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Removing the Cloak of Personal Jurisdiction From Choice of Law Analysis: Pendent Jurisdiction and Nationwide Service of Process

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REMOVING THE CLOAK OF PERSONAL JURISDICTION
FROM CHOICE OF LAW ANALYSIS: PENDENT
JURISDICTION AND NATIONWIDE
SERVICE OF PROCESS

To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether. *

INTRODUCTION

The Supreme Court shaped the contours of the modern pendent jurisdiction doctrine in United Mine Workers v. Gibbs. The Court held that when a federal court has subject matter jurisdiction over a substantial federal claim, it has the discretionary power to adjudicate state law claims arising out of "a common nucleus of operative


1. 383 U.S. 715 (1966). The Court expanded the "unnecessarily grudging" approach to pendent jurisdiction set forth in Hurn v. Oursler, 289 U.S. 238 (1933). 383 U.S. at 725. In Hurn, the Court held that a federal court had power to hear the entire case only when federal and state claims were "in support of a single cause of action." 289 U.S. at 246.


The plaintiff in Gibbs alleged that the defendant had conducted an illegal secondary boycott in violation of § 303 of the Labor Management Relations Act, 29 U.S.C. § 187 (1976), and attempted to append a state claim of illegal civil conspiracy and boycott. Id. at 720.

3. 383 U.S. at 726. The Court suggested that state claims should be dismissed if state issues substantially predominate the entire case, unless the state claims are closely tied to questions of federal policy. Id. at 726-27. The Court also suggested that state claims should be dismissed if the federal claims are disposed of before trial. Id. at 726. The Court later qualified this suggestion in Rosado v. Wyman, 397 U.S. 397, 404-05 (1970) (mooting of the federal claim would not necessarily require dismissal). Cf. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 623-29 (1974) (discretion to dismiss state claims if brought late in the proceeding).

4. 383 U.S. at 725. Justice Brennan reasoned that the constitutional power of pendent jurisdiction derived from article III of the Constitution: "Pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ....' U.S. Const., Art. III, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' " Id. (footnote omitted) (emphasis in original).
A number of federal statutes providing for nationwide service of process for federal claims have established the federal question.


Unless there are provisions to the contrary under a specific federal statute, the scope of personal jurisdiction in the federal courts for federal question and diversity claims is controlled by rule 4(e), which provides for service of process in accordance with the “statute or rule of court of the state in which the district court is held.” Fed. R. Civ. P. 4(e). To obtain personal jurisdiction, federal courts apply the long-arm statutes and corresponding case law of the state in which the district court sits. Poyner v. Erma Werke GmbH, 618 F.2d 1186, 1187 (6th Cir.), cert. denied, 449 U.S. 841 (1980); Illinois v. City of Milwaukee, 599 F.2d 151, 156 n.3 (7th Cir. 1979), cert. denied, 451 U.S. 982 (1981); Lakeside Bridge & Steel Co. v. Mountain St. Constr. Co., 597 F.2d 596, 598 (7th Cir. 1979), cert. denied, 445 U.S. 907 (1980); Forsythe v. Overmyer, 576 F.2d 777, 782 (9th Cir.), cert. denied, 439 U.S. 864 (1978); Ag-Tronic, Inc. v. Frank Paviour, Ltd., 70 F.R.D. 393, 400 (D. Neb. 1976). Federal statutes permitting nationwide service of process, together with specific congressional authorization, allow federal courts to circumvent state personal jurisdiction requirements. Fitzsimmons v. Barton, 589 F.2d 330, 333-34 (7th Cir. 1979); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 417-18 (9th Cir. 1977); Mariash v. Morrill, 496 F.2d 1138, 1142-43 (2d Cir. 1974); Ninth Fed. Sav. & Loan Ass’n v. First Fed. Sav. & Loan Ass’n, 493 F. Supp. 981, 983 (S.D.N.Y. 1980); see Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442 (1946); Eastman Kodak
subject matter foundation for appending state-law claims through pendent jurisdiction.\(^7\) Federal courts disagree as to whether they may exercise personal jurisdiction over nonresident defendants for purposes of the pendent state cause of action by applying the nationwide service provisions of federal statutes to the state claim. A number of district court decisions have rejected this application of pendent personal jurisdiction,\(^8\) although the growing trend of authority holds that a federal court may so extend the reach of its non-federal personal jurisdiction.\(^9\)


Commentary supporting this result includes: R. Cramton, D. Currie, H. Kay, Conflict of Laws 931 (3d ed. 1981); Ferguson, Pendent Personal Jurisdiction in the Federal Courts, 11 Vill. L. Rev. 56, 79-80 (1965); Lowenfels, supra note 6, at 492.

Important choice of law implications arise from the grant of pendant personal jurisdiction in this context. The Supreme Court has


For purposes of this Note, the term pendent personal jurisdiction is used to describe the grant of personal jurisdiction over a defendant for purposes of the pended state claim by utilizing federal nationwide service provisions. Although courts and commentators use the term pendent party jurisdiction or pendent personal jurisdiction to describe attempts to add a new party to a suit using the pendent jurisdiction doctrine, for purposes of this Note, the term pendent third party jurisdiction will be used to describe the addition of parties by pendent jurisdiction. See Aldinger v. Howard, 427 U.S. 1, 10 (1976); Moor v. County of Alameda, 411 U.S. 693, 715 (1973).

held that notwithstanding the federal basis of its subject matter jurisdiction over the pendent state claim, the Erie doctrine\(^\text{12}\) requires a court to apply substantive state law to the adjudication of that claim,\(^\text{13}\) including, under Klaxon Co. v. Stentor Electric Manufacturing Co., the forum state's choice of law rules.\(^\text{14}\) Thus, when a federal court decides to exercise jurisdiction over a pendent state claim that is multistate in nature, it must also examine the question of what law the forum state would apply to the merits of that case. In adhering to the Erie/Klaxon doctrine, however, those courts that accept pendent personal jurisdiction for a state claim through federal statutory process have failed to examine the relationship between personal jurisdiction and choice of law.

If a court concludes that personal jurisdiction over a nonresident defendant is proper under the aegis of the pendent jurisdiction doctrine, unresolved constitutional issues still arise in the context of the law to be applied to the state-created right. The unsettled nature of constitutional choice of law thresholds results in part from recent judicial assumptions that when the due process analysis of personal jurisdiction is completed, choice of law concerns become moot.\(^\text{15}\) This preclusive effect of personal jurisdiction has been noted in recent articles calling attention to the need for specifications of the contacts required before a state may apply its substantive law and choice of law rules to a case.\(^\text{16}\) The need for a separate analysis of choice of law is heightened by the inherent forum bias of modern choice of law theories.\(^\text{17}\)

12. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). In Erie, Justice Brandeis set forth the rule for federal adjudications of state claims: "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." Id. at 78.


17. See infra notes 184-88 and accompanying text.
Major Supreme Court decisions defining personal jurisdiction requirements, including those decisions favoring a preclusive effect of personal jurisdiction on choice of law analysis, have measured the due process requirements with policies of fairness, foreseeability and the "principles of interstate federalism." Commentators have, however, criticized this emphasis on interstate federalism while suggesting that federalist policies are better suited to choice of law analysis. A recent opinion, Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, portends a "potentially substantial" shift in Supreme Court analysis. The Court stated that the personal jurisdiction requirement flows from the due process clause, and represents a restriction on judicial power as a matter of individual liberty, not as a matter of sovereignty and federalism concerns.

Pendent personal jurisdiction has an important application to the interrelationship of choice of law and personal jurisdiction. When a court grants pendent personal jurisdiction for a state claim by utilizing a federal nationwide service of process provision, personal jurisdiction is satisfied by policy considerations of judicial economy and convenience. The modern trend of pendent personal jurisdiction cases, therefore, leaves the question of constitutional choice of law thresholds for state claims uncovered by the usual cloak of personal jurisdiction analysis.


20. 102 S. Ct. 2099 (1982). The Court allowed the application of Fed. R. Civ. P. 37(b)(2)(A), which provides for sanctions for failure to comply with discovery orders, to support a finding of personal jurisdiction.


22. 102 S. Ct. at 2104 & n.10.

Under the prevailing jurisprudence, federal courts need to apply the forum state's choice of law analysis to the pendent state claim because constitutional thresholds for personal jurisdiction are considered stronger than those for choice of law. This Note suggests that courts must inquire into choice of law contacts for pendent personal jurisdiction, and that a shift in federalism analysis should elevate choice of law considerations to a higher constitutional threshold than personal jurisdiction requirements.

Part I of this Note discusses the constitutional and judicial contours of pendent jurisdiction, explaining that judicial authority for pendent personal jurisdiction is not statutorily derived but rather is based on policies of judicial economy and convenience. Part II analyzes the interrelationship between choice of law and personal jurisdiction and examines the consequences of a shift in federalism concerns upon the resolution of pendent personal jurisdiction questions. Part III discusses the availability of federal choice of law determinations when courts grant pendent personal jurisdiction.

This Note concludes that when federal courts grant pendent personal jurisdiction and bypass minimum contacts restrictions on the exercise of personal jurisdiction, they must do so as responsible neutral forums, constrained to overlook Klaxon and forced to develop federal choice of law rules for the purpose of deciding the state-created claims. The recent Supreme Court shift in federalism analysis should provide the courts with a stronger framework to evaluate constitutional choice of law thresholds.

I. CONSTITUTIONAL AND JUDICIAL CONTOURS OF THE PENDENT JURISDICTION DOCTRINE

A. Subject Matter Jurisdiction and Pendent Claims

Article III of the United States Constitution establishes the boundaries of federal jurisdiction. Article III is not self-executing—it confers upon Congress the power to define and condition the requirements for federal subject matter jurisdiction within the constitutional limits of article III. Under the limited grant of power, access to

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24. The federal courts have jurisdiction to hear only a limited scope of cases or controversies: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." U.S. Const. art. III, § 2, cl. 1.


26. U.S. Const. art. III, § 2, cl. 2; see Ex parte McCordle, 74 U.S. (7 Wall.) 506, 512-13 (1868). Federal courts can only adjudicate those cases or controversies over which jurisdiction has been conferred by congressional action. Sheldon v. Sill, 49 U.S. (8 How.) 440, 448-49 (1850). The provision for the original jurisdiction of the Supreme Court, however, has been interpreted as self-executing. Kentucky v. Denni-
federal courts is restricted to categories of claims approved by acts of Congress. Because federal courts are not competent to adjudicate claims that fall outside their specific statutory authorizations, plaintiffs who seek redress for injuries arising from state-created claims must ordinarily pursue their remedies in the proper state forum. The doctrine of pendent jurisdiction, however, extends a federal court's power to hear an otherwise non-justiciable state claim.

Pendent jurisdiction evolved from the relationship between the judicial power of federal courts and the boundaries of article III jurisdiction. The principle that federal courts have the power to decide both federal and state issues originated in Osborn v. Bank of the United States. Chief Justice Marshall recognized that the article III grant of federal jurisdiction over cases arising under the Constitution contemplates and authorizes the judicial review of all questions presented by the case. This doctrine

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Federal courts are granted jurisdiction over controversies involving questions arising under the Constitution, laws or treaties of the United States, 28 U.S.C. § 1331 (1976 & Supp. IV 1980), or for claims exceeding $10,000 between citizens of different states. 28 U.S.C. § 1332(a) (1976); see Sheldon v. Sill, 49 U.S. (8 How.) 440, 448-49 (1850) (the jurisdiction of federal courts authorized by statute may be narrower than the boundaries of article III).


31. 22 U.S. (9 Wheat.) 738 (1824). Osborn did not involve a pendent state claim, but did raise the issue of whether a federal court could decide questions of state law in the context of a case arising under federal law. In Osborn, the Bank of the United States sued in federal circuit court to enjoin the collection of an allegedly unconstitutional state tax. Questions of state law were applicable to the liability of parties, the levying of interest and the validity of injunctive relief. Id. at 835-46.

32. Id. at 822-23. Chief Justice Marshall reasoned that "when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of congress to give the circuit courts
was expanded in *Siler v. Louisville & Nashville Railroad*, to permit federal courts to decide cases on state grounds without having to reach a federal question. In *Moore v. New York Cotton Exchange*, the Court sustained jurisdiction over a compulsory state counterclaim arising from the same transaction as the federal suit. Pendent jurisdiction entered its present stage of development in *Hurn v. Oursler*, when the Court extended the doctrine to situations in which adjudication of state issues is justified solely on grounds of procedural convenience. The Court in *Hurn* held that if a plaintiff presented a viable federal claim and a state claim that were "two distinct grounds in support of a single cause of action," the federal courts had power to hear the entire case.

jurisdiction of that cause, although other questions of fact or of law may be involved in it." *Id.* at 823. Chief Justice Marshall noted that "[t]here is scarcely any case, every part of which depends" solely upon federal law. *Id.* at 820.

33. 213 U.S. 175 (1909). In *Siler*, a state order regulating railroad rates was attacked under both state and federal law. *Id.* at 177-78.

34. *Id.* at 191. The Court held that when federal jurisdiction is based on a federal question, courts have the "right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only."

*Id.* The Court recognized that this result was based upon the traditional policy of avoiding unnecessary constitutional questions. *Id.* at 193; see *Ashwander v. T.V.A.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

35. 270 U.S. 593 (1926). In *Moore*, plaintiff claimed a federal violation of the Sherman Act and defendant asserted a compulsory state counterclaim alleging the theft of quotations from his cotton exchange. *Id.* at 602-03.

36. *Id.* at 609-10. The Court upheld jurisdiction although the federal claim had been dismissed for failure to state a claim, and the state claim had no independent federal jurisdictional basis. *Id.* at 609. Between *Siler* and *Moore*, the Supreme Court continued to hold that the pendent doctrine was constitutionally sound and discretionary with the courts. *Sterling v. Constantin*, 287 U.S. 378, 393-94 (1932); *Chicago Great W. Ry. v. Kendall*, 266 U.S. 94, 97-101 (1924); *Lincoln Gas & Elec. Light Co. v. City of Lincoln*, 250 U.S. 256, 264 (1919); *Greene v. Louisville & Interurban R.R.*, 244 U.S. 499, 508 (1917); *Louisville & Nash. R.R. v. Garrett*, 231 U.S. 298, 303-04 (1913).

37. 289 U.S. 238 (1933). *Hurn* involved a federal claim of statutory copyright infringement and state claims of unfair competition for the unauthorized use of a dramatic production and unfair competition through the use of an uncopyrighted version of the production. *Id.* at 239.

38. The Court required that the federal question averred must not be "plainly wanting in substance." *Id.* at 246.

39. *Id.* The *Hurn* focus on a pendent jurisdiction test based on the concept of a "cause of action" was criticized in *United Mine Workers v. Gibbs*, 383 U.S. 715, 724-25 (1966), as difficult to apply and "unnecessarily grudging." See *supra* note 1 and accompanying text; *Shulman & Jaegerman, Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L.J. 393, 397-410 (1936).

40. 289 U.S. at 246. The Court stated its view of the pendent jurisdiction doctrine by making the following comparison:

The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of
The modern doctrine of pendent jurisdiction was formulated in *United Mine Workers v. Gibbs*, in which the Supreme Court declared that once a federal court has subject matter jurisdiction over a substantial federal claim, it also has the power to decide a state-law claim that arises out of a “common nucleus of operative fact” sufficiently related to the federal claim so that a plaintiff would normally “be expected to try them all in one judicial proceeding.” Writing for the Court, Justice Brennan was careful to point out, however, that pendent jurisdiction is a doctrine of discretion and not of right, and that “[i]ts justification lies in considerations of judicial economy, convenience and fairness to the litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims.”

Although the Supreme Court failed to identify a congressional grant of statutory authority to support this extension of subject matter jurisdiction in the federal courts, the reasoning in *Gibbs* supplies a constitutional underpinning for the doctrine. Justice Brennan posited that when a federal and state claim are sufficiently related, they may constitute a single “case” under article III and, therefore, a federal court has the same constitutional power of subject matter jurisdiction to adjudicate the state claim as it has to adjudicate the federal claim. *Gibbs’* endorsement of pendent jurisdiction as an extension of subject matter jurisdiction serves desirable ends; the avoidance of piecemeal litigation, and the promotion of judicial economy within the bounds of fairness to the litigants. Moreover, it cau-

action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground; in the latter it may not do so upon the non-federal *cause of action.*

*Id.* (emphasis in original). The *Hurn* doctrine was codified at 28 U.S.C. § 1338(b) (1976), which gave federal courts original jurisdiction of unfair competition claims when pended with a substantial and related claim under the federal intellectual property laws. See *Note, The Doctrine of Hurn v. Oursler and the New Judicial Code*, 37 Iowa L. Rev. 406, 407 (1952).

41. 383 U.S. at 725. See *supra* notes 2-5 and accompanying text.

42. 383 U.S. at 726.

43. *Id.; see* Aldinger v. Howard, 427 U.S. 1, 15 (1976) (“The value of efficiency in the disposition of lawsuits by avoiding multiplicity may be readily conceded, but that is not the only consideration a federal court should take into account in assessing the presence or absence of jurisdiction.” (quoting Kenrose Mfg. Co. v. Fred Whitaker Co., 512 F.2d 860, 894 (4th Cir. 1972))).


46. 383 U.S. at 725.
tions against the exercise of the doctrine beyond reasonable limits, and against "[n]eedless decisions of state law . . . as a matter of comity and . . . justice." 47

B. Pendent Jurisdiction and Nationwide Service of Process

1. Pendent Personal Jurisdiction

The current trend of lower court authority has been to interpret the pendent jurisdiction doctrine as sustaining the exercise of personal jurisdiction over state claims when nationwide service on nonresident defendants is supported only by specific statutory provisions applicable to the federal claim. 48 These courts maintain that when the defendant is validly before the court for the federal claim, his procedural due process rights are not violated when the state claim is to be confronted on the same factual issues. 49 Thus, the courts reason, the defendant has had notice sufficient to avoid unfair surprise, and the interests of judicial economy and convenience are served by avoiding piecemeal litigation. 50 The lower courts attempt to justify the grant of pendent personal jurisdiction by inferring congressional authorization from the language in federal statutes providing for nationwide service of process. 51

47. Id. at 726.
The courts that have refused to exercise pendent personal jurisdiction have ruled that a federal court may not exert personal jurisdiction for purposes of the state claim simply because the doctrine of pendent jurisdiction placed the entire litigation within that court’s subject matter jurisdiction. These courts have maintained that the federal statutes asserted as the basis for pendent jurisdiction do not provide nationwide service for both federal and state claims, and that implied extensions of service of process are in violation of Supreme Court precedent and the Federal Rules of Civil Procedure. The basic contention against granting pendent personal jurisdiction is not that it is procedurally unfair or burdensome to defend in a particular state, but rather, that it is a violation of constitutional rights to apply state choice of law rules to a case when the state court would be unable to obtain personal jurisdiction.

52. See supra note 9.


54. Levin v. Great W. Sugar Co., 274 F. Supp. 974, 980 (D.N.J. 1967), aff’d, 466 F.2d 1112 (3d Cir.), cert. denied, 396 U.S. 848 (1969); Huber v. Bissel, 39 F.R.D. 346, 350 (E.D. Pa. 1965); Trussel v. United Underwriters, Ltd., 236 F. Supp. 801, 804 (D. Colo. 1964), aff’d sub nom. Crist v. United Underwriters, Ltd., 343 F.2d 902 (10th Cir. 1965); Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705-06 (D. Mass. 1964). These cases refusing to exercise pendent personal jurisdiction are in harmony with recent Supreme Court decisions discussing the contours of pendent jurisdiction. Compare Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978) (“[A] finding that federal and nonfederal claims arise from a ‘common nucleus of operative fact,’ the test of Gibbs, does not end the inquiry into whether a federal court has power to hear the nonfederal claims along with the federal ones. Beyond this constitutional minimum, there must be an examination of the posture in which the nonfederal claim is asserted and of the specific statute that confers jurisdiction over the federal claim . . . .”) and Aldinger v. Howard, 427 U.S. 1, 18 (1976) (“Before it can be concluded that [pendent third party] jurisdiction exists, a federal court must satisfy itself not only that Art. III permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence.”) with Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705 (D. Mass. 1964) (“While it clearly would be within the competence of Congress in cases involving pendent claims to allow the process of the district court to run into every part of the United States . . . this must be done expressly, and such an intent is not to be read into a statute by implication.”).

55. Wilensky v. Standard Beryllium Corp., 228 F. Supp. 703, 705-06 (D. Mass. 1964) (“It seems extremely doubtful that in enacting the provisions for extra-territorial service on claims arising out of violations of federal laws, Congress intended out-of-state defendants to be subject to whatever the various peculiarities of distant state law might be.”); ILGWU v. Shields & Co., 209 F. Supp. 145, 148 (S.D.N.Y. 1962) (“[Congress] would normally hesitate to force [defendants’] appearance far from home to defend against demands under laws the degree of severity or intricacy of
The Supreme Court has historically guarded the limits of service of process. In *Robertson v. Railroad Labor Board*, the Court rejected an assertion of nationwide process by stating that explicit extensions of personal jurisdiction by Congress have been "clearly expressed and carefully guarded exceptions to the general rule of jurisdiction *in personam*." Rule 4(f) allows service of process outside the territorial limits of the state in which the district court sits when authorized by federal statute. This authorization is the procedural link to the grant of pendent personal jurisdiction. Courts that have rejected pendent personal jurisdiction recognize that bootstrapping the applicable federal service provision to the state claim is inconsistent with rule 4, which is a procedural mechanism rather than a jurisdictional rule.

In *Mississippi Publishing Corp. v. Murphree*, the Supreme Court recognized that rule 4 should be considered in procedural rather than jurisdictional terms: Service of process "serves only to implement the jurisdiction over the subject matter which Congress has conferred, by providing a procedure by which the defendant may be brought into court."

The Supreme Court has also recognized that the question of implied extensions of personal jurisdiction is one of statutory construction, requiring careful scrutiny for evidence of congressional intent. The federal question statute and other statutes provide the district courts with subject matter jurisdiction over "actions." The word "action" has been treated by courts granting pendent personal juris-

which were unknown to Congress.

56. 268 U.S. 619 (1925).
57. *Id.* at 627.
58. *Id.* at 624.
60. *Id.*
63. *Id.* at 445 (emphasis added).
64. Robertson v. Railroad Labor Bd., 268 U.S. 619, 622 (1925); *see Frankfurter,* *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 535 (1947).
65. 268 U.S. at 627.
diction as equivalent to a "case" in constitutional terms. In giving jurisdiction over an "action," Congress apparently has also granted the district courts power to consider state-law claims meeting the Gibbs test. What is not apparent is whether the nationwide service provisions of these statutes apply to the state claims.

Courts invoking pendent personal jurisdiction have maintained that when pendent jurisdiction is granted, the federal and state claims comprise only one "case" within the meaning of article III, and consequently, federal courts have "power" to hear the entire case. These courts then conclude that statutory language authorizes nationwide service over state claims, a conclusion supported by considerations of "judicial economy, convenience and fairness to litigants." The majority of pendent personal jurisdiction cases involve the pending of state claims such as misrepresentation, fraud and blue sky violations to the federal securities statutes. The major securities statutes all have similar language, which provides that "process in such cases may be served . . . wherever the defendant may be found." In the Securities Act of 1933 and the Securities Exchange


Act of 1934, the most common statutory bases for use of pendent personal jurisdiction, the "such cases" is preceded by "all suits in equity and actions at law brought to enforce any liability or duty created by this [chapter]." The plain language of the statutes, the initial inquiry in statutory construction, directs nationwide process only toward the federal claim with no mention of pendent personal jurisdiction.

The courts that find statutory approval for pendent personal jurisdiction in the securities statutes uniformly cite the leading article advocating pendent personal jurisdiction. That article supports an interpretation of pendent personal jurisdiction by claiming that the federal courts' jurisdiction over the subject matter of pendent claims would be destroyed if the statutes were not interpreted to allow pendent personal jurisdiction. This argument runs contrary to


76. C. Sands, 2A Sutherland Statutory Construction § 46.01 (4th ed. 1973); see Frankfurter, supra note 64, at 535 ("Though we may not end with the words in construing a disputed statute, one certainly begins there.").

77. Mills, supra note 9, at 439-441.

78. Id. at 440 n.74. The relevant text of the Securities Exchange Act of 1934, § 27, 15 U.S.C. § 78aa (1976), is quoted to provide an understanding of the article's interpretation: The district courts of the United States have jurisdiction of "all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder [sentence I] . . . . Any suit or action to enforce any liability or duty created by this chapter or rules or regulations thereunder [may be brought in the proper district] . . . and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found [sentence III]." Id. at 439.

Mills argues that negative implications support pendent personal jurisdiction:

The phrase "brought to enforce any liability or duty created by this chapter" that modifies the phrase "all suits in equity and actions at law" in the first sentence of the statutes by implication also modifies the 'cases' for which extraterritorial service is authorized in the last half of the third sentence. It has been argued that this construction prevents a federal district court from hearing a pendent claim against a defendant who was served extraterritorially, i.e., that a case that includes a pendent claim is not a case "brought to enforce any liability or duty created" by the statute; see Ferguson, Pendent Personal Jurisdiction in the Federal Courts, 11 Vill. L. Rev. 56, 73-74 (1965). This argument necessarily but tacitly assumes that the modifying phrase should be construed as if it read "brought solely to enforce
straightforward statutory language and more importantly, assumes that pendent subject matter jurisdiction must also derive from the statutes providing district courts with jurisdiction over securities actions or other specific statutory grants of article III jurisdiction. The Supreme Court has declared, however, that pendent subject matter jurisdiction is a constitutional power under article III. At the same time the Court has avoided the jurisdictional question of whether Congress has authorized such an exercise of judicial power. Commentators have assumed that congressional authority for pendent subject matter jurisdiction can only derive from the general federal question statute. It is incorrect, therefore, to premise the grant of pendent personal jurisdiction upon the statutory authorization of federal nationwide service of process.

2. Pendent Third-Party Jurisdiction

The Supreme Court has in recent decisions reinforced a restrictive statutory interpretation of pendent personal jurisdiction. In Zahn v. International Paper Co., four plaintiffs brought a class action for any liability or duty created by this chapter.” Of course, if it were construed in this manner it would destroy the federal courts’ jurisdiction over the subject matter of pendent claims, because the statute’s first sentence would then be construed as meaning “The district courts of the United States . . . shall have . . . jurisdiction of . . . all suits in equity and actions at law brought solely to enforce any liability or duty created by this chapter . . . .” This meaning has never been attributed to the first sentence of the statute. But if the word “solely” cannot be added by implication to the first sentence, it cannot be added by implication to the third sentence; the use of the word “such” in the third sentence requires that that sentence’s “such cases” be co-extensive with the first sentence’s “suits in equity and actions at law.” In short, if the federal securities statutes provide any statutory basis for federal jurisdiction over the subject matter of pendent claims, then they also provide a statutory basis for permitting the use of extraterritorial service to assert those claims.

Id. at 440 n.74 (emphasis in original).

Even if this argument’s contention that the “cases” in the third sentence is co-extensive with the “actions” in the first sentence, the basic premise of the argument rests upon the assertion that pendent subject matter jurisdiction must derive solely from this statute for federal securities questions. Although the Supreme Court has never specifically identified the statutory grant of pendent subject matter jurisdiction, this authorization is uniformly recognized as coming from the general federal question statute. See infra note 80 and accompanying text.


pollution damages and based federal jurisdiction on diversity of citizenship. The Supreme Court affirmed a refusal to hear any claims that did not independently satisfy the $10,000 jurisdictional requirement and rejected an attempt to append the insufficient claims to the claim that exceeded the jurisdictional amount. Personal jurisdiction and the $10,000 jurisdictional amount are both prerequisites for federal diversity jurisdiction. Zahn establishes that plaintiffs failing to meet the jurisdictional requirements are not part of the same action for purposes of pendent jurisdiction. Similarly, this analysis supports the contention that the requirement of personal jurisdiction must remain separate from subject matter jurisdiction and, consequently, be satisfied independently.

The Supreme Court has also examined the viability of pendent third-party jurisdiction, a "subtle and complex question with far-reaching implications." In Aldinger v. Howard, the Court held that before the Gibbs test is applied, federal courts must determine both that jurisdiction is permitted under article III and that Congress has neither expressly nor impliedly negated the exercise of pendent jurisdiction under federal statutes conferring subject matter jurisdiction. The Court acknowledged that the Gibbs analysis provided only the article III test for pendent jurisdiction and that courts must

82. Id. at 301. The Court held that "any plaintiff who does not [meet the jurisdictional amount] must be dismissed from the case" even though others allege jurisdictionally sufficient claims. Id.
84. 414 U.S. at 292-95.
86. Moor v. County of Alameda, 411 U.S. 693, 715 (1973); see Aldinger v. Howard, 427 U.S. 1, 2 (1976); Philbrook v. Glodgett, 421 U.S. 707, 720 (1975). In Moor, the Court was faced with the viability of pendent third-party jurisdiction for the first time. The plaintiff alleged violations of his federal civil rights against a state officer based upon 42 U.S.C. §§ 1983, 1988 (1976 & Supp. III 1979), and attempted to append the officer's municipal employer under a state-created theory of vicarious liability, which was unavailable under federal law. 411 U.S. at 710-11. The Court emphasized the "significant difference" in the facts of Gibbs, id. at 713, and held that the district court's decision to decline to exert pendent jurisdiction was a legitimate exercise of its discretion, id. at 716, thereby avoiding a ruling on the availability of pendent third-party jurisdiction.
88. 427 U.S. at 18.
89. Id.
therefore inquire into the possible statutory limits on jurisdiction.\textsuperscript{90} Because statutes dictate the boundaries of federal subject matter jurisdiction, a court must scrutinize whether the statute either specifically excludes certain parties from suit or designates the parties amenable to the court's power prior to granting pendent jurisdiction.\textsuperscript{91} In the most recent decision examining pendent jurisdiction, Owen Equipment & Erection Co. v. Kroger,\textsuperscript{92} the Supreme Court restricted the expansion of established pendent jurisdiction theory by re-emphasizing the statutory and procedural analysis set forth in Aldinger.\textsuperscript{93}

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90. \textit{Id.} at 17. See supra note 44 and accompanying text. The Court defined the inquiry into pendent third-party jurisdiction as follows: "[W]hether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim . . . rests, Congress has addressed itself to the party as to whom jurisdiction pendent to the principal claim is sought." \textit{Id.} at 16 (emphasis in original).

91. The Court in \textit{Aldinger} made clear that both article III constitutional power and lack of congressional disinclination are prerequisites to the exercise of pendent party jurisdiction. \textit{Id.} at 18. The Court described a "congressional disinclination" to extend pendent party jurisdiction over a political subdivision under 42 U.S.C. § 1983 and merely suggested that "[o]ther statutory grants and other alignments of parties and claims might call for a different result." \textit{Id.} at 17-18 (emphasis added). The Court suggested that the argument of judicial economy and convenience, the major justification of pendent jurisdiction in \textit{Gibbs}, may support extending pendent jurisdiction into areas in which there are exclusive grants of federal jurisdiction since it is only in federal court that all claims may be tried together. \textit{Id.} at 18.

92. 437 U.S. 365 (1978). In \textit{Kroger}, the administratrix of an Iowa citizen brought a diversity action for her husband's wrongful death against a Nebraska corporation. The corporation impleaded an Iowa corporation for the right of contribution and the Iowa plaintiff then amended her complaint to state a direct claim against the Iowa corporation. All of the claims arose out of a common nucleus of operative fact, but diversity was absent between the Iowa corporation and the Iowa plaintiff. The Court held that federal diversity jurisdiction does not extend to include a plaintiff's assertion of pendent jurisdiction over a non-diverse third-party defendant. The Court implied that ancillary jurisdiction, the technical procedure attempted in \textit{Kroger}, should be evaluated in light of the congressional goal of efficient and fair dispositions of related claims. \textit{Id.} at 377. Ancillary jurisdiction refers to the addition of state claims in the form of third-party claims, counterclaims, or cross-claims. See \textit{Federman v. Empire Fire & Marine Ins. Co.}, 597 F.2d 798, 810 (2d Cir. 1979); \textit{Pearce v. United States}, 450 F. Supp. 613, 615 (D. Kan. 1978); \textit{Bay Guardian Co. v. Chronicle Publishing Co.}, 340 F. Supp. 76, 79 (N.D. Cal. 1972); \textit{Minahan, Pendent and Ancillary Jurisdiction of United States Federal District Courts}, 10 Creighton L. Rev. 279, 293-97 (1976); Note, \textit{A Closer Look at Pendent and Ancillary Jurisdiction: Toward a Theory of Incidental Jurisdiction}, 95 Harv. L. Rev. 1935, 1936-37 (1982). The Court in \textit{Kroger} refused to determine whether there was a significant difference between ancillary and pendent jurisdiction. 437 U.S. at 370 n.8; \textit{accord Aldinger v. Howard}, 427 U.S. 1, 13 (1976).

93. 437 U.S. at 373. The Court reiterated that two hurdles must be overcome as prerequisites to the exercise of federal jurisdiction: Federal courts are limited by both the outer boundaries of article III and the acts of Congress conferring article III jurisdiction. \textit{Id.} The Court required an inquiry into the posture in which the state claim is asserted and an examination of the specific federal statute to determine whether Congress had either expressly or implicitly negated the exercise of jurisdiction. \textit{Id.}
Ninth Circuit has gone so far as to hold that pendent third-party jurisdiction is unconstitutional under article III without having to implicate a statutory analysis. The court emphasized that the doctrine of pendent jurisdiction applies only to claims and not to parties. Although pendent personal jurisdiction is theoretically wedged between pendent claim and pendent third-party jurisdiction, the recent statutory limitations on pendent jurisdiction necessarily have an effect on pendent personal jurisdiction. One component of the subtlety and complexity of pendent third-party jurisdiction involves choice of law issues, and courts granting pendent third-party jurisdiction have relied upon the recent trend in the area of pendent personal jurisdiction to retain jurisdiction over the third parties.


95. 550 F.2d at 1199-1200. In Ayala, the Ninth Circuit reaffirmed its absolute ban against pendent third-party jurisdiction in any context. The federal claim in Ayala was brought against the government pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 (1976), and a state claim was asserted against a third-party defendant. Under the Federal Tort Claims Act, the grant of federal jurisdiction is exclusive. 28 U.S.C. § 1346(b) (1976). The Ayala court followed Aldinger's directive that an initial determination of pendent jurisdiction be made under article III before inquiring into statutory authority. The Ninth Circuit has maintained consistently that the doctrine of pendent jurisdiction applies to claims and not parties. 550 F.2d at 1199-1200; Aldinger v. Howard, 513 F.2d 1257, 1260-61 (9th Cir. 1975), aff'd, 427 U.S. 1 (1976); Moor v. County of Alameda, 411 U.S. 693, 712-20 (9th Cir. 1972), aff'd sub nom. Moor v. County of Alameda, 411 U.S. 693 (1973); Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969); accord Kack v. United States, 570 F.2d 754, 757 (8th Cir. 1978); Hampton v. City of Chicago, 484 F.2d 602, 611 (7th Cir. 1973), cert. denied, 415 U.S. 917 (1974); Wojtas v. Village of Niles, 334 F.2d 797, 798-99 (7th Cir. 1964), cert. denied, 379 U.S 964 (1965); Long Prairie Packing Co. v. Midwest Emery Freight Sys., 429 F. Supp. 201, 203-04 (D. Mass. 1977). But see FDIC v. Otero, 598 F.2d 627, 632-33 (1st Cir. 1979); Ortiz v. United States, 595 F.2d 65, 72-73 (1st Cir. 1979); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1154-55 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978); Kyriazi v. Western Elec. Co., 476 F. Supp. 335, 337 n.3 (D.N.J. 1979).

96. Scheinker, supra note 80, at 247 ("Pendent jurisdiction today stands at a crossroads. Aldinger and Kroger reflect clearly a restrictive view of pendent party jurisdiction. Although these opinions did not question directly the exercise of pendent claim jurisdiction under Gibbs, their reasoning threatens the continued vitality of that branch of the doctrine as well. These decisions indicate that the generally accepted rationale for pendent jurisdiction—judicial economy and convenience—is inadequate not only to support the extension of Gibbs to pendent party jurisdiction, but perhaps even to justify Gibbs itself.") (footnote omitted); Theis, supra note 44, at 104 ("Zahn, Aldinger, and Kroger all emphasize congressional intent as a limit on pendent jurisdiction . . .").

courts also have held that the statutory limitations for pendent third-party jurisdiction are applicable to general pendent claim jurisdiction, and therefore, to pendent personal jurisdiction. 98

It is evident that no explicit statutory authorization can be found for pendent personal jurisdiction, and that implicit authorization is precluded by both the clear meaning of the statutes and Supreme Court restrictions on pendent jurisdiction. The decision to grant either pendent personal or pendent third-party jurisdiction requires courts to decide matters not specifically enumerated in any statutory grant of federal jurisdiction. Ultimately, the question to be decided is whether the policies behind pendent jurisdiction suggest that personal jurisdiction for state claims should be applied by analogy through federal nationwide service provisions even without explicit or implicit authorization.

C. Pendent Personal Jurisdiction and Choice of Law Resolution

If pendent personal jurisdiction is to be authorized, the policies for its existence must derive from the congressional grant of general federal question jurisdiction over actions that arise under the laws of the United States. 98 In that the Supreme Court has not specifically identified the congressional authorization, if any, for pendent subject matter jurisdiction, this Note allows for a possible justification of pendent personal jurisdiction in the general federal question clause. In

566-67 (S.D. Iowa 1973); Lyons v. Marrud, Inc., 46 F.R.D. 451, 455 (S.D.N.Y. 1968); C. Wright, supra note 5, § 20, at 77.


But see Gagliardi v. Flint, 564 F.2d 112, 115 & n.2 (3d Cir. 1977) (statutory limitations inapplicable to pendent claims), cert. denied, 438 U.S. 904 (1978). An alternative analysis might assume congressional intent to allow pendent claims, while employing a strict scrutiny analysis for pendent third-party and pendent personal jurisdiction, as required by Aldinger and Kroger. To propose standards of statutory review for the different levels of the pendent jurisdiction schema is beyond the scope of this Note, but clearly the strict scrutiny of statutory intent has direct bearing on pendent personal jurisdiction.

this context, the implications and constitutionality of a strict adherence to the *Erie/Klaxon* choice of law doctrine must be examined.

Courts granting pendent personal jurisdiction have maintained, apart from the supposed statutory grant of jurisdiction, that pendent personal jurisdiction is merely one aspect of basic pendent subject matter jurisdiction and that due process considerations are satisfied. These courts conclude that additional justification emanates from the considerations of "judicial economy, convenience and fairness to litigants." Courts and commentators have maintained that pendent personal jurisdiction avoids duplicative litigation. Consolidation of the litigation can only occur, in the absence of pendent personal jurisdiction, if the plaintiff brings a second suit in a district court in the defendant's home state. The state claim can be brought under the diversity statute, and the federal case can then be transferred to the court hearing the state claim. The non-federal claim, however, could not be transferred to the district where the federal claim was pending because 28 U.S.C. § 1404(a) permits transfer only to a district court where the claim might have been brought. In such a case, the state claim could not have been brought in the plaintiff's original choice of district court because it had no personal jurisdiction over the defendant.

100. The courts that have granted pendent personal jurisdiction rely in particular on the due process analysis in Robinson v. Penn Cent. Co., 484 F.2d 553, 555 (3d Cir. 1973); "Once the defendant is before the court, it matters little, from the point of view of procedural due process, that he has become subject to the court's ultimate judgment as a result of territorial or extraterritorial process. Looked at from this standpoint, the issue is not one of territorial in personam jurisdiction—that has already been answered by the statutes—but of subject matter jurisdiction. It is merely an aspect of the basic pendent jurisdiction problem." See Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 720 (2d Cir. 1980); Ninth Fed. Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n, 493 F. Supp. 981, 983 (S.D.N.Y. 1980); United States Dental Inst. v. American Ass'n of Orthodontists, 396 F. Supp. 565, 575 (N.D. Ill. 1975); Allen Organ Co. v. North Am. Rockwell Corp., 363 F. Supp. 1117, 1122 (E.D. Pa. 1973).


102. Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 720 (2d Cir. 1980); Schwartz v. Eaton, 264 F.2d 195, 198 n.6 (2d Cir. 1959); Ferguson, *supra* note 8, at 77-79.

103. Fed. R. Civ. P. 42(a) provides in part: "When actions involving a common question of law or fact are pending before the court, it may order . . . all the actions consolidated."

104. 28 U.S.C. § 1404(a) (1976) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
This approach is both cumbersome and judicially uneconomical. The doctrine of pendent personal jurisdiction is an economical procedure to avoid this waste of judicial and monetary resources. In the pendent personal jurisdiction cases, however, it is the plaintiff's insistence upon a forum where the defendant is not personally amenable to suit which necessitates in part the special doctrine of pendent personal jurisdiction. When courts grant pendent personal jurisdiction, they must then apply the law of the state in which it sits, presumably the plaintiff's forum state. The defendant is then subjected to "whatever the various peculiarities of distant state law might be." The considerations of judicial economy and convenience obliterate the defendant's constitutional protection from exposure to state laws absent jurisdictional justification. The Supreme Court in Van Dusen v. Barrack, held that the transferee court under a § 1404(a) transfer is obligated to apply the state law that would have been applied by the transferor court. Under the guise of judicial economy, the Van Dusen protection from exposure to laws of a state where the defendant is not personally amenable to suit is overlooked in pendent personal jurisdiction cases. Consequently, the grant of pendent personal jurisdiction and automatic application of the Erie/Klaxon doctrine denies the constitutional protection available to nonresident defendants.

II. THE INTERRELATIONSHIP BETWEEN CHOICE OF LAW AND PERSONAL JURISDICTION

A. Personal Jurisdiction and Federalism

The trend of lower federal court authority indicates that the doctrine of pendent jurisdiction sustains the exercise of personal jurisdiction over state-created claims when service on nonresident defendants is supported only by special statutory provisions applicable to the federal claim. As mandated by the Erie doctrine, when federal courts adjudicate these pendent state claims, they must apply the substantive law of the state in which it sits. This includes applying

107. Id. at 635-37.
the forum state's choice of law rules as prescribed by *Klaxon Co. v. Stentor Electric Manufacturing Co.* which, in effect, subjects the nonresident defendant to the law of another state absent the minimum contacts that the Supreme Court has equated with due process. Although courts that grant pendent personal jurisdiction do not always announce their avoidance of minimum contacts analysis, some courts have stated explicitly that state long-arm jurisdiction over the defendant could not have been independently acquired. In the context of pendent personal jurisdiction, the issues of conformity with due process, constitutional limitations on personal jurisdiction and the emphasis on federalism need to be examined.

Throughout the evolution of personal jurisdiction theory, the Supreme Court has relied upon both the fairness and foreseeability limitations of the due process clause and the policies of interstate federalism to determine the boundaries for state court jurisdiction. The modern law of personal jurisdiction has changed substantially...
from the simplistic demands of *Pennoyer v. Neff*,\(^\text{114}\) that "[p]rocess from . . . one State cannot run into another State."\(^\text{115}\) The strict *Pennoyer* mandate, although reflecting policies of interstate federalism,\(^\text{116}\) no longer controls the rules governing personal jurisdiction.\(^\text{117}\)

The increased flow of commercial activity between the states ushered in the modern era of personal jurisdiction,\(^\text{118}\) and in its landmark decision of *International Shoe Co. v. Washington*,\(^\text{119}\) the Supreme Court held that due process is satisfied when personal jurisdiction is exercised over a nonresident defendant whose "minimum contacts" with the forum state are such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"\(^\text{120}\)

The Court required that the minimum contacts with the forum state

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114. 95 U.S. 714 (1877), overruled, Shaffer v. Heitner, 433 U.S. 186 (1977). In *Pennoyer*, the petitioner brought an action to recover land in Oregon awarded to respondent to satisfy an in personam judgment. The petitioner maintained that the judgment was invalid because the state of Oregon neither served him with legal process nor attached the land in question. The property had not been conveyed to the petitioner and he was not in Oregon to receive a summons until after the judgment had been rendered. The respondent argued that notice of summons was made by proper publication; upon the petitioner's failure to appear, judgment was entered by default. *Id.* at 719-20.

115. *Id.* at 727.

116. *Id.* The Court set forth two jurisdictional principles: first, "that every State possesses exclusive jurisdiction and sovereignty . . . within its territory," *id.* at 722, and second, "that no State can exercise direct jurisdiction and authority over persons or property without its territory. The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others." *Id.* (citations omitted); see Kamp, *The Shrinking Forum: The Supreme Court's Limitation of Jurisdiction—An Argument for a Federal Forum in Multi-Party, Multi-State Litigation*, 21 Wm. & Mary L. Rev. 161, 162-63 (1979).


119. 326 U.S. 310 (1945). International Shoe was a Delaware corporation that employed salesmen who resided and worked in Washington. Although International Shoe rented display rooms in the state for use by the salesmen, it maintained no offices, kept no merchandise and made no contracts in Washington. The salesmen's authority was restricted to solicitation of orders that were subject to the approval of the home office. The State of Washington sought to collect employer's contribution for unemployment compensation from International Shoe. When the company refused to pay, the State served process on one of the salesmen. The Supreme Court of Washington upheld jurisdiction, reasoning that appellant's business in the state was sufficient to constitute "doing business." The United States Supreme Court rejected the "doing business" test but affirmed based upon a new "minimum contacts" test. *Id.* at 316.

120. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). The Court based its holding exclusively on the due process clause. 326 U.S. at 315-17.
conform to the principles of interstate federalism by being “reasonable, in the context of our federal system of government.” In the wake of International Shoe, many cases discussed the nature of contacts demanded by the due process clause. In McGee v. International Life Insurance Co., the Court appeared to signal approval of an expansive approach to the permissible scope of state court jurisdiction over nonresidents because of the “increasing nationalization of commerce.” One year later, however, in Hanson v. Denckla, the Court narrowed the expansiveness of McGee by holding that, in addition to minimum contacts, there must be some “affiliating circumstances” of which the defendant purposefully avails himself of the privilege of conducting activities within the forum state. In an attempt to delimit the broad application of International Shoe, Chief

121. 326 U.S. at 317.
123. Id. at 223. McGee involved an insurance claim by a California resident against a Texas insurance company. State court jurisdiction was sustained on the basis of a single, isolated contact by defendant with the forum state, the act of sending a reinsurance certificate to plaintiff offering him insurance on the same terms as had defendant’s predecessor insurance company. Plaintiff accepted the offer and mailed premium payments from his home in California to the defendant’s office in Texas. Defendant had no other contacts with the forum state. The Supreme Court, in holding that the “Due Process Clause did not preclude the California court from entering a judgment binding on respondent,” reasoned that “California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.” Id. Thus, whenever the forum state’s interest is manifested by special regulation of the activity in question, the Court has found the requisite quantum of contacts to be satisfied on the basis of only slight and attenuated contacts with the forum state. In the absence of a special state interest, however, the Court has progressively insisted on something more than merely attenuated contacts. This position was first advanced in Hanson v. Denckla, 357 U.S. 235, 252-54 (1958), and reaffirmed in recent decisions. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292-94 (1980); Kulko v. California Superior Court, 436 U.S. 84, 92 (1978).
124. 357 U.S. 235 (1958). In Hanson, a Pennsylvania resident established an inter vivos trust with a Delaware trustee. The resident then moved to Florida and, while domiciled there, made gifts from the trust to her grandchildren under a power of appointment. When she died, her will was probated in Florida. Her two daughters, also Florida residents, and residuary legatees under the will, questioned the validity of the trust. In an action for a declaratory judgment to determine their interest in the estate, the Delaware trustee, an indispensable party under Florida law, was served with notice of the Florida action. The trustee did not appear, and the Florida court found for the two daughters. On appeal the Supreme Court held that the Delaware trustee’s contacts with Florida, consisting only of the remittance of trust income to Florida, were insufficient to support personal jurisdiction over that nonresident defendant. The Court emphasized that the flexible standard of International Shoe did not “[herald] the eventual demise of all restrictions on the personal jurisdiction of state courts.” Id. at 251.
125. Id. at 246 (quoting E. Sunderland, The Problem of Jurisdiction, Selected Essays on Constitutional Law 1270, 1272 (1954)).
126. 357 U.S. at 253.
Justice Warren emphasized the Court's reliance on policies of interstate federalism to explain that due process restrictions on personal jurisdiction are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.127

In two recent decisions, *Shaffer v. Heitner*,128 and *Kulko v. California Superior Court*,129 the Supreme Court has made clear that the due process clause operates as a limitation on the jurisdiction of state courts to "enter judgments affecting rights or interests of nonresident defendants."130 In the absence of sufficient "affiliating circumstances," determined by their nature and quality, due process is violated by the exercise of personal jurisdiction over nonresident defendants.131

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127. *Id.* at 251.

128. 433 U.S. 186 (1977). In *Shaffer*, the plaintiff filed a stockholder's derivative suit against officers of a Delaware corporation, alleging the defendants had violated their duties to the corporation, resulting in civil and criminal liabilities. Simultaneously, the plaintiff attached shares of common stock in the corporation belonging to a majority of the defendants. A special appearance by the defendants was rejected by the Supreme Court of Delaware, which held that sequestration of stock to compel in personam jurisdiction, with the failure to appear resulting in default, did not deny due process of law and was not controlled by *International Shoe*. The United States Supreme Court reversed and dramatically altered principles of in rem jurisdiction by requiring that it satisfy the standards of *International Shoe*. *Id.* at 189-206, 217.

129. 436 U.S. 84 (1978). In *Kulko*, a New York resident challenged the personal jurisdiction of a California court over him with respect to increased child support obligations. The appellant's former wife, at the time a California resident, brought an action in California court to establish a Haitian divorce decree and obtain an increase in child support payments. The California Supreme Court upheld jurisdiction based on the appellant's "purposeful act" of consenting to send his daughter to California to live with her mother for the school year. *Id.* at 94. The United States Supreme Court granted certiorari and reversed, stating that appellant's contacts with California "simply do not make California a 'fair forum'... in which to require appellant... to defend a child-support suit or to suffer liability by default." *Id.* at 100-01 (citation omitted).

130. *Id.* at 91 (citing *Shaffer v. Heitner*, 433 U.S. 186, 198-200 (1977)).

131. "[A]n essential criterion in all cases is whether the 'quality and nature' of the defendant's activity is such that it is 'reasonable' and 'fair' to require him to conduct his defense in that State." 436 U.S. at 92 (citing *International Shoe Co. v. Washington*, 326 U.S. 310, 316-17, 319 (1945)); see *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977); *Hanson v. Denckla*, 357 U.S. 235, 246 (1958).

The Court in *Kulko* recognized that the minimum contacts test is not susceptible to mechanical application: "[T]his determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.'" 436 U.S. at 92 (quoting *Estin v. Estin*, 334 U.S. 541, 545 (1948)).
In the 1980 decision of World-Wide Volkswagen Corp. v. Woodson, the Supreme Court reaffirmed and expanded the emphasis of "principles of interstate federalism" in the Court's due process analysis of state judicial jurisdiction. The Court maintained that

[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. . . . The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

The Court stated that fairness and foreseeability limitations of due process, while still of primary concern, had been substantially relaxed as a result of the increased mobility of private citizens and the economic interdependence of the states. Justice White, writing for the Court, then acknowledged the impact of federalism concerns in determining the constitutionality of state court jurisdiction:

Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State;

132. 444 U.S. 286 (1980). In World-Wide, two New York residents purchased a new automobile from a New York retail dealer. The following year, while driving through Oklahoma on the way to a new home in Arizona, the plaintiffs were involved in an accident with another vehicle, which produced a fire that seriously injured the plaintiffs. A products liability action was brought in Oklahoma state court against the automobile's foreign manufacturer, its importer, its regional distributor and the local dealer. Id. at 288. The dealer and the regional distributor entered special appearances to contest the constitutionality of jurisdiction on due process grounds, but their claims were rejected by the trial court and the Supreme Court of Oklahoma. The United States Supreme Court reversed, holding that the exercise of personal jurisdiction offended the minimum contacts test when based "on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma." Id. at 295.

The case of Rush v. Savchuk, 444 U.S. 320 (1980), was decided together with World-Wide. In Rush, the plaintiff, an Indiana resident and a passenger in an automobile driven by the defendant, also an Indiana resident, was injured in a single-car accident in Indiana. Plaintiff later moved to Minnesota and brought an action alleging negligence. The plaintiff attempted to obtain quasi in rem jurisdiction over the defendant by garnishing his insurance company's obligation to defend and indemnify the defendant. The insurance company, State Farm Insurance Company, did business in Minnesota. Id. at 322. The Minnesota Supreme Court's decision to exercise jurisdiction was reversed by the United States Supreme Court, which stated that "the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is any contact in the International Shoe sense between Minnesota and the insured." Id. at 329-30 (emphasis in original).

133. 444 U.S. at 293-94.
134. Id. at 293.
135. Id. at 292.
136. Id. at 292-93.
even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.\(^{137}\)

The substantial emphasis in *World-Wide* on the relevance of interstate federalism prompted many commentators to suggest that considerations of federalism were misplaced in a due process analysis of personal jurisdiction.\(^{138}\) In its most recent inquiry into due process and personal jurisdiction, the Supreme Court, in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*,\(^{139}\) appears to have substantially altered its position on the import of federalism. Justice White, the author of *World-Wide*, in writing for the Court in *Bauxites de Guinee*,\(^{140}\) maintained that the due process clause "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty"\(^{141}\) and is "the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns."\(^{142}\)

Commentators' negative reactions to *World-Wide*'s use of federalism and the supporting language in *Bauxites de Guinee* about removing the 105-year emphasis\(^{143}\) on federalism in personal jurisdiction analysis portend a new application of the policies of federalism. American federalism is rooted in two principles: the separate and independent federal-state co-existence and the federal union of the separate states, each a coequal sovereign.\(^{144}\) The latter principle focuses on the concern that citizens of individual states should not be subjected to the

\(^{137}\) *Id.* at 294 (emphasis added). The Court stated also that the minimum contacts test “protects the defendant against the burdens of litigating in a distant or inconvenient forum [a]nd it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” *Id.* at 292.


\(^{139}\) 102 S. Ct. 2099 (1982). See *supra* note 20 and accompanying text.


\(^{141}\) *Id.* at 2104.

\(^{142}\) *Id.* at 2104 n.10 (emphasis added).

\(^{143}\) The original Supreme Court emphasis on interstate federalism in personal jurisdiction cases was in *Pennoyer v. Neff*, 95 U.S. 714, 727 (1877), overruled, *Shaffer v. Heitner*, 433 U.S. 186 (1977). See *supra* notes 16-18 and accompanying text.

laws and policies of another state without sufficient justification. This federalist concept protects citizens from being forced to change or modify their behavior to comply with distant state laws. If the Supreme Court does remove federalism concerns from personal jurisdiction determinations, an even more appropriate area in which to address these vital concerns is choice of law analysis.

B. Choice of Law and Federalism

Not surprisingly, the policies underlying federalism are more applicable to choice of law restrictions than to personal jurisdiction analysis. The original federalism analysis, applied to personal jurisdiction in Pennoyer, was not based on due process, but rather upon Justice Story's commentaries on conflicts of law and international sovereignty. While the due process clause is the "only source of the personal jurisdiction requirement," the Supreme Court has struck down a state court's choice of forum law on both due process and full faith and credit grounds. The Constitution has also been inter-


146. 4 C. Wright & A. Miller, supra note 9, § 1064, at 207-08; Hazard, supra note 19, at 262-65; Jay, supra note 19, at 452-53; Kurland, supra note 19, at 585; Redish, supra note 19, at 1115-16; Whitten, supra note 19, at 840.

147. Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 2104 & n.10 (1982).

148. Home Insurance Co. v. Dick, 281 U.S. 397 (1930). In Home Insurance, the plaintiff sued two New York insurance companies in Texas by garnishing their obligations under contracts of reinsurance. The plaintiff was domiciled in Texas but the insurance policy was issued in Mexico by a Mexican insurance company to a Mexican citizen. The policy was assigned in Mexico to the plaintiff and covered a vessel in Mexican waters. Although the policy requirement that any suit be brought within a year after the loss was not met, the plaintiff brought suit in Texas based upon a Texas statute prohibiting statute of limitations of periods less than two years. The Texas court invalidated the insurance clause, but the Supreme Court reversed, declaring that "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas." Id. at 408. But see Clay v. Sun Ins. Office, 377 U.S. 179 (1964)(Court upheld Florida choice of law jurisdiction when loss of property occurred in the state although the insurance policy was issued in Illinois to an Illinois resident); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66 (1954) (Court upheld Louisiana choice of law jurisdiction when injury occurred in Louisiana although the insurance policy was issued outside the state to a nonresident corporation).

Commentary favoring the application of the due process clause for choice of law restrictions include: Restatement (Second) of Conflict of Laws § 9 comment c (1971); A. Ehrenzweig, Conflict of Laws § 9, at 33 (1962); R. Leflar, American Conflicts Law § 55 (1977); Kirgis, The Roles of Due Process and Full Faith and Credit in Choice of Law, 62 Cornell L. Rev. 94, 95-110 (1976); Reese I, supra note 16, at 1587-89; Reese, Limitations on the Extraterritorial Application of Law, 4 Dalhousie L.J. 589, 590 (1978) [hereinafter cited as Reese II].

149. John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936). In Yates, a New York resident was issued a life insurance policy by a Massachusetts insurance
interpreted to restrict choice of law decisions under the equal protection, \textsuperscript{150} privileges and immunities, \textsuperscript{151} and commerce clauses. \textsuperscript{152}

Federalism concerns play a major role in shaping the constitutional boundaries of choice of law. \textsuperscript{153} The Second Restatement of Conflict of Laws recognizes that dominant concerns in choice of law analysis are "the needs of the interstate and international systems." \textsuperscript{154} The Super

company in New York. The New York resident materially misrepresented his health—an unqualified defense in New York to a suit on the policy. The New York resident died in New York and his spouse moved to Georgia and recovered judgment against the insurance company under a flexible Georgia law concerning insurance misrepresentations. The United States Supreme Court reversed, stating that Georgia had denied full faith and credit to New York law because there was "no occurrence, nothing done, to which the law of Georgia could apply." \textit{Id.} at 182; accord \textit{Nevada v. Hall}, 440 U.S. 410, 424 (1979) (inquiry into full faith and credit); \textit{Order of United Commercial Travelers v. Wolfe}, 331 U.S. 586 (1947) (same); \textit{Alaska Packers Ass'n v. Industrial Accident Comm'n}, 294 U.S. 532, 549-50 (1935) (same).


152. Restatement (Second) of Conflict of Laws § 2 comment b (1971); Horowitz, \textit{The Commerce Clause as a Limitation on State Choice-of-Law Doctrine}, 84 Harv. L. Rev. 806 passim (1971); see Davis v. Farmers Co-operative Equity Co., 262 U.S. 312, 315-16 (1923); Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914).


154. Restatement (Second) of Conflict Of Laws § 6(2)(a) (1971). The federalism basis for choice of law considerations is the first criterion in the Restatement's listing in choice of law principles. \textit{Id.} at § 6(2)(a)-(g). These principles appear throughout
Supreme Court has indicated an intention in *Bauxites de Guinee* to remove federalism analysis from the due process clause. Unlike personal jurisdiction requirements, which are limited solely by the due process clause, choice of law restrictions can accommodate policies of federalism—policies deeply imbued in the nature of choice of law doctrine. Martin Redish recently stated that "if the Supreme Court is truly concerned with avoiding lateral friction within the federal system, it should consider giving considerably closer scrutiny to a state’s choice of law than to its assertion of personal jurisdiction."

In the recent decision of *Allstate Insurance Co. v. Hague*, the entire Court viewed choice of law inquiry as covered by both the due process and full faith and credit clauses. Both Justice Brennan’s plurality opinion and Justice Powell’s dissenting opinion, together garnering seven out of the eight Justices deciding the case, maintained that the standard of significant contacts between the forum state and the litigation controlled the constitutional restrictions of both clauses. The plurality and dissent, however, disagreed as to which contacts were sufficient to support a state’s interest, and made no specific reference to the policies of interstate federalism. In Justice Stevens’ concurrence, the full faith and credit clause was described as implementing a federalist design “by directing that a State, when acting as the forum for litigation having multistate aspects or implications, respect the legitimate interests of other States and avoid infringement upon their sovereignty.”

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the Restatement as the guiding factors of choice of law determinations involving the problem of which state has the most significant relation to any litigated issue. The original basis for the Restatement's order of principles was found in Cheatham & Reese, *Choice of the Applicable Law*, 52 Colum. L. Rev. 959 (1952). Professor Reese later became the reporter for the Second Restatement. See Leflar, *The Nature of Conflicts Law*, 81 Colum. L. Rev. 1080, 1082-83 & n.15 (1981).

155. 102 S. Ct. 2099 (1982).
156. Id. at 2104 & n.10.
157. Id.
158. Redish, supra note 21, at 1114.
159. 449 U.S. 302 (1981). In *Allstate*, the plaintiff’s husband was killed when the motorcycle on which he was riding as a passenger was struck by an automobile. Both drivers and the plaintiff were residents of Wisconsin, the situs of the accident. The plaintiff subsequently moved to Minnesota and sued on her husband’s automobile insurance policy issued by Allstate Insurance Company covering the three cars he had previously owned. Wisconsin law apparently limited recovery to $15,000, but Minnesota law permitted the coverage on all three cars to be “stacked,” resulting in a possible $45,000 recovery. Allstate Insurance Company argued that the Court should apply Wisconsin law. The Minnesota Supreme Court sustained the trial court’s application of Minnesota law. The United States Supreme Court affirmed in a plurality opinion. *Id.* at 305-06, 320 (plurality opinion).
160. Id. at 308 (plurality opinion); id. at 320-22 (Stevens, J., concurring); id. at 332, 334 (Powell, J., dissenting).
161. Id. at 313, 320 (plurality opinion); id. at 332-36 (Powell, J., dissenting).
162. Id. at 322 (Stevens, J., concurring).
that choice of law analysis under the full faith and credit clause protects interests of federalism and interstate comity.\(^{163}\) The analysis in *Allstate* was described by one commentator as follows: "[W]e suddenly find the Court preparing some sort of change. Whatever its position on conflicts may have been, the Court now seems to be wavering in it. In *Allstate*, a fragmented Supreme Court seems to be searching for a new analysis that will somehow take in these additional concerns of fairness and federalism."\(^{164}\) A shift of the federalism inquiry from personal jurisdiction to choice of law analysis may not entail a difficult transition, but it would substantially alter the prevailing jurisprudence on the relative strengths of these two doctrines.

C. The Interrelationship Between Choice of Law and Personal Jurisdiction Analysis

Courts and commentators have examined with close scrutiny the eclipsing interrelationship between choice of law and personal jurisdiction.\(^{165}\) The breadth of personal jurisdiction analysis, guided by policies of federalism, has historically been considered as a stronger test of constitutional protection and has thus encompassed choice of law analysis.\(^{166}\) This preemption stems from judicial interpretation that once due process thresholds were fulfilled for personal jurisdiction, then necessarily they were satisfied for choice of law considerations.\(^{167}\) The Supreme Court has reinforced this interpretation on


\(^{164}\) *Weinberg*, *supra* note 16, at 443.


\(^{167}\) See *supra* notes 15-18 and accompanying text.
numerous occasions by stating, in dicta, that contacts sufficing for the purpose of choice of law might not suffice for the purpose of personal jurisdiction.\(^{168}\)

The Supreme Court's recent jurisdictional decisions\(^ {169}\) have denied state courts the power to exercise extraterritorial jurisdiction over non-resident defendants, and thus the Court has not had to consider fully the constitutional implications of the choice of law problems that would have arisen in those cases had personal jurisdiction been allowed. Despite the admitted relation between choice of law and personal jurisdiction, the Court has treated the two concepts separately. It has set definitive boundaries on personal jurisdiction in terms of the defendant's contacts with the forum in *International Shoe, Shaffer, Kulko* and *World-Wide*. On the other hand, it has not yet definitively expressed what specific principles may underlie choice of law jurisdiction.\(^ {170}\) Perhaps the reason no clear standard has emerged is that choice of law problems implicate at least two separate considerations: respect by one sovereign state for another sovereign's laws (full faith and credit) and fairness to the litigants (due process).\(^ {171}\) In *Allstate Insurance Co. v. Hague*, although the Court did not follow a dual constitutional analysis, Justice Stevens observed that no clear analytical distinction between these two provisions had emerged and that no parameters had been set because the "Court's analysis of choice-of-law questions and scholarly criticism of those decisions have treated these two inquiries as though they were indistinguishable."\(^ {172}\)

It would be difficult indeed to set constitutional limits on choice of law that would satisfy simultaneously a state's sovereignty interests in its relations with other states and the fundamental fairness to be accorded to individual litigants under the due process clause.\(^ {173}\) The analyses for each clause have different outer limits: The full faith and credit clause governs the extent to which states must interact with

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\(^{171}\) *See supra* notes 148-49 and accompanying text.

\(^{172}\) 449 U.S. at 321-22 (Stevens, J., concurring) (footnotes omitted).

\(^{173}\) *See Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 & n.10 (1982).
each other in the interests of national unity, and the due process clause limits such interaction in the interests of personal rights.\textsuperscript{174} While analyses of whether either clause should be preferred, or whether a dual constitutional standard should be utilized in ordinary choice of law cases are beyond the scope of this Note, the Supreme Court's apparent intention to remove federalism inquiries from the due process clause may herald an increasing emphasis on the full faith and credit clause for choice of law analysis.

The removal of federalism concerns from the due process clause, and therefore, from personal jurisdiction analysis,\textsuperscript{175} still leaves the policies of federalism safeguarded by choice of law analysis. This shift of federalism away from personal jurisdiction demands a reversal of the prevailing jurisprudence, which bypasses choice of law concerns once personal jurisdiction thresholds have been satisfied.\textsuperscript{176} Even before the transfer of federalism policy was described by the Court, commentators had argued that choice of law concerns demanded at least the same strict scrutiny as did personal jurisdiction thresholds.\textsuperscript{177} One commentator posited: "To believe that a defendant's contacts with the forum state should be stronger under the due process clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned with where he will be hanged than whether."\textsuperscript{178} This call for a reversal in judicial assumptions on personal jurisdiction and choice of law has been buttressed by recent demands that courts specify the minimum contacts needed before a state may apply its substantive law to a case.\textsuperscript{179}

It thus appears that the cloak of personal jurisdiction may have been lifted from choice of law analysis. In his concurrence in Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,\textsuperscript{180} Justice Powell stated that "by eschewing reliance on the concept of minimum contacts as a 'sovereign' limitation on the power of

\textsuperscript{175} Insurance Corp. of Ir. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 2104 & n.10 (1982).
\textsuperscript{176} See supra notes 15-18 and accompanying text.
\textsuperscript{177} Hill, supra note 163, at 989-93 ("Being forced to defend in the distant state may be inconvenient and costly, but application of the substantive law of that state could be fatal."); Martin I, supra note 16, at 879-880 ("[Prevailing jurisprudence from defendant's perspective] turns things on their head."); Silberman, supra note 16, at 88 ("if a court has the power to apply its own law, it should have the power to exercise jurisdiction over the action" (emphasis in original)); see Hay, supra note 16, at 171-72; Lowenfield & Silberman, Choice of Law and the Supreme Court: A Dialogue Inspired by Allstate Ins. Co. v. Hague, 14 U.C.D. L. Rev. 841, 845 (1981); Reese I, supra note 16, at 1592.
\textsuperscript{178} Silberman, supra note 16, at 88.
\textsuperscript{179} See supra note 16 and accompanying text.
\textsuperscript{180} 102 S. Ct. 2099 (1982).
States . . . the Court today effects a potentially substantial change of law.”181 The doctrine of pendent personal jurisdiction removes the cloak of personal jurisdiction without any need for support from the apparent shift in federalism analysis. Courts applying the doctrine of pendent personal jurisdiction justify the bypass of personal jurisdiction requirements by referring to statutory authority and policies of judicial economy.182 These courts, however, do not then inquire into the requirements for choice of law thresholds—questions covered by the cloak of personal jurisdiction in pendent personal jurisdiction. When courts rectify the oversight of choice of law analysis in this context, the framework presented in this section may serve as a useful aid in the resolution of this problem.

III. Federal Choice of Law Determination for Pendent Personal Jurisdiction

As demanded by the Erie/Klaxon doctrine, when pendent personal jurisdiction is granted, a nonresident defendant is subjected to the choice of law rules of the state in which the district courts sits. This is so even though personal jurisdiction could not have been obtained in that state’s courts.183 Federal courts, as neutral forums, should determine for themselves the substantive law to be applied to the state case.

There are several modern choice of law theories,184 all of which have in common “a widely noted tendency to result in the application of forum law—in other words, of plaintiff’s law.”185 Commentators have noted the forum bias inherent in contemporary choice of law

181. Id. at 2110 (1982) (Powell, J., concurring) (emphasis added). In Horne v. Adolph Coors Co., No. 81-2388, slip op. at 7 (3d Cir. July 22, 1982), the court described the Supreme Court’s removal of federalism analysis from personal jurisdiction as a “somewhat surprising observation” which may have announced “the abandonment of the rationale of [World-Wide and Hanson].” Id. at 8. The court posited that “the federalism aspect of the International Shoe rule is a constitutionally protected expectation in a proper choice of the governing law.” Id. at 8 n.2.

182. See supra note 23 and accompanying text.

183. See supra notes 110-11 and accompanying text.


185. Weinberg, supra note 16, at 467 & n.140.
doctrines,186 which in a pendent personal jurisdiction case manifests itself in the application of a state's law against a non-resident defendant with no justifiable connection to that state.187 Even with the normal personal jurisdictional restrictions on state courts, one commentator concluded that "[t]he combination of far-reaching (extraterritorial) jurisdiction of courts and of inward-looking approaches to choice of law necessarily leads to forum shopping."188 In pendent personal jurisdiction cases, even the "far-reaching" personal jurisdiction requirements are ignored for reasons of economy and convenience.

One possible solution to this problem would be to require that the defendant have sufficient contacts with the state in which the district court sits before jurisdiction can be granted for the state claim. Some federal courts have gone so far as to require that even when federal statutes authorize nationwide service of process, the defendant must have minimum personal jurisdictional contacts with the state for the federal claim.189 A number of courts that have granted pendent personal jurisdiction have followed this approach by requiring that personal jurisdictional contacts be satisfied.190 Although prevailing authority merely requires personal jurisdictional contacts with the United States as the sovereign,191 a stricter test of contacts with the...
state will not solve the problem. When a federal statute provides nationwide service of process, the grant of pendent personal jurisdiction is only necessary if the federal court could not otherwise acquire personal jurisdiction for purposes of the state claim.

One court in granting pendent personal jurisdiction concluded that requiring minimum personal jurisdiction contacts with the state in which the federal court sits was unduly restrictive of federal power.\textsuperscript{192} Instead of merely requiring minimum contacts with the United States, a procedure that inadequately protected the nonresident defendant,\textsuperscript{193} the court required that a multi-level procedural fairness balancing test be satisfied.\textsuperscript{194} Although this intermediate approach appears to be somewhat satisfactory, it has not been followed by any other court.\textsuperscript{195}

This Note proposes that when courts grant pendent personal jurisdiction, they are constrained to overlook the \textit{Erie}/\textit{Klaxon} doctrine and develop federal choice of law rules. In \textit{Erie}, the Supreme Court held that in the absence of controlling federal provisions, if the jurisdiction of a federal Court rests solely on diversity, it must apply the law of the state in which it sits.\textsuperscript{196} \textit{Erie} did not specify areas in which state common law would take precedence over federal common law; only subsequently in \textit{Klaxon} did the Court hold that conflict of laws was such an area.\textsuperscript{197} The \textit{Klaxon} Court retained federal common law for resolving conflicts of law arising from federal questions: "Subject only to review by this Court on any federal question that may arise, [a state] is free to determine whether a given matter is to be governed by the law of the forum or some other law."\textsuperscript{198}
The *Klaxon* decision has spurred a plethora of criticism, including calls for federal choice of law determinations in diversity cases.\(^{199}\) The major criticism of *Klaxon* has been that federal control of choice of law resolution is particularly appropriate in light of the strong federalism policies that underlie the doctrine.\(^{200}\) One commentator asserted that "[r]esponsibility for allocating spheres of legal control among member states of a federal system cannot sensibly be placed elsewhere than with the federal government."\(^ {201}\) Despite the strength of arguments for federal control of choice of law rules in diversity cases, the Supreme Court recently reaffirmed *Klaxon*,\(^ {202}\) and has shown no inclination of overruling this doctrine.

In *United Mine Workers v. Gibbs*,\(^ {203}\) the Court reaffirmed the application of *Erie*, and necessarily that of *Klaxon*, in pendent jurisdiction cases.\(^ {204}\) The Court did not make any reference, however, to questions of pendent personal jurisdiction—a subtle and complex question that can not be reconciled with an automatic application of *Erie/Klaxon*. When a federal statute extends the reach of personal jurisdiction beyond that of the state, it is inconsistent to then apply state law. Commentators have vigorously criticized the application of

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199. See, e.g., C. Wright, supra note 5, at 266 ("[federal courts] are in a uniquely favorable position to develop a rational body of doctrine for that branch of the law"); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 515 (1954) ("[t]he federal courts are in a peculiarly disinterested position to make a just determination as to which state's laws ought to apply . . ."); Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 Law & Contemp. Probs. 105, 127 (1977) ("horizontal choice of law is an eminently appropriate area to be included within the scope of federal common law"); Traynor, *Is This Conflict Really Necessary?*, 37 Tex. L. Rev. 657, 667 (1959) ("[i]f the federal courts develop an exemplary federal common law of conflicts, their rules are bound to find their way into state law on similar problems and thus to diminish conflicts further"); von Mehren, *supra* note 186, at 42 ("[p]erhaps the most satisfactory solution would be to render choice of law unnecessary by establishing supra-national rules . . .").


204. Id. at 726 (1966). See *supra* notes 12-14 and accompanying text.
Klaxon in interpleader cases, 205 because interpleader provides for nationwide service of process, and any stakeholder can bring suit in the district where he resides and thereby force the federal court to apply the law of his state. 206 One commentator maintained, in reference to the interpleader problem, that "the power of nation-wide service of process obligates the federal court to act as a neutral forum, not as the vassal of the state in which it is sitting." 207

The criticisms applied to the interpleader/choice of law problem are easily analogized to the pendent personal jurisdiction cases. The American Law Institute (ALI) offered a compromise between Erie policy and nationwide service by suggesting that in interpleader cases the federal court should be allowed to determine the substantive state law to be applied. 208 The ALI study also addressed the question of pendent personal jurisdiction, described as "a matter on which the case law is divided." 209 Both problems were resolved by the ALI with the same solution of federal choice of law responsibility:

In [the pendent personal jurisdiction] situation the district court should be free to make its own decision on choice of law. There is no good reason why a state should be able to effectuate its desires in this regard against an individual who could not be reached by state process and appears in a forum within the state only by force of federal power. 210

The protection afforded by requiring that federal courts act as neutral forums would be significant. The predominant use of pendent personal jurisdiction entails the appending of state blue sky laws and common law to federal securities laws. 211 That the wide range of state corporate and blue sky laws results in different substantive outcomes in different states for the same set of facts has been well documented. 212 The mechanical application of the Klaxon doctrine


207. Weintraub, supra note 205, at 256.

208. ALI Study of Jurisdiction, supra note 11, § 2363(c), commentary at 420-21.

209. Id. § 1313(a), commentary at 211.

210. Id. at 211-12; see Currie I, supra note 11, at 283-84; see also E. Scoles & P. Hay, supra note 11, at 125 ("[P]otential for increased interstate forum shopping [in pendent personal jurisdiction cases] would be alleviated by freeing the federal courts from the constraints of the Klaxon doctrine.").

211. See supra notes 72, 74 and accompanying text.

in pendent personal jurisdiction cases causes a change in the applicable law to the detriment of an interested state and to the disadvantage of a defendant. If the defendant is brought into federal court with nationwide service of process, the Van Dusen v. Barrack decision signifies that under the proper procedural mechanisms, the defendant should be treated as if the suit had been brought in a state in which he could have been sued. This would include that state’s choice of law rules as required by § 1404(a). Unfortunately, in contrast to the Van Dusen analogy, it is not always clear where the suit would have been brought had there been no nationwide service of process. Therefore, for purposes of pendent personal jurisdiction, the only fair judicial compromise between Erie policy and “considerations of judicial economy” would be to force the federal courts to apply their own choice of law rules. Should a court refuse to bypass Klaxon, it must not be allowed to retain jurisdiction for the pendent state claim.

The application of different laws to the state claim under pendent personal jurisdiction affects a defendant’s substantive rights and violates the requirement of the Rules Enabling Act that those rules promulgated thereunder not abridge the substantive rights of any litigant. The Federal Rules of Civil Procedure were passed under the authority conferred by the Rules Enabling Act and therefore, the process of rule 4 can not be allowed to affect substantive rights. In view of these considerations, when a federal court grants pendent personal jurisdiction, the Constitution compels it to overlook Klaxon and make a neutral determination of the proper choice of law to be applied to the pendent state claim.

Conclusion

Pendent personal jurisdiction allows federal courts to adjudicate state-created rights by providing an alternative mechanism for obtaining personal jurisdiction. This doctrine finds no statutory authorize-
tion, but rather rests upon policies of judicial economy and convenience. When courts grant pendent personal jurisdiction and then follow the *Klaxon* directive, nonresident defendants are subjected to the choice of law rules of a state that is unable to obtain personal jurisdiction over them. The inherent forum bias of modern choice of law theories, when combined with the disparities among state law, results in varied adjudication due primarily to the location of the federal forum. Federal courts allowing pendent personal jurisdiction should, therefore, overlook *Klaxon* and develop federal choice of law rules or forego consideration of the pendent state claim.

In *Bauxites de Guinee*, the Supreme Court has shown an intention to remove federalism inquiries from personal jurisdiction analysis. Federalism protections are a cornerstone of choice of law analysis and *Bauxites de Guinee* should result in a reversal of the prevailing jurisprudence, which asserts that choice of law standards are necessarily met when personal jurisdiction requirements are satisfied. Pendent personal jurisdiction removes the cloak of personal jurisdiction without reference to a shift in federalism inquiry, and provides a fertile framework for federal courts to evaluate choice of law contacts. The forum bias of modern choice of law theories must be reconciled with the rights of individual states, and the scrutiny of choice of law contacts can ensure the continued vitality of the federalist principles of state sovereignty.

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