time litigating whether a defendant has contacts with the forum state sufficient to satisfy International Shoe and its progeny. There is, however, a feasible measure short of the Australian answer that would

8. See Borchers, supra note 6, at 88-89, 100 (arguing that nothing in the history of the adoption of the Fourteenth Amendment suggests that due process has any relationship to personal jurisdiction, and that the Court has never critically questioned its assumption that personal jurisdiction is a matter of constitutional law); Trangrud, supra note 6, at 882 (arguing that the Full Faith and Credit Act of 1790 gives the Supreme Court the power to create a federal common law of personal jurisdiction without relying on the Due Process Clause); Stephen E. Gottlieb, In Search of the Link Between Due Process and Jurisdiction, 60 Wash. U. L.Q. 1291 (1983) (examining the relevance of due process as a basis for jurisdictional rules and concluding that due process concerns do not adequately explain the pattern of jurisdictional rules).


eliminate the necessity for the International Shoe inquiry in a significant volume of cases. Courts could be empowered to exercise personal jurisdiction on the basis of contacts with the United States as a whole in federal question cases. This Article supports the adoption of legislation authorizing the exercise of such jurisdiction in both state and federal courts. Service of process in federal question cases should be authorized on a worldwide basis. Contacts with the United States at large sufficient to satisfy the International Shoe test should make the defendant amenable to jurisdiction. Protection against unfair or inconvenient forum selection should be provided by venue rules and venue transfer.

This Article first examines the present law governing the exercise of personal jurisdiction in federal question cases and concludes that the present regime is unsatisfactory. Part II looks at some previous proposals for allowing federal court jurisdiction on a nationwide basis in federal question cases and considers the constitutionality of empowering courts to exercise personal jurisdiction on the basis of the defendant’s contacts with the United States as a whole in such cases. The Article concludes that provision for such jurisdiction is desirable and constitutional. Some necessary changes in the federal venue and venue transfer statutes are considered along the way.

I. Present Law

A. State Courts

Under present law, state courts are constitutionally prohibited by the Fourteenth Amendment’s Due Process Clause from exercising personal jurisdiction over a nonconsenting nonresident defendant, unless she has contacts with the state that make it fair and reasonable to require her to defend the lawsuit in that state. The contact must be the result of the defendant’s own purposeful action, rather than the unilateral action of the plaintiff or third parties. There must also be a state law authorizing the court to subject the defendant to personal jurisdiction, and some officially prescribed process for invoking jurisdiction that is reasonably calculated to provide the defendant with actual notice and an opportunity to defend. If it is shown that the defendant has purposefully established minimum contacts with the state from which the cause of action arose, jurisdiction will be constitutionally proper unless the defendant can show that its

11. Federal question cases turning on the defendant’s contacts with the forum state made up over 18% of the federal cases in the sample noted in supra note 5.
exercise would be unreasonable or unfair. If the defendant has substantial continuous and systematic contacts with the state, she can constitutionally be subject to jurisdiction there even for causes of action that did not arise out of her contact with that state.

The determination of reasonableness and fairness involves interest balancing. In recent cases, the Supreme Court has referred to five factors that must be weighed and balanced:

A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

The application of this test is attended by much uncertainty. Different courts weigh the various factors differently, and often reach opposite results on very similar facts. Because outcomes are often difficult to predict, parties are inclined to litigate the question of personal jurisdiction in every case where the issue is not crystal clear. Hence, we get more and more conflicting decisions.

These due process standards apply to all cases in state courts, whether the cases arise from state or federal law. Thus, a state court cannot subject a defendant to personal jurisdiction in a federal question case unless the defendant has contacts with the state sufficient to satisfy state law standards and the due process requirements of the Fourteenth Amendment.

B. Federal Courts

Under the present law, federal as well as state courts must follow the state contacts standard in most cases. The range of a federal court's

process historically has been limited by the territory of the state in which it sits. The Judiciary Act of 1789 established that the federal trial courts’ process could only be served within their districts; the boundaries of the districts were the same as those of the states.20 Limiting the range of process to the district continued even after multiple districts were established in some states. In a few kinds of cases, Congress authorized service outside the district,21 but for the most part, the range of process was tied to the district until the adoption of the Federal Rules of Civil Procedure in 1938.22 Rule 4(f) allowed process to be served anywhere within the state in which the federal court sat,23 its validity was upheld in *Mississippi Publishing Corp. v. Murphree.*24

In 1963, Rule 4(e) was amended to allow a federal court’s process to be served outside the state when a state law would allow the same type of service by the state’s courts.25 Rule 4(i) was added to authorize service outside the United States when a federal law or the state’s long-arm statute would permit it.26 Rule 4(f) was amended to allow service outside the state, but within 100 miles of the courthouse, in certain kinds of cases.27

Service of process outside the state under Rule 4(e) and the state long-arm statute can only be made “under the circumstances and in the manner prescribed in the [state long-arm] statute or rule.”28 This has been understood to limit the federal courts’ ability to subject defendants to long-arm jurisdiction to the same circumstances in which a state court in that state could do so.29 That means that the federal court must apply the *International Shoe* state contacts standard of due process. And this is true in federal question cases as well as diversity cases, except where some federal statute provides otherwise. The Supreme Court rejected the contention that federal courts should be able to exercise jurisdiction in federal question cases on the basis of a federal common-law standard of

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21. An early example was the Crédit Mobilier statute involved in United States v. Union Pacific Railroad, 98 U.S. 569, 588-89 (1878) (holding that it was constitutional to allow service anywhere in the United States for suits arising under certain federal acts).
27. Fed. R. Civ. P. 4(f), 374 U.S. 876-77 (1963). Persons who are brought in as parties pursuant to Rule 14 (third-party defendants), or as additional parties to cross-claims or counterclaims pursuant to Rule 19 (necessary parties), may be served within 100 miles from the place in which the action is pending, but not outside the United States. *Fed. R. Civ. P. 4(f).*
28. *Fed. R. Civ. P. 4(e).*
29. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 716 n.6 (1982) (Powell, J., concurring) (stating that “Rule 4 relies expressly on state law” and that the lower court accordingly relied on the long-arm statute of the state in which it sits).
amenability rather than the state contacts standard in *Omni Capital International v. Rudolf Wolff & Co.* 30 The Court ruled that, whether or not it would be constitutional for a federal court in federal question cases to exercise jurisdiction on the basis of national contacts rather than state contacts, a federal court is limited by Rule 4(e) to the same standards of amenability as the state's courts, unless there is a statute or rule expressly authorizing service of process outside the state. 31 As a general rule, then, federal courts can only acquire personal jurisdiction over defendants who are subject to personal jurisdiction in the state in which the federal court sits, except for the 100-mile bulge provision of Rule 4(f), unless some federal statute authorizes the exercise of jurisdiction on a wider basis.

The federal courts also generally apply state standards of amenability to personal jurisdiction in actions against corporations that may be served within the state where the federal court sits in accordance with Rule 4(d)(3). Rule 4(d)(3) allows process to be served on an officer or managing or general agent. The rule does not say whether the corporation must have any contact with the state other than the presence of the officer or agent in the state at the time of service. In diversity cases, however, since the decision in the leading case of *Arrowsmith v. UPI,* 32 it has been generally accepted that a corporation's amenability to jurisdiction is governed by the law of the state where the federal court sits, including any constitutional restrictions applicable to state court jurisdiction. 33

In federal question cases where corporations are served under Rule 4(d)(3), the rule is not so clear. Most courts have insisted that corporations served in the state under Rule 4(d)(3) must have contacts with the state sufficient to be amenable to jurisdiction there under the state contacts standard in federal question cases as well as in diversity cases. 34 Some, however, have held that the question of amenability is to be decided by an independent federal standard, and have looked to the defendant's aggregate contacts with the United States as a whole. 35


31. Id. at 105.

32. 320 F.2d 219, 223 (2d Cir. 1963).


35. See, e.g., First Flight Co. v. National Carloading Corp., 209 F. Supp. 730, 740 (E.D. Tenn. 1962) (finding sufficient minimum contacts where the third party defendant was incorporated within and did business throughout the United States, and where service was made on an acknowledged agent within the territorial limits of the court's process); Lona Star Package Car Co. v. Baltimore & O.R.R., 212 F.2d 147, 154 (5th Cir. 1954) (holding that federal, not state, standards governed the question of
Even in situations where there is a federal statute authorizing nationwide service of process, some federal courts have held that the defendant nevertheless must have contacts with the state in which the federal court sits that satisfy *International Shoe*. This courts have regarded the nationwide service statutes as affecting only the process of invoking jurisdiction, not the basis for jurisdiction. This result seems totally inconsistent with congressional intent, although admittedly the several nationwide service statutes do not say anything about amenability standards.

There is no good reason why contacts with the state in which the federal court sits should be necessary in cases arising under federal law. This is particularly true with respect to those cases for which Congress has provided nationwide service of process, but it is also true with respect to other federal question cases as well. Considerations of importance to Fourteenth Amendment due process—interstate federalism and protection of state interests—are irrelevant in federal question cases. There is no need in such cases to impose limits on the ability to acquire personal jurisdiction as a hidden method of controlling choice of law because national law defines the rights of the parties.

Not only is the application of state contacts requirements in federal question cases unnecessary, it has significant detrimental effects. Tying the federal court’s jurisdiction to the amenability standards of the state in which the court sits undermines a purpose for which Congress granted original federal question jurisdiction to the federal courts: to provide a forum for the protection of federally created rights that is free from irrelevant procedural restrictions operating in state courts. The result of this insistence on state contacts in federal question cases may be that a foreign defendant having ample contacts with the United States will be held immune from personal jurisdiction in federal question cases arising from those contacts if the defendant lacks sufficient contact with any one state. Moreover, because the reach of state long-arm statutes may differ,

jurisdiction over a corporation predicated on service of process on the corporation’s agent in the state).


37. There may be a choice-of-law problem if the case involves some state law claims. This issue is discussed infra text accompanying notes 101-04.

38. “Congress” failure to enact a general federal question competence statute has the result of bringing to bear on federal claims, to which federalism concerns have no relevance, individual state legislative decisions in effect to protect out-of-state defendants from suit on state law claims.” *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 293 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 454 U. S. 1085 (1981).

39. *See, e.g.*, DeJames v. Magnificence Carriers, Inc., 491 F. Supp. 1276, 1282 (D.N.J. 1980) (considering, but ultimately rejecting on the ground of lack of statutory authority, the argument that
an anomalous situation may arise in which a federal question defendant is subject to personal jurisdiction in one federal court, but not in another in a different state where the defendant has essentially the same kind of contacts. Such a discrepancy makes little sense. Accordingly, nationwide jurisdiction should be extended to all federal question cases in federal courts; the jurisdictional reach of state courts should be extended in federal question cases as well.

II. Previous Proposals

More than twenty years ago, the American Law Institute recommended that federal courts be given the power to acquire personal jurisdiction over defendants in federal question cases by service anywhere in the United States. Although the ALI recommendation in terms only spoke about service of process, the commentary makes clear the proposal’s intent to make amenability to personal jurisdiction available on a nationwide basis. Legislation embodying all of the ALI’s recommendations was introduced in Congress, but was never enacted. The Judicial Improvements Act of 1990, however, did adopt the ALI’s recommendation for venue in federal question cases, and so it appears that Congress has not forgotten about the ALI study.

The ALI’s recommendation of nationwide service of process found expression in the 1989 proposal by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States for amendments in Rule 4 of the Federal Rules of Civil Procedure.

the “national contacts approach” is desirable because it prevents the possibility that a foreign corporation “could commit serious torts or contract breaches without ever having enough contacts with any one forum to give those injured an opportunity to seek redress” (quoting Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 664 (D.N.H. 1977)), affirmed, 654 F.2d 280 (3d Cir.), cert. denied, 454 U.S. 1085 (1981); Superior Coal Co. v. Ruhrkohle, A.G., 83 F.R.D. 414, 418 (E.D. Pa. 1979) (pointing out that a foreign-based corporate defendant “could commit serious torts with impunity” where it has “substantial contacts diffused throughout the nation to the extent that in no one state do these contacts accumulate sufficiently to allow any State to assume jurisdiction”).


42. See id. § 1314(d) note (“This provision is essential if venue is laid at the place where the events occurred and some defendants are not amenable to process in that state.”)

43. S. 1876, 92d Cong., 1st Sess. (1971); see also 117 CONG. REC. 15088 (1971) (statement of Sen. Burdick) (“[T]his bill, with minor stylistic changes, is exactly as drafted by the [American Law Institute].”)


45. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and
4(e) allowed nationwide service in all cases in the federal courts, except where otherwise provided by law.\textsuperscript{46} Rule 4(f) provided for service outside the United States.\textsuperscript{47} Unlike the ALI's nationwide service proposal of 1969, the 1989 Rule 4 proposal specifically addressed the problem of amenability to jurisdiction. Proposed Rule 4(l)(1) declared that the nationwide service authorized by Rule 4(e) would be effective to establish jurisdiction in diversity cases only over defendants who were subject to jurisdiction in the state courts of the state in which the federal court sat.\textsuperscript{48} The proposal for nationwide service in diversity cases, thus, did not expand the current standards for amenability of defendants to personal jurisdiction in federal courts. In federal question cases, however, an expansion of current amenability standards was contemplated. Rule 4(l)(2) provided:

Unless a statute of the United States otherwise provides, or the Constitution in a specific application otherwise requires, service of a summons or filing of a waiver of service is also effective to establish jurisdiction over the person of any defendant against whom is asserted a claim arising under federal law.\textsuperscript{49}

This provision would give federal courts personal jurisdiction over any defendant by nationwide or even worldwide service in federal question cases, unless the exercise of such jurisdiction would contravene a federal statute or the Constitution. The proposal, thus, would free forum selection in federal question cases from any concern about the defendant's contacts with the state in which the federal court sits, except to the extent that the Constitution or venue statutes might make such concerns necessary.

Unfortunately, the Advisory Committee's 1989 proposal to eliminate reference to state jurisdiction requirements in federal question cases was not included in Rule 4 as it was finally submitted to the Supreme Court in November of 1990. The language of Rule 4(l), quoted above, was eliminated. The provision dealing with amenability to jurisdiction in the 1990 proposal was Rule 4(k).\textsuperscript{50} Rule 4(k) essentially equates amenability in federal question cases with that in diversity cases, except that nationwide service "is also effective to establish jurisdiction with respect to claims arising under federal law over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any

\textsuperscript{46} Id. at 273-74 (proposed Rule 4(e)).

\textsuperscript{47} Id. at 274-75 (proposed Rule 4(f)).

\textsuperscript{48} Id. at 280 (proposed Rule 4(l)(1)(A)). It also would establish jurisdiction in "100 mile bulge" cases and statutory interpleader cases. Id. (proposed Rule 4(l)(1)(B)).

\textsuperscript{49} Id. (proposed Rule 4(l)(2)).

\textsuperscript{50} Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure, 134 F.R.D. 603-05 (1991) (proposed Rule 4(k)).
state.”51 This provision apparently is aimed at the anomalous situation, noted above, of alien defendants that have ample contact with the United States as a whole, but nevertheless are held immune from jurisdiction because they lack sufficient contact with any one state.52 This is certainly a problem that should be cured. However, limiting the proposed change to such cases would preserve the pointless inquiry into state contacts in all but a very few federal question cases.

The proposed Rule 4 was not among those promulgated by the Supreme Court that became effective December 1, 1991. Perhaps someday a revised Rule 4 will be adopted. However, in view of the weakness of the proposed change in Rule 4(k) and the fact that the Rules Advisory Committee cannot affect the range of state court jurisdiction, nationwide personal jurisdiction in federal question cases should be provided by Congress. This Article will now turn to the question of the constitutionality of such a proposed law, looking first at extending the range of the jurisdiction of federal courts and then to extending the range of state courts.

A. Federal Courts

1. Constitutionality.—The Fourteenth Amendment limits state power. It does not limit the powers of the federal government,53 of which federal courts are a branch. Article III of the Constitution gives Congress authority to ordain and establish inferior federal courts.54 Congress can determine the scope of the federal courts’ subject matter jurisdiction, within the limits of Article III. Congress should also be able to specify the conditions under which the federal courts can exercise personal jurisdiction, unless some other constitutional provision poses limitations. Congress’s power over the federal courts is subject to the Due Process Clause of the Fifth Amendment. If the Fourteenth Amendment’s Due Process Clause limits the exercise of personal jurisdiction by state courts, does the Fifth Amendment pose similar limits on the exercise of personal jurisdiction by federal courts? Does the Fifth Amendment allow a federal court, in a federal question case, to exercise jurisdiction over persons who have contacts with the United States as a whole but not with the state in which the federal court sits?55

51. Id. at 605 (proposed Rule 4(k)(2)).
52. See supra note 39 and accompanying text.
53. See U.S. CONST. amend. XIV, § 1.
55. Several recent articles have examined the question of Fifth Amendment limits on federal court jurisdiction. See Maryellen Fullerton, Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts, 79 NW. U. L. REV. 1, 39-60 (1984) (using a fairness test of due process to analyze the burden imposed on defendants by the place of trial); Robert A. Lusardi, Nationwide Service of
Many cases have considered this question in the context of the existing nationwide service statutes. Cases in which service was based on section 22 of the Securities Act and section 27 of the Securities Exchange Act, for instance, have expressed four different views of what Fifth Amendment due process requires. Some courts have ruled that the defendant must have contacts with the state in which the federal court sits that satisfy the International Shoe standards.

The rationale for this position seems to be that due process under the Fifth Amendment, as well as the Fourteenth Amendment, is concerned with fundamental fairness in the location of the litigation site. If it is not fundamentally fair to require a defendant who lacks contacts with a state to litigate in that state's court, it cannot be fundamentally fair to require her to litigate in the federal court across the street. This view is not widely followed today. The limitations on state court jurisdiction that the Supreme Court has recognized in the name of due process are at least in some respect based upon the territorial limits of the state's sovereignty. Fairness is not the only factor; it does not explain why a state court cannot reach outside the state's borders to implead third-party defendants, as the federal courts can. There are factors that limit the range of a state's legislative and judicial jurisdiction but have no relevance when applied to federal courts in federal question cases. The view that Fifth Amendment due process requires state contacts, then, must be rejected.

Another view holds that the International Shoe analysis is irrelevant when process under the special service statute is served within the United States. If process is served outside the United States, however, the


defendant must have minimum contacts with the state where the federal court sits.\textsuperscript{61} No rationale was offered for this curious position, and it seems quite likely that it was based on a misinterpretation of an earlier decision in which the court had said that minimum contacts are irrelevant when service is made within the United States, but are required when the service is made abroad.\textsuperscript{62} It is reasonably clear that the earlier case referred to minimum contacts with the United States as a whole.\textsuperscript{63} Accordingly, this second view must be rejected.

A third view holds that due process is satisfied if the defendant has minimum contacts with the United States as a whole,\textsuperscript{64} provided that the process was sufficient to give the defendant notice and an opportunity to be heard. This view is followed in a majority of the decisions.\textsuperscript{65} Courts that use this national or aggregate contacts approach basically apply the \textit{International Shoe} minimum contact analysis but look to the fairness of requiring the defendant to defend in the United States as a whole rather than focusing on the location of the chosen court.

A fourth view is often referred to as the basic fairness standard. Under this view, contact with the nation as a whole may not satisfy Fifth Amendment due process. On the other hand, contact with the state in which the federal court sits is not required. The due process test under this standard turns on the fairness of requiring the defendant to defend in the particular federal court chosen by the plaintiff. The leading case taking this approach is \textit{Oxford First Corp. v. PNC Liquidating Corp.}.\textsuperscript{66} In that case, Judge Becker articulated an interest balancing test in the following terms:

\begin{quote}
The fairness test which we will apply includes consideration of the following matters: \textit{First}, a court should determine the extent of the defendant’s contacts with the place where the action was brought; \textit{i.e.}, the \textit{International Shoe} type criteria. \textit{Second}, a court should weigh the inconvenience to the defendant of having
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\textsuperscript{62} Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974).
\textsuperscript{63} See id.
\textsuperscript{65} See Graham C. Lilly, Jurisdiction over Domestic and Alien Defendants, 69 Va. L. Rev. 85, 132 (1983); Erickson, supra note 55, at 1140.
to defend in a jurisdiction other than that of his residence or place of business. Subsidiary considerations here might include the nature and extent and interstate character of the defendant’s business, the defendant’s access to counsel, and the distance from the defendant of the place where the action was brought. Third, the matter of judicial economy should be evaluated. . . . Fourth, a court should consider the probable situs of the discovery proceedings in the case and the extent to which the discovery proceedings will, in any event, take place outside the state of defendant’s residence or place of business, thus muting the significance of his claim that he is inconvenienced by the distant forum. Fifth, a court should examine the nature of the regulated activity in question and the extent of impact that defendant’s activities have beyond the borders of his state of residence or business.67

This basic fairness test has been applied in a number of cases.68 Recent cases have said that this test must replace the national contacts test in view of the Supreme Court’s decision in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinée, which rejected territorial sovereignty as an element of due process and emphasized the protection of the defendant’s liberty interest.69

Professor Fullerton has proposed a similar balancing test.70 She rejects the idea that national contacts alone satisfy Fifth Amendment due process, particularly in view of the de-emphasis on the sovereignty element in Insurance Corp. of Ireland.71 The constitutional standard demands consideration of the fairness of requiring the defendant to defend in the locale chosen. In assessing that fairness, the court must consider and weigh the inconvenience to the defendant, the defendant’s reasonable anticipation of litigation at the location chosen, and governmental interests that may justify the burden imposed on the defendant.72 What constitutes “the location chosen” is left to the courts, but Fullerton offers three alternative definitions: the state the federal court sits in, the federal judicial

67. Id. at 203-04.
69. 456 U.S. 694, 702-03 (1982); see also GRM, 596 F. Supp. at 314 (applying the holding of Insurance Corp. of Ireland).
70. Fullerton, supra note 55, at 38-61 (outlining a specific sequence in which various factors should be considered by a court).
71. Id. at 13.
72. Id. at 39-60.
district in which the court is located, or the general region where the federal court is located.\textsuperscript{73}

The main difficulty with the basic fairness approach is that it invites the very kind of threshold litigation over the balance of the fairness factors required by the \textit{International Shoe} state contacts standard. Such litigation generally can be averted, however, if venue requirements are adopted to ensure that the case will be brought in a locale that is not unfair. The present nationwide service statutes generally cannot be used unless the venue is properly laid in accordance with the special venue rules prescribed in the statute.\textsuperscript{74} The prescribed rules limit venue to places where significant contacts exist. With some qualifications to be noted below,\textsuperscript{75} the same can be said of the general venue statute,\textsuperscript{76} which presumably would apply to federal question cases brought under the proposed statute. Fairness and convenience are important considerations, but they can be adequately assured by the venue statutes.

Proponents of the basic fairness test argue, however, that although venue statutes and venue transfer may, as a practical matter, prevent most instances of unfairness and inconvenience, these statutes always can be repealed.\textsuperscript{77} Some basic protection against unfair forum selection, then, must be constitutionally grounded. The weakness of this argument, however, is that the Fourteenth Amendment due process cases discussing fairness in forum selection are concerned only with the fairness of requiring the defendant to defend in that state. If the defendant can fairly be subjected to the state's sovereign power, the Due Process Clause is satisfied. The state's venue rules determine the place of trial within the state. For example, if the defendant has minimum contacts with Texas sufficient to satisfy \textit{International Shoe} and its progeny, Texas state law can determine where within that vast state the action should be tried. Each state has venue rules that serve to channel litigation to the courts that the state's legislature considers to be the most appropriate. There are, thus, institutional protections against unfair and unreasonable forum selection.

\begin{footnotes}
\item[73.] \textit{Id.} at 44-52.
\item[75.] See infra text accompanying note 118.
\item[77.] Fullerton, supra note 55, at 36.
\end{footnotes}
within the state. It may be that there is a due process right to a procedural system that contains such institutional protections. Perhaps there is a due process right to fairness in forum selection within the state comparable to the due process right to service of process in accordance with an officially prescribed method of service that is reasonably calculated to provide actual notice. The defendant has a due process right to notice: not to actual notice, but to a process that assures the likelihood of notice.\textsuperscript{78} The defendant’s right to a fair forum within the state, if it is a concern of due process at all, should likewise be satisfied by rules that are reasonably calculated to direct the litigation to a fair forum. If a state has no such rules, that might raise a due process problem.

In the context of the federal courts and the Fifth Amendment, it may well be a denial of due process to subject a defendant to jurisdiction in an unfair or inconvenient forum without institutional protections against that result. That problem would emerge, however, only in the unlikely event that Congress actually did repeal the venue and venue transfer statutes. The denial of due process then would be in the repeal itself, that is, in taking away the institutional protections that provide reasonable assurance of a fair forum. As long as the statutes remain in force, the national contacts approach should be constitutional; it has an advantage over the basic fairness approach in not inviting threshold litigation about the fairness of the “locale” of the action, however that locale may be delimited.

Proponents of the basic fairness test also contend that venue statutes and venue transfer do not sufficiently protect against unfair forum selection because improper venue, unlike jurisdictional limitations, cannot be raised in a collateral attack on a judgment. If the plaintiff’s forum choice is unfair, they argue, the defendant should not have to raise his objection in that court, but should be able to attack the resulting default judgment when an attempt is made to enforce it.\textsuperscript{79} It is true that improper venue is a defense that must be raised in the first court or it is waived. However, the burden of filing a Rule 12(b)(3) motion is not very heavy. If the venue is proper, the forum choice will not be unfair. If it is improper, the case will be transferred or dismissed. Moreover, the court on its own motion can transfer the venue to a more convenient court where it might have been brought, and can be expected to do so if the forum appears to be unfair. If the defendant is an American, these procedures should provide adequate protection against unfair forum selection so that collateral attack would rarely if ever be warranted. If the defendant is a foreigner, the right of

\textsuperscript{78} See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (holding that due process requires “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action”).

\textsuperscript{79} See Fullerton, supra note 55, at 36-37.
collateral attack may be available anyway, because foreign countries will apply their own laws in ruling on the enforceability of an American judgment.\(^{30}\) An American judgment in which jurisdiction is based on national contacts is likely to receive "no worse a reception than those obtained under the current state contacts standard."\(^{31}\)

If appropriate venue rules are provided that will effectively protect against unfairness, it makes little practical difference whether the national contacts approach or the basic fairness approach is the correct standard of Fifth Amendment due process. However, recent Supreme Court decisions lend some indirect support to the national contacts position. The present Supreme Court does not appear to attribute great importance to fairness and convenience in forum access cases. The endorsement of jurisdiction based on pure physical power by the plurality in *Burnham v. Superior Court*\(^ {32}\) makes it clear that those four justices did not think fairness was an element of Fourteenth Amendment due process in the case of defendants served within the territory of the forum. The departure from the Court of two members who disagreed with the plurality suggests that the plurality view now may be the majority view. That would indicate that the "basic fairness" standard for Fifth Amendment due process is not appropriate, at least for defendants who can be served within the territory of the United States.

Further indication that the Supreme Court majority places small importance on fairness in forum selection can be seen in *Carnival Cruise Lines v. Shute*.\(^ {33}\) In that case, the Court enforced a proration provision contained in a cruise ticket that had the effect of requiring a Washington state plaintiff to bring a damage suit in Florida for injuries sustained on a Pacific cruise that began and ended in California. The plaintiffs did not have an opportunity to read the cruise ticket that contained the clause until they had paid for and received it, so they clearly did not agree to that term as part of the bargain. Because the ticket was nonrefundable, the plaintiffs did not really have an opportunity to turn the ticket down after they received it.\(^ {34}\) To even consider the clause a contract term requires some imagination. This was an admiralty case governed by federal law.\(^ {35}\) The Supreme Court did not note any Fifth Amendment due process problem with the case, despite the suggestion by the Court of Appeals that the plaintiffs would be physically and financially unable to pursue the case in

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\(^ {34}\) *Id.* at 1529 (Stevens, J., dissenting).

\(^ {35}\) *Id.* at 1525.
Florida and that enforcement of the clause would thus deprive the plaintiffs of their day in court.\textsuperscript{86} The case stands as some indication, at least, that fairness of forum selection within the United States is not an important element of Fifth Amendment due process.

Of the four views about the contacts required by Fifth Amendment due process, then, the national contacts approach appears to be the most appropriate. Due process requires purposeful contact with the United States sufficient to make it fair to require the defendant to defend in the United States, but the place of trial within the United States should be a matter of venue, not constitutional right. Congress constitutionally can empower the federal courts to exercise personal jurisdiction over any defendant who has purposefully established minimum contacts with the United States in cases arising under federal law. The fairness of requiring the defendant to defend in the United States is a factor to be considered, but the place of trial within the United States is a venue question.

2. \textit{Supplemental Personal Jurisdiction}.—If nationwide jurisdiction is to be available for federal question cases, an issue that must be considered is whether jurisdiction over the person obtained by such a special service statute can extend to state law claims that may be joined with the federal claim.

The supplemental jurisdiction statute gives the federal court supplemental subject matter jurisdiction “over all other claims that are so related to claims in the action within [federal] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.”\textsuperscript{87} Both the federal question and state claims will be part of the same Article III case or controversy if they arise out of the same “common nucleus of operative fact” and are so related to the federal claim that, apart from their federal or state character, one ordinarily would expect them to be tried in the same proceeding.\textsuperscript{88} Article III authorizes Congress to give the federal courts jurisdiction over “cases” arising under federal law,\textsuperscript{89} and under supplemental jurisdiction a “case” includes the federal claim and also any properly joined state claims that stem from the same core of facts.\textsuperscript{90} Federal subject matter jurisdiction extends to the state law claims in such cases, even though the state law claim could not have been brought in the federal court if it were the only claim in the action.

\begin{itemize}
\item[] 89. U.S. \textit{CONST.}, art. III, \textsection 2, cl. 2.
\item[] 90. \textit{Gibbs}, 383 U.S. at 725.
\end{itemize}
Can the federal court, by analogous reasoning, exercise personal jurisdiction over the defendant in a state law claim joined with a federal question claim where service is made under a nationwide jurisdiction statute? Can it do so if personal jurisdiction could not have been obtained over the defendant in the forum state for that claim if it had been the only claim in the suit?

The language of Rule 4 would seem to exclude the possibility of such supplemental personal jurisdiction over the defendant with respect to the state law claim. Rule 4(f) limits the range of the federal court’s process to the state in which the federal court sits except “when authorized by a statute of the United States or by these rules.” The existing nationwide service statutes apply to specific federal claims and do not expressly authorize nationwide service for any other claims. The rules authorize extraterritorial service only when a state long-arm statute would permit it or when the 100-mile bulge provision applies. Nothing in the statutes or rules, then, expressly authorizes the exercise of personal jurisdiction for the pendant claims. Nevertheless, the question has been considered in numerous cases involving the existing nationwide service statutes; in the past twenty years most of these cases have upheld pendant (or what is now called supplemental) personal jurisdiction for the state claims. Many cases have upheld pendant personal jurisdiction for state claims joined with Securities Act and Securities Exchange Act claims. Pendent personal jurisdiction has also been upheld in cases arising under the Investment Company Act, the Clayton Act, the Employment Retirement Income Security Act (ERISA) and the Racketeer Influenced and Corrupt Organization Act (RICO). The constitutionality of the practice

92. Id.
93. See Jon Heller, Note, Pendent Personal Jurisdiction and Nationwide Service of Process, 64 N.Y.U. L. Rev. 113, 116 (1989) (“For the past twenty years, courts have universally allowed such exercises of ‘pendent personal jurisdiction.’” (footnote omitted)).
is seldom questioned. Venue for actions under the special service statutes must be laid in a district with which the defendant has significant contacts. Accordingly, that defendant generally could constitutionally be subjected to jurisdiction on the state law claim in that state anyway. If the defendant cannot be sued in that state on the state law claim, the reason will often be because the state's long-arm statute does not provide for it. In any event, because the defendant is subject to personal jurisdiction on the federal claim and the state claim arises from the same core of facts, any inconvenience to the defendant from having to defend the state law claim in that state can hardly be of constitutional significance.

An argument against allowing supplemental personal jurisdiction for the state law claim could be made on the ground that there might be insufficient protection against an unfair choice of law. One of the functions performed by the present *International Shoe* state contacts requirement is to serve as a "disguised regulator of choice-of-law power." Plaintiffs could avoid this check on unfair forum shopping by joining the state law claim with the federal claim and taking advantage of nationwide service and the national contacts standard for personal jurisdiction.

This objection to allowing pendent personal jurisdiction under the nationwide service statute is not very strong, however. In the first place, the policy against shopping for favorable law from state to state is not firm, as the Supreme Court made clear in *Keeton v. Hustler Magazine, Inc.* and *Ferens v. John Deere Co.* In the second place, the federal venue

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102. 465 U.S. 770 (1984). In this libel action, the Supreme Court upheld the plaintiff's forum shopping over the objection that it was unfair to permit her to sue in New Hampshire, a state that was not her residence, for the damages to her reputation outside of New Hampshire when the statute of limitations had run on her claim in every other state. "Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Id.* at 779.

103. 494 U.S. 516 (1990). "The issue now before us arose when the Ferenses took their forum shopping a step further: having chosen the federal court in Mississippi to take advantage of the State's
rules, even under the general venue statute, normally limit the plaintiff's forum choice to a district in which the defendant has contacts sufficient to satisfy the *International Shoe* test anyway: *i.e.*, a state where a substantial part of the events giving rise to the claim occurred. This would provide as much protection against unfair choice of law as the *International Shoe* state contacts test would. Accordingly, the unfair choice-of-law argument should not prevent the use of supplemental personal jurisdiction for the pendent state law claim.

Although pendent personal jurisdiction appears to be constitutional, the Rules Advisory Committee, which proposed the extension of nationwide service to all federal question cases in 1989, expressed some concern about it. The Advisory Committee's Notes to proposed Rule 4(l) observed:

Additional caution should be exercised in [the nationwide service provision's] use to bring into a federal court a state-law or foreign-law claim that could not be otherwise presented either to a federal court or to a state court in the district in which the federal court sits. There is a problem of fairness in the exercise of such "double-pendent" jurisdiction. The unfairness that can result in "double-pendent" jurisdiction lies in the unforeseeably episodic nature of federal court involvement in relationships largely governed by the law of a distant state. Unless the interlocking relationship between the state and federal claims is strong, there may even be a consideration of constitutional due process applicable to constrain "double-pendent" jurisdiction over the person of a defendant. *Cf.* *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408 (1984). When it is necessary or desirable to join a federal-law claim with a state-law claim that could not be maintained in a local state court, consideration should be given to a transfer of the action to a federal court in a state in which the state-law action might have been brought.

To relieve doubts about the propriety of pendent personal jurisdiction, the statute authorizing nationwide service in federal question cases should specifically authorize the assertion of pendent state law claims in the same action without the necessity of separate service of process under the

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state's long-arm statute. A special reference authorizing venue for the pendent claim should be included as well.\(^{106}\)

The supplemental jurisdiction statute extends subject matter jurisdiction to state law claims against other parties when they are joined in the same action with a federal question claim and form a part of a single constitutional case. Whether personal jurisdiction for such pendent party claims can be acquired by virtue of the nationwide service statute is much more problematic. The Advisory Committee's Note to the 1989 proposal expressly declared that the nationwide jurisdiction it authorized "does not apply to a defendant who is joined in the action only by reason of that defendant's possible liability for a state law claim that is pendent to a federal claim."\(^{107}\) However, there may be some situations in which such pendent party jurisdiction is appropriate. Some commentators have argued that aliens are subject to jurisdiction on the basis of national contacts anyway.\(^{108}\) If the pendent party is an alien, supplemental personal jurisdiction may be warranted. Jurisdiction over nonalien pendent parties is more doubtful, however; they can claim a right to the protection of the Fourteenth Amendment's Due Process Clause in actions brought against them on state claims. There may be a federal interest in trying together in federal court all matters based on the facts giving rise to the federal question claim, but whether that interest is strong enough to offset the pendent party's claim to Fourteenth Amendment protection is questionable. Accordingly, even if Congress could constitutionally provide nationwide jurisdiction for such pendent party claims, it probably would not do so in view of these doubts. Certainly the Rules Advisory Committee did not recommend it.\(^{109}\)

Another question raised by nationwide jurisdiction for federal question cases concerns the use of nationwide service to get personal jurisdiction for claims not arising from the same core of facts as the federal claim where there is an independent ground for subject matter jurisdiction over the nonpendent claim. If the parties are of diverse citizenship and the state law claim exceeds $50,000, the federal court would have subject matter jurisdiction over the joined claim.\(^{110}\) There would, however, be questions about personal jurisdiction and venue for the joined nonfederal

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108. See Degnan & Kane, supra note 81, at 820-24.


claim. If venue is proper and personal jurisdiction over the defendant could be obtained through the state long-arm statute, it would seem proper to allow the federal court to entertain the nonfederal claim without requiring the ritual of a second service of process for the nonfederal claim. If the nonpendent, nonfederal claim is not related to the federal claim, however, no good reason is apparent to alter the rules of venue and amenability to personal jurisdiction that would apply if the nonfederal claim were the only claim just because it is joined with the federal claim. Either the case should be transferred to a district where the nonfederal claim could have been brought or the nonpendent, nonfederal claim should be dismissed.

3. Venue.—The existing nationwide service statutes contain their own special venue provisions, but it is not clear whether the venue provided in the special statutes is exclusive, or whether venue also can be laid in accordance with the general venue statute. In statutory interpleader cases, venue as provided in the special venue provision is generally considered exclusive. In civil antitrust cases under the Clayton Act, on the other hand, the special venue provision is generally considered nonexclusive, so venue can also be predicated on section 1391. Most courts hold that the nationwide service provision can be used only if the venue is laid as provided in the special statute, but some have allowed nationwide service even when the venue is based on section 1391.

If section 1391 is an alternative and nationwide service can be used when venue is so laid, a difficult issue is posed by the current venue rule when the defendant is a corporation (or there are multiple corporate defendants). The 1990 amendments to the general venue statute provided that venue in federal question cases could be laid in the district where any defendant resides if all defendants reside in the same state. Under section 1391(c) a corporation is deemed to reside in any district where it

113. "Venue is proper in a statutory interpleader action only if the standards of Section 1397 are satisfied." CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1712, at 569 (2d ed. 1986). But see RCA Records v. Hanks, 548 F. Supp. 979, 982 (S.D.N.Y. 1982) (allowing venue in statutory interpleader to be laid where no defendant resided because one defendant was an alien and under 28 U.S.C. § 1391(d) could be sued in any district).
115. See Hovenkamp, supra note 74, at 509-10.
is subject to personal jurisdiction.\textsuperscript{118} If the nationwide service statute can be used, all corporate defendants will be subject to personal jurisdiction wherever the plaintiff chooses to bring the action and will accordingly be considered residents of that district. Therefore, if all defendants are corporations, both venue and personal jurisdiction will be proper wherever the plaintiff elects to sue. The venue statute, thus, poses no limitation on forum selection. This anomalous result may be one reason the proposal for nationwide jurisdiction in all federal question cases was dropped from Rule 4 as it was originally proposed in 1989.

This same difficulty may arise under some of the existing nationwide service statutes that allow venue to be laid on the basis of a defendant’s residence.\textsuperscript{119} In Pure Oil Co. \textit{v. Suarez},\textsuperscript{120} the Supreme Court held that section 1391(c) should be used to determine a corporate defendant’s residence for purposes of the Jones Act’s special venue provision:

Although there is no elucidation from statutory history as to the intended effect of § 1391(c) on special venue provisions, the liberalizing purpose underlying its enactment and the generality of its language support the view that it applies to all venue statutes using residence as a criterion, at least in the absence of contrary restrictive indications in any such statute.\textsuperscript{121}

Of course, the Court was referring to the pre-1988 definition, which treated the corporation as a resident of the state of incorporation, any state where it was licensed to do business, and any state where it was doing business.\textsuperscript{122} \textit{Suarez} established, however, the practice of looking to section 1391(c) to determine corporate residence in all special venue statutes.\textsuperscript{123}

If nationwide jurisdiction is extended to federal question cases generally, either an exclusive special venue provision must be enacted or section 1391 must be changed. The latter may be the preferable solution; the general venue statute should be changed anyway. The 1988 and 1990 amendments have muddled the process of venue determination. The venue rules should be more restrictive than the constitutional standards for personal jurisdiction and should provide fairly specific rules for channeling

\textsuperscript{119} Examples include the interpleader venue statute, 28 U.S.C. § 1397 (1988), and the ERISA subchapter III venue statute, 29 U.S.C. § 1451(d) (1988).
\textsuperscript{120} 384 U.S. 202 (1966).
\textsuperscript{121} \textit{Id.} at 204-05.
\textsuperscript{123} See Moseley \textit{v.} Sunshine Biscuits, Inc., 110 F. Supp. 157, 158 (W.D. Mo. 1952) (looking to the general venue provisions of 28 U.S.C. § 1391(c) to establish corporate residence under the interpleader statute).
litigation to a convenient forum. Whether a special venue statute is adopted or section 1391 is used, the definition of corporate residence cannot be the one now found in section 1391(c). The venue rules do not serve any function if venue is proper wherever the defendant is subject to personal jurisdiction. Part of the pre-1988 section 1391(c) definition of a corporate defendant’s residence should be restored. A corporation should be deemed to reside in any judicial district in a state in which it is incorporated or is doing business. The pre-1988 statute also considered a corporation a resident of any state where it was licensed to do business. That seems a questionable ground for venue if the corporation is not actually doing business there, however.

Section 1391(d), which authorizes suits against aliens to be brought in any district, raises a similar problem. Under the present statute, courts must rely on venue transfer under section 1404(a) and the doctrine of forum non conveniens to protect alien defendants from unfair forum selection. Forum non conveniens should not be invoked in federal question cases, however. If the defendant has sufficient contact with the United States to satisfy Fifth Amendment due process, there must be some district in the United States that is sufficiently fair and convenient, so the doctrine of forum non conveniens should not be invoked. Although venue transfer may be adequate protection for alien defendants, in my opinion it would be better to eliminate the special venue provision and make the general federal question venue rule, modified as suggested above, applicable in suits against aliens.

If the definition of corporate residence and the venue rules for alien defendants were changed, the present federal question venue provision, section 1391(b), would assure fairness in forum selection in most cases. Under section 1391(b), cases can be brought in “(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which 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, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.” Some clarification of the language of the third alternative is necessary. That provision applies only when no substantial part of the events or omissions underlying the claim took place in the United States and the defendants do not reside in the same state, or, if there is only one defendant, the defendant does not reside in the United States. In that case venue can be laid where the defendant, or a defendant, may be “found.” Some courts have construed the term “found” in special

venue statutes to mean "subject to personal jurisdiction." Under that definition the venue provision, again, poses no limitation on forum selection in cases where the third alternative is applicable.

It seems more probable that "found" in the 1990 version of section 1391(b) was intended to mean "physically present." If that is true, venue under the third alternative can be laid where a defendant is physically present. In the case of an individual defendant, that place is easy to identify, but in the case of a corporation it is not so easy. Courts interpreting the term "found" in the Clayton and Sherman Acts have looked to see if the corporation's agents are engaged in sufficient substantial and continuous activity to establish the corporation's "presence" there. The tests for "found" approximate the tests for "doing business" under the pre-1988 corporate venue provision in section 1391(c).

If "found" in the present section 1391(b)(3) means physical presence in the case of an individual, and continuous and systematic corporate activity in the case of a corporation, and if the reference to corporate residence in section 1391(c) were changed as has been suggested, then the current federal question venue statute would provide assurance of fundamental fairness in forum selection in federal court cases brought under the nationwide jurisdiction statute that this Article recommends. Venue can be laid in the state where all defendants reside, a forum that might not be convenient but certainly will not be unfair to the defendants. It can also be laid in the district where a substantial part of the events in suit took place, a forum that will normally be both convenient and not unfair. In the probably rare case where the events in suit did not occur in the United States and the single defendant does not reside in the United States but does have sufficient contacts with the United States as a whole to satisfy Fifth Amendment due process, venue can be laid where the defendant is found. If the events did not occur in the United States and there are multiple defendants, foreign or domestic, but all do not reside in the same state, venue can be laid where any defendant can be found. That place will not necessarily be a fair and convenient forum. In that case, however, and in any case where the properly selected venue is not sufficiently fair or convenient, venue can be transferred to another district


128. The "doing business" and "found" tests were declared to be the same in Friends of Animals, Inc. v. American Veterinary Medical Ass'n, 310 F. Supp. 620, 622 (S.D.N.Y. 1970).
where it might have been brought in accordance with the venue transfer statute, section 1404(a). The doctrine of forum non conveniens should not be used for transfer: if due process concerns have been satisfied, some district is sufficiently fair and convenient. The case should be tried somewhere in the United States. The plaintiff should not be forced to bring a case arising under federal law in some foreign country.

The language of section 1404(a), limiting transfer to a district “where it might have been brought,” poses a problem, however, for cases in which venue is laid on the basis of a defendant being “found” in the district. The “found” provision can be used only when there is no other district in which the action can be brought. The only other district where it might have been brought will be another district where a defendant is found. A corporation might have enough activity in other districts to be “found” there, but rarely will a natural person be found simultaneously in more than one state. Accordingly, a special venue transfer provision should be available for federal question cases where jurisdiction is asserted on the basis of national contacts and where the initial venue is laid under the “found” provision of section 1391(b)(3). The case should be transferrable to any convenient forum, even though the defendant was not found there when the suit was commenced.

B. State Courts

1. Constitutionality.—Can Congress constitutionally empower state courts to assert personal jurisdiction in federal question cases over defendants who have minimum contacts with the United States as a whole, but not with the state itself? At first glance, the answer seems to be “no.” International Shoe and Fourteenth Amendment due process apply to state courts, and they require that the defendant have minimum contacts with the state. However, the Fourteenth Amendment poses limits only on what the states can do. A state legislature might not be able to confer upon its courts nationwide jurisdiction, even for federal question cases, but Congress is not subject to the Fourteenth Amendment. The same constitutional authority that gives Congress the power to create the federal cause of action, coupled with the Necessary and Proper Clause,129 should enable Congress to prescribe the conditions that will cause defendants to be amenable to jurisdiction for that cause of action. Considerations of significance to Fourteenth Amendment due process have no relevance in federal question cases.

One federal judge has suggested that, even without special federal legislation, the constitutional limits on the range of state court jurisdiction

in federal question cases are found in the Fifth, not the Fourteenth, Amendment. It is “[t]he nature of the claim, not the identity of the court, [that] should determine the appropriate due process test.”130 Under that view, a state court in a state that has an “any constitutional basis” long-arm statute131 can exercise nationwide jurisdiction in federal question cases already. Although that position has merit, congressional action will be required to extend the state courts’ jurisdiction in states that do not have “any constitutional basis” statutes.

Congress clearly can regulate the exercise of jurisdiction by state courts in appropriate cases. In the Parental Kidnapping Prevention Act,132 Congress enacted rules governing the exercise of jurisdiction by state courts in child custody cases. Similarly, Congress enacted a statute providing the bases for personal jurisdiction in actions brought under the Uniformed Services Former Spouses’ Protection Act,133 which it made applicable to state as well as federal courts.134 That provision has been held binding on state courts in such actions, preempting the state’s own long-arm statute.135 This federal statute’s reach is not as long as some states’ long-arm statutes, but if Congress can narrow the range of state court jurisdiction in federal question cases, it surely can enlarge it as well. Testa v. Katt136 established that states are not free to refuse jurisdiction when Congress has authorized suits in state courts on federal claims. Congress can empower state courts to entertain suits that their own state legislatures could not authorize them to entertain.137 This same principle should support the constitutionality of a congressional act empowering state courts to exercise personal jurisdiction over persons their own legislatures could not empower them to reach.138

131. E.g., CAL. CIV. PROC. CODE § 410.10 (West 1973) (“A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.”).
137. Id. at 393.
138. Professor Lilly has suggested that dicta in Mondou v. New York, N.H. & H.R.R., 223 U.S. 1, 56 (1912) (that Congress cannot “enlarge or regulate the jurisdiction of state courts”) may indicate that Congress could not compel states to exercise nationwide jurisdiction in federal question cases. Lilly, supra note 65, at 148 n.239. However, the Court in Mondon apparently was referring to forcing the state to create some new judicial machinery. Expanding the range of state court personal jurisdiction will not cause the state courts to do anything for which they are not equipped.
2. **Supplemental Personal Jurisdiction.**—If Congress extended state court jurisdiction, the question of supplemental personal jurisdiction would also have to be faced. Because state courts are courts of general jurisdiction, a state court will have subject matter jurisdiction over any claims joined with a federal question claim, whether or not they are related to the federal claim. Whether Congress can constitutionally authorize pendent personal jurisdiction over nonfederal claims by state courts poses some questions different from those involved in authorizing pendent personal jurisdiction by federal courts. In state courts, the federal venue statute will not be available to ensure fairness in forum selection and choice of law, unless Congress enacts a special venue statute for that purpose. Nevertheless, the doctrine of forum non conveniens is available in most states as protection against serious inconvenience. The Commissioners on Uniform State Laws recently approved a Uniform Transfer of Litigation Act;\(^{139}\) if it were to be widely adopted, alleviation of unfairness and inconvenience in forum selection would become easier. And in any event, the defendant can remove the case from the state court to the federal court if he is dissatisfied with the plaintiff’s forum choice. If the state claim is so closely related to the federal claim as to be part of the same constitutional case, the whole case can be removed to federal court by virtue of section 1441(b);\(^{140}\) because both the state law and the federal question claims would be within the federal court’s original jurisdiction in accordance with the supplemental jurisdiction statute. If the state claim is unrelated, the federal and state claims will be “separate and independent,” and the defendant can remove the whole case under section 1441(c).\(^{141}\)

Removal under section 1441(c) poses some constitutional problems, however. If there is at least minimal diversity of citizenship among the parties to the unrelated state law claim, removal is constitutional. If there is none, however, the exercise of jurisdiction over the separate and independent state law claims under section 1441(c) probably would be unconstitutional under existing precedents. Congress can only give the federal courts jurisdiction over “cases and controversies” of the types listed in Article III of the Constitution.\(^{142}\) In federal question cases, the constitutional “case” includes the claim that arises under federal law and also any state law claims arising from the same common nucleus of operative fact.\(^{143}\) The “case” does not include unrelated state law

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The federal court cannot constitutionally have jurisdiction over such unrelated cases unless some head of federal judicial power other than "cases arising under federal law" applies. In the absence of diversity of citizenship, then, federal jurisdiction cannot constitutionally extend to the "separate and independent" state law claim in most private lawsuits. Section 1441(c) gives the federal court discretion to remand the state law claims after removal. If the state law claim is unrelated to the federal claim and the parties are not diverse, however, the federal court would have to remand the state law claim, despite the discretionary language of section 1441(c).

If the whole case is removed to a federal court, that court can then transfer venue to a more convenient district, just as it could if the case had originally been brought in the federal court. If the state claim is unrelated to the federal question claim, however, the state claim must be remanded to the state court. If that state is an unfair or inconvenient forum, the defendant will have only such remedies as are extended by state law, unless Congress enacts some special provision for such cases. The availability of removal in such cases does not provide institutional protection against unfair or inconvenient forum selection. Unless federal law can provide some protection against unfair or seriously inconvenient forum selection, supplemental personal jurisdiction should not be available for unrelated state claims.

In the case of closely related state law claims, the availability of removal and transfer would provide sufficient protection against the selection of an inconvenient forum. This would not, however, provide any choice-of-law protection. The federal court on removal must apply the choice-of-law rules of the state in which it sits. And if the case is transferred to another federal court, the transferee court must apply the same law as the transferor court would have applied. If the plaintiff brought the case in a state that would apply its own law to the state claim, even though that choice might be inappropriate, removal would require the federal court to apply that state's law unless that choice would be unconstitutional. The constitutional limits on choice of law by state courts are not very demanding. The Supreme Court has instead used the personal jurisdiction standards as the only effective check on the choice-of-law process by states. If the states could exercise nationwide personal jurisdiction for the supplemental state law claims, there would be no effective federal protection against unfair choice of law. Accordingly,
if Congress extends to state courts the ability to exercise personal jurisdiction on the basis of national contacts, and authorizes the exercise of supplemental personal jurisdiction for closely related state law claims, some limitation on the plaintiff’s power to choose the state in which the action is brought should be included. Such a law should limit the state court’s power to exercise supplemental personal jurisdiction to states where the defendant or defendants reside or where a substantial part of the events giving rise to the suit occurred, borrowing the terms of the federal venue statute.149 Such a limitation would be as effective as the International Shoe state contacts test for personal jurisdiction in protecting against a forum choice that would produce an inappropriate choice of law, and it would be far easier to apply.

3. Other Nationwide Jurisdiction Proposals.—I am certainly not the first to suggest that Congress can constitutionally authorize state courts to exercise personal jurisdiction through nationwide service and national contacts.

The reporte
rs for the American Law Institute’s Complex Litigation Project have proposed a procedure for transferring a case pending in a state court in one state to a state court in another where the case can be consolidated and tried with others dealing with the same subject.150 If cases are thus transferred, a mechanism must be provided for the transferee court to get personal jurisdiction over all the parties to the consolidated action. Because all the parties may not have the requisite contacts with the transferee state to satisfy International Shoe, the reporters propose action by Congress authorizing state transferee courts to exert personal jurisdiction on a national contacts basis.151 Because of the impact of complex litigation on the economy, the reporters suggest that the Commerce Clause would support congressional action conferring such nationwide jurisdiction on state courts.152

The constitutionality of the exercise of personal jurisdiction by state courts for state law claims on the basis of aggregate nationwide contacts has also been considered by several commentators in connection with the exercise of jurisdiction over aliens.153 Professors Degnan and Kane have argued that the Fourteenth Amendment’s Due Process Clause “has no bearing at all on what American courts can do to foreigners. It regulates only what the courts of one American state can do to persons who are in

151. Id. § 8.
152. Id. at 341 cmt. e.
153. See, e.g., Lilly, supra note 65; Note, supra note 40, at 474-81.
another American state." They contend that aliens should be subject to jurisdiction if they have sufficient contact with the United States as a whole. "This is true regardless of whether the court addressing the question is state or federal or whether the case is premised on an alleged violation of state or federal law." The status of aliens vis-à-vis the United States is a matter of international law, not state law, and so it is due process under the Fifth Amendment, not the Fourteenth Amendment, that is relevant to the personal jurisdiction question. Thus, state courts can constitutionally exercise jurisdiction to adjudicate state causes of action over alien defendants who have minimum contacts with the United States as a whole.

Perhaps Congress should authorize both state and federal courts to exercise jurisdiction over aliens on the basis of aggregate national contacts. That would eliminate the necessity for the International Shoe state contacts inquiry in another large group of cases where that inquiry is now required. However, some protections against seriously inconvenient or unfair forum selection would have to be enacted as well, since present law does not provide the kind of institutional protections against unfairness in connection with suits against aliens as it does in federal question cases. The federal venue statute permits suits against aliens to be brought in any district. There is no automatic right of removal from state to federal court for suits against aliens like the automatic right of removal for federal question cases, although many suits against aliens will be removable under either federal question jurisdiction or alienage jurisdiction. If Congress were willing to provide such venue and removal protection, however, extension of jurisdiction on the basis of national contacts by aliens would be beneficial.

Perhaps eventually Congress will come to see that the question of the bases for personal jurisdiction is sufficiently important to interstate commerce, or specific areas of commerce, to justify eliminating the state contacts inquiry from other classes of cases as well. This suggestion, however, leads into the uncharted waters of "protective jurisdiction." I am not prepared to embark on that voyage at this time. Congress may also have power under section five of the Fourteenth Amendment to enact measures eliminating the necessity for the International Shoe inquiry in all cases. That too, however, is a question for consideration on another occasion. In the meantime, jurisdiction on the basis of national contacts in federal question cases would be constitutional and highly desirable. Let us

154. Degnan & Kane, supra note 81, at 812.
155. Id. at 817.
hope that the movement started by the American Law Institute and revived (but later abandoned) by the Advisory Committee on the Federal Rules of Civil Procedure gets a new and successful lease on life.

III. Conclusion

The present law limits the power of both state and federal courts to acquire personal jurisdiction over defendants in federal question cases to situations in which the defendant has contacts with the state in which the court sits sufficient to satisfy the Fourteenth Amendment due process requirements of International Shoe and its progeny. This limitation is wholly unnecessary, and leads to some anomalous results. If it is a due process matter at all, it is the Fifth Amendment, not the Fourteenth Amendment, that should determine the constitutionality of the exercise of personal jurisdiction in federal question cases. Congress can constitutionally empower both federal and state courts to exercise personal jurisdiction over any defendants that have minimum contacts with the United States as a whole in federal question cases. The venue statutes, the venue transfer statute, and the removal statute generally provide adequate institutional protections against oppressive and unfair forum selection to satisfy Fifth Amendment due process. Nationwide jurisdiction should also extend to state law claims arising out of the same basic core of facts as the federal claim. The statute should not, however, extend to unrelated state law claims, nor should it permit the exercise of personal jurisdiction over other parties for even related state law claims unless the other parties would be subject to personal jurisdiction in that court anyway.

Unless a special venue statute is provided for federal question cases based on the nationwide jurisdiction statute, the definition of corporate residence and the provision for aliens in the general venue statute would have to be changed. In addition, the venue transfer statute should be modified to permit transfer of a case to a convenient forum even though the forum may not have been one in which the action could have been brought initially. Finally, Congress should enact a provision limiting forum choice among state courts as protection against a forum choice that could lead to an unfair choice of law with respect to joined state law claims.