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Beyond Burger King: The Federal Interest in Personal Jurisdiction

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Beyond Burger King: The Federal Interest in Personal Jurisdiction

Cover Page Footnote

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In memory of Dean Joseph R. Crowley

BEYOND *BURGER KING*: THE FEDERAL INTEREST IN PERSONAL JURISDICTION

*DAVID S. WELKOWITZ**

INTRODUCTION

> Now, one would think that in a rational system, especially one that seeks (or should seek) clarity and definiteness, experienced lawyers could simply and with conviction unanimously answer [the client's] question: 'Can I sue the guy who sold me the [defective] tanker here in Indiana?' But alas we know, to our embarrassment, that the only honest answer the lawyer can probably give is a 'Gee, I can't say for sure.'[1]

THAT statement, by Judge Evans in *Hall's Specialties, Inc. v. Schupbach*,[2] capsulizes the frustration of courts attempting to determine whether the assertion of jurisdiction over a defendant comports with constitutional standards. Even after numerous Supreme Court decisions spanning the past several years,[3] the subject remains imponderable.

Although most case law and commentary on the subject focus on the exercise of jurisdiction by state courts, the problem is no less complex in the federal courts.[4] Unfortunately, case law provides little thoughtful

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* Associate Professor, Whittier College School of Law. J.D. New York University School of Law, 1978; A.B. Princeton University, 1975. I would like to thank my colleague David Treiman for his insightful comments on earlier drafts of this Article and for his willingness to discuss ideas as this Article progressed. I would also like to thank Ellis Prince and Richard Gruner for their comments on an earlier draft of the Article. Finally, I thank Gary Wittenberg, Whittier '87, for his research assistance.

1. Hall's Specialties, Inc. v. Schupbach, 758 F.2d 214, 216 (7th Cir. 1985).

2. *Id.*

3. *See* Asahi Metal Indus. Co. v. Superior Ct., 107 S. Ct. 1026 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984); Calder v. Jones, 465 U.S. 783 (1984); Keeton v. Hustler Magazine, 465 U.S. 770 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); *see also* Rush v. Savchuck, 444 U.S. 320 (1980) (quasi in rem jurisdiction).

4. Recently, interest in jurisdiction problems in federal courts has increased. *See, e.g.*, Abrams, *Power, Convenience, and the Elimination of Personal Jurisdiction in the Federal Courts*, 58 Ind. L.J. 1 (1982) (arguing for a federal concept of personal jurisdiction based on presence of defendant in United States); Berger, *Acquiring In Personam Jurisdiction in Federal Question Cases: Procedural Frustration Under Federal Rule of Civil Procedure 4*, 1982 Utah L. Rev. 285; Fullerton, *Constitutional Limits on Nationwide Personal Jurisdiction in the Federal Courts*, 79 Nw. U.L. Rev. 1 (1984) (arguing that the Constitution does limit the exercise of personal jurisdiction by federal courts); Green, *Federal Jurisdiction In Personam of Corporations and Due Process*, 14 Vand. L. Rev. 967 (1961) (sufficient contacts with some part of United States rather than forum state alone should result in jurisdiction over corporation); Sann, *Personal Jurisdiction in Federal Question Suits: Toward a Unified and Rational Theory for Personal Jurisdiction over Non-Domiciliary and Alien Defendants*, 16 Pac. L.J. 1 (1984) (prescribing "consistent, sensible" scheme of personal jurisdiction in federal question cases); Seidelson, *The Jurisdictional Reach of a Federal Court Hearing a Federal Cause of Action: A Path Through the Maze*, 23 Duq. L. Rev. 323 (1985) (arguing that a federal court hearing a federal cause of

guidance for a federal judge faced with a personal jurisdiction issue. This Article examines the problem of personal jurisdiction or "amenability"[5] with a focus on federal courts, and develops an analytical framework that can be used by all courts, state and federal, in resolving personal jurisdiction questions.

Part I analyzes current limitations on personal jurisdiction, concentrating on federal question and diversity cases. It discusses the inappropriateness of current analysis. Part II discusses the role of Federal Rules of Civil Procedure Rule 4 in personal jurisdiction and the constitutional limitations on its exercise. It concludes that courts interpret Rule 4 too restrictively and often use an incorrect constitutional standard to measure the assertion of personal jurisdiction in federal courts. Parts III and IV propose that the constitutional standard used must be one better integrated with other due process analyses. Moreover, this Article proposes that fifth amendment, rather than fourteenth amendment, standards should govern all federal actions. Current jurisdictional analysis fails to do justice to either the federal interests involved or to the rights of the parties. The proposal advanced in this Article addresses these problems in state and federal courts, focusing on federal courts, where the lack of a realistic standard seems most pronounced. Part V discusses how the federal courts should apply the proposed standard in different categories of cases. Although in many instances the results achieved by the proposed test will not differ from those reached using existing analyses, the proposal is intended to make the process more rational and consistent.

I. DUE PROCESS LIMITS

In 1877, the Supreme Court in *Pennoyer v. Neff*,[6] recognized that due process limits the exercise of personal jurisdiction by the courts.[7] Juris-

action may assert jurisdiction over non-resident defendant in any manner provided by rules or statute); Stephens, *The Federal Court Across the Street: Constitutional Limits on Federal Court Assertions of Personal Jurisdiction*, 18 U. Rich. L. Rev. 697 (1984) (suggesting that the fifth amendment compels consideration in federal court jurisdiction similar to those considerations the fourteenth amendment imposes upon state courts); Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 Harv. L. Rev. 470 (1981) [hereinafter Note, *Alien Corporations*] (noting the need for a theoretical basis for an acceptable federal jurisdictional standard, suggests implementation of the aggregate contacts test).

5. "Amenability" refers to the authority of a court to force a defendant to come into the forum and to render a valid judgment against a party, assuming proper notice is given. It is distinct from service, which serves as the method of giving notice. Technically, proper jurisdiction requires both amenability and notice, as well as process that accords with the local statutes. Although the Constitution does not require compliance with local statutes, failure to do so will be fatal to jurisdiction nonetheless. *See* Abrams, *supra* note 4, at 3-4.

6. 95 U.S. 714 (1877), *overruled*, Shaffer v. Heitner, 433 U.S. 186, 212 (1977).

7. *See id.* at 733. In *Pennoyer*, the Court simply used a "sovereign power" theory of jurisdiction. According to this analysis, the sovereign has authority over anything within its borders and nothing outside them. *See id.* at 722-23; *see also*, Gottlieb, *In Search of the Link Between Due Process and Jurisdiction*, 60 Wash. U.L.Q. 1291, 1291-1300 (1983);

dictional analysis, however, seldom is discussed in relation to other due process analyses,[8] but rather is discussed as a unique subset of due process.[9] On its face, this seems curious.[10]

Jurisdictional analysis has evolved since *Pennoyer*. The "modern" approach to jurisdiction and due process dates from *International Shoe Co. v. Washington*.[11] There, the Court further defined due process to require that a defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[12] But as Justice Black, concurring in the result, pointed out, such a standard is highly subjective and difficult to apply.[13] As a result, courts have struggled with the task of determining what "minimum contacts" and "fairness" mean in the jurisdictional context.

The language of *International Shoe* indicates that the sufficiency of the "contacts" is measured against some concept of "fairness."[14] Clearly, "fairness" must have some context; contacts that are sufficiently fair in one setting will not necessarily be fair in another setting.[15]

In its subsequent decision in *McGee v. International Life Insurance Co.*,[16] the Supreme Court indicated that, in addition to the sufficiency of the defendant's contacts with the forum, the state's interests in the conflict would be relevant to the court's determination of finding the defendant amenable to jurisdiction.[17] The state's interest in *McGee* consisted of providing a convenient forum for its citizens injured by out-of-state busi-

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Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 Nw. U.L. Rev. 1112 (1981).

8. *See infra* notes 145-158 and accompanying text for a discussion of traditional due process analyses.

9. *See, e.g.*, 2 R. Rotunda, J. Nowak, J. Young, Treatise on Constitutional Law Substance and Procedure (3d ed. 1986). This three volume standard text on constitutional law by Professors Nowak, Rotunda, and Young does not discuss personal jurisdiction in its due process sections. The treatise relegates the entire subject to a single, albeit lengthy, footnote. *See id.* § 17.8, at 252 n.10. The authors state that a discussion of personal jurisdiction "is beyond the scope of this treatise." *Id.*

10. This recalls Professor Ely's remark that "to one accustomed to the savagery of constitutional criticism, writers on procedure seem strangely, if refreshingly, accepting." Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 698 (1974).

11. 326 U.S. 310 (1945).

12. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

13. *See id.* at 325 (Black, J., concurring). Justice Black noted that "there is a strong emotional appeal in the words 'fair play,' 'justice' and 'reasonableness' . . . [b]ut they were not chosen by those who wrote the original Constitution." *Id.* at 310.

14. *Id.* at 320.

15. For example, suppose that an insurance company sold a policy to the plaintiff's employer in Connecticut. The plaintiff, a New York resident, fairly could not sue the company in California, although the company had sold one insurance policy in California to a third party. *Cf.* McGee v. International Life Ins. Co., 355 U.S. 220 (1957). According to *McGee*, the person to whom the California policy was sold, however, could sue the insurance company in California. *See id.* at 223.

16. 355 U.S. at 220.

17. *See id.* at 222-23.

nesses.[18] *McGee* also implicitly recognized that the overall reasonableness of the situation may allow jurisdiction.[19]

International Shoe and *McGee* seem to require the use of a test that balances governmental interests against private rights when determining the question of fairness.[20] The Court's more recent decisions concerning personal jurisdiction, however, suggest that a traditional balancing test is not being used. These decisions, most notably *World-Wide Volkswagen Corp. v. Woodson*[21] and *Burger King Corp. v. Rudzewicz*,[22] have adopted the formula stated in *Hanson v. Denckla*,[23]—that the defendant must have "purposely availed" itself of the benefits and protections of the forum's laws before due process will be satisfied.[24]

By adopting purposeful availment as the sine qua non of amenability, the Court has turned a balance of factors analysis into a two-step process that is highly protective of defendants. First, courts must determine whether the defendant has sufficient "contacts" that have resulted in its purposeful availment of the benefits and protections of doing business in the forum that the defendant may " 'reasonably anticipate' out-of-state litigation."[25] Only then does the court examine other interests to determine the fairness of asserting jurisdiction under the circumstances.

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18. *See id.* at 223.

19. *See id.* at 224.

20. *See* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 510 (2d Cir. 1960) (describing *International Shoe* as "applying substantially a balancing of interests").

21. 444 U.S. 286 (1980).

22. 471 U.S. 462 (1985).

23. 357 U.S. 235 (1958).

24. *Id.* at 253. *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474-76 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

25. Burger King Corp. v. Rudzewicz, 471 U.S. at 474-75. This test "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475 (citations omitted).

The Court's recent opinion in Asahi Metal Industrial Co. v. Superior Court, 107 S. Ct. 1026 (1987), however, adds some confusion to the first step of the analysis. Justice O'Connor, writing for a plurality, focused on whether the defendant " '*himself*' ", through some purposeful conduct, created a substantial connection with the forum, *id.* at 1031 (emphasis in original) (quoting *Burger King*, 471 U.S. at 475), which is akin to the focus of the test articulated in *World-Wide Volkswagen*, 444 U.S. at 297-98 (unilateral activity of consumer in bringing defendant's product into the forum was not purposeful availment by the defendant of the benefits and protections of the forum), and *Hanson v. Denckla*, 357 U.S. at 253 (unilateral activity of plaintiff does not satisfy the requirement of purposeful availment by the defendant). Although Justice Brennan, writing for the majority in *Burger King* and dissenting in *Asahi Metal*, reiterated the "purposeful availment" standard, *see Burger King*, 471 U.S. at 475; *Asahi Metal*, 107 S. Ct. at 1035 (Brennan, J., dissenting), in *Asahi Metal* he focused more on defendant's purposeful contacts with the forum, not necessarily requiring purposeful conduct by the defendant himself to create such contacts. *See Asahi Metal*, 107 S. Ct. at 1035 (Brennan, J., dissenting) (as long as defendant is aware that his product is being marketed in the forum, he will benefit—no " '[a]dditional conduct' " or direct business activity in the forum is required (quoting majority opinion, 107 S. Ct. at 1035)).

Step one of the analysis ultimately requires minimum contacts, however, regardless of whether the standard for minimum contacts is purposeful contacts, or purposeful conduct by the defendant creating such contacts.

Under this test, no matter how strong the other interests in litigating in a particular forum may be, if the defendant has not purposely availed itself of the forum state's laws, it normally cannot be subjected to the jurisdiction of that forum's courts.[26]

The Court's opinion in *Burger King*; llustrates the emphasis placed on contacts and deemphasis placed on other interests. The defendants in *Burger King*, residents of Michigan,[27] entered into an agreement with Burger King, a Florida corporation, to open and operate a Michigan-based franchise.[28] The defendants fell behind in their franchise payments.[29] Burger King sued in federal district court in Florida for breach of contract and trademark infringement under the Trademark Act of 1946, popularly known as the Lanham Act.[30] The defendants unsuccessfully challenged the Florida court's exercise of personal jurisdiction,[31] and Burger King ultimately prevailed on the merits of both claims.[32]

On appeal, defendants challenged only the exercise of jurisdiction over, and the judgment on the merits of, the state contract claim; they did not appeal jurisdiction or substance regarding the federal trademark claim.[33] The Eleventh Circuit reversed, upholding defendants' claim of lack of personal jurisdiction. An appeal to the Supreme Court followed, and the Court reversed the Eleventh Circuit.[34]

Justice Brennan's opinion for the Supreme Court recapitulates prior doctrine in the area of jurisdiction, specifically the "minimum contacts"

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26. *See* Lilly, *Jurisdiction Over Domestic and Alien Defendants*, 69 Va. L. Rev. 85, 106-07 (1983) (discussing *World-Wide Volkswagen*). Professor Clermont has written that the Court's analysis breaks down into "power" and "reasonableness" components. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 Cornell L. Rev. 411, 413 (1981). Only if power exists does one go on to measure reasonableness. *Id.* at 423-25. *Pennoyer v. Neff* almost exclusively used a "power" rationale for jurisdiction, with little regard for the "reasonableness" factor. 95 U.S. 714 (1877). Thus, even in an enlightened era of due process analysis, the trappings of *Pennoyer* appear not to be discarded; *Pennoyer* simply has been embellished with extra precautions of fairness.

The *Burger King Corp. v. Rudzewicz* decision may have affected this analysis, however. 471 U.S. 461 (1985). In *Burger King*, Justice Brennan wrote that "[reasonableness] considerations sometimes serve to establish the reasonableness of jurisdiction upon a *lesser* showing of minimum contacts than would otherwise be required." *Id.* at 477 (emphasis added).

27. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 466 (1985).

28. *Id.* at 464-67.

29. *Id.* at 468.

30. 15 U.S.C. §§ 1051-1127 (1982 & Supp. IV 1986).

31. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469 (1985); Burger King Corp. v. MacShara, 724 F.2d 1505, 1508 (11th Cir. 1984), *rev'd*, 471 U.S. 462 (1985).

32. Burger King Corp. v. Rudzewicz, 471 U.S. at 469; Burger King Corp. v. MacShara, 724 F.2d at 1508.

33. *See* Burger King Corp v. MacShara, 724 F.2d at 1508; *see also Burger King Corp*, 471 U.S. at 469-70 n.11. The Eleventh Circuit mentioned in passing that the suit included a trademark claim, but did not comment further on the subject. *See* 724 F.2d at 1508.

34. 471 U.S. at 487.

analysis initiated by *International Shoe*[35] and further developed in *Shaffer v. Heitner*[36] and *World-Wide Volkswagen*.[37] Ultimately, in *Burger King* the Court determined that the defendants did have "minimum contacts" with Florida and that the exercise of jurisdiction over them did not violate due process.[38]

Despite its apparently orthodox approach, the opinion seems to extend prior doctrine by pointing to a choice of law provision in the franchise agreement as an element of "minimum contacts."[39] Previously, the Court had held choice of law analysis irrelevant.[40] The decision also discusses the reasonableness and fairness to defendants of the chosen forum.[41] Prior to *Burger King*, the Court barely had acknowledged this notion.[42]

The most intriguing aspects of the case, however, are those that the

35. 326 U.S. 310 (1945). The author assumes that the reader is familiar with the major cases and will discuss them only as necessary to support the arguments presented in this Article. For an extended discussion of the case law, see Fullerton, *supra* note 4; Lilly, *supra* note 26. For a discussion of more recent cases, see Weinberg, *The Helicopter Case and the Jurisprudence of Jurisdiction*, 58 S. Cal. L. Rev. 913 (1985).

36. 433 U.S. 186 (1977).

37. 444 U.S. 286 (1980).

38. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1984).

39. *See id.* at 479.

40. *See id.* at 481-82. The Court in *Burger King* distinguished "choice-of-law analysis—which focuses on all elements of a transaction, and not simply on the defendant's conduct—," *id.* at 481, from a choice of law provision. Prior to *Burger King*, the Court shunted aside suggestions that a state's interest in applying its own law to a conflict should be considered in the minimum contacts analysis. *See, e.g.*, Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977) (although Delaware has an interest in outcome, choice of law does not demonstrate that forum is fair); Hanson v. Denckla, 357 U.S. 235, 254 (1958) (although Florida has substantial interest in the suit, choice of law factors are not determinative of personal jurisdiction over action).

Furthermore, the *Burger King* Court's notion that the "contemplated future consequences" of a contract can serve as significant contacts, 471 U.S. at 479, represents a new concept that may have interesting ramifications for personal jurisdiction. Choice of law clauses may undergo new scrutiny if they are to become virtual forum-selection clauses. A business may be willing to have a particular state's law apply but be unwilling to litigate there.

41. Burger King Corp. v. Rudzewicz, 471 U.S. at 476-78 (after minimum contacts are established, "fair play and substantial justice" are considered).

42. In World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), the Court reaffirmed that due process analysis involved "minimum contacts" and the reasonableness of subjecting the defendant to the authority of the particular forum. *Id.* at 291-94. Justice Brennan's dissent criticized the majority for deemphasizing "fairness" in favor of "contacts." *See id.* at 300 (Brennan, J., dissenting); *see also* Clermont, *supra* note 26, at 430-58; *supra* notes 21-26 and accompanying text. By contrast, the *Burger King* Court discussed the reasonableness and fairness to the defendants. *See* 471 U.S. at 478-82. Of course, in *Burger King*, unlike in *World-Wide Volkswagen*, the Court had already determined that sufficient contacts existed. *See id.* at 478-80. The *Burger King* Court also indicated that, in rare cases, reasonableness of jurisdiction could be established with a lesser showing of contacts than is usually required. *See id.* at 477 (citing Keeton v. Hustler Magazine, 465 U.S. 770, 780 (1984); Calder v. Jones, 465 U.S. 783, 788-89 (1984); McGee v. International Life Ins. Co., 355 U.S. 220, 223-24 (1957)). Much the same attitude existed in the Court's opinion in Keeton v. Hustler Magazine, 465 U.S. 770 (1984), a diversity case rendered during the previous term. *See id.* at 780-81.

Court did not discuss. First, the Court found Florida's long-arm statute determinative of the jurisdiction of the federal court without discussing any federal statute or rule to support this finding.[43] Much of the opinion seems to treat the case as if it were brought in a state court. The Court mentioned, for example, that defendants entered "special appearances" without commenting on the fact that no such procedure exists in federal court.[44]

Second, and more troubling, is the treatment of the federal claim. Because the defendants had chosen not to contest personal jurisdiction or appeal the judgment against them on the trademark claim, the Court barely mentioned that Burger King's complaint also included a trademark claim[45] that invoked federal question jurisdiction. Interestingly, the Court indicated in a footnote that Florida law also applied to determine jurisdiction under the federal question claim.[46] The Court did not discuss why it would use state long-arm statutes and fourteenth amendment standards aimed at state governmental conduct to analyze jurisdiction for a federal question claim. Finally, the defendants' failure to contest jurisdiction for the trademark claim raises the issue of whether a defendant can consent to jurisdiction regarding a federal claim and contest jurisdiction regarding a related state law diversity claim in the same case.

Similar problems have arisen in other contexts.[47] The Court's failure to delve into the federal aspects of the *Burger King* case illustrates the failure of federal courts to address important federal interests when faced with a personal jurisdiction question, including the rights of the litigants to have the federal claim litigated in an appropriate forum and any interest expressed in the federal statute that gives rise to the claim for having that claim litigated in a particular forum. Thus, there is a significant gap in this area of the law.

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43. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 468-69 (1985). For example, the Court does not cite Federal Rules of Civil Procedure Rule 4(e) which directs federal courts to look to state statutes. *See* Fed. R. Civ. P. 4(e); *see also infra* notes 48-55 and accompanying text.

44. In fairness to the Court, the record shows that defendants did file papers denominated "Special Appearance" in the district court. *See* Record on Appeal in the Circuit Court at 107; *see also* Burger King Corp. v. MacShara, 724 F.2d 1505, 1508 (11th Cir. 1984) (defendants entered special appearance to contest personal jurisdiction), *rev'd sub nom.* Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The proper procedure required filing a pre-answer motion or pleading to dismiss under Federal Rules of Civil Procedure Rule 12(b)(2). Defendants eventually filed a motion for summary judgment and dismissal, Record at A43, which was denied. Record at A21.

45. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 468-69 (1985).

46. *Id.* at 470-71 n.12.

47. For a discussion of the problem of whether jurisdiction for one purpose gives jurisdiction for another purpose, see *infra* notes 243-47 and accompanying text. The problem of the appropriate constitutional standard for jurisdiction in federal question cases is discussed *infra* Part II.A.

II. RULE 4 AND FEDERAL JURISDICTION

The appropriate due process standard emanates from the statutory and constitutional authority under which a federal court asserts personal jurisdiction.[48] There is no general federal jurisdiction statute comparable to general state long-arm statutes. Amenability and service of process issues in federal court generally fall under the auspices of Rule 4 of the Federal Rules of Civil Procedure.[49]

Most of Rule 4 concerns proper methods of serving process on defendants to provide notice of the action (manner of exercising jurisdiction), rather than when the defendant may be subject to jurisdiction (amenability to the exercise of jurisdiction).[50] The methods of effecting service are

48. "Arguably, federal courts do not require enabling legislation to assume adjudicatory jurisdiction under federal standards, even in diversity litigation." von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1123 n.6 (1966) (noting Second Circuit so held in Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960), but subsequently reversed itself in Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963)).

49. *See* Fed. R. Civ. P. 4.

50. *See id.* Amenability problems in federal court arise primarily in diversity cases because the general federal venue statute limits claims not based solely on diversity to the districts where all defendants reside or where the claim arose, except where another federal statute provides otherwise. 28 U.S.C. § 1391(a) (1982). *See* Foster, *Long Arm Jurisdiction in Federal Courts*, 1969 Wis. L. Rev. 9, 28-29 (1969).

Statutes with their own venue provisions most often allow venue where the defendant lives, such as the antitrust venue provision, 15 U.S.C. § 22 (1982), or where the claim arose, or both. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77v (1982); Futures Trading Act, 7 U.S.C. § 13a-2(4) (1982); Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1719 (1982); Employee Retirement Income Security Act, 29 U.S.C. § 1132(e)(2) (1982); Civil Rights Act, 42 U.S.C. § 2000e-5(f)(3) (1982). The Federal Interpleader Act, which provides for both nationwide service of process and venue where any claimant lives, constitutes a notable exception. *See* 28 U.S.C. § 2361 (1982) (process); 28 U.S.C. § 1397 (1982) (venue). For a further discussion of statutes with nationwide service of process, see *infra* notes 68-70 and accompanying text.

If the claim arose in the forum district or an act constituting a violation occurred there, in most cases the defendant will have sufficient contacts with that district for specific jurisdiction to exist under the *International Shoe* standard. *See, e.g.*, Violet v. Picillo, 613 F. Supp. 1563, 1573-79 (D.R.I. 1985). One would also expect that an individual defendant would be subject to jurisdiction where he or she resides. For venue purposes, corporations may be sued wherever they do business. *See* 28 U.S.C. § 1391(c) (1982). Although one would also expect them to be subject to jurisdiction in most such districts, it is certainly possible, in theory, that "doing business" for venue purposes would not be sufficient for jurisdictional purposes. The cases, however, generally find either the standards to be the same or that the venue standard is a higher one. *See* cases cited *infra* note 67. This probably occurs because so many state statutes are construed to go to the limits of due process; if jurisdiction is constitutionally unfair, then a court would be unlikely to find that venue exists there, or even to reach the question. And even where the state statute falls short of due process limits, it is unlikely that a court would determine the venue question before deciding the jurisdictional issue.

In most federal question cases, a defendant probably would forego a jurisdictional objection, believing it to be pointless. Nevertheless, amenability problems have arisen in a number of federal question cases. *See, e.g.*, Bandai America, Inc. v. Bally Midway Mfg., 775 F.2d 70, 75 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1265 (1986) (in copyright and antitrust action, court held that defendant's relation to forum state is important to personal jurisdiction); Catrone v. Ogden Suffolk Downs, Inc., 647 F. Supp. 850, 855-56 (D.

found primarily in Rule 4(c)(2)(C)[51] and 4(d).[52] Rule 4(f) limits the territorial reach of process to "the state in which the district court is held."[53] It does provide for service outside the state, but only "when authorized by a statute of the United States or by these rules."[54] Rule 4(e) permits service upon a party not an inhabitant of or found within the state "under the circumstances and in the manner prescribed" by a federal statute or a statute of the state in which the district court sits.[55]

Some federal statutes contain their own nationwide service of process sections.[56] If the federal statute providing the right of action does not provide for nationwide service, the parties of the federal action are limited in their ability to serve process by the "circumstances" set forth in the state statute or some other standard of amenability.[57] This raises the

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Mass. 1986) (discussing amenability problems under both the Sherman Antitrust Act and the federal Civil Rights Act); Hughes v. Lister Diesels, Inc., 642 F. Supp. 233 (E.D. La. 1986) (discussing amenability under the Outer Contintental Shelf Lands Act). Moreover, variations on the *Burger King* situation involving a defendant who clearly is subject to jurisdiction regarding one claim but challenges it as to another are not infrequent. *See infra* notes 234-53 and accompanying text.

51. Fed. R. Civ. P. 4(c)(2)(C).

Rule 4(c)(2)(C) provides that a summons and complaint may be served pursuant to the law of the state in which the district court sits, or by mail. *See id.*

52. Fed. R. Civ. P. 4(d).

Rule 4(d) describes to whom, where, and by what manner service can be effected upon different classes of defendants. *See id.*

53. Fed. R. Civ. P. 4(f).

54. *Id.*

55. Fed. R. Civ. P. 4(e). Arguably, the Rule speaks only to methods of service and not to standards of amenability to jurisdiction. However, the language of the rule indicates otherwise. Rule 4(c)(2)(C)(i) allows a federal district court to use the methods of service of the state in which it sits. Fed. R. Civ. P. 4(c)(2)(C)(i). Yet Rule 4(e) also incorporates state statutes for service of non-resident defendants. Fed. R. Civ. P. 4(e). Logically, Rule 4(e) is intended to invoke the state's amenability standards, particularly in view of its language that service may be made "under the circumstances and in the manner" that the state statute provides. *See* 4 C. Wright & A. Miller, Federal Practice and Procedure, § 1075, at 494-96 (1987); *see also* Fed. R. Civ. P. 4(e). In addition, there is no reason to assume that Rule 4(c)(2)(C), or its predecessor Rule 4(d)(7), or Rule 4(d) were intended to give additional power to the courts to make up their own federal statutory amenability standards. *See* Fed. R. Civ. P. 4(c)(2)(C), 4(d); Fed. R. Civ. P. 4(d)(7), *repealed by* Pub. L. No. 97-462 § 2(3)(B), 96 Stat. 2528 (1983). Indeed, Rules 4(c) and 4(d) do not say anything about amenability. Fed. R. Civ. P. 4(c), 4(d). Strictly speaking, this may not limit the amenability reach of a district court. In a practical sense, however, arguing about whether that limitation goes to "amenability" or "service" is pointless if one is not empowered to serve process. In either case, the person over whom jurisdiction is sought properly cannot be made a party to the action. Wright and Miller note that, although Rule 4(d)(3) arguably permits a separate amenability standard, most courts have declined to read that into the rule. *See* 4 C. Wright & A. Miller, *supra*, § 1075, at 487-88.

56. *See, e.g.*, Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1982); Federal Interpleader Act, 28 U.S.C. § 2361 (1982); Employee Retirement Income Security Act, 29 U.S.C. § 1132(e) (1982). Rule 4(e) does not conflict with these statutes because it allows service on out-of-state inhabitants "under the circumstances . . . prescribed" by a federal statute. Fed. R. Civ. P. 4(e).

57. *See* Fed. R. Civ. P. 4(e). If the federal statute sets forth only the circumstances under which service can be made, the plaintiff may use any method of service provided in

following problems in federal court cases: (1) If the case were brought in state court, state long-arm statutes would limit the "circumstances" of permissible service. Does Rule 4(e) require a federal court to adopt fourteenth amendment limitations placed by federal law on state action, or should a federal court use a standard developed under the fifth amendment?[58] (2) In a case involving a federal statute that explicitly provides for service, are the constitutional standards different from those used in other due process cases?[59] (3) If a fifth amendment standard applies to determine the constitutionality of extraterritorial service, is the standard used different from the standard under the fourteenth amendment?[60]

Unfortunately, the evolution of Rule 4(e) provides only slight illumination. Prior to its amendment in 1963, Rule 4 only allowed process from a district court to run to the state line.[61] Once long-arm statutes became common in the states, limited federal court process, particularly in diversity cases, became anomalous.[62] Effective July 1, 1963, Congress amended Rule 4 to allow the use of state long-arm statutes to reach out-of-state defendants.[63] The amendment was designed to allow federal courts to exercise personal jurisdiction in diversity cases in a manner similar to the courts of the state in which they sit.[64] The courts and Congress gave little thought to the Rule's effect on federal question cases because, at that time, venue in such cases was proper only in the district where all defendants resided.[65] When, in 1966, venue was expanded to include the district where the claim arose,[66] potential long-arm problems

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Rule 4. *See* International Controls Corp. v. Vesco, 593 F.2d 166, 175-76 (2d Cir. 1979), *cert. denied*, 442 U.S. 941 (1979); Thompson v. Battle, 54 F.R.D. 222, 225 (N.D. Ill. 1971).

58. *See infra* notes 68-120 and accompanying text.

59. *See infra* notes 145-58 and accompanying text.

60. *See infra* note 171.

61. *See* Fed. R. Civ. P. 4(f), 31 F.R.D. 593, 626 (1963 amendments).

62. *See generally* 4 C. Wright & A. Miller, Federal Practice and Procedure, § 1061, at 217 (1987) (1963 Rule 4 amendments were "a recognition of the important changes that had taken place since 1938 in state practices regarding jurisdiction and service of process."); Vestal, *Expanding the Jurisdictional Reach of the Federal Courts: The 1963 Changes in Federal Rule 4*, 38 N.Y.U. L. Rev. 1053, 1054-56 (1963) (federal court jurisdiction reaches as far as the comparable state court).

63. Fed. R. Civ. P. 4(f). *See generally* Kaplan, *Amendments of the Federal Rules of Civil Procedure, 1961-1963 (I)*, 77 Harv. L. Rev. 601, 619-22 (1964) (discussing problems that arose prior to the amendment and concluding that amendment of Rule 4 had put methods of securing personal jurisdiction over non-residents furnished by state law on a "clearer footing" by amending Rule 4).

64. Kaplan, *supra* note 63 at 620-21; *see* Fed. R. Civ. P. 4, 374 U.S. 869 (1963) (statement by Justice Black and Justice Douglas dissenting from promulgation of 1963 amendments to Rule 4 for fear that diversity actions would increase).

65. The advisory committee notes on the 1963 amendment to Rule 4(e) state only that "[t]he necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service." Fed. R. Civ. P. 4(e) advisory committee notes; *accord* Fed. R. Civ. P. 4, 374 U.S. 869 (1963) (Black & Douglas, JJ., dissenting from promulgation of 1963 amendments to Rule 4).

66. Pub. L. No. 89-714, §§ 1, 2, 80 Stat. 1111 (codified as 28 U.S.C. § 1391 (1982)).

for federal question cases resulted.[67]

A. *Rule 4(e) and Federal Question Cases: Fifth or Fourteenth Amendment?*

Several federal statutes contain provisions providing for nationwide service of process.[68] In applying federal statutes that provide for nationwide service of process, courts properly find that the fifth amendment restrains their jurisdictional authority.[69] In determining whether they have the authority to exercise personal jurisdiction, courts test the sufficiency of defendant's aggregate contacts with the United States.[70]

If a federal statute does not provide for nationwide service of process, then in interpreting Rule 4(e), most federal courts, without any clear support from legislative history, have decided that Rule 4(e)'s authorization to use state long-arm statutes extends to federal question cases.[71] These courts have held that in such a case Rule 4 requires that state jurisdic-

67. The concept of residence for venue purposes is broader than the "minimum contacts" necessary for personal jurisdiction. If jurisdiction were expanded to encompass the venue concept of residence, certain defendants, particularly corporations, would have problems. In practice, though, that appears not to have occurred. Many courts view the standard for venue to be greater than for jurisdiction. *See, e.g.*, Conaway Ent. v. Dyna Indus., 547 F. Supp. 577, 578 (W.D. Pa. 1982) (to be deemed as doing business in a district for venue purposes, activity must be more than the minimum required to meet a due process objection to personal jurisdiction); Lubrizol Corp. v. Neville Chem. Co., 463 F. Supp. 33, 36-37 (N.D. Ohio 1978) (requirement that corporation be doing business requires more than that defendant be amenable to service of process); Philadelphia Housing Auth. v. American Radiator & Std. Sanitary Corp., 291 F. Supp. 252, 257 (E.D. Pa. 1968) ("[M]ore activity is needed to subject a defendant corporation to venue in a jurisdiction than would be needed to subject it to service of process there"). Other courts, however, have determined that the standards for venue and jurisdiction are the same. *See, e.g.*, Galonis v. Nat'l Broadcasting Co., 498 F. Supp. 789, 791 (D.N.H. 1980); Westphal v. Stone Mfg. Co., 305 F. Supp. 1187, 1191 (D.R.I. 1969); Champion Spark Plug Co. v. Karchmar, 180 F. Supp. 727, 731 (S.D.N.Y. 1960).

68. *See, e.g.*, Securities Act of 1933, 15 U.S.C. § 77v (1982); Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1982); Employee Retirement Income Security Act, 29 U.S.C. § 1132(e) (1982). In addition, Bankruptcy Rule 7004(d) provides that, in a bankruptcy action, "[t]he summons and complaint and all other process except a subpoena may be served anywhere in the United States." 11 U.S.C. Rule 7004(d) (Supp. III 1985).

69. *See, e.g.*, FTC v. Jim Walter Corp., 651 F.2d 251, 256-57 (5th Cir. Unit A July 1981) (jurisdiction was proper since a Florida corporation necessarily had sufficient minimum contacts with the United States to satisfy due process requirements); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (jurisdiction was proper after application of fifth amendment due process standards to a claim under the federal securities laws).

70. *See* FTC v. Jim Walter Corp., 651 F.2d at 256-57; Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979); *see also* Mariash v. Morrill, 496 F.2d at 1143. *But see* Sun First Nat'l Bank of Orlando v. Miller, 77 F.R.D. 430, 433-36 (S.D.N.Y. 1978) (ascertaining authority to exercise jurisdiction based on defendant's contacts with the *state* under the Securities Exchange Act of 1934).

71. The Supreme Court seems to have endorsed this view in its recent decision in Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987). Also see the cases cited in 4 C. Wright & A. Miller, Federal Practice and Procedure, § 1075, at 496-98 (1987). The lack of legislative guidance is illustrated by Wright & Miller's reference to the "*apparent* intent of the draftsmen of Rule 4(e) to use state provisions for service" in federal question cases. 4 C. Wright & A. Miller, *supra*, § 1075, at 496 (emphasis added). Indeed,

tional standards apply, even though the substantive right "arises under" federal law.[72] Therefore, the majority of courts have used the "minimum contacts" standard set out in *International Shoe*[73] and its progeny[74] to determine whether the court had jurisdiction over the defendant.

For example, in *Max Daetwyler Corp. v. R. Meyer*,[75] the plaintiff brought suit against a foreign defendant in federal court on a patent infringement claim. Because the patent statutes[76] do not contain a long-arm provision, the court obtained jurisdiction using the Pennsylvania long-arm statute under Rule 4(e).[77] In reviewing the constitutionality of jurisdiction, the Third Circuit rejected a fifth amendment standard based on the defendant's aggregate contacts with the United States in favor of the *International Shoe* fourteenth amendment standard of "minimum contacts" with the state of Pennsylvania.[78] The court held that the Rule 4 provision allowing service of process "under the circumstances" of the state statute incorporated the state's amenability standards.[79] The court recognized "that use of a state standard may produce anomalous results when applied to the litigation of a federal claim."[80] Nevertheless, it felt bound by the language of the Rule and the apparent congressional intent to use fourteenth amendment standards.[81]

Similarly, in *Violet v. Picillo*,[82] several defendants were sued for violating the Comprehensive Environmental Response, Compensation and Li-

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they note that in general "it is unclear whether state or federal law governs amenability" under Rule 4(e). *Id.* at 494.

72. Point Landing, Inc. v. Omni Capital Int'l, 795 F.2d 415, 426-27 (5th Cir. 1986) (en banc) (per curiam), *aff'd sub nom.* Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987); Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 297 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985); Violet v. Picillo, 613 F. Supp. 1563, 1574 (D.R.I. 1985); Colon v. Gulf Trading Co., 609 F. Supp. 1469, 1475-77 (D.P.R. 1985).

73. The test as set forth in *International Shoe* is as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if [the defendant] be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (citations omitted).

74. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, 474, 476 (1985); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984); Calder v. Jones, 465 U.S. 783, 788 (1984); Keeton v. Hustler Magazine, 465 U.S. 770, 780-81 (1984); Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 (1982); Rush v. Savchuck, 444 U.S. 320, 324 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980); Hanson v. Denckla, 357 U.S. 235, 251 (1958); McGee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

75. 762 F.2d 290 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

76. 35 U.S.C. §§ 272, 281, 283-94 (1982); *id.* at §§ 271, 282 (1982 & Supp. III 1985).

77. *See* 762 F.2d at 290, 300.

78. *Id.* at 293-97. The court already had determined that the statutory requirements had been met because Pennsylvania's statute goes to the limits of due process. *Id.* at 293.

79. *Id.* at 295.

80. *Id.* at 296.

81. *Id.*

82. 613 F. Supp. 1563 (D.R.I. 1985).

ability Act (CERCLA),[83] a federal environmental statute. After determining that CERCLA did not provide for nationwide service of process,[84] the court decided the jurisdictional questions based on fourteenth amendment standards.[85] Numerous other decisions are in accord.[86]

In *Point Landing, Inc. v. Omni Capital International*,[87] the Court of Appeals for the Fifth Circuit, sitting en banc, resolved a split in its own circuit over whether the fifth or fourteenth amendment standard of amenability applied to a federal question case.[88] It rejected a standard based on the defendant's "aggregate contacts" with the United States by finding that the language of Rule 4(e) mandated the use of state law.[89]

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83. 42 U.S.C. §§ 9601-9657 (1982).

84. 613 F. Supp. at 1569. *But see* United States v. Bliss, 108 F.R.D. 127, 135 (E.D. Mo. 1985) (court found that CERCLA implied nationwide service of process). A late 1986 amendment to the statute added a provision allowing nationwide service of process. Pub. L. No. 99-499, 100 Stat. 1647 (1986) (codified as amended at 42 U.S.C.A. § 9613(e) (Supp. 1987)). 42 U.S.C. § 9613(e) provides, in pertinent part, that "[i]n any action by the United States under this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for the service of process."

85. 613 F. Supp. 1563, 1574-76 (D.R.I. 1985).

86. *See, e.g.*, DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1269-70 (5th Cir. 1983) (because Longshoreman's Act did not provide for nationwide service of process under Rule 4(e), fourteenth amendment standards applied to determine personal jurisdiction); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 286-90 (3d Cir. 1981) (because admiralty claim arose under a statute which did not authorize nationwide service of process, Rule 4(e) required that fourteenth amendment standards apply), *cert. denied*, 454 U.S. 1085 (1981).

87. 795 F.2d 415 (5th Cir. 1986) (en banc) (per curiam), *aff'd sub nom.* Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987).

88. *Id.* at 424-27. The court held that the nationwide service of process provisions found in the Commodities Futures Trading Commission Act of 1974, 7 U.S.C. §§ 13a-1, -2, 18(d) (1982), did not apply to the provisions of the Commodity Exchange Act providing for private actions, 7 U.S.C. § 25 (1982), under which plaintiff sued. *See* 795 F.2d at 423. Thus the court analyzed whether jurisdiction was proper under Rule 4. *Id.* at 424. The court noted that the Fifth Circuit had split over what standard of amenability to apply, *id.* at 419, and discussed the following cases, *id.* at 424-27.

In Lapeyrouse v. Texaco, Inc., 693 F.2d 581 (5th Cir. 1982), *overruled*, *Point Landing*, 795 F.2d at 427, and Terry v. Raymond Int'l, Inc., 658 F.2d 398 (5th Cir. Unit A Oct. 1981), *cert. denied*, 102 S. Ct. 1975 (1982), *overruled*, *Point Landing*, 795 F.2d at 427, Fifth Circuit panels held that fifth amendment standards of amenability, rather than limitations of state long-arm statutes, applied to nondiversity cases. *See Lapeyrouse*, 693 F.2d at 585; *Terry*, 658 F.2d at 401-02. Nevertheless, when determining the constitutionality of asserting jurisdiction in both cases, the courts examined defendant's contacts with the state in which the district court sat. *See Lapeyrouse*, 693 F.2d at 586; *Terry*, 658 F.2d at 403. Yet in Burstein v. State Bar of California, 693 F.2d 511 (5th Cir. 1982), decided three days before *Lapeyrouse*, another Fifth Circuit panel held that Rule 4(e) requires application of the state's standard of amenability. *Id.* at 514-15.

89. Point Landing, Inc. v. Omni Capital, 795 F.2d 415, 426-27 (5th Cir. 1986) (en banc) (per curiam), *aff'd sub nom.* Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987). The court applied the state long-arm statute to limit jurisdiction even though it recognized the anomaly of doing so when adjudicating a uniform national law. *Id.* at 426-27. Although the Supreme Court affirmed the judgment of the Fifth Circuit, it did so on narrow grounds. The Court held that, in the absence of a nationwide service provision

Reading Rule 4(e) as requiring a fourteenth amendment standard has not achieved unanimous acceptance.[90] Even in *Point Landing*, Judge Wisdom, dissenting in part with six judges, asserted that "Rule 4 provides the mechanics for service of process [and] [i]t has no necessary relation with a court's *acquiring* personal jurisdiction."[91] He argued that under Federal Rules of Civil Procedure Rule 83, which provides for the promulgation of local rules, the federal courts could fashion a rule to deal with jurisdictional questions even on a case-by-case basis.[92] He went on to say that to the extent Rule 4(e) provides for the use of state law, this language is permissive, not mandatory.[93] He concluded that the appropriate due process standard is aggregate contacts with the United States.[94]

As noted in the *Daetwyler* decision, some federal courts have rejected the *International Shoe* fourteenth amendment standard in favor of a fifth amendment standard that examines a defendant's aggregate contacts with the United States to determine if those contacts are sufficient to satisfy due process.[95] Such a fifth amendment standard, however, may be applied in a variety of ways.

For example, in *Holt v. Klosters Rederi A/S*,[96] a Michigan citizen sued a Norwegian company under the Death on the High Seas Act.[97] The court held that personal jurisdiction was measured by a fifth amendment standard[98] based on the defendant's minimum contacts with the United

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in the Commodity Exchange Act, Rule 4(e) required application of the state long-arm statute before the Court could reach the question of sufficiency of contacts. 108 S. Ct. at 409. Because it was virtually conceded that Louisiana's long-arm statute did not permit service under the circumstances, the Court rested its decision on that ground, *id.* at 4034, declining to reach the constitutional issue concerning whether the appropriate test is aggregate contacts with the United States, *id.* at 4033 n.5.

90. *See, e.g.*, Bar's Leaks Western, Inc. v. Pollack, 148 F. Supp. 710, 713 (N.D. Cal. 1957) (court implies that in federal question cases, where the compulsion of the *Erie* doctrine is absent, it is not bound by state statute and state due process standards when determining the amenability of a foreign corporation to process); Abrams, *supra* note 4, at 6-9; *see also* Von Mehren & Trautman, *supra* note 48, at 1125 n.6 (when enforcing federal claims, some aspects of state law should be disregarded).

91. Point Landing, Inc. v. Omni Capital, 795 F.2d. 415, 429 (5th Cir. 1986) (en banc) (per curiam), *aff'd sub nom.* Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987).

92. *Id.* at 429-30. This proposition was rejected by the Supreme Court's affirming opinion. *See* 108 S. Ct. at 408.

93. 795 F.2d at 430.

94. *Id.* at 433-34.

95. *See* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 296-97 (3d Cir.), *cert denied*, 474 U.S. 980 (1985); Buckeye Assoc. v. Fila Sports, Inc., 616 F. Supp. 1484, 1488 n.5 (D. Mass. 1985); *see also* Green, *supra* note 4, at 969-70 (stating that fifth amendment standards should apply in cases involving federal service of process); Note, *Alien Corporations*, *supra* note 4, 474-78 (citing courts that have accepted aggregate contacts analysis).

96. 355 F. Supp. 354 (W.D. Mich. 1973).

97. *Id.* at 356 (citing 46 U.S.C. §§ 761-68 (1982) (does not provide for nationwide service)).

98. 355 F. Supp. at 356-57.

States.[99] Although the court stated that the defendant's contacts with the state of Michigan were insufficient to satisfy fourteenth amendment standards,[100] its contacts with the United States were sufficient to allow the Michigan federal court to assert personal jurisdiction.[101] Although other courts have used this test, its use appears confined mostly to cases where the defendant is an alien.[102]

A Sixth Circuit case, *Handley v. Indiana & Michigan Electric Co.*,[103]

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99. *Id.* at 357-58.

100. *Id.* at 358 n.5.

101. *Id.* at 358. In FTC v. Jim Walter Corp., 651 F.2d 251 (5th Cir. Unit A July 1981), the Fifth Circuit used a "national contacts" standard. However, that decision did not discuss the state long-arm statute because the court held that nationwide service existed under the FTC Act. It is noteworthy that the court asserted jurisdiction on the basis of contacts alone, finding it unnecessary to determine whether the forum was a fair one. *Id.* at 253-58.

102. *See* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 294 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); Centronics Data Computer Corp. v. Mannesmann, A.G., 432 F. Supp. 659, 663-64 (D.N.H. 1977).

Several cases, however, expressly rejected the test. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 418 (9th Cir. 1977) (determining that Rule 4(e) compels measuring defendant's contacts with the forum state, not the United States, when state long-arm statute is used) (quoting Edward J. Moriarty & Co. v. General Tire & Rubber Co., 289 F. Supp. 381, 390 (S.D. Ohio 1967)); Ingersoll Milling Machine Co. v. J.E. Bernand & Co., 508 F. Supp. 907, 910 n.4 (N.D. Ill. 1981) (declining to adopt the aggregate contacts with the United States approach as being too broad). *But see* Catrone v. Ogden Suffolk Downs, Inc., 647 F. Supp. 850 (D. Mass. 1986).

In *Catrone*, plaintiff sued both a corporate and an individual defendant, neither of whom were aliens, alleging violations of federal antitrust law, 15 U.S.C. §§ 1-7 (Sherman Act), §§ 12-22 & 27 (Clayton Act), the Civil Rights Act, 42 U.S.C. § 1983, and state law. 647 F. Supp. at 852. Defendants claimed that the court lacked personal jurisdiction. *Id.* at 852. The district court, citing precedent from the Court of Appeals for the First Circuit, stated that "[p]ersonal jurisdiction in federal question cases is a matter of federal law, to be governed by the due process standards of the Fifth Amendment rather than the Fourteenth Amendment. . . . The First Circuit has adopted the 'nationwide contacts' approach to personal jurisdiction in federal question cases." *Id.* at 852-53 (citing Driver v. Helms, 577 F.2d 147 (1st Cir. 1978), *rev'd on other grounds sub nom.* Stafford v. Briggs, 444 U.S. 527 (1980)); *see, e.g.*, Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947 (1st Cir. 1984); Trans-Asiatic Oil Ltd. v. Apex Oil Co., 743 F.2d 956 (1st Cir. 1984). Since the antitrust statute at issue in *Catrone* contained a nationwide service of process provision, the court applied the fifth amendment "nationwide contacts" test and found the corporate defendants amenable to process even though they were not aliens. *Catrone*, 647 F. Supp. at 856.

The district court did not apply the fifth amendment test to the individual defendants, however, because the nationwide service of process provisions expressly apply to corporate defendants only. *Id.* at 856 (citing 15 U.S.C. § 22 (1982) (§ 12 of the Clayton Act)). The federal civil rights statute, which did apply to the individual defendants, did not contain a nationwide service provision. *See id.* at 856 & n.4. Consequently, the court looked to Rule 4, which it found referred it to Massachusetts' long-arm statute. *Id.* at 856. It interpreted Rule 4, however, not only as limiting the court to the circumstances of the state long-arm statute, but also as incorporating fourteenth amendment standards of due process. *Id.* at 855, 856. The court went on to find that the individual defendants were not amenable to the court's jurisdiction because neither the Massachusetts statute nor the fourteenth amendement permitted jurisdiction. *Id.* at 857-60.

103. 732 F.2d 1265 (6th Cir. 1984).

brought under the Jones Act,[104] used a different analysis. Plaintiff served defendant pursuant to the Kentucky long-arm statute. The court first determined that state statutory requirements had been met.[105] Then it analyzed the constitutionality of jurisdiction in this federal question case, and, after arguing that the minimum contacts standard should be applied flexibly, it actually looked at whether the assertion of jurisdiction was fundamentally unfair under a fifth amendment standard.[106] The *Handley* court, however, measured fairness by looking at whether the defendant would "reasonably anticipate" being sued in the forum state.[107] This test, in effect, is closer to the fourteenth amendment contacts test than to the reasonableness or fairness test under the fifth amendment.[108] In the Third Circuit, Judge Gibbons' dissent in *DeJames v. Magnificence Carriers, Inc.*[109] argued for a similar test.

The disparities in the federal decisions discussed above stem from two sources. First, courts disagree as to what standard, if any, Rule 4 incorporates.[110] Those courts choosing a fifth amendment standard should note that Rule 4(e) does not proscribe the application of state law to federal question cases. Thus, it is not reasonable to assume that state long-arm statutes are irrelevant to a Rule 4(e) analysis in a federal question case, as the courts did in *Terry v. Raymond International, Inc.*[111] and *Holt v. Klosters Rederi A/S.*[112] At a minimum, whatever limits are

104. *Id.* at 1267 (citing 46 U.S.C. § 688 (1976) (does not provide for nationwide service)).

105. *Id.* at 1271. In Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987), the Supreme Court gave as a reason for granting certiorari "a possible conflict with views of the Sixth Circuit expressed in [*Handley*]." *Id.* at 4032. In view of the Court's decision, this is curious. The Court held that Rule 4(e) requires the district court to look first to the state long-arm statute to decide whether jurisdiction exists. *Id.* at 4033. The Court expressly declined to reach the question of the appropriate constitutional standard. *Id.* at 4033 n.5. Since *Handley* also looked first to the state long-arm statute, the conflict with the Fifth Circuit's approach in *Omni Capital* is not apparent.

106. Handley v. Indiana & Michigan Electric Co., 732 F.2d 1265, 1271-72 (6th Cir. 1984).

107. *Id.* at 1272.

108. *See supra* notes 21-26 and accompanying text.

109. 654 F.2d 280, 292-93 (3d Cir. 1981) (Gibbons, J., dissenting) (fifth amendment requires only that forum be fair and reasonable, and defendant only need have "national" contacts, as opposed to contacts with forum's locale).

110. *See supra* notes 71-94 and accompanying text.

111. 658 F.2d 398 (5th Cir. Unit A Oct. 1981). In *Terry*, the court looked only to the "fairness test" that it said governed amenability in a federal question case. *See id.* at 402-03. When the party in question asserted that Louisiana's long-arm statute did not cover the act in question because the amenability contacts were not related to the claim, the court stated that "this objection is beside the point. The company's amenability to process is established under the federal standard of *International Shoe*. Federal law eliminates any need to determine whether [the company] was amenable under the Louisiana long arm statute." *Id.* at 403.

112. 355 F. Supp. 354, 356-58 (W.D. Mich. 1973) (holding that federal, not state, law is controlling in a federal question case). Indeed, the Supreme Court found in Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404, 410 (1987), that "under Rule 4(e), a federal court, [in deciding a case under the federal securities laws and the Commodity Exchange Act,] normally looks either to a federal statute or to the long-arm statute of the

imposed as a matter of state law are incorporated by the terms of the Rule. State statutes vary widely, and most of them explicitly require contacts with the state in order to obtain jurisdiction.[113] Typically, the legislature or the state court of last resort has declared that the statute was intended to be interpreted as broadly as possible—to go to the limits of due process—thus limiting jurisdiction only to the extent required by the Constitution.[114]

In states that do interpret their long-arm statutes as going to the federal constitutional limits of due process,[115] however, a federal court deciding a federal question case should examine the fifth amendment due process standard because the fourteenth amendment is a due process limitation placed by the federal Constitution on state power; Rule 4 should not incorporate limitations placed by the federal Constitution on state power, because Rule 4 refers only to those limitations set by the state itself.[116] Furthermore, since Rule 4 incorporates state law, state interests already are amply represented, eliminating the need for a fourteenth amendment standard. The extensive authority of the federal government, which reaches broadly across state lines, contrasted with a state's legitimate right to assert power which ends at its borders, provides another reason for the application of a fifth amendment standard that ac-

State in which it sits to determine whether a defendant is amenable to service." *Id.* at 410.

113. *See, e.g.*, Ill. Ann. Stat. ch. 110, ¶ 2-209 (Smith-Hurd 1983); N.C. Gen. Stat. § 1-75.4 (1983). The California long-arm statute, Cal. Civ. Proc. Code § 410.10 (West 1973), seems to be an exception. It states that jurisdiction is proper whenever the state or federal constitutions would permit it. *See id.* The California statute incorporates whatever state constitutional restrictions exist, but they appear to be no different from federal constitutional restrictions. *See* Cal. Civ. Proc. Code § 410.10 (West 1973); *see also* Walker v. University Books, Inc., 382 F. Supp. 126, 128 (N.D. Cal. 1974) (court stated that state constitution "indicates 'an intent to exercise the broadest possible jurisdiction' consistent with the due process clause of the federal Constitution") (quoting Michigan Nat'l Bank v. Superior Ct., 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823, 826 (1972)).

114. *See, e.g.*, Giotis v. Apollo of the Ozarks, Inc., 800 F.2d 660, 666 (7th Cir. 1986) ("reach of [the statute] is intended to be coextensive with the requirements of due process") (citing Stevens v. White Motor Corp., 77 Wis. 2d 64, 74, 252 N.W.2d 88, 93 (1977)), *cert. denied*, 107 S. Ct. 1303 (1987); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 436, 176 N.E.2d 761, 763 (1961) (Illinois statute contemplates extension of jurisdiction to limits of due process) (citing Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957)). *But see* Masonite Corp. v. Hellenic Lines, 412 F. Supp. 434, 438 (S.D.N.Y. 1976) (New York's long-arm statute does not extend jurisdiction to its "fullest limits"); Escambia Treating Co. v. Otto Candies, Inc., 405 F. Supp. 1235, 1236 (N.D. Fla. 1975) (Florida's long-arm statute requires "more than the contacts necessary to satisfy due process"). The Illinois courts, however, may have had a change of heart. *See Giotis*, 800 F.2d at 665 n.2. By drafting a long-arm statute to "go to the limits of due process," legislatures put no specific limits on its interpretation. The best example of such a statute is Cal. Civ. Proc. Code § 410.10 (West 1973).

115. *See, e.g.*, Cal. Civ. Proc. Code § 410.10 (West 1973); Wis. Stat. Ann. § 801.05 (West 1977).

116. *See* Fed. R. Civ. P. 4(e). Rule 4(e) explicitly provides that when a state statute or rule allows service on a person who is not an inhabitant of the state, then service is limited to the circumstances set out in the statute or rule itself. It does not suggest that the court also look to limits that the federal constitution places on state power. *See id.*

commodates nationwide interests.[117]

When states do not interpret their statutes as going to the federal constitutional limits of due process, Rule 4's provision that courts apply state jurisdictional limits requires that federal courts deciding federal questions respect specific statutory limits.[118] Thus, if the statute does not allow for a contract made with a non-resident to function as the basis for jurisdiction, the federal court would have to respect that limitation, even if, in other categories, such as torts committed by non-residents, the statute goes to the federal constitutional limits of due process.

Admittedly, the relationship of a defendant with a state will govern, at least in part, the defendant's amenability to process in a federal question case. It would be anomalous to conclude, however, that the Supreme Court in drafting, or Congress in passing Rule 4(e), intended that federal interests be ignored in favor of purely state concerns when deciding amenability issues in federal question cases.[119] Certainly Congress should eliminate this anomaly.

The second source of the disparity in federal decisions, developed in Part III within, is that even in those cases where courts adopt a fifth amendment standard, they disagree on the substance of that standard.[120]

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117. For example, in Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945), the Court overturned a state regulation limiting the length of railroad trains passing through the state. Distinguishing earlier cases upholding a state's right to impose "full crew" requirements, the Court noted that "[the full train crew laws] had no effects outside the state beyond those of picking up and setting down the extra employees at the state boundaries; they involved no wasted use of facilities or serious impairment of transportation efficiency, which are among the factors of controlling weight here." *Id.* at 782; *see also* Davis v. Farmers Coop. Equity Co., 262 U.S. 312, 315 (1923) (Court held that Minnesota statute subjecting corporation to jurisdiction on basis of soliciting agent's presence, without regard to any business done, violated commerce clause).

More recently, the Court has stated:

> For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a "minimal connection" between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise.

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980); *see also* Curry v. McCanless, 307 U.S. 357, 364 (1939) (tangible property generally only taxable by state where it is located). The proposition that a state's authority ends at its borders is consistent with the territorial limitations placed on state long-arm statutes by the current due process test. *See infra* notes 163-66 and accompanying text.

118. For an example of a statute which falls short of due process limits, see N.Y. Civ. Prac. L. & R. § 302 (McKinney 1977 & Supp. 1988). *See* Lavie v. Marketscope Research Co., 71 Misc. 2d 373, 374, 336 N.Y.S.2d 97, 99 (Sup. Ct. 1972) (in dicta, court noted New York chose not to exhaust "full potential" of jurisdiction permissible under the federal Constitution).

For examples of statutes listing categories of contacts, see N.Y. Civ. Prac. L. & R. § 302 (McKinney 1972 & Supp. 1988) (including transacting business in the state, the commission of certain tortious acts within the state or without the state that cause injury, an interest in real property located in the state); N.C. Gen. Stat. § 1-75.4 (1983) (including local presence, injury, service, property, marital relationship).

119. *See* Green, *supra* note 4, at 982-83.

120. *See infra* Part III.

B. *Rule 4(e), Diversity and a Fourteenth Amendment Standard*

In diversity cases, courts seem to assume, with little or no analysis, that fourteenth amendment standards apply to the constitutional analysis of jurisdiction.[121] They base this assumption on Rule 4(e), which permits extraterritorial service pursuant to any applicable federal statute and "under the circumstances and in the manner prescribed" by the laws of the state in which the district court sits.[122] Thus, courts have accepted state fourteenth amendment standards as appropriate.

One should question, however, whether courts apply the fourteenth amendment amenability standard as a matter of convenience since it is a well-known standard that, on the surface, seems reasonably applicable, or whether Rule 4 or other federal law mandates the application of fourteenth amendment standards.[123]

Justice Powell discussed the amenability standard for diversity cases in his concurring opinion in *Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee*.[124] In *Bauxites*, a diversity action, the district court exercised jurisdiction to enable it to sanction the defendant for failure to comply with discovery orders concerning jurisdiction.[125] Without much analysis, the majority of the Court upheld the finding as a valid exercise of the district court's authority consistent with due process.[126]

Justice Powell, in his concurrence, first asserted that since no federal

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121. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-78 (1985) (applying fourteenth amendment minimum contacts test); Keeton v. Hustler Magazine, 465 U.S. 770, 774 (1984) (same).

122. Fed. R. Civ. P. 4(e).

123. The history of Rule 4 is not particularly illustrative. It seems clear that the 1963 amendments were intended to allow an expansion of personal jurisdiction exercised by the federal courts by permitting the use of state long-arm statutes. The advisory committee notes to the rule state that

> [t]he second sentence [of the rule], added by [the 1963] amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties . . . .
>
> . . . [T]here appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts.

Fed R. Civ. P. 4 advisory committee notes.

It is not clear that the advisory committee intended to deal comprehensively with the problem of federal interests in a diversity case. The Advisory Committee specifically refers to jurisdiction by attachment but otherwise does not discuss the implications of the amendment comprehensively. Presumably, the drafters did not consider that federal courts treat jurisdiction in a diversity case any differently than a state court would. Otherwise, there likely would have been some discussion of Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960), in the advisory committee notes. In *Jaftex*, a Second Circuit panel held that federal law determined amenability to jurisdiction even in a diversity case. *See id.* at 516. The committee's silence on the issue suggests that it supported the contrary view subsequently taken by the Second Circuit in Arrowsmith v. United Press Int'l, 320 F.2d 219, 223 (2d Cir. 1963).

124. 456 U.S. 694, 709-16 (1982) (Powell, J., concurring).

125. *See id.* at 698-99; *id.* at 711 (Powell, J., concurring).

126. *See id.* at 709.

long-arm statute existed, the Rules of Decision Act[127] and *Erie Railroad Co. v. Tompkins*[128] required the use of state law in diversity cases. He then reasoned that because state law determined the jurisdictional reach of a court, "[the federal court's] jurisdiction . . . normally would be subject to the same due process limitations as a state court."[129]

The Rules of Decision Act, however, does not clearly mandate this conclusion. Although Rule 4 requires that specific limitations on the exercise of jurisdiction imposed by the state statutes be respected, the due process limitations on those statutes usually are imposed as a matter of federal constitutional law, stemming from the fourteenth amendment's restrictions on state power.[130] Even assuming that the Rules of Decision Act is applicable, it does not follow that federal constitutional limitations imposed on state laws apply when the federal government, and not the state, is attempting to enforce due process.[131]

Moreover, Rule 4 seems to incorporate the state long-arm statute by its terms. Thus, the Rules of Decision Act would not apply. If anything, the question is whether, under the Rules Enabling Act,[132] the *Bauxite* Court acted properly. Because Rule 4 incorporates existing state standards, it does not "abridge, enlarge or modify a substantive right,"[133] as is prohibited by the Rules Enabling Act.[134] Viewing it otherwise would assume that the defendant has a "substantive right" embodied in the particular due process standard invoked. Initially, the notion that jurisdictional interests are "substantive" is at least open to debate.[135] More important, however, the applicable due process limit is set by the Consti-

127. 28 U.S.C. § 1652 (1982) (requiring that federal courts apply state law unless the Constitution, treaties of the United States or Acts of Congress require otherwise); *see Bauxites*, 456 U.S. at 711 (Powell, J., concurring).

128. 304 U.S. 64 (1938); *see Bauxites*, 456 U.S. at 711 (Powell, J., concurring).

129. *Bauxites*, 456 U.S. at 712 (Powell, J., concurring).

130. *See* Berger, *supra* note 4, at 310-18.

131. In most situations outside the realm of jurisdictional due process, the issue will not arise because a federal due process standard under the fifth amendment would operate identically to the fourteenth amendment standard. *See infra* note 171 and accompanying text. Jurisdiction is unique, however, in that the due process concept is tied, in part, to a particular territorial entity by the requirement of "contacts" or "purposeful availment." *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980). Thus the standard will change according to the territorial entity against which "contacts" are viewed.

132. 28 U.S.C. § 2072 (1982) provides that the Supreme Court has the power to prescribe rules governing federal court procedure and process, and that "[s]uch rules shall not abridge, enlarge or modify any substantive right." *Id.*

133. *Id.*

134. *See supra* note 132.

135. Justice Harlan believed that a "substantive" right could be defined by the rules that "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation." *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring). Because jurisdiction does not go to the merits of the case or the remedy, but rather to an apportionment of cases within the system, it could be described as procedural. On the other hand, as recognized in *World-Wide Volkswagen Corp. v. Woodson*, individuals might organize their activities so as to enable some predictability as to where that conduct will render them subject to jurisdiction. 444 U.S. 286, 297

tution, not Rule 4, and the constitutional limits on federal power stem from the fifth amendment, not the fourteenth amendment which limits state power.[136]

In addition, in diversity actions it is the federal government, not the state, that is denying due process. The federal government provides the forum for the plaintiff under a federal statute. Although the requirement in Rule 4 that state law be applied may cause the problem, the provision for diversity jurisdiction creates the compulsion.

Thus, a fifth amendment jurisdictional standard should be applied even in diversity cases. As discussed in the next section, this analysis does not ignore state-oriented concerns underlying the fourteenth amendment analysis; it simply weighs relevant federal interests in the balance.

(1980). Such activities could be within the spirit, at least, of Justice Harlan's formulation of "substantive" rights.

136. Justice Powell cited Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963), to support the notion that fourteenth amendment standards apply in diversity cases. *World-Wide Volkswagen*, 456 U.S. at 711-12 & n.3. *Arrowsmith*, however, does not really answer that issue. In *Arrowsmith*, the Second Circuit focused on whether, in the absence of congressional direction, a federal court could fashion its own long-arm rules. 320 F.2d at 226. Judge Friendly in *Arrowsmith* viewed the *International Shoe* standard as part of the state statute. He stated that "[t]he decision of what contacts, within the constitutionally permitted sphere, shall suffice to make a [defendant] . . . subject to suit is one for the state to make in the first instance." *Arrowsmith*, 320 F.2d at 229. He further stated that "jurisdiction over the person of the defendant is to be determined here on the basis of constitutionally valid [state] . . . law." *Id.* at 231. But that statement begs the question. Whether the statute is applied constitutionally is a matter of federal law and thus such a determination ought to reflect the context in which the question is raised—in this case, a restraint on the assertion of authority by a federal court. Therefore, a fifth amendment standard should apply. Rule 4(e), which was added after *Arrowsmith*, represents a congressional mandate to use the state statute in the area of personal jurisdiction, but it does not by its terms incorporate a particular constitutional standard with which to judge the assertion of authority. In the author's view, statements, such as the one in Burstein v. State Bar, 693 F.2d 511 (5th Cir. 1982), that Rule 4(e) incorporates fourteenth amendment standards are simply wrong. *Id.* at 523.

Curiously, Justice Powell gives cursory attention to Rule 4 and seems to assume that the use of state long-arm statutes is the result of something other than a congressional direction via Rule 4. *See* Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee 456 U.S. 694, 711 (1982) (Powell, J., concurring) ("*[I]n the absence of a federal rule or statute* . . . personal jurisdiction . . . is determined in diversity cases by the law of the forum State.") (emphasis added).

Presumably, Congress could pass a long-arm statute that pertained to diversity cases. The only possible major obstacle to such a statute would arise from a finding that the constitutional principles underlying *Erie* somehow prevent an abridgement of the states' rights to decide which defendants are subject to the authority of their courts. This seems a tenuous proposition at best. *See Arrowsmith*, 320 F.2d at 226 ("[*Erie*] would not prevent Congress or its rule-making delegate from authorizing a district court to assume jurisdiction over a foreign corporation in an ordinary diversity case although the state court would not . . . ."). *But cf.* Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949) (federal jurisdiction could not be maintained in diversity case in which the state would not permit jurisdiction); Angel v. Bullington, 330 U.S. 183, 192-93 (1947) (upholding use of state "door closing" statutes in diversity cases).

III. SUBSTANCE OF A FIFTH AMENDMENT STANDARD

Assuming that a fifth amendment standard is appropriate for federal cases, jurisdictional analysis should fall within the traditional due process scheme.

A. *A Comparison of Jurisdictional Due Process Interests with the Interests of Traditional Due Process Analysis*

The Supreme Court has identified several due process interests relating to personal jurisdiction. The "liberty interest" is central to jurisdictional analysis and to much of traditional due process analysis.[137] In *Bauxites*, for example, the Court asserted that the defendant has a liberty interest emanating from the due process clause that limits the state court's assertion of jurisdiction.[138] More recent opinions have reiterated this belief.[139] Other due process interests relating to personal jurisdiction noted by the Court include "the burden on the defendant, . . . the plaintiff's interest in obtaining convenient and effective relief, . . . 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."[140]

Clearly, however, the first step in the traditional jurisdictional due process analysis—an assessment of contacts—is a measure of state authority or power to overcome the defendant's liberty interest, and predominates over the other considerations of fairness and efficiency.[141] In most non-jurisdictional situations involving constitutional issues where a "liberty interest" is at stake, that interest is termed fundamental,[142] which re-

137. *See infra* notes 138-39 and accompanying text (liberty interest in jurisdiction analysis); *infra* notes 142-43 and accompanying text (liberty interest in traditional due process analysis).

138. Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 702-03 & n.10 (1982).

139. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985); Keeton v. Hustler Magazine, 465 U.S. 770, 782 (1984) (Brennan, J., concurring).

140. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980) (citations omitted).

141. In *Burger King*, although the Court acknowledged that fairness factors must be considered, its opinion made it plain that those factors rarely would overcome a finding of contacts. *See Burger King*, 471 U.S. at 482-84; *see also World-Wide Volkswagen*, 444 U.S. at 292. In *Asahi Metal Indus. v. Superior Court*, at least some Justices determined that jurisdiction was unfair, despite the existence of contacts. 107 S. Ct. 1026, 1035 (1987) (Brennan, J., concurring); *see also id.* at 1038 (Stevens, J., concurring).

142. The due process clause of the fourteenth amendment is used to protect fundamental rights, primarily those delineated in the Bill of Rights. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 404 (1965) (noting "the belief of the Framers of those liberties and safeguards [in the Bill of Rights] that confrontation was a fundamental right essential to a fair trial in a criminal prosecution"); Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (right of privacy in marriage is "within the zone of privacy created by several fundamental constitutional guarantees"); Gitlow v. New York, 268 U.S. 652, 666 (1925) (freedom of speech and of the press are fundamental personal rights and liberties protected by the fourteenth amendment). Justice Harlan, however, viewed the due process clause as broadly protect-

quires that the state show a compelling interest sufficient to outweigh the defendant's liberty interest.[143] In the jurisdictional context, however, when analyzing whether the state has sufficient interest to overcome the defendant's liberty interest, the Supreme Court does not treat the liberty interest as a fundamental interest because it fails to discuss it within a compelling-interest framework.[144]

B. *Traditional Due Process Analysis*

1. Procedural Due Process

Current due process analysis is divided into "procedural" and "substantive" areas.[145] Current procedural due process analysis crystallized in *Mathews v. Eldridge*,[146] where the Supreme Court articulated a three-factor balancing test.[147] The *Mathews* formulation pits the government's interests in the regulatory mechanism against the private interests at stake and the value of protecting those interests.[148]

While some observers have placed jurisdictional analysis in the procedural due process camp,[149] the *Mathews* model is not transposed easily

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ing the "basic values 'implicit in the concept of ordered liberty.' " Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

143. *See, e.g.*, *Griswold*, 381 U.S. at 497; Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

144. *See, e.g.*, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982) (stating that the defendant has a liberty interest restricting jurisdiction, but not analyzing that interest as fundamental, nor requiring that the state have a compelling interest to overcome it).

145. Roughly speaking, "procedural" due process is concerned with whether the mechanisms by which a decision is arrived at are appropriate and fair, but it does not concern whether the substantive rule of law is fair. "Substantive" due process concerns whether the substantive rule is fair. *See generally* R. Rotunda, J. Nowak, T. Young, Treatise on Constitutional Law, § 10.6, at 321-23 (1986) (comparing procedural with substantive due process).

146. 424 U.S. 319 (1976).

147. *Id.* at 334-35. The Court stated that:

> our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 334-35.

148. *Id.*

149. *See* 2 R. Rotunda, J. Nowak, T. Young, *supra* note 9, § 17.8, at 252 n.10. This treatise puts its brief discussion of jurisdiction under the procedural due process heading, but does not discuss it in terms of the other procedural due process cases. Presumably, it was so catalogued because jurisdiction does not deal with the underlying rule of decision in the case. *See* Crawford v. Minutemen Gourmet Foods, Inc., 489 F. Supp. 181, 182 (N.D. Ala. 1980) (court finds that "it may exercise personal jurisdiction . . . without exceeding the limits of procedural due process"); Coe & Payne Co. v. Wood-Mosaic Corp., 230 Ga. 58, 60, 195 S.E.2d 399, 401 (1973) (adopting Illinois' interpretation of its similarly worded long-arm statute, court noted " 'that the Long Arm Statute [of Illinois]

into the jurisdiction area. *Mathews* suggests that the costs of creating adequate procedures to avoid erroneous results must be balanced against the risk of error.[150] The minimization of risk of error addresses fairness to the party. With jurisdictional issues, however, the risk of an erroneous result in the underlying action is peripheral. In fact, risk of error is not calculated in the jurisdictional result. Furthermore, unlike procedural due process analysis, jurisdictional analysis is not keyed to the mechanism by which the decision is reached, but rather to the substance of the jurisdictional issue itself.

2. Substantive Due Process

Superficially, at least, jurisdictional analysis seems to have more in common with substantive due process than with procedural due process. Both appear to deal with the fairness of the underlying result, rather than with the mechanism used to get there.

Precise comparisons are difficult, however, because there is no single, accepted substantive due process analysis. Some courts have purported to use a "threshold" analysis in cases where they find that a "fundamental right" is at issue, employing a heightened scrutiny test to determine whether the government's interest is strong enough to overcome the due process liberty interest.[151] In many other cases, including some challenging a governmental regulation as "unfair," the Court has said that the government, to overcome any due process interest, need show only a rational basis for its action.[152] Most typically, these cases challenge economic regulations.[153] In still other substantive due process cases, a continuous balancing test seems to be used whereby no threshold governmental interest is necessary; the court balances whatever interests the

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contemplates that jurisdiction shall be exercised over non-resident parties to the maximum extent permitted by procedural due process' ") (quoting Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 436, 176 N.E.2d 761, 763 (1961). *But see* Scott v. Ford Ord Federal Credit Union (In re G. Weeks Securities, Inc.), 5 Bankr. 220, 225 (Bankr. W.D. Tenn. 1980) (discussing personal jurisdiction under the fifth amendment as a matter of *substantive* due process).

150. Mathews v. Eldridge, 424 U.S. 319, 341-42 (1976) (citing Fusari v. Steinberg, 419 U.S. 379, 389 (1975)).

151. *See, e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678, 685-86 (1977) (citing Roe v. Wade, 410 U.S. 113, 154-56 (1973)) (right to privacy cannot be abridged absent a "sufficiently compelling" state interest). As these and other cases demonstrate, the heightened scrutiny test is used largely in what might be termed "procreative privacy" cases.

152. *See, e.g.*, Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985), where the "right" deprived was one to retake a medical board examination. *Id.* at 509. The Court stated that a due process violation would require a showing that the student's rejection was irrational or beyond reasoned, academic decision-making. *Id.* at 514-15 & n.13; *see also id.* at 515-16 (Powell, J., concurring) (interests asserted did not rise to the level of substantive due process); United States v. Carolene Prods. Co., 304 U.S. 144, 147-48, 152 (1938) (legislative regulation presumed supported unless it fails to rest on a rational basis).

153. *See* cases cited in 2 R. Rotunda, J. Nowak, T. Young, *supra* note 9, § 15.4, at 62-64 nn.45-49.

government has against whatever interests the individual has.[154]

These varied analyses make comparison with jurisdictional issues difficult. There is a resemblance between the two-step analysis for jurisdictional questions[155] and the threshold approach to substantive due process questions. In both, the government must meet some threshold to overcome the due process interest at stake.[156] Jurisdiction, however, adds the step of analyzing the fairness of the exercise of jurisdiction and the reasonableness of the forum. On the other hand, this second step in jurisdiction cases encompasses a balancing approach similar to the balance used in some substantive due process cases.[157]

Last, a fairly striking difference emerges. The due process tests, whether threshold or balancing, expressly incorporate governmental interests as a major feature of the analysis, whereas in jurisdictional analysis, the government's interest is considered, if at all, only after contacts have been found. Consequently, mere presence of the defendant may not be sufficient to give the sovereign authority to entertain the litigation.[158] Rather, a defendant gives up his right to dispute the assertion of authority if he has sufficient contacts, even if the sovereign would care little about those contacts. Similarly, a plaintiff may invoke sovereign authority, even where the sovereign might be deemed indifferent to doing so itself.

IV. THE PROPOSED TEST FOR PERSONAL JURISDICTION: A THRESHOLD-PLUS-BALANCING APPROACH

The best way to reconcile the sovereign power or "contacts" approach with other due process tests is to analyze jurisdiction under a threshold-plus-balancing approach, combining the threshold governmental interests expressed in the substantive due process analysis, with the other in-

154. *See Developments in the Law, the Constitution and the Family*, 93 Harv. L. Rev. 1156, 1195 (1980) [hereinafter *Developments*] (describing flexible balancing approach used in due process analysis); *cf.* Treiman, *Equal Protection and Fundamental Rights—A Judicial Shell Game*, 15 Tulsa L.J. 183, 223 (1980) (discussing balancing test used by the Court in fundamental rights cases analyzed as equal protection problems). The authors of *Developments, supra*, noted that the Court has used both substantive due process and equal protection language in its fundamental rights cases. *Id.* at 1193.

155. *See supra* notes 20-26 and accompanying text.

156. *See supra* notes 151-54 and accompanying text (substantive due process threshold test); text accompanying notes 25-26 (analysis of defendant's contacts and other interests).

157. *See supra* text accompanying note 154 (balancing government interests against individual interests).

158. Whether a defendant's mere presence in a forum is sufficient to grant jurisdiction remains unanswered after *Shaffer v. Heitner*, *World-Wide Volkswagen Corp. v. Woodson*, and *Burger King v. Rudzewicz*. *Compare* O'Brien v. Eubanks, 701 P.2d 614, 616 (Colo. Ct. App. 1984) ("Where . . . service is made upon a natural person found within the state, the minimum contacts analysis is inapplicable."), *cert. denied*, 474 U.S. 904 (1985), *with* Duehring v. Vasquez, 490 So. 2d 667, 671 (La. Ct. App. 1986) ("[m]ere service of process upon a nonresident defendant transiently within the state is no longer sufficient to satisfy due process standards").

terests[159] presented in the jurisdictional due process analysis. Under the threshold arm of the proposed test, the interests of the state in asserting its authority to force the defendant to litigate in the state substitute for the "contacts" analysis used in *Burger King* and *World-Wide Volkswagen*.[160] The focus of the current jurisdictional due process analysis on the defendant's contacts requires this substitution because current analysis causes courts to neglect governmental interests.[161] The proposed test,

159. *See supra* text accompanying notes 137 & 140.

160. The idea that the "forum state interest" should play a role in jurisdictional analysis is disputed by Professor Harold Lewis. *See* Lewis, *The "Forum State Interest" Factor in Personal Jurisdiction Adjudication: Home-Court Horses Hauling Constitutional Carts*, 33 Mercer L. Rev. 769 (1982). His premise is that "the sole proper concern of due process . . . is to assure the parties a fair forum." *Id.* at 771. Even conceding that point, objective fairness must be taken in context. Being "fair" to a defendant, for instance, by giving greater weight to her right to be left alone, may be "unfair" to a plaintiff in some cases because it could deprive the plaintiff of a convenient forum. If the definition of "fairness" is no more than a reflection of a balancing of interests, then the analysis functionally may not be all that dissimilar to the one proposed here. But the insistence that state interests are not a legitimate part of the analysis seems to belie that conclusion. Because the state is depriving the defendant of due process, the state should have the burden of proof in setting forth the countervailing interests.

Perhaps Professor Lewis' reasoning stems from the peculiar nature of constitutional jurisdiction analysis. Recently, the Supreme Court has described the analysis as one of due process implicated by the possible deprivation of a liberty interest belonging to the defendant. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982). In many due process cases not involving jurisdiction, the individual whose rights are being infringed sues the state. In a jurisdiction case, however, the liberty infringement constitutes a subordinate part of a litigation between private parties. Thus, the plaintiff becomes the champion of the state's interest. At the same time, plaintiff's own selfish interests in upholding jurisdiction, which may or may not correspond to the state's interest, will also be at stake.

A due process analysis also has been used in private litigation. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 607 (1974); Fuentes v. Shevin, 407 U.S. 67, 84 (1972). Those cases involved purely private litigation, but in each it was alleged that the prejudgment attachment statutes denied due process to the parties whose property was attached. In resolving these disputes, the Court examined the state interest involved in these statutes: protecting creditors from defaulting debtors. *See North Georgia Finishing, Inc.*, 419 U.S. at 601-03; *Mitchell*, 416 U.S. at 608; *Fuentes*, 407 U.S. at 78-79, 92-93. It is harder to ascribe a strong state interest to the location of an essentially private litigation.

Possibly Professor Lewis is concerned that overindulgence of the state's interest will result in a lack of concern for plaintiff's interest in protecting his choice of forum. *See* Lewis, *supra* at 810. Under the test proposed by this Article, the interest of the plaintiff in a convenient forum would be protected by considering the state's interest. It is questionable whether the failure of a state to provide a convenient forum is a deprivation of due process if plaintiff has no recognized liberty or property right to such a forum. At most, the analysis of defendant's due process right against the state should consider whether granting such a right would harm other parties, such as the plaintiff. Because of the way jurisdictional due process cases arise, this merely adds a factor not present in other due process cases.

161. Consider Point Landing, Inc. v. Omni Capital Int'l, 795 F.2d 415 (5th Cir. 1986) (en banc) (per curiam), *aff'd sub nom.* Omni Capital Int'l v. Rudolf Wolff & Co., 108 S. Ct. 404 (1987). The original action alleged securities fraud (for which a nationwide service statute exists) against several defendants, including some foreign ones. *Id.* at 417-18. After the Supreme Court indicated that a private right of action existed under the Com-

however, provides a means of invoking overriding governmental concerns, should they exist, at the threshold level, even if a defendant has only a tenuous connection to the forum. Viewing jurisdiction from a state interest[162] point of view allows courts to ask whether the state cares enough about this litigation to permit the plaintiff to invoke the authority of its courts. The proposed test incorporates the factors included in the jurisdiction analysis that are not a part of traditional due process analysis.

Fleshing out this proposal requires examination of the defendant's interests in the jurisdictional scheme, the constitutional threshold interest that the government must cross to overcome that interest, and other factors that weigh in the balance once the threshold is met.

A. *Defendant's Due Process Interests*

The defendant has several due process interests at stake. First, the

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modity Exchange Act, plaintiffs asserted a claim under that statute. *Id.* at 418. The Commodity Exchange Act does not have a jurisdictional section. 7 U.S.C. §§ 1-24 (1982). The Fifth Circuit dismissed the securities claim, which provides for nationwide service, as preempted by the commodities claim, making the nationwide service provision of the securities statute inapplicable. 795 F.2d at 419. Suddenly, the same facts that implicated federal interests sufficient to warrant nationwide service were measured only against local interests under Rule 4(e). Given the similarities between commodities fraud actions and securities fraud actions, and the similar governmental interests in prosecuting (or not prosecuting) frauds perpetuated by foreign parties, it is strange to ignore those interests completely simply because the *statutory* basis of jurisdiction has changed.

162. The use of a state's interest is not completely foreign to the Supreme Court's jurisdiction vocabulary. In Keeton v. Hustler Magazine, 465 U.S. 770 (1984), the Court stated: "We agree that the 'fairness' of haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities." *Id.* at 775-76. The Court stated that deterring nonresidents from committing torts within the state and "discourag[ing] the deception of its citizens" with libelous material are major interests. *Id.* at 776. On the other hand, the Court dismissed the state's interest in applying its law, noting that "such choice-of-law concerns should [not] complicate or distort the jurisdictional inquiry." *Id.* at 778.

Thus, the nature of the forum state interest was not subjected to rigorous analysis in *Keeton*, perhaps because the Court viewed it as a fairly simple case. It is also noteworthy that Justice Brennan, the author of the *Burger King Corp. v. Rudzewicz* opinion, disavowed the forum state interest aspects of the cases except "to the extent that they bear upon the liberty interests of the respondent." *Id.* at 782 (Brennan, J., concurring). Indeed, in *Burger King*, the Court relegated the forum state's interest to the list of factors considered after contacts are established. 471 U.S. 462, 476-77 (1985). Nevertheless, the Court did recognize that Florida's interests (at least in protecting its citizens) were relevant to the jurisdictional inquiry. *Id.* at 482-83.

In the reasonableness portion of its opinion in *Asahi Metal Indus. Co. v. Superior Court*, the Court also discussed state interests. *See* 107 S. Ct. 1026, 1034-35 (1987). The Court noted that once the main suit had been settled, the remaining indemnification dispute between two foreign companies was hardly one in which California had an interest. *Id.* at 1034. Interestingly, the Court, in its discussion of state interests, raised the question of whether California law would apply but did not state that this was a factor to be considered. *Id.*

defendant has a privacy interest in being left alone.[163] A complaint simply represents a set of unproven allegations. Although society's interest in dispute resolution sometimes requires that defendants answer erroneous charges, they should not be forced to go a long way to do so. Primarily for historical reasons, "a long way" is defined here in terms of state boundaries, even when a defendant lives close to the border of the forum state. People tend to think of themselves as living in a particular state.[164] Having to defend in another state raises questions of bias against out-of-state residents, even, and perhaps especially, in areas close to state borders.[165] Thus, some justification exists for connecting the individual interest with state boundaries. In some cases, however, an individual should have a recognized interest against being dragged into another area of his home state. Such intra-state bias is not unknown, but, for reasons discussed below, this is unlikely to affect drastically litigation within a state.[166]

Defendants also have an interest in being able to organize their activities to avoid litigation in certain places.[167] This interest is more tenuous because a defendant should not be permitted to determine unilaterally where disputes will be resolved.[168] Nevertheless, one should be able to control one's destiny within reason. At a minimum, the defendant should not be forced to litigate in a surprising forum.[169]

The Court has not articulated clearly what level of scrutiny it assigns

163. In Olmstead v. United States, 277 U.S. 438 (1928), *overruled on other grounds*, Katz v. United States, 389 U.S. 347, 352 (1967), Justice Brandeis wrote that "[the framers of the Constitution] conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Id.* at 478 (Brandeis, J., dissenting). *See also* Carey v. Brown, 447 U.S. 455, 471 (1980); Doe v. Bolton, 410 U.S. 179, 213 (1973) (Douglas, J., concurring).

164. *See* Fullerton, *supra* note 4, at 44-45.

165. For a discussion of interstate bias see generally Goldman and Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. Leg. Stud. 93 (1980). *See also* 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice, ¶ 0.71 [3.-2] at 701.32- .33 (2d. ed. 1986).

166. 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3601, at 357 n.68 (1984). Discussing the role of diversity jurisdiction as it relates to out-of-state bias, the American Law Institute stated:

> [I]t is more appropriate, however, to consider the risk of prejudice not as a separate problem but rather as one aspect of the possible shortcomings of state justice. One such shortcoming is that the state venue provisions often localize the place of trial in small constituencies. In these circumstances justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang.'

13B C. Wright, A. Miller & E. Cooper, *supra*, § 3601, at 357 n.68 (1984) (quoting American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Official Draft, 106-07 (1969)).

167. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

168. This is consistent with the results, though not the analysis, of conventional state court minimum contacts analysis since the requirement of "contacts" actually should give a great deal of weight to the defendant's interest in avoiding out-of-state litigation.

169. *See* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Stevens, J., concurring).

to the defendant's interest in avoiding jurisdiction. *Burger King* reinforces the *Bauxite* Court's statement that the defendant's jurisdictional interest is a liberty interest.[170] *Burger King* and *World-Wide Volkswagen*, however, indicate that the threshold is not described properly as either a rational basis or fundamental rights/strict scrutiny analysis.[171] The rela-

170. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985) (citing Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982)). Although the "minimum contacts" test is uniform, the nature of the liberty interest it affords to a defendant is not. For example, if a Connecticut resident has a car accident with a Rhode Island resident in Connecticut, the Rhode Island resident may not be able to sue in a Rhode Island court, even if the Connecticut resident lives five miles from the Rhode Island state line. But if a Los Angeles resident collides with a San Fransisco resident anywhere in the country, any California court has jurisdiction over the defendant, even though she lives several hundred miles from the home of the plaintiff. Of course, state venue rules appear to indicate that the suit be brought in Los Angeles County, where the defendant resides. *See* Cal. Civ. Proc. Code § 395 (West 1973 & Supp. 1987). *But see* N.Y. Civ. Prac. L. & R. § 503(a) (McKinney 1976) (allowing venue where any party resides). Thus, the due process interest in jurisdiction is dependent on state boundaries. This concept of contacts within a state boundary has no simple analogy in ordinary due process analysis.

Even more troubling, *World-Wide Volkswagen Corp. v. Woodson* sets forth a "sovereignty" or "power" aspect of jurisdiction that seems to draw federalism issues into the analysis. *See* 444 U.S. 286, 294 (1980) (describing this interest as "interstate federalism"). The Court, however, has backed away from this part of its jurisdictional analysis. *See* Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 & n.10 (1982). The only area in which territorial concerns appear prevalent is jurisdiction to tax—a category which includes *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (dispute over liability for unemployment tax). For example, the Court in Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), stated:

> For a State to tax income generated in interstate commerce, the Due Process Clause of the Fourteenth Amendment imposes two requirements: a 'minimal connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. The requisite 'nexus' is supplied if the corporation avails itself of the 'substantial privilege of carrying on business' within the State . . . .

Id. at 436-37 (citations omitted).

171. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 294 (1980).

In other areas of constitutional law involving liberty interests, such as free speech, privacy and self-incrimination, the rights afforded individuals by due process restrictions on state and federal powers are described more uniformly than they are with jurisdiction. In other words, the freedom granted by the restrictions on federal power is generally the same as the freedom granted by restrictions on state power. *See* Malloy v. Hogan, 378 U.S. 1, 3 (1964); *but cf. id.* at 19-20 (Harlan, J., dissenting) (criticizing majority for using the fourteenth amendment's due process clause to incorporate, as against states, specifics of fifth amendment's protection against self-incrimination).

In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), however, the Court suggested that the scope of equal protection provided by the fifth amendment's due process clause might not be the same as that afforded by the equal protection clause of the fourteenth amendment. *Id.* at 100. The fifth amendment has no equal protection clause; the concept was judicially determined to be included in the fifth amendment in Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Thus, the difference may be due to the fact that the fifth amendment aspect was not "incorporated" but simply was an adjunct of due process. Also, disuniformity would result from the difference between the national interests that weigh against the fifth amendment rights and the state interests that weigh against fourteenth amendment rights. *Id. Hampton* even suggests that overriding federal interests may re-

tive ease with which the Court found jurisdiction in *Keeton v. Hustler Magazine*,[172] where the defendant had relatively little connection with the forum,[173] in *Calder v. Jones*,[174] where the basis of jurisdiction was the knowledge and intent of individuals to cause harm in California,[175] and in *Burger King*, where the focus of the Florida suit was a purely local Michigan fast food franchise,[176] clearly suggests that the defendant's interest in avoiding litigation outside of his home state is less than "fundamental."[177]

B. *Threshold Level of Governmental Interest*

The analogy of a defendant's liberty interest to a privacy interest[178] suggests that the appropriate threshold level of governmental interest in jurisdiction be an intermediate level—the government should be required to show an important, though not compelling, interest.[179] Because a plaintiff has the option of suing a defendant in his home state, and be-

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strict the individual right in a situation where the state could not. *See Hampton*, 426 U.S. at 100. The proposed analysis is entirely consistent with *Hampton*. Indeed, by requiring courts to focus on the governmental interests at stake, the proposed test brings the federal-state differences to the forefront of the analysis.

The reasons for the disparity in jurisdictional analysis may be historical. *Pennoyer v. Neff* and *International Shoe Co. v. Washington* were decided before modern due process analysis had been formulated fully. That is not a good reason, however, to relegate jurisdiction to its own due process niche. A careful analysis of jurisdiction permits at least certain facets of it to coexist with other due process areas.

172. 465 U.S. 770 (1984).

173. Defendant's only connection with the forum was the distribution of a relatively small percentage of its magazines in New Hampshire. *See* 465 U.S. at 772. The plaintiff sought damages primarily for the defamatory effects of the article outside New Hampshire. *See id.* at 773.

174. 465 U.S. at 783 (1984).

175. *Id.* at 789-90.

176. 471 U.S. at 466-68.

177. Although a discussion of the theory of fundamental rights is beyond the scope of this Article, I believe my conclusion is warranted particularly in light of the Court's recent decision concerning the Georgia sodomy statute. Bowers v. Hardwick, 106 S. Ct. 2841 (1986). If fundamental rights do not encompass privately expressed sexual preferences, jurisdictional rights can hardly be viewed as "fundamental." Moreover, if one examines cases involving nationwide service, the liberty interest of a domestic defendant is overcome in the face of a congressional mandate of authority. *See* Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985) (indicating that due process does not restrict Congress' ability to authorize nationwide service over domestic defendants).

178. *See supra* note 163 and accompanying text.

179. As discussed above, it is evident that jurisdiction is not considered a "fundamental" right requiring the highest level of scrutiny. *See supra* text accompanying note 177. However, a "rational basis" test does not give sufficient protection to the liberty interest at stake; it would allow almost any justification to be sufficient to overcome the defendant's interest. Thus, some intermediate level of governmental interest which this author calls "important" seems most appropriate. One can usefully compare this to the level of scrutiny applied to commercial speech. In that area, the Court requires a "substantial" governmental interest. *See, e.g.*, Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980). Since overcoming jurisdictional interests does not result directly in liability for the defendant, the protection of her interests do not seem to

cause a complaint represents only allegations of wrongdoing, this threshold should adequately protect the more or less fixed interests of privacy and life management involved. One may ask why a threshold approach rather than a pure balancing approach is being proposed. A simple answer would be that it conforms loosely to what actually is being done. There are, however, more compelling reasons for the choice. A pure balancing approach can undervalue the defendant's interests in a particular case, or even overvalue it in another. The privacy-like interest ascribed here to the defendant can be thought of as a floor on defendant's rights, even if no "inconvenience" or other objective factors seem to exist in a particular case. By forcing the government to establish a certain threshold interest, the proposed test recognizes the subjective factors that surround the so-called "right to be left alone." To this author, pure balancing tests appear somewhat ad-hoc in administration. A threshold test provides at least some degree of uniformity.[180]

Considering only state court jurisdiction, the strongest state interest lies in enforcing its own regulatory schemes—based either on statutory or common law—against out-of-state transgressors.[181] The Supreme Court explicity has stated that this interest lacks relevance in jurisdictional analysis.[182] It is difficult to fathom why the Court insists on divorcing the choice of law question[183] from the jurisdiction question since typical jurisdictional due process analysis already considers state's interests in general, of which the state's interest in applying its own laws is the strongest. By separating the two analyses, the Court ignores the state's primary reason for passing long-arm statutes.[184]

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require more stringent scrutiny than the free speech interests found in cases like *Central Hudson*.

180. Admittedly, however, a fair degree of subjectivity enters into the decision of what constitutes a governmental interest important enough to meet the threshold.

181. As Professor Silberman noted regarding the Supreme Court's decision in *Hanson v. Denckla*, "two different state courts, one in Delaware and one in Florida, adjudicated an issue concerning the disposition of $400,000. Each court applied the law of its own state" against the out-of-state transgressor, resulting in victory for the Florida plaintiffs in Florida and defeat in Delaware since the Delaware court applied its own law to the out-of-state Florida party. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. Rev. 33, 83 (1978) (discussing Hanson v. Denckla, 357 U.S. 235 (1958)). The plaintiffs, then, are more concerned about what law applies than where the suit is brought. *Cf.* Keeton v. Hustler Magazine, 465 U.S. 770, 776 (1984) ("New Hampshire may rightly employ its libel laws to discourage the deception of its citizens."); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (citing State's interest in its scheme of regulating common trust funds to uphold jurisdiction over absent beneficiaries).

182. *See* Shaffer v. Heitner, 433 U.S. 186, 215-16 (1977); Hanson v. Denckla, 357 U.S. 235, 254 (1958).

183. The proposed test favors use of choice of law considerations in jurisdictional analysis but will not be satisfied by the mere assertion of a jurisdictional interest by a state. Rather, in the jurisdictional analysis, courts must examine the legitimacy of the state's interest in regulating the underlying conduct at issue.

184. *See* Shaffer v. Heitner, 433 U.S. 186, 224-26 (1977) (Brennan, J., concurring in part and dissenting in part). Professor Silberman has argued rather persuasively that a state should be able to assert jurisdiction over a defendant whenever it may apply its own law to the transaction. Silberman, *supra* note 181, at 79-90 (1978). Until the Supreme

Use of choice of law analysis in jurisdictional analysis, however, would involve certain complications. Presently there are few constitutional limitations on a state's choice of which law to apply.[185] The proposed constitutional test for jurisdiction, however, examines the legitimacy of the state's choice of its own law at an early stage. In some cases, this test will require a court to make choice of law decisions that were previously avoidable, as when the law in all relevant states is the same. In such cases, courts should examine whether the forum state could assert its own law under the present constitutional standards.[186] This decreases the value of that interest due to the minimal review of such decisions. In addition, if choice of law will not affect the rule of decision in the underlying case, its weight in the jurisdictional analysis is lessened. In a complex choice of law problem, the weight ascribed to the state's choice of law interest also should be reduced correspondingly.

The *Burger King* decision provides some hope that the Court will move towards weighing choice of law interests in the future. The Court specifically rejected the idea that *Hanson v. Denckla* made choice of law considerations irrelevant to jurisdictional analysis:

> The Court in *Hanson* and subsequent cases has emphasized that choice-of-law *analysis*—which focuses on all elements of a transaction, and not simply on the defendant's conduct—is distinct from minimum-contacts jurisdictional analysis—which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggests that a choice-of-law *provision* should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes.[187]

It is not a great leap from this statement, concurred in by six of the nine justices, to the proposition that a state's interest in applying its own law is generally a relevant jurisdictional interest.[188] Regardless, under the

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Court makes a serious effort to regulate choice of law under the fourteenth amendment, I prefer simply to accord it weight as one of the state's interests balanced against the defendant's liberty interest.

185. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (state's choice of law must not be "arbitrary nor fundamentally unfair"); *see generally* Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. Chi. L. Rev. 440 (1982). In the same term as *Burger King*, the Court struck down a state's use of its own law in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822 (1985) (state's application of its law to every claim was "arbitrary and unfair"). Perhaps the *Shutts* decision signals more diligent supervision by the Court in this area. *Shutts*, however, apparently approved of the minimal scrutiny principle of *Allstate*. *See* 472 U.S. at 818-19.

186. This analysis will not always be easy. In some cases, more than one state's law can apply. In such cases, courts should focus on whether the forum state could apply its law to this particular defendant, leaving other choice of law problems for a different analysis.

187. 471 U.S. 462, 481-82 (1985) (emphasis in original) (citation omitted).

188. For evidence of further movement by courts towards considering choice of law interests, see Asahi Metal Indus. Co. v. Superior Court, 39 Cal. 3d 35, 53, 702 P.2d 543, 554, 216 Cal. Rptr. 385, 395 (1985) (discussing California's interest in ensuring that for-

proposed test, choice of law is only one of the governmental interests present in state court cases.[189] Although it is a very important factor, its recognition is not decisive in meeting the threshold.

Protecting state residents by affording them a convenient forum in which to litigate constitutes the primary remaining state interest.[190] Presently, courts recognize this interest only after sufficient "contacts" have been established,[191] and, admittedly, this interest is relatively small. Related to this interest is one of preventing out-of-state actors from committing unlawful acts, as defined by any state or federal law, within the state. Where the plaintiff is a state resident, both interests are advanced. Even when the plaintiff is not a state resident, a convenient forum protects local witnesses and also provides a forum less biased against the defendant. Unless coupled with an interest in applying the state's own law, however, providing a generally convenient forum seldom will prove to be a substantial interest.[192]

C. *Other Factors*

Under the proposed test, once the threshold is surmounted, a balancing test is applied. Courts should examine a number of factors. Inconvenience to the defendant and to his witnesses should be weighed.[193]

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eign manufacturers comply with the state's safety standards), *rev'd*, 107 S. Ct. 1026 (1987). Though it reversed the lower court, the Supreme Court discussed the possible interests of California, concluding that they were minimal. *See* Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1034 (1987); *cf.* Keeton v. Hustler Magazine, 465 U.S. at 776 (describing states' interest as a "surrogate" for other jurisdictional factors).

189. Choice of law is not always the motivating force behind a plaintiff's choice of forum. In the first place, many states apply the same set of legal principles to a variety of cases. Moreover, other concerns are often more compelling. For example, in *World-Wide Volkswagen Corp. v. Woodson*, the plaintiff's motive in selecting the forum may have been the reputation of the local court to award large verdicts.

190. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980); McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957).

191. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 481-82 (1985).

192. Some indication of this is found in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In *Mullane*, the Supreme Court determined, among other things, that the New York courts had jurisdiction over out-of-state trust beneficiaries. In doing so, the Court gave some weight to the interest of New York in settling the accounts of common trust funds located in New York—thus protecting the interests of the local institutions including the interest in providing a convenient forum in which to litigate. *Id.* at 313. Providing a local forum in which to litigate, however, also was an integral part of the legislative scheme which sought to promote New York institutions as trustees of common trust funds. *Id.* at 311-13. Thus, the local forum interests were combined with an interest in the state in upholding its legislative scheme.

193. Arguably, witness inconvenience comprises a *greater* factor. Most defendants are covered by insurance, which lessens their inconvenience costs. Defendants tend to be deposed where they live or are employed, *see, e.g.*, Sugarhill Records Ltd. v. Motown Record Corp., 105 F.R.D. 166, 171 (S.D.N.Y. 1985) (citing this as the general rule, though declining to follow it); Pinkham v. Paul, 91 F.R.D. 613, 615 (D. Me. 1981) (following this rule and extending it to include a defendant asserting a compulsory counterclaim as well as a party joined in a compulsory counterclaim, since both should be considered to be in the same position as ordinary defendants); Buryan v. Max Factor &

Because the degree of inconvenience varies widely from case to case,[194] the balancing portion of the test becomes a more appropriate place to consider it than at the threshold level. The plaintiff's convenience factors also should comprise an element of the balancing test,[195] especially if the alternative forum is distant from the one plaintiff has chosen.[196] Although not relevant to federal cases, the interstate interests cited in *Burger King* and *World-Wide Volkswagen* also should be weighed.[197]

Application of the threshold-plus-balancing test using only presently accepted governmental interests, which exclude choice of law, yields results strikingly similar to those reached under minimum contacts analysis, because the contacts analysis—and the purposeful availment segment of this analysis in particular—incorporates the major state interests. Specifically, a defendant that "purposefully avails" itself of the forum state has invoked the state's interest in deterring unlawful acts by such out-of-state residents. Since, however, the major state interests are seen from the perspective of their impact on the defendant's interests, in a close case the remaining state interests often become relatively small, and the cases result in more defendant-oriented decisions like those following in the wake of *Shaffer* and *World-Wide Volkswagen*.[198] If choice of law considerations were not excluded, then the results in some cases would

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Co., 41 F.R.D. 330, 331-32 (S.D.N.Y. 1967) (applying this rule since requiring defendants to leave their place of residence or employment "would necessarily be oppressive and annoying" and would seriously hamper their ability to operate their businesses); Kurt M. Jachmann Co. v. Hartley, Cooper & Co., 16 F.R.D. 565, 565 (S.D.N.Y. 1954) (citing the rule as "[t]he proper place for taking the oral deposition of indivudual defendants is their residence, or of corporate defendants, their principal place of business"), and will only be inconvenienced greatly if the case goes to trial. Even then, their expenses may be paid for. The insurance company often undertakes to pay the expenses, or the court may order it to do so. *See, e.g.*, Philadelphia National Bank v. Dow Chemical Co., 106 F.R.D. 342, 345 (E.D. Pa. 1984). In contrast, reimbursement for witness expenses under the federal statute is meager. *See* 28 U.S.C. § 1821 (1982) (generally gives thirty dollars per day and some travel expenses).

194. Determining witness inconvenience requires courts to analyze the importance of the witness, the ability of the parties to use the witness' deposition at trial, the willingness of the witness to appear, the ability of the court to subpoena the witness, the actual burden on the witness to appear, and so forth.

195. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (citing World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)); Keeton v. Hustler Magazine, 465 U.S. 770, 780 (1984).

196. *See* McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957) (discussing the value of plaintiff's home forum in the context of forum non conveniens); Koster v. Lumberman's Mutual Ins. Co., 330 U.S. 518, 524 (1947) (same).

197. These include " '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.' " *Burger King*, 471 U.S. at 477 (quoting *World-Wide Volkswagen*, 444 U.S. at 292). In a federal question case, the *interstate* judicial system has little contact with the matter because such cases usually are brought in *federal* court. The social policies being furthered are those federally-, not state-, mandated and again are tried primarily in federal court.

198. *See* Asahi Metal Indus. Co. v. Superior Court, 107 S. Ct. 1026, 1031-33 (1987); Heliocopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415-16 (1984); Kulko v. Superior Court, 436 U.S. 84, 94 (1978).

have been different.[199]

As discussed above, the proposed test assumes that the government must demonstrate an important interest in asserting jurisdiction over the defendant. Because it forces early and more frequent decisions about choice of law, this analysis also will force the courts to reflect on the appropriate limits on a state's choice of its own law.[200]

V. APPLICATION OF THE PROPOSED TEST IN FEDERAL CASES

A. *Federal Question Cases*

Although the proposed analysis would have some effect on jurisdiction in state courts, it would effectuate its most far-reaching changes in federal cases. This section will examine the proposed test in federal questions cases.

Roughly speaking, these cases can be divided into two categories for the purpose of jurisdictional analysis: federal questions where a special long-arm statute (ordinarily providing for nationwide service of process) exists and federal questions where no such special statute exists. The first category—nationwide service—does not raise the preliminary statutory questions that were discussed in Part II above.[201] The language of Rule 4(e) allowing service "under the circumstances . . . prescribed by the [federal] statute . . . " governs these cases.[202]

As a rule, in cases where the statute provides for nationwide service, the courts do not spend much time on a due process discussion. This appears to result from an application of a "minimum contacts" analysis to such cases. Once the "contacts" portion of the test is satisfied, jurisdiction is said to exist.[203] In nationwide service cases, the forum against

199. For example, in *Shaffer*, the state of Delaware had a manifest interest in regulating the corporate activities of officials of Delaware corporations. If such considerations were taken into account, Delaware would have had jurisdiction over the defendants. The Court implicitly acknowledged this interest but said that Delaware had to assert it affirmatively, which it later did. Shaffer v. Heitner, 433 U.S. 186, 214-15 (1977); *see* 6 Del. Code Ann. tit. 10, § 3114 (Supp. 1986); *see also* Armstrong v. Pomerance, 423 A.2d 174, 179 (Del. 1980) (upholding the Delaware statute).

Another possible difference resulting from the balancing of state interests, including choice of law, would arise in large states. At present, there is no due process impediment to dragging a defendant a large distance across a state like California, Texas or Alaska, which may prove far more inconvenient than dragging a defendant a short distance across state lines. If the defendant's due process right is not linked to being dragged out of state, but simply related to being forced to litigate in an unanticipated, faraway forum, in theory, one's due process rights could be violated by a purely intrastate suit. The state's interests in apportioning rights between its own citizens and in organizing its own judicial system, however, should outweigh the individual's interest in all but the rarest of cases.

200. The Supreme Court has placed minimal constitutional limits on choice of law thus far. *See supra* note 185 and accompanying text.

201. *See supra* notes 48-120 and accompanying text.

202. Fed. R. Civ. P. 4.

203. For example, once the Court in *Burger King Corp. v. Rudzewicz* found sufficient contacts, it disposed of defendant's inconvenience argument by suggesting that a defend-

which contacts are measured is usually the United States.[204] Thus, virtually any domestic defendant will have minimum contacts with the country as a whole. The cases discussing due process in this context, therefore, often involve alien defendants, and courts measure the alien's contacts with the country as a whole.[205] Although *Burger King* and *Asahi Metal Industrial Co. v. Superior Court*[206] indicate that, even where contacts exist, courts should address fairness considerations,[207] they seldom do so, especially in nationwide service cases.[208] Indeed, at least one case and one commentator have suggested that, in a nationwide service case, once contacts with the United States are found, no further analysis

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ant who was severely inconvenienced by plaintiff's choice of forum could ask for a change of venue. 471 U.S. 462, 477 (1985). Arguably, once it is clear that defendant is subject to jurisdiction in *any* federal court the rest is just a matter of venue. *See* FTC v. Jim Walter Corp., 651 F.2d 251, 257 (5th Cir. Unit A July 1981) (once defendant has minimum contacts with the United States, Congress has discretion over where the case should be litigated). Thus, it appears that the analysis described here "constitutionalizes venue." *See* Barrett, *Venue and Service of Process in the Federal Courts—Suggestions for Reform*, 7 Vand. L. Rev. 608, 628-30 (1954) (suggesting nationwide service along with liberalized venue for all federal cases).

This argument is not without force, but there is no reason to assume that the Constitution places no restriction on Congress' venue choices. Whether one calls it "venue" or "jurisdiction," a defendant still has a due process liberty interest at stake. *See supra* note 170 and accompanying text. In diversity cases, where fourteenth amendment jurisprudence currently is used to safeguard due process, the choice of forum also determines choice of law, including the forum state's choice of law rules. *See* Van Dusen v. Barrack, 376 U.S. 612, 638-39 (1964) (transfer of venue does not affect choice of law); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

The same situation exists in federal question cases that include pendent claims, ancillary claims, or both, which the court will also decide using state law. *See* 19 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4515, at 276 & n.11 (1982). Thus, imparting venue with a constitutional dimension may impact profoundly on the rule of decision used in the underlying case. Moreover, as Professor Fullerton has pointed out, improper venue is not a ground for collateral attack, nor is transfer available as a matter of right. Therefore, constitutional restriction is needed. Fullerton, *supra* note 4, at 35-38; *see also* Clermont, *supra* note 26, at 430-32, 434-37.

204. *See, e.g.*, Securities Investor Protection Corp. v. Vigman, 764 F.2d 1309, 1315-16 (9th Cir. 1985) ("[w]here a federal statute . . . confers nationwide service of process, 'the question becomes whether the party has sufficient contacts with the United States' ") (quoting Nelson v. Quimby Island Reclamation Dist. Facilities Corp., 491 F. Supp. 1364, 1378 (N.D. Cal. 1980)); FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. Unit A July 1981); Green, *supra* note 4, at 469-70 (when minimum contacts exist with the relevant sovereign, due process no longer protects a defendant from distant litigation because the location of permissible venue is a matter of sovereign prerogative).

205. *See supra* note 102 and accompanying text; for a general discussion, see *supra* notes 75-102 and accompanying text.

206. 107 S. Ct. 1026 (1987).

207. *See* Asahi Metal Indus. v. Superior Court, 107 S. Ct. 1026, 1033-34 (1987) (although the Court had already found that defendant had insufficient contacts, it analyzed the contacts to determine reasonableness); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985) (even though contacts are established, Court looks at other factors to determine if jurisdiction would be unfair regardless of the contacts).

208. *See, e.g.*, FTC v. Jim Walter Corp., 651 F.2d 251, 256-57 (5th Cir. Unit A July 1981); Fitzsimmons v. Barton, 589 F.2d 330, 333 (7th Cir. 1979); Clement v. Pehar, 575 F. Supp. 436, 438-39 (N.D. Ga. 1983).

is necessary.[209] This provides no protection for domestic defendants, however, and possibly inadequate protection for aliens.

Moreover, of the other considerations set out in *World-Wide Volkswagen* and *Burger King*—"the 'forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' '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' "[210]—only one is not tied to a state-based jurisdictional system. Thus, these considerations serve little purpose in a nationwide service case (or in any other federal case for that matter). But if defendant has a real due process interest, the mere assertion of power by Congress should not end the discussion. At the very least, a court should determine whether there is good reason to force the defendant to come to *this particular* district court to litigate.

This is the point of the proposed analysis. Rather than delegating the constitutional task to a judge's sense of fairness,[211] the test attempts to impose some order and consistency on the decisions. After all, the defendant's liberty interest is one partly tied to a location, namely the home. Assuming that the right to be left alone reaches, at most, to the borders of the home state,[212] it is not rational to assume that a defendant reasonably expects to be sued in any federal court on a federal claim. Many defendants will not make the distinction between conduct that violates a federal law and that which violates state law; some will violate both. Moreover, most people do not understand the notions of federalism and a unified federal court system. They see the country in terms of state boundaries. Some historical logic exists, therefore, to using state boundaries as a starting point for a defendant's expectations, even in a federal question case.[213]

Thus, the proposed analysis forces the court to look for an important interest in forcing defendant into that particular district, but the analysis of governmental interests occurs at the threshold level, where it can affect the results, instead of being considered only after the court finds suf-

209. *See* Stafford v. Briggs, 444 U.S. 527, 553-54 (1980) (Stewart, J., dissenting); *see also* Abrams, *supra* note 4, at 8 (quoting Justice Stewart's dissenting opinion in *Stafford v. Briggs*).

210. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

211. Professor Fullerton uses fairness as a primary factor in her balancing test for analyzing the legitimacy of nationwide service. Fullerton, *supra* note 4, at 38-41, 85. She states that governmental interests have a place in the analysis. *Id.* at 56-60, 85. *See also* Oxford First Corp. v. PNC Liquidating Corp., 372 F. Supp. 191, 203-05 (E.D. Pa. 1974) (court applies fairness test to determine appropriateness of nationwide service of process). The threshold-plus-balancing test, however, gives more precise protection to the presumed privacy-like interest of the defendant, while giving appropriate weight to other factors.

212. *See supra* text accompanying notes 164-67.

213. *See* Fullerton, *supra* note 4, at 44-45.

ficient contacts. This allows what might be a tenuous case for jurisdiction in state court terms to become a constitutionally permissible one.

Federal question cases, in contrast with diversity cases, theoretically involve no choice of law issue.[214] The fact that nationwide service is part of a larger regulatory scheme, however, creates a governmental interest. For example, with securities regulation, Congress intended to provide a broad remedial statute.[215] By making it easier for private litigants to sue, Congress enhanced the deterrent effect of the law and the rights of disclosure set out in the securities laws. The federal interest, however, does not always necessarily override defendant's interests. Courts still must consider the countervailing individual interests of reasonable control over the effects of one's conduct so that unexpected litigation consequences, such as a very inconvenient forum, do not result. When faced with the more substantial federal interest in the statutory scheme, however, the individual's interest ordinarily will lose.

Things grow a bit more complicated when dealing with federal question cases where no nationwide service statute exists. In those cases, state long-arm statutes provide the statutory basis for jurisdiction, and, as noted above, specific statutory limits must be respected.[216] Once those limits have been complied with, however, the analysis proceeds to the constitutional test, which incorporates the same concepts for nationwide service expressed above. On the governmental interest side, however, one major piece will be missing: jurisdiction no longer forms a part of the larger statutory scheme. Once the jurisdictional interest is removed, the remaining federal interests shrink in importance, though they never disappear.[217]

Individual statutory schemes, however, may contain some evidence of the need for a broader jurisdictional standard, even though they contain no jurisdictional section. For example, in the civil rights statutes, Congress clearly intended that the statutory scheme provide a relatively accessible remedy,[218] suggesting that courts allow jurisdiction where it

214. A choice of law issue could arise in a federal question case involving a foreign defendant.

215. *See* Carpenter v. Hall, 352 F. Supp. 806, 809-10 (S.D. Tex. 1972) (noting congressional purpose of providing a convenient forum through the nationwide service and venue provisions of the 1933 and 1934 securities acts); J.I. Case Co. v. Borak, 377 U.S. 426, 431-32 (1964) (discussing § 14(a) of the Securities Exchange Act of 1934, governing proxies, codified at 15 U.S.C. § 78n(a) (1982)); Kane v. Central Am. Mining & Oil, Inc., 235 F. Supp. 559, 565 (S.D.N.Y. 1964) (noting congressional purpose of providing an accessible forum).

216. *See supra* notes 57, 118 and accompanying text.

217. Because the interest must relate to having the litigation brought in a *particular* federal court, rather than in federal court in general, the overall statutory scheme automatically does not provide a jurisdictional interest in such cases.

218. In McNeese v. Board of Education, 373 U.S. 668 (1963), the Court stated that:

> [t]he purposes [of Section 1983] were severalfold—to override certain kinds of state laws, to provide a remedy where state law was inadequate, to provide a

would otherwise fail.[219] Courts must exercise caution in adopting such a lenient attitude toward jurisdiction, however, because if Congress had considered the interest in ease of litigation very large, it probably would have provided for nationwide service in the statute.

In addition, federal jurisdictional interests often relate to substantive regulatory interests.[220] Those substantive regulatory interests bearing on the jurisdictional question should be considered to determine if that particular federal court, not federal courts in general, have jurisdiction.

The federal venue statutes[221] express a general interest in having the litigation brought in particular districts. Venue alone, however, does not translate into a strong federal interest in asserting jurisdiction. Absent some strong showing of a connection between federal venue under Section 1391,[222] the general venue statute, and a federal statutory scheme, this interest is small. A number of federal statutes contain specific venue provisions providing that venue is proper in almost every instance, but many of these statutes do not contain separate service of process provisions.[223] Under the proposed test, the federal interest in jurisdiction expressed by these special venue statutes carries greater weight when the regulatory scheme does not contain a provision for nationwide service.

By incorporating state long-arm statutes through Rule 4 when the federal statute does not provide for jurisdiction, Congress arguably has included as federal interests the concerns of the state in which the district court sits, as well as the more general concerns of the substantive statute at issue. Thus, when an action constituting a violation of the federal statute takes place in the district, an important interest in adjudicating the suit there exists.

Assuming that the governmental interest has reached the intermediate threshold, the court then can consider whatever interests defendant has, such as convenience. The government's interests would then be balanced against the totality of defendant's interests. On balance, the results using the modified important-governmental-interest-plus-balancing test should

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federal remedy where the state remedy, though adequate in theory, was not available in practice, and to provide a remedy in the federal courts supplementary to any remedy any State might have.

Id. at 671-72 (quoting Monroe v. Pape, 365 U.S. 167, 174 (1961)); *see also* United States v. City of Philadelphia, 644 F.2d 187, 197-98 (3d Cir. 1980).

219. A state court analogy can be found in Calder v. Jones, 465 U.S. 783 (1984), where the Court, citing *Keeton v. Hustler Magazine*, stated that the plaintiff's contacts with the forum, though not sufficient or even necessary, could justify a finding of jurisdiction when it might otherwise be improper. *Id.* at 788 (citing Keeton v. Hustler Magazine, 465 U.S. 770, 780-81 (1984)).

220. *See supra* text accompanying notes 214-16.

221. 28 U.S.C. §§ 1391-1407 (1982).

222. 28 U.S.C. § 1392 (1982).

223. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3825, at 252 (1986). Most federal statutes that provide for venue allow it where the defendant resides or where some act constituting a violation of the statute takes place. *See id.* Under the test set out here, there should be no problem upholding jurisdiction in those districts.

at least resemble those presently achieved.[224]

B. *Diversity Cases*

At first glance, Justice Powell's *Bauxite* opinion seems to imply that federal interests[225] play a very small role in diversity cases. To some degree this is true; the main purpose of diversity jurisdiction is to provide a neutral forum for an out-of-state litigant in an otherwise ordinary state court case.[226]

Simply because a plaintiff otherwise would be forced to bring suit in the defendant's home state does not give weight to arguments that a federal court should assert jurisdiction in a diversity case where a state could not. Though such jurisdiction would prevent bias to the plaintiff,[227] local bias against the plaintiff is overcome adequately by the availability of federal court jurisdiction in the defendant's home state. Thus, the federal government's interest is very tenuous, if it exists at all. For the federal government to have a significant jurisdictional interest in the location of a trial, diversity jurisdiction must be viewed as intending to protect an out-of-state defendant from local state bias while simultaneously giving the plaintiff the right to litigate in his or her home state.

Moreover, the right being litigated is a creation of state, not federal, law. A federal court, out of simple comity concerns, appropriately can defer to the local state court's determination of the importance of protecting those rights. This suggests that whatever interests suffice for a

224. If defendant is an alien, the proposed test could support the results achieved by the "aggregate contacts" tests—at least in federal question cases. The greatest liberty deprivation for an alien is to litigate in an American court. Further, the great leeway traditionally afforded the federal government in regulating the conduct of aliens doing business with Americans, *see* Mathews v. Diaz, 426 U.S. 67, 78-80 (1976); Leon Moon Sing v. United States, 158 U.S. 538, 547 (1895); *cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 99-101 (1976) (plenary federal power over immigration and naturalization), would provide a fairly significant interest, as long as the choice of districts is not so irrational as to deprive the defendant of a reasonable opportunity to defend itself.

The decision to adopt a fifth amendment standard, however, does not mean that the "aggregate contacts" test is appropriate in all cases. The most glaring problem with this analysis is that its adoption via Rule 4 would mean that Congress adopted nationwide service for all federal claims except where the state long-arm statute falls short of due process limits. Although the 1963 amendments to Rule 4 were intended to broaden the jurisdictional reach of federal district courts, it is doubtful that Congress intended such a broad change.

225. Parts B and C largely will discuss the federal interests that fall within the proposed test. It is assumed that the defendant's basic interests remain the same throughout. *See supra* notes 163-77 and accompanying text. Naturally, any special problems would be handled on a case-by-case basis through the balancing portion of the test, making generalizations difficult.

226. 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3601, at 355-56 (1984). Wright, Miller & Cooper believe, however, that in today's mobile society, this concern no longer retains significance. *Id.* at 356-57.

227. One assumes that bias against out-of-state plaintiffs is also a rationale for diversity jurisdiction because otherwise there is little reason to afford diversity jurisdiction when the plaintiff is the out-of-state party.

state court to subject a defendant to its jurisdiction should also suffice to bring that defendant into federal court in that state.[228]

In some diversity cases, courts also should take uniquely federal interests into account. For example, in *Bauxite*, the Court upheld a finding of juridiction as a Rule 37[229] sanction for failure to abide by discovery orders concerning jurisdiction.[230] A simple fourteenth amendment "minimum contacts" analysis ignores the federal court's interest in upholding its procedures.[231] In *Bauxite*, Justice Powell's concurrence argued that at least a prima facie case of minimum contacts must be made before a Rule 37 sanction can be invoked.[232] Courts should ask whether the federal government's interests in upholding its procedures and providing plaintiffs with an opportunity to prove their case outweigh the defendant's liberty/due process interests.[233] The proposed analysis considers federal interests while preserving the state-based interests seemingly expressed in Rule 4(e).

C. *Diversity Cases With Federal Claims*—Burger King *Revisited*

At trial, the diversity claim in *Burger King* was joined with a federal question claim. On appeal, defendants contested personal jurisdiction only for the state contract claim,[234] even though the trademark claim also was governed by Rule 4(e). The plaintiff logically could have argued that jurisdiction should be challenged for all related claims or for none of them because the constitutional standards are the same.[235] The Supreme Court, however, treated the case as a simple diversity matter, making only a passing reference in a footnote to the fact that the original claim

228. Congress could decide that the federal interest is less than the state interest and amend Rule 4 to make it harder to bring the out-of-state litigant into federal court than into the state court.

229. Fed. R. Civ. P. 37.

230. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982).

231. *See id.* The Court's approach in *Bauxite*, however, contains problems. One might question how a court reasonably can expect compliance with its orders when jurisdiction over the party has yet to be established. *See Bauxite*, 456 U.S. at 714-16 (Powell, J., concurring in judgment) (noting that there is nothing in Rule 37 that grants jurisdiction). Moreover, one might well ask whether a state court could make a similar finding using its own discovery rules. Some of these problems are dealt with by the proposed government interests test for jurisdiction.

232. *Id.* at 715-16 (Powell, J., concurring in judgment).

233. *But see id.* at 714-15 (Powell, J., concurring) (Rule 37 is not a basis for asserting personal jurisdiction).

234. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469-70 & n.11 (1985).

235. *Compare* Keeton v. Hustler Magazine, 465 U.S. 770, 774-76 (1984) (using fourteenth amendment due process standards in a diversity case) *and* DeMelo v. Toche Marine, Inc., 711 F.2d 1260, 1265 (5th Cir. 1983) (same) *with* Max Daetwyler Corp. v. R. Meyer, 762 F.2d 290, 296 (3d Cir.) (fourteenth amendment due process standards restrict federal court jurisdiction in nondiversity cases), *cert. denied*, 474 U.S. 980 (1985) *and* Johnson Creative Arts, Inc. v. Wool Masters, Inc., 743 F.2d 947, 950 (1st Cir. 1984) (denying that fourteenth amendment standards apply in federal question cases).

had involved a trademark claim, a matter of federal law, as well.[236]

Treating a diversity case which also involves a federal claim as a simple diversity action ignores important federal interests. The interest in judicial economy alone is insufficient to overcome a due process interest, except where inconvenience to the defendant is virtually non-existent. Control of the fact-finding process in the federal part of the action, however, constitutes a more potent interest. If the case is split into a state and a federal action, the state case might go to trial first. In that event, a federal court could be forced to give issue-preclusive effect to the findings of the state court.[237] Moreover, the federal claim might be subject to claim preclusion because it could have been brought in the state action.[238] Thus, whatever interests allowed the case to be brought in the federal court would be lost. Litigation of the second case in state court would subjugate to the due process interest the goal of uniform federal adjudication of federal statutes.

Burger King serves as a prime example. Jurisdiction over the defendants under the federal trademark statute was not questioned by either defendant.[239] Curiously, the plaintiff did not argue that the existence of jurisdiction for purposes of the Lanham Act claim conferred jurisdiction over the defendants for all related claims.[240]

The federal interest in *Burger King* is indirect. In *Burger King*, if juris-

236. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 469-70 n.11 (1985).

237. *See, e.g.*, Allen v. McCurry, 449 U.S. 90, 95 (1980) (recognizing that federal courts generally give preclusive effect to issues litigated in prior state proceeding, Court held that collateral estoppel applies when § 1983 plaintiffs attempt to relitigate in federal court issues decided against them in state court proceedings); *see also* 28 U.S.C. § 1738 (1982) (ensuring full faith and credit given to state court proceedings).

238. *See, e.g.*, Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 83-85 (1984) (claim under 42 U.S.C. § 1983 can be precluded by prior state case; Court remanded for determination of Ohio law of preclusion); Derish v. San Mateo-Burlingame Bd. of Realtors, 724 F.2d 1347, 1352 (9th Cir. 1983) (claim under federal antitrust laws precluded by prior case brought under state antitrust law); Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 486-92 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981) (same).

The Supreme Court has held that the claim preclusive effect of a prior state judgment is to be determined by looking to the preclusion law of the judgment-rendering state. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380 (1985); *Migra*, 465 U.S. at 85. As the Court suggested in *Marrese*, many states deny claim preclusive effect when the first court would not have had subject matter jurisdiction over the claim that is being asserted in the second suit. *Marrese*, 470 U.S. at 383 (noting that the Restatement (Second) of Judgments §§ 25(l), 26(l)(c) supports this view). In those instances, the prior state judgment may not have claim preclusive effect on a later claim that is within the exclusive subject matter jurisdiction of the federal courts. *See id.*

239. *See supra* note 33 and accompanying text. Because the Lanham Act does not contain a nationwide service provision, *see* 15 U.S.C. §§ 1051-1127 (1982 & Supp. IV 1987), Rule 4(e) applies, incorporating the state's—in this case Florida's—long-arm statute.

240. *Burger King*'s brief to the Court mentioned the possibility but did not develop the point. Brief for Appellant at 47-48. The idea resembles pendent subject matter jurisdiction, where the courts hear claims related to a federal claim even when federal subject matter jurisdiction would not exist for the related claim alone. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 725-29 (1966).

diction did not exist for the contract claim in Florida, then the plaintiffs would have had to litigate in Michigan. At that point, Burger King either would have had two cases in two jurisdictions—a contract claim in Michigan and a trademark claim in Florida—or it would have been forced to bring its trademark claim in a Michigan federal court. If it chose the former, the Michigan judgment could preclude the Florida action.[241] If it chose, or was forced into, the latter option, it would lose the ability to litigate the trademark claim in Florida. As a result, the federal policy behind the ability to litigate in Florida would be thwarted. Though this may seem like a relatively insignificant interest, it is the same interest that allows the trademark claim to be brought in Florida in the first place.[242] Thus, it would have been sufficient to satisfy the government's initial burden under the proposed test.

Even if the liberty interest is overcome and the threshold test is met for one claim, the court should not automatically conclude that the test has been met for all claims. Arguably, if a given state or district is not inconvenient for the litigation of one claim, it cannot be inconvenient for another claim. Such an argument, however, is insufficient to block a due process challenge to jurisdiction over the second claim since jurisdiction is not viewed purely as a matter of convenience. For example, in at least one case in New York state court, plaintiff's argument that defendant's amenability to process in an unrelated case in New York federal court made him subject to suit in New York state court[243] was dismissed by the court on statutory grounds.[244] Constitutional grounds, however, mandate the same decision. To conclude otherwise would take even the proposed interest analysis too far.

The idea that a defendant can be subject to jurisdiction for only a narrow purpose is not new. It serves as the basis for the distinction between

241. Because the federal claim could have been litigated in Michigan, claim preclusion probably would bar the Florida action if the Michigan case went to trial first. However, the Florida action might not preclude the Michigan action because of the inability of the federal court in Florida to obtain jurisdiction over Rudzewicz on the contract claim. *See* Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 383 (1985).

242. It is hard to understand why Rudzewicz and MacShara only appealed personal jurisdiction as to the contract claim. Surely the trademark claim, which was a product of the franchise agreement, has as much, or as little, connection with Florida as the contract claim. Given that Rule 4 would govern both claims, one would have expected a court to apply the same standard—minimum contacts with Florida—to both claims. Under this Article's proposed analysis, the chances of having jurisdiction over a federal claim and not over a related state claim would be increased, because different interests would be considered.

In general, where the "pendent" claim stems from diversity, and the state claim is brought in federal court, the problem of a state court thwarting federal resolution of federal questions is not present. Unless it is impossible to find a federal forum where both can be tried (which is extremely unlikely), the federal claim no doubt would be transferred pursuant to 28 U.S.C. § 1404(a) and consolidated with the diversity claim.

243. Rockwood Nat'l Corp. v. Peat, Marwick, Mitchell & Co., 100 Misc. 2d 688, 690-91, 420 N.Y.S. 2d 49, 51-52 (N.Y. Sup. Ct., Westchester County 1976), *aff'd on other grounds*, 63 A.D.2d 978, 406 N.Y.S.2d 106 (N.Y. App. Div. 2d Dep't 1978).

244. *Id.*

specific and general jurisdiction.[245] Permitting jurisdiction over unrelated claims would destroy this distinction. Proper assertion of personal jurisdiction over a party does not constitute waiver of the liberty interest. Although proper assertion of personal jurisdiction may indicate a lack of personal inconvenience in defending claims in the forum, lack of personal inconvenience is not the only limitation on jurisdiction. The defendant's liberty interest includes the ability to have witnesses testify without inconvenience.[246] In addition, where the state's interest in applying its own law barely falls within constitutional bounds, courts should afford the liberty interest greater weight. Thus, the state interest should be construed narrowly so that the liberty interest is overcome only for the narrow purpose of the claim brought and related claims, and not for unrelated claims.[247]

An alternative solution, supported by ample precedent, entails the use of pendent personal jurisdiction.[248] In *Burger King*, for example, although the Court's diversity jurisdiction technically supported the

245. In Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), the Court, in defining specific jurisdiction, stated "[it] has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant". *Id.* at 414 n.8.

The Court defined general jurisdiction over a defendant as "a State exercis[ing] personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Id.* at 414 n.9.

246. The Supreme Court noted that this could be a factor in *Burger King v. Rudzewicz*, 471 U.S. 462, 483 & n.27 (1985), but found it not to be factually supported in that case. *See also supra* note 193 and accompanying text.

247. An analogous problem existed in Kulko v. Superior Court, 436 U.S. 84 (1978). In that case, a California resident sued her ex-husband, a New York resident, in California state court to obtain custody of their children (previously awarded to the father) and child support. *See id.* at 88. The children were residing with the mother in California at the time, and neither the father nor the Court questioned the authority of the California courts to rule on the custody dispute. *See id.* The Court held, however, that asserting jurisdiction over the father to decide the issue of child support violated due process. *Id.* at 96-98. Thus, a significant facet of the child support problem—which parent should have custody—would be decided in California, while a New York state court would determine how much should be paid for support. The case does not raise the preclusion problem inherent in pendent jurisdiction cases. If the father conceded that California had a sufficient interest to consider the custody dispute, why was it insufficient to confer a constitutionally permissible level of interest to decide the support issue? The real issue being determined was whether California should be permitted to apply its own law to the support question. Under the author's proposal, that would normally be a factor. Under the *Kulko* facts, one could resolve the jurisdictional issue in favor of the mother, even assuming New York law applied, because of the interest conferred by the custody battle. At some later date, however, the court would have to face squarely the choice of law issue.

248. *See, e.g.*, Ferguson, *Pendent Personal Jurisdiction in the Federal Courts*, 11 Vill. L. Rev. 56 (1965); Mills, *Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 Colum. L. Rev. 423, 423-25 (1970); Note, *Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process*, 51 Fordham L. Rev. 127, 166 (1982) [hereinafter Note, *Removing the Cloak*]; Note, *Ancillary Process and Venue in the Federal Courts*, 73 Harv. L. Rev. 1164, 1175-78 (1960); Comment, *Extraterritorial Service Provisions of Federal Statute Held In-*

breach of contract claim, the breach of contract claim could have remained in the Court's jurisdiction as a pendent claim to the federal trademark claim even if no diversity jurisdiction existed.[249] Arguably, because defendants unquestionably are going to litigate the trademark claim in Florida, the entire suit should be litigated in one place. Viewing jurisdiction as a matter of pure fairness to the defendant, once the defendant is already subject to the authority of the court for a trademark claim, it is not unfair to subject him to jurisdiction for all related claims. Viewing jurisdiction from the due process standpoint as set out above, once the threshold-plus-balancing test weighs against the defendant, the court should allow all claims to be made against him.

The precedent for this argument largely stems from cases involving nationwide service of process, where the state's long-arm statute proved insufficient to obtain jurisdiction over the defendant for the pendent state claim.[250] One of the few appellate cases confronting the issue directly is *Robinson v. Penn Central Co.*,[251] where the Third Circuit held that the district court had jurisdiction over the defendant for purposes of claims pendent to a federal securities action.[252] The majority of other cases dealing with the issue reach the same result.[253] These decisions stem from the premises that nationwide service of process is always valid within the United States,[254] and that the same concept of judicial economy as a factor that allows federal courts to assert subject matter jurisdiction over pendent claims, allows courts to assert personal jurisdiction over the pendent claims as well.[255] As previously discussed, however, the first premise, based on nationwide service of process, is not valid,[256] and the second, judicial economy, does not per se seem to involve a sufficient federal interest to overcome a defendant's liberty interest.

A strong argument can be made that under Rule 4(e), the federal court

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applicable to Pendent Nonfederal Claim, 63 Colum. L. Rev. 762, 765 (1963) (discussing the requirements of pendent jurisdiction).

249. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966).

250. *See* Note, *Removing the Cloak*, *supra* note 248, at 140-41.

251. 484 F.2d 553 (3d Cir. 1973).

252. *Id.* at 555-56. The Securities claims were made pursuant to the Securities Exchange Act of 1934, 15 U.S.C. § 78aa (1982), and the Securities Act of 1933, 15 U.S.C. § 77v (1982). *Id.* at 554. There is nationwide service of process for these claims.

253. *See, e.g.*, Oetiker v. Jurid Werke, G. m. b. H., 556 F.2d 1, 4-5 (D.C. Cir. 1977) (patent infringement claim); Emerson v. Falcon Mfg., 333 F. Supp. 888, 889-90 (S.D. Tex. 1971) (securities claim); Kane v. Central Am. Mining & Oil, 235 F. Supp. 559, 567-68 (S.D.N.Y. 1964) (shareholders' derivative action). *But see* Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705-06 (D. Mass. 1964) (pendent claim to securities claim stricken when not supported by judicial economy).

254. *See* Robinson v. Penn Central Co., 484 F.2d 553, 554 (3d Cir. 1973) (noting that Congress undisputably could extend process of federal district courts throughout the United States) (citing Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946)).

255. *See Oetiker*, 556 F.2d at 5; *Emerson*, 333 F. Supp. at 890; *Kane*, 235 F. Supp. at 568; *Robinson*, 484 F.2d at 555-56.

256. *See supra* notes 204-11 and accompanying text.

lacks jurisdictional authority in diversity cases with federal claims. If Congress has incorporated the limits of state statutes interpreted as not going to the limit of due process into Rule 4(e), then, unless one can say that personal jurisdiction is conferred directly by the nationwide service of process statute, the limits of Rule 4(e) must be respected. There appears to be little precedent discussing this possibility.

In *Oetiker v. Jurid Werke, G. m. b. H.*,[257] the court held that where personal jurisdiction existed over a patent infringement claim, pendent jurisdiction permitted personal jurisdiction over the defendant for a related federal claim.[258] The court made this assertion without any discussion of Rule 4(e), although the Rule was applicable to the related federal claim.

Bodine's, Inc. v. Sunny-O, Inc.,[259] a diversity case involving tort and contract claims, similarly allows jurisdiction on a pendent claim theory. The court determined that federal personal jurisdiction existed under Illinois law for the tort claim.[260] Regarding the contract claim, the court "believe[d] that it would not offend the underlying purposes of the Illinois Long-Arm Statute for the Court to treat the contract claims as pendent to the tort claim . . . ."[261] The court refused to recognize the strict limits of the Illinois statute for purposes of this additional, related claim.[262]

In *RFD Group Ltd. v. Rubber Fabricators, Inc.*,[263] however, the Southern District of New York, without discussing pendent jurisdiction, dismissed certain claims in a diversity action as not within New York's long-arm statute, although they had a relationship to claims for which personal jurisdiction existed.[264]

Purely statutory grounds justify the decisions in *Oetiker* and *RFD Group*, as well as in nationwide service cases like *Robinson*. Note, however, that although the concept of pendent claims was not developed fully at the time that many of the nationwide service statutes were enacted, Congress presumably intended to give broad reach to them.[265] In *Robinson*, the statute allowing nationwide service arguably was intended to allow such service for pendent or related claims.[266] This would circumvent the Rule 4(e) problem. In a federal question case with a pen-

257. 556 F.2d 1 (D.C. Cir. 1977).
258. *Id.* at 4-5.
259. 494 F. Supp. 1279 (N.D. Ill. 1980).
260. *Id.* at 1281.
261. *Id.* at 1285 (citation omitted).
262. *Id.* at 1284-85.
263. 323 F. Supp. 521 (S.D.N.Y. 1971).
264. *Id.* at 524-27.
265. *See, e.g.*, Bertozzi v. King Louie Int'l, Inc., 420 F. Supp. 1166, 1170 (D.R.I. 1976) (noting the "wide accessibility that § 27 [(the nationwide service provision of the Securities Exchange Act of 1934)] is designed to provide"); In re Whippany Paper Bd. Co., 15 B.R. 312, 314 (Bankr. D.N.J. 1981) (discussing nationwide service under the Bankruptcy Rules).
266. *See* Robinson v. Penn Central Co., 484 F.2d 553, 555-56 (3d Cir. 1973). Related

dent state claim, like *Oetiker* and *Robinson*, and even in diversity cases like *Bodine's*, the proposed test would allow jurisdiction as long as the amenability problem is the result of constitutional limitations, not of limitations inherent in the state long-arm statute.

Even if jurisdiction is justified on statutory grounds, however, it still must satisfy due process under the fifth amendment, which requires an identifiable federal interest. With regard to purely pendent claims, or to claims raising only state law issues, the above discussion of diversity claims might militate against such an interest. On the other hand, there are significant federal interests in a case involving both federal and state claims that are lacking in a pure diversity case.[267]

D. *Interpleader*

Federal interpleader is a major exception to the complete diversity requirement. The Federal Interpleader Act[268] provides for nationwide service of process for such actions, which are brought on the basis of diversity among the claimants.[269]

Although federal courts apply state law to resolve a federal interpleader claim,[270] legitimate federal interests in establishing an amenability standard still exist. The original impetus for the Federal Interpleader Act was the unavailability of personal jurisdiction in one state court over all the claimants.[271] The statute permits the stakeholder to join claimants from different places.[272] Modern standards of jurisdiction undoubtedly enable states to entertain the overwhelming majority of such cases, where they choose to do so.[273] This alone does not eliminate the possibility of a federal interest.

In addition to creating a federal protection against potential multiple

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claims technically would not be pendent if they were subject to independent federal jurisdiction such as diversity.

267. *See supra* notes 235-38 and accompanying text.

268. 28 U.S.C. § 1335 (1982).

269. 28 U.S.C. § 2361 (1982).

270. *See* Great Falls Transfer & Storage Co. v. Pan Am. Petroleum Corp., 353 F.2d 348, 349-50 (10th Cir. 1965); Kerrigan's Estate v. Joseph E. Seagram & Sons, Inc., 199 F.2d 694, 697 (3d Cir. 1952); *see also* Griffin v. McCoach, 313 U.S. 498, 503 (1941) (federal court must look to the forum state's choice of law rules to determine which state's law will govern as to the rights of claimants).

271. *See* Chafee, *Interpleader in the United States Courts*, 41 Yale L.J. 1134, 1136 (1932); *see also* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518, 521 (1916); 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1702, at 493 (2d ed. 1986).

272. *See* 28 U.S.C. § 1335 (1982).

273. Many state long-arm statutes do not cover the transactions that would lead to an interpleader action, focusing instead on "tortious acts" and the like. *See, e.g.*, N.Y. Civ. Prac. L. & R. § 302 (McKinney 1978); N.C. Gen. Stat. § 1-75.4 (1983); Ill. Ann. Stat. Ch. 110 § 2-209 (1983). Note, however, that the early passage of the federal statute—long before *International Shoe*—eliminated the need for broad state jurisdiction over interpleader actions. Thus, the lack of state involvement in the area may reflect the preemptive action of federal law.

litigation, the current federal act eliminates many of the technical limitations of common law interpleader procedure.[274] Moreover, when combined with a low five hundred dollar minimum claim value for the federal proceeding,[275] the Act provides a greater incentive for use of federal, instead of state, courts. This has resulted in the development of a well-defined, uniform remedy[276] that protects many entities doing business in interstate commerce from the vagaries of differing state practices.[277] Because interstate commerce is recognized explicitly in the Constitution as a federal concern,[278] the substantiality of a federal interest in using federal amenability standards is clear.

This does not mean, however, that the extremely broad amenability standards of the Federal Interpleader Act are beyond question in all cases. The problems with amenability under the Act lie not so much with the availability of nationwide service as with its interaction with the venue provisions of the Act. Venue is proper where any claimant resides.[279] Because the Act requires only minimal diversity, venue is proper in a district with almost no connection to the stakeholder or to the great majority of claimants.[280] It is difficult to see what federal interest requires allowing jurisdiction under all such circumstances. If the claimants were scattered around the country, with no real plurality of residence, this result could be justifiable on the grounds of necessity.[281] When the majority of claimants would be inconvenienced severely by the choice of venue, however, their liberty interests ought not to be invaded so cavalierly.

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274. 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1701, at 488-91 (2d ed. 1986).

275. 28 U.S.C. § 1335 (1982).

276. *See, e.g.*, Maryland Casualty Co. v. Glassell-Taylor & Robinson, 156 F.2d 519, 523-24 (5th Cir. 1946); Irving Trust Co. v. Nationwide Leisure Corp., 95 F.R.D. 51, 59 (S.D.N.Y. 1982); Commercial Union Ins. Co. v. Adams, 231 F. Supp. 860, 867 (S.D. Ind. 1964).

277. In Chafee, *Interstate Interpleader*, 33 Yale L.J. 685 (1924), Professor Chafee stated that "[w]hile our present governmental machinery is adequately adapted for preventing state interference with national powers, or vice versa, a serious and little discussed difficulty is the absence of machinery to adjust clashes and secure co-operation among the states." *Id.* at 685.

278. U.S. Const. art. I, § 8, cl. 3.

279. 28 U.S.C. § 1397 (1982).

280. The statute allows "minimal" diversity, *see id.*; that is, the claim may be brought as long as any two claimants are diverse. State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530 (1967).

Interpleader claims also may be brought under Federal Rules of Civil Procedure Rule 22. *See* Fed. R. Civ. P. 22. The Rule requires complete diversity, however, and jurisdiction would be determined according to Rule 4 standards. *See* 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1703, at 498-99 (2d ed. 1986) (Rule 22 requires complete diversity between stakeholder and claimants); *id.* at 499 (service of process for Rule 22 is made according to Rule 4).

281. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 317-18 (1950) (permitting service of process by publication to obtain jurisdiction over beneficiaries to a common trust fund who are scattered around the country).

Some cases involving jurisdiction over claimants in the interpleader context have discussed the limits of the federal interest involved. Those cases held that the remedial function served by the Act does not allow a court to assert jurisdiction over claimants for claims not directly provided for under the Act.[282] This is a proper conclusion; the federal interest resides in protecting against multiple vexations of stakeholders, not in providing a comprehensive action to resolve all related claims.[283] Thus, if reasonably restricted, the nationwide service provision is consistent in most cases with the governmental interest standard. The court must determine, on a case-by-case basis, that the interest served by the Federal Interpleader Act surpasses the intermediate threshold necessary to overcome the stakeholders' or claimants' due process interest.

E. *A Final Aside—Federal Law in the State Courts*

Under the proposed test, federal courts would take federal interests into account when deciding amenability questions. In addition, federal interests also arise when state courts decide federal question cases. Whether state courts should be required to use federal amenability standards or should apply their own long-arm statutes with fourteenth amendment restrictions depends on whether the state standards would interfere with the federal policy embodied in the substantive law being applied.[284] In areas where the federal statute allows nationwide service of process, Congress has expressed a policy allowing plaintiffs a liberal choice of forum as a substantive aspect of the remedy involved.[285] Therefore, state courts should follow the federal statute and afford na-

282. *See, e.g.*, Hagan v. Central Ave. Dairy, Inc., 180 F.2d 502 (9th Cir. 1950) (dismissing cross-claim arising out of the same transaction because it would enlarge the jurisdiction of a court and create rights not provided for under the Act); Marine Bank & Trust. Co. v. Hamilton Bros., 55 F.R.D. 505 (M.D. Fla. 1972) (co-defendant not permitted to maintain cross-claim against non-resident defendant served with process under the procedures set for nationwide service of process); *see also* Indianapolis Colts v. Mayor of Baltimore, 733 F.2d 484, 487 (7th Cir. 1984) (plaintiff not allowed to use interpleader action to subject defendant to personal jurisdiction when the defendant otherwise would not have been subject to jurisdiction), *cert. denied*, 105 S. Ct. 1753 (1985).

283. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1967), where the Court stated that the interpleader device was never meant to be a " 'bill of peace,' capable of sweeping dozens of lawsuits out of the various state and federal courts in which they were brought and into a single interpleader proceeding." *Id.* at 535-36.

284. Although cases containing a discussion of jurisdiction in this context do not appear to exist, the concept that state courts must use federal law when state law interferes with federal interests is expressed in case law in other contexts. *See* Dice v. Akron, C. & Y. R. Co., 342 U.S. 359, 361 (1952) (federal law determines defenses under federal statute); Brown v. Western Ry. of Ala., 338 U.S. 294, 298-99 (1949) (states' trial practice cannot defeat a right created by federal law).

285. In Kane v. Central Am. Mining & Oil, 235 F. Supp. 559 (S.D.N.Y. 1964), the court, discussing the broad venue provisions of section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa (1982), noted that they reflected "the Congressional purpose of providing an accessible forum for imposing the Act's standards upon multistate transactions in securities." 235 F. Supp. at 565. Then, discussing the nationwide service of process provisions also contained in section 27, the court stated: "[C]onsidering the broad remedial

tionwide service, subject to the fifth amendment governmental interest standard. This would measure federal, not state interests, even though a state court resolves a suit.

This issue seldom arises in practice because most statutes providing for nationwide service also give exclusive jurisdiction to federal courts.[286] Some exceptions do exist.[287] One state case, however, lends implicit support to the position set forth here. In *Lakewood Bank & Trust Co. v. Superior Court*,[288] plaintiff alleged violations of sections 5 and 12 of the Securities Act of 1933[289] and of state law. The statute provides for both concurrent jurisdiction and nationwide service.[290] Although the court ultimately determined that the plaintiff did not properly state a claim under the Securities Act, in dictum it appeared to assume nationwide service would apply if the federal statute were found to be applicable.[291] Moreover, the jurisdictional authority in a nationwide service case comes from a federal statute. Hence it is fitting that a fifth amendment standard, incorporating federal concerns, apply.

In cases where the federal statute does not contain a nationwide service of process provision, the issue is different. By failing to provide an express jurisdictional statute, Congress apparently has delegated the statutory standard of authority to the states' long-arm statutes.[292] Since this constitutes the same standard as would be used in a federal court, it is not altogether out of place. To measure the federal interests in having a federal dispute resolved in a particular location by purely state concerns, however, is inappropriate. Nevertheless, the source of jurisdictional authority is now a state statute, and the more appropriate standard may be a fourteenth amendment one, in which case the concerns of the state, perhaps weaker in this circumstance, will be the ones to measure. This

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objective of the 1934 Act, it would be an anomaly to expand the venue provision and at the same time to contract service of process amenability." *Id.* at 566-67.

286. *See, e.g.*, 15 U.S.C. § 78aa (1982); 28 U.S.C. § 1332(a)(1) (1982); 42 U.S.C. § 9613(b) (1982); *see also* 28 U.S.C. § 1334(a) (1982).

287. One such exception is the Securities Act of 1933, which gives concurrent subject matter jurisdiction over claims brought under the statute to state and federal courts. 15 U.S.C. § 77v (1982).

288. 129 Cal. App. 3d 463, 180 Cal. Rptr. 914 (Cal. Ct. App. 1st Dist. 1982).

289. *See id.* at 469, 180 Cal. Rptr. at 917; 15 U.S.C. § 77e, 771 (1982).

290. *Lakewood Bank & Trust*, 129 Cal. App. 3d at 468-69, 180 Cal. Rptr. at 916-17 (citing 15 U.S.C. § 77v(a) (1982)).

291. *See id.* at 470-71, 180 Cal. Rptr. at 918 ("California court may obtain jurisdiction over petitioner pursuant to section 22(a) [of the Securities Exchange Act of 1934] only if . . . a claim . . . is either brought to enforce any liability or duty created by the Securities Act of 1933 or is fundamentally derived from and dependent on such claim."). For a contrary view, see Negin v. Cico Oil & Gas Co., 46 Misc. 2d 367, 259 N.Y.S.2d 434 (N.Y. Sup. Ct., N.Y. County 1965). In *Negin*, the court rejected use of the nationwide service provisions of the Securities Act of 1933. It reasoned that the language of the Act, which refers to suits being brought in any district, did not apply to cases brought in the state courts. *Id.* at 368, 259 N.Y.S.2d at 436 (interpreting § 22(a) of the Securities Act of 1933, 15 U.S.C. § 77v(a) (1982)).

292. *See* Fed. R. Civ. P. 4.

may make it more difficult to sue out-of-state defendants in state court on federal claims, but this may not be an undesirable result.

CONCLUSION

The analysis of jurisdiction of federal courts suffers from two fundamental problems: the first is Rule 4 which is difficult to apply, and which has resulted in an anomalous use of fourteenth amendment standards to judge the propriety of federal action, and the second is constitutional tests which, divorced from other due process cases, have proven less than ideal in the federal area, and imperfect even for state courts.

For over one hundred years, courts have measured jurisdiction by the constitutional test of "due process." It has been treated as a due process outsider, however, never quite considered part of mainstream due process analysis. Lack of analytical uniformity in general does not justify the complete exclusion of jurisdiction from the traditional analysis. Moreover, keeping jurisdictional analysis in its own due process box has led to decisions that, despite the emergence of the minimum contacts analysis, are often ad hoc.

The unified analysis proposed here will not work radical changes in the results of cases; it will, however, produce some changes. It also will allow a careful consideration of the real interests involved in a jurisdiction decision. In federal courts, it will prevent federal interests from being ignored, while allowing due process rights to be protected in cases, such as nationwide service, that currently ignore this issue. It is hoped that this Article will provoke a careful reconsideration of the jurisdiction question in federal courts, and will constitute a first step in making the analysis of jurisdiction a more reasonable and rational one.